International Economic Law Clinic

ENVIRONMENT-RELATED COMMITMENTS IN THE EU-CHILE, BRAZIL-CHILE AND EU-MERCOSUR FREE TRADE AGREEMENTS

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Executive Summary

This Report assesses the extent to which environmental provisions in the selected free trade agreements (FTAs) might impact the parties' environmental policies by comparing the main environment-related provisions and enforcement mechanisms of the following FTAs: European Union (EU)-Chile, Brazil-Chile, and EU-Mercosur. The comparison of environmental commitments in the FTAs is divided into four broad categories: (i) defensive clauses that exempt parties from strictly complying with trade rules in light of environmental concerns (defensive clauses); (ii) obligations that are based upon existing international environmental standards (derivative commitments); (iii) obligations that are related to existing domestic law (domestic regulation); and (iv) aspirational clauses that seek to promote a higher degree of environmental protection (aspirational clauses).

Based on this comparison, and the discussions at the World Trade Organization (WTO), this Report enables insights on future trade and environment-related constraints and opportunities for Brazil.

The demise of the Doha Round made the discussions surrounding environment and trade to shift from the WTO to other forums and organizations. The WTO acts on the matter at issue in coordination with the implementation bodies of the multilateral environment agreements and the United Nations (UN) to better understand the impacts of trade in environment and of the environmental policies on trade.

Notwithstanding the WTO's unspecific regulation of the trade-environment interface, General Agreement on Tariffs and Trade (GATT) Article XX and its development through WTO caselaw remain a key pillar of trade and environment, providing objective exemption criteria that are replicated by bilateral and regional FTAs.

The provisions referring to GATT Article XX (referred in the Report as defensive clauses and, therefore) allow the imposition of trade-restrictive measures by an importing party, provided that this imposition is designed to address environmental concerns and interests. Therefore, these provisions provide space for a trade-restricting party to enforce environmental concerns without violating trade obligations.

Concerning the FTAs at issue, the EU-Chile FTA, from 2002, has only one limited environmental regulation, and excluded the trade and environment-related disputes from its dispute resolution mechanism. It is currently undergoing discussion for modernization.

The Brazil-Chile FTA devotes a structured chapter to trade and environment, referencing mostly multilateral environment agreements, calling the parties to observe their provisions and cooperate on environmental matters. It also excludes trade and environment-related commitments from the dispute resolution mechanism, establishing a multi-tiered consensual procedure to address such issues, and a reference GATT Article XX.

The EU-Mercosur FTA is the more developed of the three FTAs when it comes to the trade and environment nexus. It has a specific chapter on sustainable development, and consequently on environmental regulation. It expressly refers to multilateral environment agreements and requires the parties to effectively implement them. It also includes provisions on transparency, and exchange of information regarding the implementation of the multilateral environment agreements (MEAs), scientific and technical information on environment related issues.

The EU-Mercosur FTA, like the Brazil-Chile FTA, excludes the trade and environment-related commitments from the scope of its dispute resolution mechanism, and places them under a cooperative mechanism – a Panel of Experts without adjucative power. Notwithstanding the critique, this FTA has pushed the pre-existing boundaries of preferential trade agreements further compared to the other FTAs at issue. The text of the EU-Mercosur FTA does not allow the unilateral enforcement of its environmental provisions outside the framework of a defensive clause, and it does not appear to allow trade sanctions as countermeasures for alleged environmental breaches. The FTA is pending legal scrubbing and ratification.

This Report's comparison shows that all three FTAs at issue contain provisions whereby parties are exempted from complying with trade obligations when faced with certain domestic policy goals (referencing GATT Article XX as mentioned above). Concerning derivative commitments, which refer to obligations based on existing international environmental standards, the EU-Mercosur is the more advanced among the three – the EU-Chile FTA

does not even have a provision recalling or referencing multilateral commitments.

Overall, the Brazil-Chile and EU-Mercosur FTAs primarily contain ‘soft’ provisions on MEAs, which leave their effectiveness subject to the discretion of the parties. The EU-Mercosur however, also expressly indicates the fulfilment of multilateral agreements and their underlying principles as a key area of concern, and establishes mechanisms to incentivize the parties to effectively implement those agreements. Because there is no enforceable mechanism within the FTA, ensuring parties’ compliance with these provisions may prove challenging. On the other hand, the reference to MEA obligations combined with Article XX GATT (might) expand the capacity of the parties to implement unilateral measures for environmental protection. This conjecture is subject to confirmation through future practice.

With regard to the domestic regulation provisions, which reinforce the parties’ right to regulate and address a need to increase existing levels of domestic environmental protection, this report shows that the Brazil-Chile and the EU-Mercosur FTAs set forth specific provisions on the right to regulate. Both FTAs recognize the right of each party to develop policies, priorities, and levels of domestic environmental protection. The EU-Mercosur FTA provisions illustrate a deeper concern with the effectiveness of policy-making and domestic enforcement. The EU-Chile FTA does not make any reference to the right to regulate on environment-related commitments.

The EU-Mercosur FTA, unlike the other two FTAs, expressly recognizes the precautionary principle. According to Article 10(1) of the Trade and Sustainable Chapter, parties shall ensure that, when establishing or implementing measures aimed at protecting the environment that affect trade or investment, they do so based on relevant scientific and technical evidence from recognized technical and scientific bodies. However, if the evidence is insufficient and there is a risk of serious environmental degradation, a party may adopt measures based on the precautionary principle. In that case, a risk of serious environmental degradation must exist. However, these terms have not been further defined and leave a significant scope for interpretation. Moreover, a combination of the precautionary principle with the Article XX

GATT-like provision in the FTA (might) further enable a trading party to implement and enforce unilateral measures to protect the environment.

Finally, with respect to the aspirational clauses – provisions that may not be binding while seeking to promote higher degrees of protection – this report argues that it would be difficult to assert whether a higher degree of protection is sought. The usefulness of these aspirational clauses is likely reduced, especially when compared to obligations based on existing international standards, or obligations related to existing domestic legislation, since the letter prevent parties from altering their regulatory frameworks to the detriment of environmental protection (i.e., non-regression clauses).

Regarding the basic structure of the FTA dispute settlement, albeit their different structure and functioning, a common core premise is that matters pertaining to trade and sustainability (environment-related commitments) do not fall within the scope of the trade-related, adjudicative means of dispute resolution. Rather, they fall under general consultation mechanisms in the Brazil-Chile and EU-Mercosur FTAs. From this perspective, a dispute related to environmental policies would hinge upon a “core” trade obligation, and the environmental policy at issue would be discussed as a defence to the violation of that “core obligation”.

Purely environmental concerns, i.e., those arising out of the specific trade and sustainable development chapters, would fall outside the scope of the respective dispute settlement mechanisms. In the Brazil-Chile and EU-Mercosur FTAs, they would be subject to non-adjudicative and unenforceable means of dispute resolution. In this sense, the parties’ environmental policies on the national level would not themselves face potential litigation. This can limit the ability of another party to suspend trade benefits granted under the FTAs to enforce environmental objectives. In this sense, it is arguable that the EU’s leverage over Brazil concerning advancing EU’s environmental interests is more limited than it would be under a binding dispute settlement mechanism for environmental obligations under the FTA. Yet, it is important to keep in mind that the weight and the effect of a Panel of Expert’s opinion, although not binding, can be significant. For instance, it could have reputational repercussions detrimental to Brazil’s foreign policies and investments.

1. Introduction[1]

The present Report comparatively assesses the extent to which the environmental provisions in selected Free Trade Agreements (FTAs) may have impacts on the parties' trade and environmental policies. The report compares the main environment-related related provisions and their enforcement mechanisms in the following FTAs: the European Union (EU)-Chile FTA, the Brazil-Chile FTA, and the EU-Mercosur FTA. Based on this comparison and on positions as expressed in discussions at the World Trade Organization (WTO), the report enables insights on future trade and environment-related constraints and opportunities for Brazil.

The Brazil-Chile FTA has not yet been ratified,[2] and the EU-Mercosur FTA's text is under legal scrubbing. The EU-Chile FTA has been in force for almost two decades and the EU and Chile are negotiating its revamping. Yet, an analysis of the publicly available texts of these agreements as they stand illustrates that concerns about environmental policies have become central to international trade negotiations. Therefore, focusing on the FTAs at issue and on their lessons for Brazil, this report aims to contribute to the existing debate on the balancing of trade liberalization and environmental-related concerns.

This report suggests that, although there is no express mechanism to allow for the suspension of trade benefits under the FTAs at issue as a result of violations of environmental obligations, there may be room under the exceptions to provisions similar to Article XX of the WTO's General Agreement on Tariffs and Trade (GATT) for such measures to be deployed.

The report proceeds in the following manner. After this introduction, **Chapter 2** provides an overview of the current discussions regarding trade and

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[1] The authors would like to thank Trade Lab Fellows Fong Han Tan and Bo Kruk, as well as University of São Paulo Professors Alberto do Amaral Júnior, Luiz Eduardo Salles, and Lucas Spadano, for their contribution throughout the research, preparation, discussion and countless revisions of this Report. The report would not have been concluded without their help and guidance. All remaining errors are our own.

[2] On the 30th of June 2021, the Brazilian Federal Chamber of Deputies, the lower house of the Brazilian National Congress, approved the text of the Brazil-Chile FTA. At the time of writing this Report, the text was pending the approval by the upper house of the Brazilian National Congress: The Brazilian Federal Senate. On 28th September 2021, after this report had been submitted to the beneficiary and after the Clinic was concluded, the Brazilian Senate approved the FTA. The approval was published on 14th October 2021 through Legislative Decree 33/2021.

environment at the WTO and of the FTAs at issue. **Chapter 3** sets-out an analytical framework for the comparative analysis of environment-related commitments in FTAs. Based on this framework, **Chapter 4** compares the main environmental commitments in each of the FTAs at issue. **Chapter 5** provides concluding remarks.

2. Overview of the agreements

This Chapter provides an overview of the environmental discussions within the WTO, and of the EU-Chile, Brazil-Chile, and EU-Mercosur FTAs.

2.1. Environmental discussions at the WTO

The notion of 'sustainable development' started its inroad to the trade debate in the 70s within the WTO, still in the scope of the GATT of 1947.[3] Towards the end of the Uruguay Round (1986–1994), which led to the establishment of the WTO, there was increased attention to trade-related environmental issues, as it was found that they could impact the work of the WTO. [4] This may be identified in the Preamble of the Marrakesh Agreement, which expressly acknowledges that global trade should allow for the optimal use of the world's resources, aiming sustainable development. The expressed goal is to promote trade and protect and preserve the environment.[5]

Efforts towards this goal included, at first, the incorporation of the 'Decision on Trade and Environment' by the Marrakesh Declaration, [6] whereby WTO members committed to begin a comprehensive work program on trade and

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[3] "Trade and environment, as an issue, is by no means new. The link between trade and environmental protection — both the impact of environmental policies on trade, and the impact of trade on the environment — was recognized as early as 1970." – WTO. Early years: emerging environment debate in GATT/WTO, In Trade Topics, Environment, History. Available at: [https://www.wto.org/english/tratop_e/envir_e/hist1_e.htm].

[4] "During the Uruguay Round (1986–1994), trade-related environmental issues were once again taken up. Modifications were made to the TBT Agreement, and certain environmental issues were addressed in the General Agreement on Trade in Services, the Agreements on Agriculture, Sanitary and Phytosanitary Measures (SPS), Subsidies and Countervailing Measures, and Trade-Related Aspects of Intellectual Property Rights (TRIPS)." – WTO. Early years: emerging environment debate in GATT/WTO, In Trade Topics, Environment, History. Available at: [https://www.wto.org/english/tratop_e/envir_e/hist1_e.htm]

[5] "As a result, the preamble to the Marrakesh Agreement Establishing the World Trade Organization, refers to the importance of working towards sustainable development. (…) The fact that the first paragraph of the preamble recognizes sustainable development as an integral part of the multilateral trading system illustrates the importance placed by WTO members on environmental protection." – World Trade Organization. Early years: emerging environment debate in GATT/WTO, In Trade Topics, Environment, History. Available at: [https://www.wto.org/english/tratop_e/envir_e/hist1_e.htm].

[6] "In Marrakesh in April 1994, ministers also signed a "Decision on Trade and Environment" which states that: "There should not be, nor need be, any policy contradiction between upholding and safeguarding an open, non-discriminatory and equitable multilateral trading system on the one hand, and acting for the protection of the environment, and the promotion of sustainable development on the other." The decision also called for the creation of the Committee on Trade and Environment." – WTO. Early years: emerging environment debate in GATT/WTO, In Trade Topics, Environment, History. Available at: [https://www.wto.org/english/tratop_e/envir_e/hist1_e.htm].

environment within the WTO, and established the Committee on Trade and Environment (CTE). The CTE has a broad function, covering three core areas of the multilateral trading system – goods, services, and intellectual property. It studies the relationship between trade and the environment, and makes recommendations on possible changes to the agreements. The CTE also regularly receives trade-relevant information and updates from the multilateral environmental agreements, cooperating, alongside the WTO Secretariat, with many implementing bodies for those agreements.

Notwithstanding the connection between trade and the environment, the WTO does not work as an environmental agency. The WTO Agreement does not establish national or international environmental policies or sets environmental standards. More than two-hundred international agreements outside the WTO dealing with various environmental concerns are currently in force and aim to play that role.[7]

The WTO Agreement recognizes that measures actually or allegedly addressing environmental concerns may conflict with its Member States' trade obligations. However, Article XX of the GATT, which will be further discussed in **Chapter 4.1** below, exempts policies affecting trade in goods from normal trade disciplines if they meet certain requirements. Article 14 of the GATS (General Agreement on Tariffs and Services) is similarly worded, and provides for similar exemptions for trade in services. Accordingly, it is possible to state that the WTO only sets base parameters for measures that affect trade based on environmental concerns and refers international environmental concerns to domestic policies and actions under other international agreements.

In this sense, the CTE recognized in its first report, in 1996, that trade measures based on specifically agreed-upon provisions may be needed in certain cases to achieve the environmental objectives of a multilateral

[7] WTO. Matrix on Trade Measures Pursuant to Selected Multilateral Environmental Agreements, Note by the Secretariat, Committee on Trade and Environment (Special Session), Rev.2 (2003). Available at: [https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/TN/TE/S5.pdf&Open=True].

environment agreement. [8] Additionally, a 1999 WTO Secretariat's Report on Trade and Environment recognized that, while trade is rarely the sole cause of environmental degradation, 'trade would unambiguously raise welfare if proper environmental policies were in place'. Likewise, this Report indicates that the WTO has become a focal point for resolving (or at least addressing) the trade-environment interface because of its 'integrated adjudication mechanism backed by trade sanctions as the ultimate enforcement tool'.[9]

In 2001, the Doha Ministerial Declaration (DMD) included the environment in the WTO's negotiation agenda for the first time.[10] That agenda was supposed to draw on 'enhancing the mutual supportiveness of trade and environment' and stated that further negotiations should cover 'the relationship between existing WTO rules and specific trade obligations (STOs) set out in the multilateral environmental agreements'. [11] It was expected that the clarification on this relationship would bring significant impact on the interpretation of the GATT Article XX exceptions (and article 14 of the GATS), as well as on the term 'sustainable development' in the Preamble of the Marrakesh Agreement. The DMD also called the CTE and the Committee on Trade and Development to act as forums of discussion, in order to identify and debate the environmental and developmental aspects of the negotiations. [12]

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[8] WTO. Report of the Committee on Trade and Environment, Committee on Trade and Environment, November (1996). Available At: [https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/CTE/1.pdf&Open=True].

[9] WTO, Special Studies n. 4, Trade and Environment (1999). Available at: [https://www.wto.org/english/res_e/publications_e/special_studies4_e.htm].

[10] WTO. Doha WTO Ministerial 2001: Ministerial Declaration. WT/MIN(01)/DEC/1 (2001). Available at: [https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm].

[11] Paragraph 31 established that "31. With a view to enhancing the mutual supportiveness of trade and environment, we agree to negotiations, without prejudging their outcome, on: (i) the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements (MEAs). The negotiations shall be limited in scope to the applicability of such existing WTO rules as among parties to the MEA in question. The negotiations shall not prejudice the WTO rights of any Member that is not a party to the MEA in question; (ii) procedures for regular information exchange between MEA Secretariats and the relevant WTO committees, and the criteria for the granting of observer status; (iii) the reduction or, as appropriate, elimination of tariff and non-tariff barriers to environmental goods and services. We note that fisheries subsidies form part of the negotiations provided for in paragraph 28.". Available at: [https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm].

[12] Article 51 establishes: 'The Committee on Trade and Development and the Committee on Trade and Environment shall, within their respective mandates, each act as a forum to identify and debate developmental and environmental aspects of the negotiations, in order to help

As a result, the CTE started to address the sustainable development agenda by sector. In 2003, it provided an overview of the advancements on the topic in the sectors of agriculture (WT/CTE/GEN/8 [13]), market access for non-agricultural products (WT/CTE/GEN/9 [14]), rules (WT/CTE/GEN/10 [15]) and services (WT/CTE/GEN/11 [16]). These documents briefly summarize the achievements of the negotiations trailed in those sectors until 2003, establishing the main subjects, such as trade-distorting agricultural policies, fishery subsidies, and the liberalization of environmental goods and services. [17] However, with the demise of the Doha Round, the WTO has not concluded specific agreements regulating environmental concerns and sustainable development, jeopardizing the work carried on within the CTE. Although there have been discussions about the liberalization of environmental goods since 2001, WTO Member States did not seem able to surpass the debated definitions of 'environmental goods' and these

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achieve the objective of having sustainable development appropriately reflected.'. Available at: [https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm]

[13] WTO. Committee on Trade and Environment, *Environmental Issues Raised In The Agriculture Negotiations*, Statement by Mr. Frank Wolter1 at the Regular Session of the Committee on Trade and Environment of 14 February 2003. Available at: [https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=61832,4951&CurrentCatalogueIdIndex=1&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True]

[14] WTO. Committee on Trade and Environment, *Environmental Aspects Of The Negotiations On Market Access*, Statement by Mrs. Carmen Luz Guarda1 at the Regular Session of the Committee on Trade and Environment of 14 February 2003. Available At: [https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=58044,8929&CurrentCatalogueIdIndex=1&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True].

[15] WTO. Committee on Trade and Environment, *Environment-Related Issues In The Negotiations On WTO Rules*, Statement by Mr. Jan Woznowski1 at the Regular Session of the Committee on Trade and Environment of 29-30 April 2003. Available at: [https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=59001,68741&CurrentCatalogueIdIndex=1&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True].

[16] WTO. Committee on Trade and Environment, *Environmental Issues Raised In The Services Negotiations*, Statement by Mr. A. Hamid Mamdouh1 at the Regular Session of the Committee on Trade and Environment of 29-30 April 2003. Available at: [https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=53328,3547&CurrentCatalogueIdIndex=1&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True].

[17] WTO. Environment: Issue, *Sustainable development*. Available at [https://www.wto.org/english/tratop_e/envir_e/sust_dev_e.htm].

negotiations have not succeeded.[18] A smaller group of interested members tried to launch plurilateral talks on an Environmental Goods Agreement (EGA), [19] but these talks stagnated in 2017. In 2021, a number of developed country governments have called for the revival of EGA negotiations at the WTO, including the EU, Japan, Korea, and Switzerland, seeking to eliminate tariffs on a number of environment-related products. However, the outcome of this initiative is uncertain. [20]

In that context, the debate on trade and environment appears to have shifted from the WTO to bilateral and regional trade forums, as the FTAs analysed under **Chapters 2.2 – 2.4** illustrate, and, also, within other international organizations, for instance, the informal State Groups, the Group of 8 (G-8), the Group of 20 (G-20)[21] and the United Nations (UN). The discussions within these less formal state groups, initially focused on economic issues, have evolved to wide-ranging of issues, noticeably including the environment.

The UN has significantly advanced in the past years on the matter at issue, especially with the enactment, in 2015, of the 2030 Agenda for Sustainable Development. The agenda touches some aspects of trade and its importance to fulfil the goal of sustainable development. For example, it calls on nations to correct and prevent trade restrictions and distortions in world agricultural markets, to prohibit certain forms of fisheries subsidies that contribute to overcapacity and overfishing, and to upgrade the infrastructure and retrofit industries to make them sustainable.[22]

The UN has also launched the Environment and Trade Hub in 2015, under the United Nations Environment Programme's (UNEP), to further the work of

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[18] Jaime de Melo, Jean-Marc Solleder. What's wrong with the WTO's Environmental Goods Agreement: A developing country perspective, in Vox EU (2019). Available at: [https://voxeu.org/article/what-s-wrong-wto-s-environmental-goods-agreement].

[19] WTO. Environmental Goods Agreement (EGA) (2015). Available at: [https://www.wto.org/english/tratop_e/envir_e/ega_e.htm].

[20] European Parliament. Plurilateral Environmental Goods Agreement (EGA) (2021). Available at: [https://www.europarl.europa.eu/legislative-train/api/stages/report/current/theme/a-stronger-europe-in-the-world/file/environmental-goods-agreement-(ega)].

[21] UN. Transforming our world: the 2030 Agenda for Sustainable Development (2015). Available at: [https://sdgs.un.org/2030agenda].

[22] Available at: [https://sdgs.un.org/2030agenda].

the UNEP on trade.[23] The Trade Hub provides support to countries seeking to leverage trade and investment as vehicles for achieving the United Nations Sustainable Development Goals (SDGs) – also enacted and adopted in 2015 – and their Paris Agreement commitments.[24] It also provides studies on the impacts of trade in the environment, through analyzing some key areas, such as wild species trade, agriculture, and innovation and technology[25].

Thus, although the WTO has a regular committee on trade and environment (the CTE), the demise of the Doha Round made the discussions on trade and environment shift to other forums and organizations. The WTO has acted in coordination with the implementation bodies of the multilateral environment agreements and the UN to better understand the impacts of trade in the environment and of the environmental policies on trade.

Notwithstanding the WTO's unspecific regulation of the trade-environment interface, GATT Article XX and its development through WTO caselaw remain a key pillar of trade and environment discussions, supplying objective exemption criteria that are replicated throughout bilateral and regional FTAs.[26]

2.2. EU-Chile FTA

The EU and Chile have concluded an Association Agreement in 2002.[27] The Association Agreement includes a comprehensive FTA that entered into force in February, 2003. At the time, the Doha Round was still in course and the environmental discussions within the context of FTAs were still incipient, basically due to two reasons. First, although there have been environmental

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[23] Available at: [https://www.unep.org/explore-topics/green-economy/what-we-do/environment-and-trade-hub].

[24] Available at: [https://www.unep.org/explore-topics/green-economy/what-we-do/environment-and-trade-hub].

[25] Available at: [https://tradehub.earth/our-work/what-we-work-on/]

[26] "Certain measures taken to achieve environmental protection goals may, by their very nature, restrict trade and thereby impact on the WTO rights of other members. They may violate basic trade rules, such as the non-discrimination obligation and the prohibition of quantitative restrictions. This is why exceptions to such rules, as contained in Article XX, are particularly important in the trade and environment context. Article XX being an exception clause, it comes into play only once a measure is found to be inconsistent with GATT rules." – World Trade Organization. WTO rules and environmental policies: key GATT disciplines, in Trade Topics, Trade and Environment, the rules. Available at: [https://www.wto.org/english/tratop_e/envir_e/envt_rules_gatt_e.htm].

[27] EU-Chile Association Agreement (2002). Available at: [https://eur-lex.europa.eu/resource.html?uri=cellar:f83a503c-fa20-4b3a-9535-f1074175eaf0.0004.02/DOC_2&format=PDF].

movement since the early 19th century, it is undeniable that public discourse on the relevance of environmental concerns has only reached significant global awareness levels during the first two decades of the 21st century. By way of example, the EU-Chile FTA predates the Paris Agreement by approximately 13 years. Second, attempts to interface global trade and environmental concerns up to the demise of the Doha Round mainly took place at the WTO, and not within bilateral and regional negotiations, as **Chapter 2.1** described.

In this context, the EU-Chile FTA addresses the trade and environment nexus to a limited extent, including a single provision on trade and environment,[28] which sets forth a commitment towards cooperation on the preservation, protection, and improvement of the environment. It also briefly mentions topics that are '*particularly significant*' for the general interplay between trade and environment, including: (i) the relation between poverty and the environment; (ii) the environmental impact of economic activities; and (iii) the relevance of exchanges in information, technology, experience, technical assistance, and the development of joint infrastructure for environmental projects.

The EU-Chile FTA boasts a structured dispute settlement mechanism which has been described by the European Centre for Development Policy Management as one of the most expeditious dispute settlement procedures among the EU's previous generation-preferential trade agreements.[29] The trade and environment provisions, however, fall outside the scope of

[28] Article 28, on the Cooperation on the environment, establishes: '1. The aim of cooperation shall be to encourage conservation and improvement of the environment, prevention of contamination and degradation of natural resources and ecosystems, and rational use of the latter in the interests of sustainable development. 2. In this connection, the following are particularly significant: (a) the relationship between poverty and the environment; (b) the environmental impact of economic activities; (c) environmental problems and land-use management; (d) projects to reinforce Chile's environmental structures and policies; (e) exchanges of information, technology and experience in areas including environmental standards and models, training and education; (f) environmental education and training to involve citizens more; and (g) technical assistance and joint regional research programmes'. Available at: [https://eur-lex.europa.eu/resource.html?uri=cellar:f83a503c-fa20-4b3a-9535-f1074175eaf0.0004.02/DOC_2&format=PDF].

[29] Stefan Szepesi, Comparing EU free trade agreements Dispute Settlement, in In Brief No. 6G (2004). Available at: [https://ecdpm.org/wp-content/uploads/2013/11/IB-6G-Comparing-EU-Free-Trade-Agreements-Dispute-Settlement-2004.pdf].

application of this dispute settlement mechanism and, are left without any such recourse under the text of the EU-Chile FTA.[30]

Notwithstanding the limited regulation of environmental matters, the environmental exceptions in GATT Article XX are largely reproduced in the EU-Chile FTA. This is done by means of Article 91 of the EU-Chile FTA, which is essentially a carbon-copy of GATT Article XX.

In November 2017, the EU and Chile embarked on negotiations to adjust their Association Agreement. In this context, the European Commission first issued the 2017 Ex-ante Study of a Possible Modernization of the EU-Chile Association Agreement,[31] which expressly addressed the need to strengthen cooperation between the EU and Chile on technical and policy-making environmental issues. In 2019, the European Commission issued a Trade Sustainability Impact Assessment in Support of the Negotiations for the Modernization of the Trade Part of the Association Agreement ('Impact Assessment') with Chile,[32] which identified key environmental aspects to be addressed by the new modernized agreement. The Impact Assessment discusses topics such as climate change and biodiversity, Greenhouse gas (GHG) emissions, transport and the use of energy, air quality, land use, water quality and resources, and waste and waste management.[33]

Taking into account the analysis in the Impact Assessment and the recent EU-Mercosur FTA draft text analysed below, it is expected that the EU-Chile negotiations will involve provisions similar to those in the EU-Mercosur FTA and, perhaps some new additions, given the documents issued by the

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[30] Pursuant to Article 182 of the EU-Chile FTA, the provision which establishes the scope of the FTA's dispute settlement mechanism, its application is limited to Part IV of the EU-Chile FTA, i.e., Articles 55 through 196 thereof. As such, Article 28 of the EU-Chile FTA and its environmental disciplines unequivocally fall outside the scope of the FTA's dispute settlement mechanism.

[31] European Commission, Ex-ante Study of a Possible Modernization of the EU-Chile Association Agreement – Final Report (2017). Available at [https://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155758.pdf].

[32] Sustainability Impact Assessment in Support of the Negotiations for the Modernization of the Trade Part of the Association Agreement with Chile – Final report (2019). Available at [https://trade.ec.europa.eu/doclib/docs/2020/june/tradoc_158829.pdf].

[33] The Trade Sustainability Impact Assessment supports the negotiations between EU and Chile and presents findings regarding the four 'sustainability pillars', economic, social, human rights and environmental areas in horizontal issues and economic sectors, and recommendations, derived from the analysis, on issues to be incorporated into the modernized Agreement and mitigating measures.

European Commission in support for the modernization discussions. It is highly possible that the negotiations would involve additional provisions regarding, for instance, transport and the use of energy, air quality, waste, and waste management, matter that the EU-Mercosur FTA does not directly address, given the documents issued by the European Commission in the context of the modernization discussions.

In conclusion, the trade and environment provisions in the current text of the EU-Chile FTA are general and drafted in a cooperative manner. Other than a provision along the lines of GATT Article XX, the EU-Chile FTA does not include specific provisions that could be used by the parties to adopt trade-related measures to enforce environmental objectives.

2.3. Brazil-Chile FTA

Trade between Brazil and Chile is governed by the Chile-Mercosur Economic Complementation Agreement No. 35 (ACE No. 35), which has been in force since 1996 and has been amended from time to time. In November 2018, Brazil and Chile signed the Sixty-fourth Additional Protocol to ACE-35, which incorporates the Free Trade Agreement (FTA) between Brazil and Chile. This FTA expands the scope of the commitments under ACE No. 35, and includes provisions on e-commerce, sanitary and phytosanitary measures, gender, the environment, and labour.

On March 10th, 2020, the Foreign Relations Commission of the Chilean Chamber of Deputies approved the text of the FTA, followed by Chile's Chamber of Deputies approval on May 6th, 2020, and the Senate's approval on August 12th, 2020. On June 2021, Brazil's Chamber of Deputies approved the FTA and submitted it to the Senate on July 2nd, 2021, where, by the time of writing of this Report, was pending approval. [34]

Chapter 17 of the Brazil-Chile FTA is entirely devoted to trade and environment. It starts by recalling some of the main multilateral agreements

[34] Brazil and Chile 64th Free Trade Agreement (2018). Available at: [http://www.sice.oas.org/TPD/BRA_CHL/FTA_CHL_BRA_s.pdf]. And MSC 369/2019. Processing Information available at: [https://www.camara.leg.br/proposicoesWeb/fichadetramitacao?idProposicao=2217142]. See note 2 above, written after the submission of this Report to the Beneficiary and the end of the Clinic's term.

on environment and reaffirming the commitment of the parties to implement them. These are the United Nations Framework Convention on Climate Change (UNFCCC), the Kyoto Protocol and the Paris Agreement, as well as multilateral environmental agreements related to biodiversity, sustainable management of forests, and fisheries.

The other provisions of Chapter 17 are of a cooperative nature, establishing tenets to strengthen joint and individual capabilities to protect the environment and promote sustainable development. In this regard, the FTA includes a provision respecting the sovereignty of the parties through reassuring their right to regulate, develop internal policies, and decide their national priorities, and levels of domestic environmental protection.

Concerning transparency, Chapter 17 addresses access to justice, information and participation in Environmental Matters (Article 17.5), and sets out an obligation for the parties to have appropriate sanctions and remedies for violations of their environmental laws, and ensure the proper application of these laws. However, the text does not define the term 'appropriate', which can lead to interpretative divergence.

Regarding enforcement, the FTA does not provide for any specific environment-related mechanism. Chapter 17 of the FTA is expressively left out of the dispute resolution system under the Article 22 of the FTA. [35]

In line with the cooperative tone of other provisions, the Brazil-Chile FTA incentivizes the parties to maintain viable communication and cooperation channels on matters related to trade and environment. For instance, article 17.18 imposes best efforts obligations upon the parties to communicate, consult, exchange information, and cooperate with each other on the implementation of Chapter 17. This article also allows the parties to submit consultations pertaining to the implementation of Chapter 17. Should these consultations be unsatisfactory, the parties may submit the matter before the

[35] Artículo 17.19: No Aplicación de Solución de Controversias. Ninguna de las Partes podrá recurrir al mecanismo de solución de controversias previsto en el Capítulo 22 (Solución de Controversias) respecto de cualquier asunto derivado de este Capítulo [Article 17.19: Non-Application of Dispute Resolution. Neither Party may resort to the dispute settlement mechanism provided for in Chapter 22 (Dispute Settlement) with respect to any matter derived from this Chapter].

joint Committee on Trade and Environment, [36] wherein a consensual solution and recommendations for conformity may be reached. If no mutually satisfactory result can be achieved at the Committee level, either party may submit the matter before an Administrative Commission.

The Administrative Commission is ultimately responsible for the management and implementation of the FTA (article 21). However, the text of the FTA does not provide definitive guidance on the actual procedure to be adopted or on the extent to which the Commission may rule on a party's non-conformity regarding Chapter 17. Although the Administrative Commission has powers to 'adopt decisions to implement the provisions of this Agreement', [37] the drafters of the FTA have also left the specific rules and procedures of the Commission open for debate, to be decided upon the Commission's first meeting.

Although the procedure and powers of the Commission are not clear, Article 21.1(2) of the FTA clarifies that all the Commission's 'decisions and recommendations shall be adopted by mutual agreement'. Thus, consent is required for the adoption of measures to remedy any possible breaches or to promote the implementation of pending commitments. And even if any implementation were to take place, the text of the FTA does not grant coercive powers to the Administrative Commission.

While Chapter 17 is carved-out of the standard dispute resolution mechanism under the FTA, Article 23 of the FTA specifically refers to Article XX(b) GATT and permits 'environmental measures necessary to protect human life or health', with no cross-reference to any of the commitments under Article 17 of the FTA. As a result, unilateral measures to address environmental concerns under the Brazil-Chile FTA would be subject to the standard trade disciplines of the FTA and to a defence à la GATT Article XX.

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36 Under the Brazil-Chile FTA, several joint committees shall be established for the purposes of reporting on the implementation of specific areas of the FTA and identifying areas for potential cooperation between the State Parties. These committees are usually defined by the specific areas covered, e.g., Committee on Sanitary and Phytosanitary Measures (Article 4.14), Committee on Technical Barriers to Trade (Article 5.11), Committee on Trade and Gender (Article 18.4), among others.

37 Artículo 21.2: Funciones de la Comisión Administradora. 2. La Comisión Administradora podrá: (a) adoptar decisiones para: (i) implementar las disposiciones de este Acuerdo que requieran un desarrollo contemplado en el mismo [Article 21.2: Functions of the Administrative Commission. 2. The Administrative Commission may: (a) adopt decisions to: (i) implement the provisions of this Agreement that require a development contemplated therein].

2.4. EU-Mercosur FTA

On June 28th, 2019, after a two-decade negotiation, EU and Mercosur finally reached an agreement for a free trade agreement. The text is currently under legal revision by the parties. Once a final version is reached, the ratification process will likely take years and may face some resistance along the way, as the resistance and opposition from Member States of both blocs such as France and Argentina illustrate.[38] If, however, ratification is achieved, this FTA may become the world's largest agreement between two economic blocs to date.[39]

The publicly available text of the EU-Mercosur FTA includes a chapter on trade and sustainable development (not yet numbered). This chapter urges the parties to promote sustainable development through respecting their multilateral environmental agreements, and to enhance cooperation and understanding of their respective environmental trade-related policies and measures. Moreover, the chapter calls on parties to fulfil multilateral agreements and effective implement them, including their related protocols and amendments.

For instance, in an article titled 'Trade and Climate Change', the FTA refers to the UNFCCC and the Paris Agreement, and further bind the parties to effectively implement the provisions contained therein.[40] The obligation to effectively implement multilateral agreements also appears in other provisions of the sustainable development chapter, such as those related to biodiversity, sustainable management of forests, fisheries and aquaculture. In these cases, specific reference is made, for instance, to the Convention on Biological

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[38] Global Risk Insights. EU-Mercosur FTA: Threats and Challenges (2019). Available at: [https://globalriskinsights.com/2019/10/eu-mercosur-trade-agreement/] and Oliver Stuenkel. Why the EU-Mercosur Deal Hinges on Germany's Reaction to Bolsonaro, In Americas Quarterly. (2019). [https://www.americasquarterly.org/article/why-the-eu-mercosur-deal-hinges-on-germanys-reaction-to-bolsonaro/].

[39] CAMEX. Mercosul e UE fecham maior acordo entre blocos do mundo. Available at: [http://www.camex.gov.br/noticias-da-camex/2229-mercosul-e-ue-fecham-maior-acordo-entre-blocos-do-mundo].

[40] Article 6. Trade and Climate Change. 1. The Parties recognize the importance of pursuing the ultimate objective of the United Nations Framework Convention on Climate Change (UNFCCC) in order to address the urgent threat of climate change and the role of trade to this end. 2. Pursuant to paragraph 1, each Party shall: (a) effectively implement the UNFCCC and the Paris Agreement established thereunder. EU-Mercosur Free Trade Agreement partial text available at: [https://trade.ec.europa.eu/doclib/press/index.cfm?id=2048].

Diversity (CBD), the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), and the International Treaty on Plant Genetic Resources for Food and Agriculture.

As a means to bolster the implementation of multilateral environmental agreements, the FTA also incentives parties to cooperate on trade-related environmental matters, through a commitment to exchange information. This commitment is not merely one-sided, as parties are able to commence consultations and expressly request other parties to provide clarification on suspected breaches of the terms of the FTA. The FTA also incentivizes the parties to report on their progress concerning the ratification and implementation of multilateral environmental agreements. More specific provisions on the sustainable management of forests also call upon parties to report on their efforts to preserve and maintain their forest areas, as well as provide transparent figures on deforestation.

The EU-Mercosur FTA guarantees the right of the parties to regulate, develop their own policies, set out priorities, and determine levels of domestic environmental protection. However, it also expresses a concern about the effectiveness of policy making on the subject. For example, it determines that the parties shall strive to improve their laws and policies so as to ensure higher and more effective levels of environmental protection. It also provides that the parties should not weaken the levels of protection or fail to effectively enforce their environmental domestic laws with the intention of encouraging trade or investment.

Furthermore, the FTA sets forth a number of obligations regarding transparency, and exchange scientific and technical information. It also has provisions regarding responsible management of supply chains (Article 11), through responsible business conduct and corporate social responsibility practices based on internationally agreed guidance (for example the OECD Due Diligence Guidance for responsible supply chains of minerals from conflict-affected and high-risk areas and its supplements).

Like other free trade agreements, the EU-Mercosur FTA incorporates a broad iteration of GATT Article XX. Article 13.1 of the Chapter on ‘Trade in Goods’ makes express reference to the exceptions contained under GATT Article XX, and, in fact, expand the scope of GATT Articles XX(b) and XX(g). This is done

both by incorporating language from WTO caselaw in respect of GATT Article XX(g), pertaining to the preservation of living and non-living exhaustible natural resources, and by including, within the scope of GATT Article XX(b), measures taken towards the implementation of MEAs.

Regarding the enforcement and dispute resolution of environmental obligations, like the Brazil-Chile FTA, the EU-Mercosur FTA expressly excludes environmental matters from its general dispute resolution chapter.[41] It also establishes a separate dispute resolution mechanism exclusively for alleged breaches or non-conformities with commitments that fall within the general notion of 'Trade and Sustainable Development'. The 'Trade and Sustainable Development' dispute resolution mechanism under the EU-Mercosur FTA is more structured than the one under the Brazil-Chile FTA. However, neither mechanism bears a truly adjudicative nature and both are both predicated upon mutual consent between disputing parties.

Dispute resolution under the EU-Mercosur FTA starts with diplomatic consultations. Parties are encouraged to submit matters for discussion by clearly indicating the subject-matter of the breach or non-conformity and by presenting a summary of their claims. The matter may be submitted before a 3-member Panel of Experts if consultations fail to bring about a mutually satisfactory result.[42]

The Panel Experts appears to be functionally similar to an Arbitral Tribunal under the general dispute resolution mechanism of the FTA. In this sense, provisions related to the appointment of Experts, as well as rules governing the formalities of the Hearings, Costs, Confidentiality, and the Rules of Procedure and Code of Conduct that were originally drafted to regulate Arbitration under the EU-Mercosur FTA are expressly imported into and apply to the Trade and Sustainable Development dispute resolution mechanism. By

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[41] Article 15. Dispute Resolution. 5. No Party shall have recourse to dispute settlement under Title VIII (Dispute Settlement) for any matter arising under this Chapter.

[42] Article 17. Panel of Experts. 1. If, within 120 days of a request for consultations under Article 16 no mutually satisfactory resolution has been reached, a Party may request the establishment of a Panel of Experts to examine the matter. Any such request shall be made in writing to the contact point of the other Party established in accordance with Article 14.5 and shall identify the reasons for requesting the establishment of a Panel of Experts, including a description of the measure(s) at issue and indicating the relevant provision(s) of this Chapter that it considers applicable.

way of example, a Panel of Experts constituted under the EU-Korea FTA, which provides for dispute resolution mechanism similar to the EU-Mercosur FTA, issued a Final Report on the 20th of January 2021, where it found South Korea to be in breach of certain labour obligations. This Final Report resembles an Arbitral Award as far as its general structure and methodology are concerned.[43]

A key difference between an Arbitral Tribunal and a Panel of Experts is the extent of the powers conferred to either body. On the one hand, an Arbitral Tribunal has the power to establish a clear deadline for a party to 'take any measure necessary to comply promptly and in good faith with the arbitral award',[44] and even to order a party to offer temporary compensation or suffer suspensions in the concessions and benefits of the FTA if that party fails to comply with an Arbitral Award. On the other hand, a Panel of Experts is not empowered to order parties to either implement recommendations, offer compensation, or suffer from a suspension of benefits. Rather, it may only (i) assert whether a party is in breach of or is non-conforming with the environmental commitments of the FTA, and (ii) recommend corrective measures, if necessary.

The actual implementation of reports issued by Panels of Experts is contingent upon the parties' consensus on measures deemed appropriate. The parties are encouraged to consider the Final Report and recommendations rendered by the Panel of Experts and the responding party has a general duty to provide information on any actions or decisions to be implemented within 90 days as of the publishing of the Report. Yet, there are no other means to enforce compliance with Trade and Sustainable Development commitments upon parties.

Considering the differences in the possible outcomes of either procedure, it stands to reason that parties will disagree over the applicable means of dispute resolution. Whereas complaining parties will likely advocate for the

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[43] Panel of Experts Proceeding Constituted under Article 13.15 of the EU-Korea Free Trade Agreement. Report of the Panel of Experts (2021). Available at: [https://trade.ec.europa.eu/doclib/docs/2021/january/tradoc_159358.pdf].

[44] Article 15. Compliance with the Arbitral Award. 1. The defending party shall take any measure necessary to comply promptly and in good faith with the arbitral award.

constitution of an Arbitral Tribunal, respondent parties will likely advocate for the constitution of a Panel of Experts. The critical factor for determining which procedure applies has been recently discussed in a dispute under the EU-Ukraine FTA, which is similar to the EU-Mercosur FTA and shall be further analysed under **Chapter 3**. In that matter, the EU alleged the breach of Ukraine's obligation not to impose import and export restrictions, which falls within the scope of a standard dispute settlement mechanism, i.e., an Arbitral Tribunal. Ukraine challenged the jurisdiction of the Arbitral Tribunal, arguing that the alleged breach of was justifiable due to environmental concerns, relying, for this purpose, upon the defensive clauses available under the EU-Ukraine FTA. Due to this connection, Ukraine contended that the dispute should instead be heard by a Panel of Experts.

In its Final Report, the Arbitral Tribunal held that one must look upon the challenged measure and the provision which has allegedly been breached in order to discern whether a given dispute fell under the jurisdiction of an Arbitral Tribunal under the standard dispute settlement mechanism, or under the jurisdiction of a Panel of Experts under the trade and sustainability dispute settlement mechanism. The Arbitral Tribunal decided that, since the EU had fundamentally alleged a breach of Ukraine's obligations under Article 35 of the EU-Ukraine FTA, pertaining to 'import and export restrictions', the nature of the dispute was fundamentally related to trade – notwithstanding Ukraine's defence based on environmental concerns – and, as such, the standard dispute settlement mechanism applied. By contrast, had the EU challenged a measure adopted by the Ukraine in light of a provisions established under the EU-Ukraine FTA's Trade and Sustainability Chapter, the dispute would fall upon a Panel of Experts.

To the extent that this outcome would apply also under the EU-Mercosur FTA based on the similarity of text, the ability to suspend benefits, request economic compensation, or ultimately compel a party into compliance under the EU-Mercosur FTA appears to only be limited to cases where a core trade obligation is breached.

The EU-Mercosur FTA is the more developed of the three FTAs under analysis when it comes to the trade and environment nexus. Notwithstanding the critique it has been subject to, it has pushed the pre-existing boundaries of

preferential trade agreements further compared to the other FTAs under analysis. Yet, the text of the FTA does not allow for the unilateral enforcement of its environmental provisions outside the framework of a defensive clause, akin to GATT Article XX, and the FTA does not appear to allow trade sanctions as countermeasures for alleged environmental breaches.

2.5. Key take-aways

WTO	**EU-Chile FTA**	**Brazil-Chile FTA**	**EU-Mercosur FTA**
• Hosts a regular committee on trade and environment • Functions as a forum for the negotiation of plurilateral agreements • The demise of Doha Round shifted the discussions on trade and environment to FTAs • GATT Article XX remains as a key pillar of the interface between trade and environment	• Limited environmental regulation • Environmental disputes not covered by arbitration • Express reference to GATT Article XX • Undergoing modernization	• Specific chapter on environmental regulation, divided by subject • Express reference to MEAs • Environmental disputes subject to multi-tiered consensual procedure • Consolidation of WTO caselaw on GATT Article XX(g) • Pending ratification by Brazil	• Specific chapter on environmental regulation, divided by subject • Express reference to MEAs and to their effective implementation • Includes provisions on transparency and scientific and technical information • Reference to precautionary principle • Environmental disputes subject to panel of experts with no adjudicative powers • Consolidation of WTO caselaw on GATT Article XX • Pending legal scrubbing and ratification by all parties

Although the WTO has a regular committee on trade and environment (the CTE), the demise of the Doha Round made the discussions surrounding environment and trade to shift from WTO to other forums and organizations, such as the informal State Groups (G-20 and G-8)[45] and the UN. [46]

The WTOs acts on the matter at issue in coordination with the implementation bodies of the multilateral environment agreements and the UN, to better understand the impacts of trade in environment and of the environmental policies on trade. There are ongoing discussions within the WTO about the Liberalization of environmental goods.

Notwithstanding the WTO's unspecific regulation of the trade-environment interface, GATT Article XX and its development through WTO caselaw remain a key pillar of trade and environment, supplying objective exemption criteria that are replicated throughout bilateral and regional FTAs. [47]

The EU-Chile FTA, from 2002, has limited environmental regulation and excludes the trade and environment-related disputes from the dispute resolution mechanism. However, it makes express reference to GATT Article XX and is undergoing discussion on being modernized.

The Brazil-Chile FTA has a structured chapter on trade and environment, basically referencing MEAs, calling the parties to observe their provisions and to cooperate. It excludes trade environment-related commitments from the dispute resolution mechanism, establishing a multi-tiered consensual procedure to addresses such issues, and also references GATT Article XX.

The EU-Mercosur FTA, the more developed of the three FTAs when it comes to the trade and environment nexus, has a specific chapter on sustainable

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[45] Brazil. Federal Government. The WTO Doha Round and the Doha Development Agenda (2020). Available at: [https://www.gov.br/mre/en/subjects/economic-and-commercial-foreign-policy/international-economic-organizations/the-wto-doha-round-and-the-doha-development-agenda].

[46] United Nations. Transforming our world: the 2030 Agenda for Sustainable Development. Available at: [https://sdgs.un.org/2030agenda].

[47] "Certain measures taken to achieve environmental protection goals may, by their very nature, restrict trade and thereby impact on the WTO rights of other members. They may violate basic trade rules, such as the non-discrimination obligation and the prohibition of quantitative restrictions. This is why exceptions to such rules, as contained in Article XX, are particularly important in the trade and environment context. Article XX being an exception clause, it comes into play only once a measure is found to be inconsistent with GATT rules." – World Trade Organization. WTO rules and environmental policies: key GATT disciplines, in Trade Topics, Trade and Environment, the rules. Available at: [https://www.wto.org/english/tratop_e/envir_e/envt_rules_gatt_e.htm].

development, and, consequently on environmental regulation, divided by subjects, and provides express reference to multilateral environment agreements, adding a commitment to the parties effective implement them. It also includes provisions on transparency and exchange of information. Like the Brazil-Chile FTA, the EU-Mercosur excludes the trade and environment-related commitments from the scope of its dispute resolution mechanism, and places them under a cooperative mechanism – a Panel of Experts without adjucative powers. The text of this FTA does not allow for the unilateral enforcement of its environmental provisions outside the framework of a defensive clause, similar to GATT Article XX, and it does not appear to allow trade sanctions as countermeasures for alleged environmental breaches.

3. Analytical framework

This Chapter sets-out an analytical framework for comparing environment-related commitments in the EU-Chile, Brazil-Chile, and EU-Mercosur FTAs. This framework classifies the main environmental provisions of the FTAs at issue into four broad categories: (i) defensive clauses that exempt parties from strictly complying with trade rules in light of environmental concerns; (ii) obligations that are based upon existing international environmental standards (derivative commitments); (iii) domestic regulation obligations, which encompasses obligations that are related to existing domestic law; and (iv) aspirational clauses that seek to promote a degree of higher protection.

The regulation of environment-related concerns in trade agreements tends to fall along a continuum of two broad, opposite approaches: a 'sanctions-based' approach and a 'promotional' approach. The sanctions-based approach generally favours restrictive measures (sanctions) as a means of enforcing international compliance with obligations. Employed alongside other integrated and comprehensive policy measures, sanctions usually amount to the partial or total suspension of the benefits granted under an international instrument, and are deployed as a response to non-conformity with trade and trade-related obligations.

The promotional approach, on the other hand, generally focuses on cooperation and dialogue between trade partners. This usually entails promoting the involvement of civil society and other stakeholders in monitoring the implementation of commitments by countries, as well as reiterating and bolstering pre-existing commitments on the international and domestic level.

While treaties that embody the sanctions-based approach usually allow restrictive measures as means of enforcing commitments, treaties that embody the promotional approach usually rely on more diffuse methods of enforceability. From this perspective, the environmental commitments regulated by the EU-Chile, Brazil-Chile, and EU-Mercosur FTAs are generally aligned with a promotional approach. Most notably, none of the FTAs' trade and environment chapters expressly provide for sanctions or restrictive measures as responses to non-conformity. Since the three FTAs at issue

generally adopt a promotional approach, it is useful to consider further categories as signposts for the comparison that this Report undertakes.

For this purpose, this Report relies on the categories recently adopted by Bronckers and Gruni (2021), [48] complemented by one additional category to account for the fact that all the FTAs under review also include a 'GATT Article XX-like' provision. Bronckers and Gruni analyse the nature and functioning of the sustainability provisions that are usually reflected in the EU's latest preferential trade agreements and suggest that there are three categories of these provisions: (i) obligations that are based upon existing international environmental standards; (ii) obligations that are related to existing domestic environmental law; and (iii) aspirational clauses that seek to promote a degree of higher protection.[49]

The first category suggested by Bronckers and Gruni consists of **obligations based on existing international standards.** This category encompasses obligations based on existing international environmental standards, in the sense of pre-existing bilateral and multilateral international commitments undertaken by countries and international organizations. This category is further divided into **three subgroups**: (a) obligations regarding the ratification of international conventions on environmental protection; (b) obligations to respect, promote and realize fundamental principles, even if a party has not ratified the convention that elaborates on a particular principle; and (c) obligations to effectively implement the multilateral environmental conventions that the parties have ratified.[50]

First, **obligations regarding the ratification of international conventions on environmental protection**, includes provisions requiring parties to ratify specific international conventions if they have not yet done so. There is

[48] As a culmination of their research on recent preferential trade agreements executed by the European Union, including the EU-Mercosur FTA, Marco Bronckers and Giovanni Gruni have recently published a paper titled "Retooling the Sustainability Standards in EU Free Trade Agreements" in the March 2021 Issue 1 of the Journal of International Economic Law.

[49] Marco Bronckers; Giovanni Gruni. Retooling the Sustainability Standards in EU Free Trade Agreements. *Journal of International Economic Law*, Volume 24, Issue 1, 25–51 (2021). Available at: https://doi.org/10.1093/jiel/jgab007.

[50] Article 23.3(4) CETA; Article 13.4(3) EU–Vietnam FTA; Article 16.3(3) EU–Japan FTA; Article 4.4 EU–Mercosur FTA TSD; Article 12.3(4) EU–Singapore FTA; Article 3.4 EU–Mexico FTA TSD; Article 13.4 EU–Korea FTA.

usually no predetermined deadline for ratification, and these provisions are usually worded as 'best-efforts' obligations.[51]

Second, **obligations to respect, promote and realize fundamental principles, even if a party has not ratified the convention that elaborates on a particular principle**, refers to general obligations to respect, promote, and implement fundamental principles that are not necessarily applicable to parties, as they may be contained in conventions and international instruments that have not been specifically ratified by the parties, but that are nonetheless relevant for the subject-matter at issue.

Third, there are **obligations to effectively implement the multilateral environmental conventions that the parties have ratified**. This subgroup covers not only obligations to generically implement all ratified conventions, but also obligations to implement specific conventions. For instance, the EU–Mercosur, EU–Japan, EU–Mexico, EU–Vietnam, and EU–Singapore FTAs all contain obligations to effectively implement the Paris Agreement under the United Nations Framework Convention on Climate Change ('Paris Agreement').

The second category suggested by Bronckers and Gruni refers to **obligations related to existing domestic regulation.** This category reinforces the parties' right to regulate, provided that this is consistent with the international commitments undertaken by each party.[52] Furthermore, they discourage the parties from lowering their existing levels of domestic environmental protection. This is expressed by means of non-regression clauses, which seek to prevent parties from weakening the current level of protection under their own laws, and by non-enforcement clauses, which seek to prevent parties from failing to enforce their own laws.[53]

The third category suggested by Bronckers and Gruni refers to **aspirational clauses referring to higher levels of protection.** This category encompasses vaguer provisions that generally urge parties to raise their

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[51] Article 4 EU–Mercosur FTA TSD; Article 3.4 EU–Mexico FTA TSD; Article 12.3(4) EU–Singapore FTA; Article 13.4(3) EU–Vietnam FTA; Article 23.3(4) CETA

[52] For example, Article 2(1) of the EU–Mercosur TSD chapter.

[53] For example: Article 2(3) of the EU–Mercosur TSD chapter: "*A Party should not weaken the levels of protection afforded in domestic environmental or labor law with the intention of encouraging trade or investment*"

levels of protection, without any specific references as to the intensity of these obligations or any concrete milestones or deadlines to be concretely achieved. According to Bronckers and Gruni, [54] these types of provisions are especially indicative of the promotional approach, inasmuch as the absence of sanctions or clear metrics for compliance allow countries greater flexibility in accepting aspirational language whose strict implementation would otherwise prove to be unfeasible. This particular feature of aspirational clauses is especially relevant when distinguishing them from the other two categories: whereas the first two categories contain binding provisions establishing both specific results and best-efforts obligations (depending on the exact language of each provision), the provisions contained in this third category do not appear to be binding.

In addition to the abovementioned three categories that rely on Bronckers and Gruni's proposed categories, this Report advances an additional category to account for **defensive clauses**, which Bronckers and Gruni do not specifically cover. Defensive clauses, such as Article XX of the GATT 1994 ("GATT Article XX"), and more specifically Articles XX(b) and XX(g), allow parties to deviate from their trade obligations based on environmental concerns. They allow the imposition of trade-restrictive measures by an importing party, provided that this imposition is designed to address environmental concerns and interests, among other key policy goals that are deemed to be justifiable reasons for trade exemptions.[55] Therefore, these clauses provide room for a trade-restricting party to enforce environmental concerns without violating its trade obligations.

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[54] Marco Bronckers; Giovanni Gruni. Retooling the Sustainability Standards in EU Free Trade Agreements. *Journal of International Economic Law*, Volume 24, Issue 1, 25–51 (2021). Available at: https://doi.org/10.1093/jiel/jgab007.

[55] Namely, measures necessary to protect public morals – GATT Article XX(a); measures relating to the importations or exportations of gold or silver – GATT Article XX(c); measures necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of GATT – GATT Article XX(d); measures relating to the products of prison labor – GATT Article XX(e); measures imposed for the protection of national treasures of artistic, historic or archaeological value – GATT Article XX(f); measures undertaken in pursuance of obligations under any intergovernmental commodity agreement – GATT Article XX(h); measures involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan – GATT Article XX(i); and measures essential to the acquisition or distribution of products in general or local short supply – GATT Article XX(j).

Defensive clauses akin to GATT Article XX are often present in FTAs and can be closely related to the provisions in specific environment-related chapters of the FTAs. By way of example, in the dispute arising under the EU-Ukraine FTA discussed previously, an Arbitral Tribunal analysed whether Ukraine's ban on exports to the EU of certain wood products was justifiable under the EU-Ukraine FTA's defensive clause (Article 36), which expressly incorporates GATT Article XX.[56]

The EU alleged that Ukraine's export ban fell outside the scope of GATT Article XX and Article 36 of the EU-Ukraine FTA, insofar as it had failed to prove to what extent they had been designed or were necessary either for the protection of plant life and health or for the preservation and sustainable exploitation of forests.[57] Ukraine relied on its alleged environmental protection policy goals in the sense of GATT Articles XX(b) and XX(g), arguing that the export ban had to be interpreted within the context of Ukraine's environmental policy, and were necessary for the preservation of plant health and life, as well as for the preservation and sustainable exploitation of forests.[58]

The Arbitral Tribunal held that the dispute did not strictly arise from the EU-Ukraine FTA's Trade and Sustainability chapter, but rather related from the parties' core trade obligations. As such, the dispute fell within the scope of the FTA's standard dispute settlement mechanism.[59] This outcome illustrates that the addition of defensive clauses to Bronckers and Gruni's three-pronged framework add to the understanding of environmental commitments and parties' policy spaces in FTAs that regulate environmental matters, which is relevant to this Report.

Accordingly, this Report assesses the main trade and environment-related provisions in the EU-Chile, Brazil-Chile, and EU-Mercosur FTAs in light of the following four categories: (i) defensive clauses that exempt parties from

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[56] See Final Report, Ukraine – Wood Products (2020). Available at: [https://trade.ec.europa.eu/doclib/docs/2020/december/tradoc_159181.pdf].

[57] See Final Report, Ukraine – Wood Products. p. 31, paras. 73 – 74/ pp. 72 – 73, paras. 272 – 277 (2020). Available at: [https://trade.ec.europa.eu/doclib/docs/2020/december/tradoc_159181.pdf].

[58] See Final Report, Ukraine – Wood Products, p. 32, paras. 79 – 80/ pp. 70 – 71, paras. 267 – 271 (2020). Available at: [https://trade.ec.europa.eu/doclib/docs/2020/december/tradoc_159181.pdf].

[59] See Final Report, Ukraine – Wood Products p. 126 (2020). Available at: [https://trade.ec.europa.eu/doclib/docs/2020/december/tradoc_159181.pdf].

strictly complying with trade rules in light of environmental concerns; (ii) obligations that are based upon existing international environmental standards (derivative commitments); (iii) domestic regulation, which encompasses obligations that are related to existing domestic environmental law; and (iv) aspirational clauses that seek to promote a higher degree of protection.

4. Comparative analysis[60]

This Chapter compares the main trade and environment commitments in the EU-Chile, Brazil-Chile, and EU-Mercosur FTAs in light of the framework described in Chapter 3. Because the EU-Chile FTA environment-related provisions are not particularly developed, the comparison with respect to this FTA is restricted to the section on defensive clauses, the only category that is common to the three FTAs under analysis.

4.1. Defensive clauses

Key take-aways:

- GATT Article XX remains a key pillar of trade and environment
- Defensive clauses essentially reproduce the text of GATT Article XX into the FTAs
- EU-Chile FTA provides for fewer exceptions but does not exclude environmental defenses
- Brazil-Chile and EU-Mercosur FTAs expand upon the text of GATT Article XX(g) by incorporating language based on WTO caselaw
- Brazil-Chile FTA generically expands upon GATT Article XX(b) by making express reference to 'environmental measures'
- EU-Mercosur FTA specifically expands upon GATT Article XX(b) by including measures towards the adoption of MEAs as justifiable reasons for trade restrictions

As explained above, defensive clauses such as GATT Article XX and particularly Articles XX(b) and XX(g) exempt parties from complying with trade obligations based on environmental concerns. They allow the imposition of trade-restrictive measures by an importing party, provided that this imposition is designed to address environmental concerns and interests, among other key policy goals that are deemed to be justifiable reasons for trade exemptions. Therefore, these clauses provide room for a trade-restricting party to enforce environmental concerns without violating its trade obligations.

[60] Under each Subchapter of this Chapter 4, comparative tables have been drafted in order to provide a clearer immediate comparison between the respective provisions under the FTAs at issue. As such, for the sake of clarity and brevity, provisions have not been reproduced in their entirety, but rather summarized as cliff-notes.

The three FTAs at issue contain provisions whereby parties are exempted from complying with trade obligations when faced with certain domestic policy goals. These provisions are either textual reproductions of GATT Article XX or direct references to GATT Article XX, whereby the WTO's general exceptions are incorporated by reference into the body of the FTAs. Broadly, whereas the EU-Chile FTA merely reproduces GATT Article XX, with some exclusions, the Brazil-Chile and EU-Mercosur FTAs seek to encompass a wider scope of environmental measures as justifiable reasons to exempt trade violations.

Article 91 of the EU-Chile FTA, for instance, is essentially a carbon-copy of GATT Article XX when environmental exceptions are concerned. Article 23.1.1 of the Brazil-Chile FTA, on the other hand, incorporates GATT Article XX and its explanatory notes by reference, but limits is scope of application to the Chapters 2 (Trade Facilitation), 4 (Sanitary and Phytosanitary Measures) and 5 (Technical Barriers to Trade). Article 23.1.2 of the Brazil-Chile FTA clarifies that 'environmental measures' are expressly included within the scope of GATT Article XX(b), and that 'measures for the preservation of non-renewable resources' are expressly included within the scope of GATT Article XX(g).

In similar fashion, Article 13.1 of the EU-Mercosur FTA's chapter on Trade in Goods makes express reference to GATT Article XX, incorporating its text and its Notes and Supplementary Provisions into the EU-Mercosur FTA's provisions on Market Access, Non-Tariff Measures, and Customs and Trade Facilitation. When clarifying the scope of the specific scope of GATT Article XX(b), however, Article 13.2 of the EU-Mercosur FTA's chapter on Trade in Goods expressly includes not only 'environmental measures', but also "*measures taken to implement multilateral environmental agreements*". The scope of GATT Article XX(g), in turn, is expanded so as to include "*measures for the conservation of living and non-living exhaustive natural resources*."

Since the three FTAs at issue refer to GATT Article XX or its underlying rationale to a significant extent, it is important to discuss the application of this provision. GATT Article XX's paragraphs indicate policy objectives that are deemed to be justifiable reasons for adopting measures that would otherwise amount to violations of the WTO framework. These include, for instance, measures "*that are necessary to protect human, animal or plant life or health*",

under GATT Article XX(b), and measures "*relating to the conservation of exhaustible natural resources*", under GATT Article XX(g).

The chapeau of Article XX requires that the measures adopted to fulfil the objectives mentioned above must "not be applied in a manner which would constitute a means of arbitrary or unjustified discrimination between countries where the same conditions prevail, or a disguised restriction on international trade."[61]

The application of GATT Article XX defences starts with the provision's subparagraphs. This exercise aims to first identify whether the policy objective allegedly being enforced through the trade restrictive measure falls under the list of justifiable policy goals. Passing this initial test, the analysis then focuses on whether the measure at issue is, as forbidden by the chapeau: an 'arbitrary', 'unjustified' or a 'disguised restriction'.[62]

Although the analysis is conducted on a case-by-case basis, the WTO Dispute Settlement Body has established some general notions to better guide the interpretation of GATT Article XX – and, in particular, Articles XX(b) and XX(g), which are the Articles usually applied when environmental and sustainability concerns are raised to justify trade restrictive measures. In respect of GATT Article XX(b), for instance, previous rulings have dismissed defences that loosely relied upon 'environmental protection' when no particular connection between the proposed measure and the purported environmental policy gain could be identified.[63]

In stressing measures endeavoured towards environmental protection as exceptions under GATT Article XX(b), the Brazil-Chile and EU-Mercosur FTAs have essentially reinforced this defensive provision's ability to harbour environmental policy interests, although neither FTA waives the need for parties to demonstrate that the challenged measure is necessary for the protection of "*human, animal or plant life or health*". In relation to other

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[61] GATT Article XX - General Exceptions, chapeau.

[62] WTO Appellate Body. Report on US-Gasoline (DS2), 29.04.1996, pp. 22 - 23. Available at: [Available at: [https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/DS/2ABR.pdf&Open=True].

[63] WTO Panel. Report on Brazil-Retreaded Tyres (DS332), 12.06.2007, para. 7.46. Available at: [https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/DS/332R-00.pdf&Open=True].

international obligations, Article 13.2 of the EU-Mercosur FTA's chapter on Trade in Good actually doubles-down on the bindingness of the FTA's derivate commitments, as it potentially exempts parties from non-compliant trade measures if they are (i) adopted for the implementation of multilateral environmental agreements (including, but not limited to, those referenced by the FTA itself), and, once again, (ii) necessary for the satisfying the core policy goals of GATT Article XX(b).

The successful application of GATT Article XX(g) requires additional conditions. Not only must measures be justifiable within the particular policy objectives of GATT Article XX(g), but their negative externalities on trade must be proportionate to their purported policy gains and they must be coherent with a party's domestic measures to achieve these gains. In a nutshell, measures adopted under GATT Article XX(g) cannot have indiscriminate effects on trade, even if they ultimately achieve the respective policy concern, and cannot, in any event, be deployed exclusively at an international level, and must also be present on the domestic side.

At first sight, one could argue that very little innovation is provided by the Brazil-Chile and the EU-Mercosur FTAs. In fact, by making express reference to "*measures for the conservation of living* […] *exhaustive natural resources*", Article 13.2 of the EU-Mercosur FTA's chapter on Trade in Goods consolidates currently standing WTO caselaw, such as that of US-Shrimp (DS58), wherein the definition 'natural resources' was broadly construed. On the other hand, the apparent lack of innovation may be indicative of GATT Article XX's effectiveness in integrating trade and environmental concerns. When negotiating bilateral and regional instruments, such as the FTAs at issue, parties were free to adopt any other mechanism that would function as defensive clauses. Instead, they have relied on language akin to GATT Article XX.

From a purely textual comparison, the EU-Chile FTA provides as much room for parties to adopt trade restrictions in light of domestic policy goals as the WTO. In fact, since Article 91 of the EU-Chile FTA reproduces only a portion of GATT Article XX, the EU-Chile FTA arguably allows for an even stricter

environmental policy space than what is generally afforded under the WTO.[64] Articles 23.1.1 and 23.1.2 of the Brazil-Chile FTA and Articles 13.1 and 13.2 of the EU-Mercosur FTA, in turn, incorporate GATT Article XX and expand the blackletter of GATT Articles XX(b) and XX(g). Hence, whereas the defensive clause provided by the EU-Chile FTA is essentially on par with GATT Article XX, the defensive clauses provided by the Brazil-Chile and EU-Mercosur FTAs expand upon the text of GATT Article XX, allowing parties greater discretion in adopting trade restrictions in light of environmental concerns.

When directly comparing the defensive clauses provided by the Brazil-Chile and EU-Mercosur FTAs, special attention must be drawn to the means through which these FTAs expand upon GATT Article XX. Both of the Brazil-Chile and EU-Mercosur FTAs incorporate the developments within the WTO Dispute Settlement Body in respect of GATT Article XX(g), by respectively making reference to 'measures for the preservation of non-renewable resources' and 'measures for the conservation of living and non-living exhaustive natural resources'.

In respect of GATT Article XX(b), however, the Brazil-Chile FTA generically includes 'environmental measures' as policy goals that allow for the adoption of trade restrictions. The EU-Mercosur is narrower, as it specifically contemplates 'measures taken to implement multilateral environmental agreements'. This inclusion appears to be in line with the EU-Mercosur FTA's general trend of strengthening commitments and obligations that are derived from existing international environmental instruments, as will be addressed on **Subchapter 4.2** below. This inclusion also allows for a greater interplay between trade and environmental provisions within the context of the EU-Mercosur FTA's dispute settlement mechanism, including with reference to MEA commitments.

In fact, the text of Article 13.2 of the EU-Mercosur FTA allows for the FTA's derivative environmental commitments to be scrutinized under the standard dispute resolution mechanism of the FTA, that is, binding Arbitration, as opposed to the non-binding Panel of Experts that would usually govern the

[64] To be sure, since Article 91 of the EU-Chile FTA leaves GATT Articles XX(b) and XX(g) intact, this reduced scope has no impact in the parties' ability to adopt trade restrictions in light of environmental concerns and policy goals.

FTA's Trade and Sustainability chapter. By comparison, in the absence of a provision similar to Article 13.2 of the EU-Mercosur FTA, this level of interplay may have been made less possible under the Brazil-Chile FTA, as it does not elect measures taken to implement MEAs as possible exemptions to trade rules established by the FTA.

To illustrate the comparison, one may imagine a hypothetical Country X that, in order to comply with its nationally determined contribution under Articles 4.1 and 4.2 of the Paris Agreement, enacts trade restrictions on goods usually imported from Country Y whose industrial process disproportionately contributes towards greenhouse gas emissions. In response, Country Y challenges the respective trade restriction under the terms of the prevailing FTA between itself and Country X. If Countries X and Y were parties to the Brazil-Chile FTA, the matter would be subject to the dispute settlement mechanism described under Article 22 of the FTA. Country X's defence that it acted pursuant to the Paris Agreement may not be accepted as justified in the sense of Articles 23.1.1 or 23.1.2 of the Brazil-Chile FTA.

However, if Countries X and Y were parties to the EU-Mercosur FTA, the matter would be subject to the standard dispute settlement mechanism and Country X's defence that it acted pursuant to the Paris Agreement could be accepted under Article 13.2 of the FTA. In this instance, Country X's defence would also likely be based upon Article 6(1)(a) of the EU-Mercosur, which provides that parties shall effectively implement the Paris Agreement.[65]

In closing, the EU-Chile FTA provides for the least room in adopting trade restrictions in light of environmental concerns, whereas the EU-Mercosur FTA provides for the most room, so long as the environmental concern at issue stems from an existing multilateral environmental agreement. The Brazil-Chile FTA, in turn, stands as a middle ground: although it slightly expands upon the scope of GATT Article XX, it does not provide for an immediate textual link between MEA commitments and core trade obligations.

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[65] Article 6. Trade and Climate Change. 1. The Parties recognize the importance of pursuing the ultimate objective of the United Nations Framework Convention on Climate Change (UNFCCC) in order to address the urgent threat of climate change and the role of trade to this end. 2. Pursuant to paragraph 1, each Party shall: (a) effectively implement the UNFCCC and the Paris Agreement established thereunder.

4.2. Derivative commitments

Key take-aways:

- EU-Chile FTA does not have provisions recalling, reaffirming, or referencing multilateral commitments
- Brazil-Chile FTA recognizes the relevance of MEAs and their implementation
- Eu-Mercosur FTA goes further and establishes a commitment to effectively implement the MEAs
- Most of the environmental commitments and obligations relate to international and/or multilateral environmental standards and agreements
- The environment-related commitments and obligations are not automatically enforceable under the FTAs' dispute settlement mechanisms
- EU-Mercosur FTA provides greater interplay between trade and environment provisions, as derivative commitments may serve either as triggers for Panel of Expert procedures, or as support for a defense of trade restrictions

Derivative commitments refer to obligations based on existing international environmental standards (pre-existing bilateral and multilateral international commitments undertaken by the parties and international organizations), encompassing: (a) obligations regarding the ratification of international conventions on environmental protection; (b) obligations to respect, promote and realize fundamental principles, even if a party has not ratified the convention that elaborates on a particular principle; and (c) obligations to effectively implement the multilateral environmental conventions that the party has ratified.[66]

The EU-Chile FTA does not have provisions recalling, reaffirming or referencing multilateral environmental agreements. Among the remaining two FTAs under analysis, the EU-Mercosur FTA contains the most derivative commitments. This FTA expressly indicates the fulfilment of multilateral agreements and their underlying principles as a key area of concern. In this sense, the EU-Mercosur FTA establishes assurances and mechanisms to

[66] Article 23.3(4) CETA; Article 13.4(3) EU–Vietnam FTA; Article 16.3(3) EU–Japan FTA; Article 4.4 EU–Mercosur FTA TSD; Article 12.3(4) EU–Singapore FTA; Article 3.4 EU–Mexico FTA TSD; Article 13.4 EU–Korea FTA.

ensure that parties will **effectively implement** international environmental commitments, their related protocols, and other miscellaneous amendments.

	Brazil-Chile FTA	EU-Mercosur FTA
General provisions on MEAs	**article 17.4** The parties recognize that the MEAs of which they are a part are important and highlight the need to improve mutual support, reaffirming their commitment to implement the MEAs of which they are a party.	**article 5** The parties recognize the importance of the MEAs; the need to enhance the mutual supportiveness; and reaffirm their commitments to promote and effectively implement the MEAs, protocols and their amendments.

4.2.1. Climate change

	Brazil-Chile FTA	EU-Mercosur FTA
Climate change	**article 17.14** Parties reaffirm the principles and objectives of the UNFCCC, the Kyoto Protocol, and the Paris Agreement.	**article 6** Parties recognize the importance of pursuing the ultimate objective of the UNFCCC. Parties shall effectively implement the UNFCCC and the Paris Agreement and promote the development of global trade in tandem with low greenhouse gas emissions and adapt to the impacts of climate change whilst maintaining food production.

Climate change is a major focal point for both the Brazil-Chile and the EU-Mercosur FTAs. Both FTAs contain an express reference to the UNFCCC and the Paris Agreement.

Much like the general provisions pertaining to the implementation of MEAs, the key distinction between the Brazil-Chile and the EU-Mercosur FTAs is specificity and the degree to which parties are actually bound to implement MEAs related to climate change.

The EU-Mercosur FTA obliges parties to **effectively** implement them the UNFCCC and the Paris Agreement. Parties of the EU-Mercosur FTA are expected to cooperate on trade-related climate change issues bilaterally, regionally and in international fora, particularly in the UNFCCC.

Comparatively, the Brazil-Chile FTA only generically reaffirms the principles and objectives underlying the UNFCCC, the Kyoto Protocol, and the Paris Agreement, without providing any specific metrics for implementation or cooperation thereon. It thus appears that, on the one hand, the Brazil-Chile FTA merely reinstates the status quo, whereas the EU-Mercosur FTA, on the other, seeks to advance currently existing regulation by prescribing cooperation and committing parties to so-called 'effective' implementation of MEAs that focus on climate change.

4.2.2. Biodiversity

	Brazil-Chile FTA	EU-Mercosur FTA
Biodiversity	**article 17.9** Parties reaffirm their commitments under the Convention on Biological Diversity (CBD) and related legal instruments to which they are parties. **article 17.16** Parties acknowledge the need to combat unlawful exploitation of wildlife and wildlands and undertake to promote, in line with their international and domestic obligations, lawful initiatives in the area.	**article 7** Parties recognize the importance of the conservation and sustainable use of biological diversity consistent with the Convention on Biological Diversity (CBD), the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the International Treaty on Plant Genetic Resources for Food and Agriculture. Parties shall promote the use of CITES, implement effective measures leading to a reduction of unlawful trade in wildlife, encourage trade in natural

		resource-based products obtained through a sustainable use of biological resources, and promote the fair and equitable sharing of benefits.

When comparing the derivative commitments related to biodiversity, the Brazil-Chile and EU-Mercosur FTAs once again differ in specificity. Article 7 of the Trade and Sustainable Development Chapter of the EU-Mercosur FTA refers to several MEAs focused on biodiversity, such as the Convention on Biological Diversity (CBD), the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the International Treaty on Plant Genetic Resources for Food and Agriculture.

The Brazil-Chile FTA only makes express reference to the CBD and generically seeks to encompass other related MEAs that have also been ratified by parties. Thus, at first sight, one could be led to conclude that the Brazil-Chile FTA is less concerned with biodiversity than the EU-Mercosur FTA. Article 17.9 of the Brazil-Chile FTA, however, also reiterates several of the core policy objectives sought by biodiversity MEAs. Article 17.16 further specifies the relevance of combatting unlawful commercial exploitation of wildlife and urges parties to promote lawful initiatives related to the sustainable commercial exploitation of wildlife and wildlands.

Hence, although the EU-Mercosur FTA is more specific in listing MEAs of relevance, the Brazil-Chile FTA could be construed as appealing to similar underlying principles and objectives. Additionally, the Brazil-Chile FTA's open-ended language (i.e., other related instruments which parties have ratified) could arguably cause this FTA to encompass any future MEAs which the parties eventually ratify.

In this respect, the EU-Mercosur FTA only provides for similarly open-ended language in its article 7(2)(b), which pertains to the effective implementation of measures consistent with other international instruments ratified by the parties specifically towards the reduction of unlawful trade in wildlife.

In fact, differently from the derivative commitments related to climate change, the EU-Mercosur does reiterate that parties shall effectively implement all MEAs related to biodiversity. As mentioned, such language ('effectively

implement') is reserved to Article 7(2)(b) of the Trade and Sustainability Chapter of the EU-Mercosur FTA. In tandem with its trend to adopt a more general and less specific language, the Brazil-Chile FTA likewise does not provide for any specific commitments towards the 'effective implementation' of biodiversity MEAs.

Regarding the EU-Mercosur FTA, the absence of a duty to 'effectively implement' may not be as relevant as it seems on first look. This is the result of Article 5(3) of its Trade and Sustainability Chapter, which provides a blanket commitment for parties to 'promote and effectively implement' MEAs to which they are parties. As such, although the biodiversity MEAs listed under Article 7 of the EU-Mercosur FTA's Trade and Sustainability Chapter would not automatically be subject to a duty of 'effective implementation', the general framework of the EU-Mercosur FTA and its emphasis on the implementation of MEAs may lead to an equivalent outcome.

As a sidenote to the abovementioned comparisons on the scope and extent of obligations to implement biodiversity MEAs, another difference between the two FTAs is the express provision under the EU-Mercosur FTA urging parties to encourage trade in natural resource-based products. Although framed as a generic duty, its mere existence is indicative of ongoing discussions by the FTA's parties. For instance, there have been discussions in Brazil and abroad towards a 'sustainable taxation', that is, the imposition of differential taxation on companies and industries that seek sustainable alternatives to the development of their activities, encompassing trade in natural resource-based products.

Therefore, although both FTAs may provide similar levels of protection in respect of specific biodiversity MEAs, neither provides for the "effective implementation" of any one particular biodiversity MEA. However, the EU-Mercosur FTA includes a general duty to effectively implement MEAs which its parties have ratified.

4.2.3. Sustainable management of forests

	Brazil-Chile FTA	EU-Mercosur FTA

Sustainable management of forests	**article 17.12** Parties recognize the importance of preserving and sustainably managing forests. This is translated into undertakings to promote trade in legally obtained forest products, exchange information and cooperate on initiatives to promote forest management, and cooperate in international fora on the conservation and sustainable management of forests. These undertakings are framed within the context of parties' existing international and domestic obligations, with no specific reference to any MEAs or other international instruments.	**article 8** Parties recognize the importance of sustainable forest management and the role of trade in pursuing this objective and of forest restoration for conservation and sustainable use. Parties shall encourage trade in products from sustainably managed forests harvested in accordance with the law of the country of harvest, promote the inclusion of forest-based local communities and indigenous peoples in sustainable supply chains of timber and non-timber forest products, as a means of enhancing their livelihoods and of promoting the conservation and sustainable use of forests, and implement measures to combat illegal logging and related trade. Finally, parties are urged to cooperate in a manner consistent with the 2030 Agenda for Sustainable Development.

The Brazil-Chile and EU-Mercosur FTAs contain provisions on the preservation of forests, but to varying degrees. Whereas the Brazil-Chile FTA is limited to acknowledging the importance of preserving forests, the EU-Mercosur FTA provides that parties shall encourage trade in products from sustainably managed forests, harvested in accordance with the law of the country of harvest, promote the inclusion of forest-based local communities and indigenous peoples in sustainable supply chains of timber and non-timber forest products, and implement measures to combat unlawful logging and related trade.

Based on the language of the two FTAs, the EU-Mercosur FTA indicates that parties will devote more attention to this topic, for instance, in combatting unlawful logging practices. Additional pressure towards sustainable management of forests on Mercosur countries can be expected.

Differently from other provisions in the EU-Mercosur FTA, Article 8 of its Trade and Sustainability Chapter makes no reference to any specific MEAs on the topic. Rather, this set of provisions is only deemed as a derivative commitment in light of Article 8(3)(b) thereof, which expressly references the United Nations 2030 Agenda for Sustainable Development. Even this reference, however, varies from EU-Mercosur FTA's general trend of imposing obligations to 'effectively implement'. Softer and more cautious language is adopted here.

The Brazil-Chile FTA, in turn, contains no reference to either MEAs or international instruments. It merely urges the parties to adopt measures in accordance with their international and domestic obligations on the matter. In absence of stronger language, the Brazil-Chile FTA may, once again, be seen as reiterating the status quo without, providing for specific means for achieving existing goals and commitments in the topic.

4.2.4. Biological resources and marine ecosystems

	Brazil-Chile FTA	EU-Mercosur FTA
Biological resources & marine ecosystems	**article 17.11** Parties recognize the importance of the marine fisheries sector. Each party shall endeavor to operate a fisheries management system that regulates wild-catch fishing and is designed to prevent overfishing and overcapacity, reduce incidental capture of particularly vulnerable non-target species, promote the recovery of	**article 9** Parties recognize the importance of conserving and sustainably managing marine biological resources and marine ecosystems as well as of promoting responsible and sustainable aquaculture, and the role of trade in pursuing these objectives and their shared commitment to achieving Sustainable Development Goal 14 of the 2030 Agenda for Sustainable Development, particularly

	overfished populations for all marine resources, and promote fisheries' management. This management system will be based on the best available scientific evidence and internationally recognized good practices for fisheries management and conservation, as reflected in the relevant provisions of MEAs. Express exclusion of aquacultures from the scope of this provisions. Express reference to MEAs on the topic is provided.[67]	SDGs 14.4 and 14.6. Parties shall implement long-term conservation and management measures and sustainable exploitation of marine living resources in accordance with related MEAs, implement, consistent with the MEAs' comprehensive, effective and transparent measures to combat IUU fishing, and exclude from international trade products that do not comply with such measures, and cooperate to this end, including by facilitating the exchange of information. Express reference to the 1982 UN Convention on the Law of the Sea is provided, alongside a generic reference to other relevant UN and FAO instruments.

The Brazil-Chile and EU-Mercosur FTA address the importance of preserving and sustainably managing marine biological resources and marine ecosystems. The scope and intensity of the commitments are, however, different.

On one hand, the Brazil-Chile FTA expressly excludes aquacultures from its scope of application and adopts softer language ('shall endeavour do promote'). The EU-Mercosur FTA, on the other hand, expressly includes aquacultures and adopts stronger language ('shall implement').

Although both FTAs reference MEAs, the references are framed in slightly different fashion. Whereas the Brazil-Chile FTA prescribes the adoption of

[67] United Nations Convention on the Law of the Sea, 1982; the United Nations Agreement to Implement the Provisions of the United Nations Convention on the Law of the Sea, 1 December 1982 on the Conservation and Ordering of Straddling Fish Populations and Highly Migratory Fish Populations, 1995 (United Nations Agreement on Fish Populations); the FAO Code of Conduct for Responsible Fishing; the FAO Agreement to Promote Compliance with International Conservation and Ordering Measures by FAO Fishing Offshore Fisheries, 1993 (Compliance Agreement); the Fishing Action Plan, 2001, and the Agreement on Porto State Measures to Prevent, Prevent and Eliminate Illegal, Unreported and Unregulated Fishing, 2009.

measures inspired by several MEAs related to the topic, with special regard to the adoption of available scientific evidence and internationally recognized best practices, the EU-Mercosur FTA more generally states that long-term conservation and management measures should be implemented in observance of the 1982 UN Convention on the Law of the Sea, alongside a generic reference to other relevant UN and FAO instruments.

Among the specific measures towards combating IUU fishing, the Brazil-Chile FTA also establishes that the parties shall cooperate to identify needs and build capacity to support the implementation of FTA provisions, support monitoring, control, surveillance, compliance, and enforcement systems, including through the adoption or review, as applicable, of measures to deter vessels flying their flag and their nationals from becoming involved in IUU fishing activities, and to combat transhipment and implement port State measures.

Apart from implementing long-term conservation and management measures and sustainable exploitation of marine living resources, the agreement includes an obligation of implement, consistent with its international commitments, comprehensive, effective and transparent measures to combat IUU fishing, and exclude from international trade products that do not comply with such measures.

In short, the Brazil-Chile FTA establishes more objective measures to be adopted on the topic, while the related provisions of the EU-Mercosur FTA refer to a larger scope of application (expressly including aquaculture) and include stronger language (‘shall endeavour to promote’ versus ‘shall implement’). In this sense, the EU-Mercosur FTA provides greater room for parties to either allege breaches of derivative commitments or rely upon obligations to implement derivative commitments as exemptions for trade restrictions that would otherwise violate core trade obligations under the FTA.

4.3. Domestic regulation

Key take-aways:

- The EU-Chile FTA does not refer to the right to regulate - mere cooperation commitment on environmental issues
- The Brazil-Chile and EU-Mercosur FTAs establish specific provisions

on right to regulate

- The EU-Mercosur FTA provides for clear non-regression and non-enforcement clauses, whereas the Brazil-Chile FTA establishes a general need to comply with existing MEAs
- The right to regulate under the Brazil-Chile FTA is limited only to existing MEAs, whereas under the EU-Mercosur FTA, it is limited by the current level of protection offered under domestic environmental law
- The EU-Mercosur FTA expressly recognizes the precautionary principle in environmental matters, but cautions against its abuse in the context of defensive clauses

Domestic regulation refers to the category of commitments that recognizes parties' rights to regulate and possibly addresses the need to maintain or increase their existing levels of domestic environmental protection. This is generally expressed by means of non-regression clauses, which prevent parties from weakening the current level of protection under their own laws, and by non-enforcement clauses, which prevent parties from failing to enforce their own laws.

In addition to recognizing the right to regulate, the EU-Mercosur FTA establishes the precautionary principle in Article 10 of the Trade and Sustainability Chapter. This principle acknowledges that environment legislation is marred by complex scientific debate and subject to some uncertainty. Accordingly, parties shall ensure that the scientific and technical evidence on which their decisions are based is provided by recognized technical and scientific bodies and may adopt measures based upon current information.

4.3.1. Right to regulate

	Brazil-Chile FTA	EU-Mercosur FTA
Right to regulate	**article 17.2** Parties recognize their sovereign rights to establish their own environmental priorities, their own levels of internal environmental protection	**article 2** Parties recognize their rights to determine their own sustainable development policies and priorities, to establish the levels of domestic environmental

	and conservation, as well as to establish, adopt or modify their environmental legislation and policies accordingly. Parties shall ensure that their environmental legislation and policies are consistent with the MEAs which they have ratified.	protection that are deemed appropriate and to adopt or modify their law and policies. Such levels, law and policies shall be consistent with parties' commitments to MEAs. Parties should not weaken the levels of protection afforded in domestic environmental law with the intention of encouraging trade or investment. Parties shall not waive or derogate from, or offer to waive or derogate from, their environmental laws in order to encourage trade or investment. Parties shall not, through a sustained or recurring course of action or inaction, fail to effectively enforce their environmental laws in order to encourage trade or investment.

The core of the respective provisions (Article 17.2 of the Brazil-Chile FTA and Article 2 of the EU-Mercosur FTA's Trade and Sustainability Chapter) at issue acknowledge the parties' rights to self-regulate on their international environmental regulatory frameworks. The provisions quickly differ, however, in respect of the limits to parties' right to regulate, i.e., non-regression and non-enforcement clauses. The Brazil-Chile FTA does not contain a language that may be construed as a non-regression or non-enforcement clause. Its article 17.2 merely establishes that parties' environmental legislation should be consistent with their respective MEAs.

In turn, Article 2 of the EU-Mercosur FTA's Trade and Sustainability Chapter not only provides that parties' domestic environmental legislation should be consistent with their MEAs. It also unequivocally sets forth a non-regression and non-enforcement clause. Moreover, the EU-Mercosur FTA requirement that parties comply with their MEAs would work in tandem with Article 5(3) of the Trade and Sustainability Chapter, which requires the 'effective

implementation' of MEAs and the obligations contained therein. Hence, the EU-Mercosur FTA goes beyond the Brazil-Chile FTA and seeks to safeguards domestic environmental regulation from being 'held hostage' and bargained within the context of trade or investment encouragement.

Under the Brazil-Chile FTA, it appears that only existing MEAs would limit a party's right to regulate. In this sense, a party to the Brazil-Chile FTA could hypothetically weaken and fail to enforce its domestic legislation, so long as there is no conflict with obligations that it has contracted under any particular MEA. Quite differently, the EU-Mercosur FTA provides for specific non-regression and non-enforcement clauses regarding domestic law, in addition to a general duty not to contradict existing MEAs. In this sense, the EU-Mercosur FTA seeks to 'lock' its parties' current domestic environmental legislation (and the protection it affords) as a minimum regulatory standard that shall remain in effect in that particular jurisdiction.

In terms of interplay between trade and environment, provisions that fall within the domestic regulation category may provide interesting grounds for discussion if a party's restrictive environmental regulation at the moment that it celebrates the EU-Mercosur FTA appears to conflict with the FTA's core trade obligations. If the party in question were to violate the non-regression clause and comply with the FTA's core trade obligations, the provision violated would be Article 2 of the EU-Mercosur FTA's Trade and Sustainability Chapter. The dispute would thus be subject to a Panel of Experts. If the party in question were, however, to disregard the FTA's core trade obligations and instead comply with the non-regression clause, then the provision violated would be a trade obligation subject to an Arbitral Tribunal.

4.3.2. Precautionary principle

	Brazil-Chile FTA	EU-Mercosur FTA
Scientific and technical information	**no similar provision is available**	**article 10, § 1** When establishing or implementing measures aimed at protecting the environmental conditions that may affect trade or investment, each party

		shall ensure that the scientific and technical evidence on which they are based is from recognized technical and scientific bodies and that the measures are based on relevant international standards, guidelines or recommendations where they exist.
Precautionary principle	**no similar provision is available**	**article 10, §§ 2, 3 and 4** In cases when scientific evidence or information is insufficient or inconclusive and there is a risk of serious environmental degradation, a party may adopt measures based on the precautionary principle. Such measures shall be based upon available pertinent information and subject to periodic review. The party adopting the measure shall seek to obtain new or additional scientific information necessary for a more conclusive assessment and shall review the measure as appropriate. When a measure adopted in accordance with the above paragraph has an impact on trade or investment, a party may request to the party adopting the measure to provide information indicating that scientific knowledge is insufficient or inconclusive in relation to the matter at stake and that the measure adopted is consistent with its own level of protection and may request discussion of the matter in the TSD Sub-Committee. Such measures shall not be applied in a manner which would

		constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.

The EU-Mercosur FTA's acknowledgement of the importance of domestic environmental legislation is perhaps most evident in the precautionary principle and on the weight attributed to current scientific information. Based on these, the FTA allows parties to unilaterally enforce environmental policies and concerns based upon insufficient or inconclusive scientific information – even if such measures have implications on trade.

Article 10 of the EU-Mercosur FTA's Trade and Sustainability Chapter allows parties affected by trade restrictions issued under the precautionary principle to request additional information and even to submit the matter before the Trade and Sustainability Sub-Committee.

4.4. Aspirational clauses

Key take-aways:

- Absence of sanctions or enforceability
- Absence of clear metrics or objective criteria to determine compliance
- Questionable effects in achieving trade and environment objectives
- Provisions appear to apply to either areas over which parties have little direct control or sensitive areas that may be difficult to negotiate under normal circumstances

Aspirational clauses consist of provisions that, although not strictly binding upon parties, seek to promote higher degrees of protection than those established by provisions that belong to the other categories. On one hand, insofar as aspirational clauses are not strictly binding, they allow for greater flexibility in negotiating and executing instruments that regulate innovative and possibly sensitive topics. In this sense, in a non-paper issued on 26 February 2018, the European Commission has generally concluded that, in the absence of sanctions and clearly quantifiable parameters for assessing damages, the Trade and Sustainability chapters included in the EU's latest

FTAs have been able to regulate a far wider range of subjects than other, non-EU FTAs.[68]

On the other hand, the lack of enforceable metrics has garnered criticism: in the absence of objective criteria, it would be difficult to assert the effective implementation of these higher standards of protection. The usefulness of these aspirational clauses has also been called into question, especially compared to obligations based on existing international standards, which serve to strengthen existing international obligations (i.e., obligation to effective implement MEAs) or obligations related to existing domestic legislation (i.e., non-regression clauses).[69]

The Brazil-Chile and EU-Mercosur FTAs establish aspirational clauses seeking to promote a higher degree of protection in various areas. Examples of noteworthy aspirational clauses in the FTAs at issue pertain to: (i) the promotion of corporate social responsibility in the management of supply chains as a means of ensuring environmental protection; (ii) the integration of indigenous populations in sustainable development; and (iii) sustainable agriculture. Although the EU-Mercosur FTA appears to establish fewer aspirational clauses, it is usually more specific and goes into greater level of detain as to parameters that parties may adopt in aspiring to improve their regulatory frameworks. The Brazil-Chile FTA appears to adopt aspirational clauses to regulate areas related to sensitive cultural concerns (e.g., the provision on indigenous populations in Article 17.15 of the Brazil-Chile FTA) or economic concerns (e.g., the provision on sustainable agriculture in Article 17.13 of the Brazil-Chile FTA).

4.4.1. Promotion of corporate social responsibility

	Brazil-Chile FTA	EU-Mercosur FTA

[68] European Commission. 'Feedback and way forward on improving the implementation and enforcement of Trade and Sustainable Development chapters in EU Free Trade Agreements'. *Non paper of the Commission services*, p. 3 (2018). Available at: [https://trade.ec.europa.eu/doclib/docs/2018/february/tradoc_156618.pdf].

[69] Marco Bronckers; Giovanni Gruni. Retooling the Sustainability Standards in EU Free Trade Agreements. *Journal of International Economic Law*, Volume 24, Issue 1, 33 (2021). Available at: https://doi.org/10.1093/jiel/jgab007.

Promotion of corporate social responsibility	**article 17.6** The parties recognize the relevance of encouraging and promoting the adoption of corporate social responsibility standards and practices in the private sector	**article 11** The parties recognize the relevance of encouraging and promoting the adoption of corporate social responsibility standards and practices in the private sector, especially by fostering supportive environments towards the adoption of these standards. In environmental matters, specific reference is made to the UN Global Compact and the OECD Guidelines for Multinational Enterprises, although there is no obligation to adopt or implement these benchmarks.

Article 17.6 of the Brazil-Chile FTA establishes that the parties recognize the relevance of encouraging companies operating within their jurisdictions to incorporate and implement corporate social responsibility standards that are deemed to be coherent with sustainable development. The provision does not make any specific reference to applicable international standards or to specific means of implementation or to the environment specifically.

Article 11 of the EU-Mercosur FTA makes specific reference to environmental matters and to on international benchmarks on sustainable corporate practices. However, while specific reference is made to the UN Global Compact and the OECD Guidelines for Multinational Enterprises, in line with its aspirational nature, Article 11 does not require that the parties to implement these standards. It does encourage parties to promote the voluntary adoption of these benchmarks and to create a supportive regulatory framework for their implementation by the private sector.

Thus, in terms of corporate social responsibility, neither the Brazil-Chile or the EU-Mercosur FTAs provide for concrete obligations upon parties. Both FTAs seek to raise the overall standard of corporate social responsibility, in the

case of the EU-Mercosur FTA, specifically by reference to international benchmarks.

4.4.2. Integration of indigenous population

	Brazil-Chile FTA	EU-Mercosur FTA
Integration of indigenous populations and persons	**article 17.15** The parties adopt a holistic approach towards indigenous populations and persons, seeking to integrate them economically and environmentally within all facets of sustainable development.	**article 8(b)** The parties adopt a restrictive approach towards indigenous populations and persons, only making specific reference to them within the context of preserving forests.

Article 17.15 of the Brazil-Chile FTA presents an overarching acknowledgement of the relevance of indigenous populations and the persons to sustainable development as a whole, accounting for several facets of sustainable development and its relationship with indigenous persons and populations. Comparatively, the EU-Mercosur FTA adopts a more limited approach. Article 8(b) of the EU-Mercosur FTA's Trade and Sustainability Chapter merely refers to the integration of indigenous populations and persons into the supply chain of forest products. The ostensible objective is twofold: first, to improve the lives of indigenous populations and persons; and second, to bolster the preservation of forests.

4.4.3. Sustainable agriculture

	Brazil-Chile FTA	EU-Mercosur FTA

Sustainable agriculture	**article 17.13** The parties acknowledge the negative effects caused by climate change and other phenomena to the efficiency and quality of agricultural processes and generically undertake to promote more efficient and environmentally-sound agricultural processes.	**no similar provision is available**

The Brazil-Chile FTA also provides for an article on sustainable agriculture – a provision that finds no comparison in the EU-Mercosur FTA. Article 17.13 has three subparagraphs whereby parties acknowledge the impacts of climate change and its related phenomena on economic sectors that are fundamentally dependent upon the environment, such as agriculture, livestock, and forest products. By means of Article 17.13, the parties also acknowledge the importance of strengthening policies and rendering projects that may contribute towards more efficient, sustainable, inclusive, and resilient agricultural systems. In line with its aspirational nature, however, the FTA does not impose tangible obligations, and only generally encourages parties not to improve agricultural productivity to the detriment of environmental concerns.

5. Conclusions

This report analysed the environmental provisions of the EU-Chile, Brazil-Chile, and EU-Mercosur FTAs. It sought to comparatively evaluate whether the environmental provisions included in these FTAs (i) allow for the implementation of unilateral measures to respond to environmental concerns and (ii) whether they allow for the violation of trade rules in order to address environmental concerns and obligations.

The analysis compared the provisions regarding environment protection by dividing environmental provisions into four categories: (i) defensive clauses that exempt parties from strictly complying with trade rules in light of environmental concerns; (ii) obligations that are based upon existing international environmental standards (derivative commitments); (iii) domestic regulation obligations, which encompasses obligations that are related to existing domestic law; and (iv) aspirational clauses that seek to promote a higher degree of protection regarding environmental concerns.

Regarding defensive clauses, all three FTAs at issue contain provisions whereby parties are exempted from complying with trade obligations when faced with certain domestic policy goals. The EU-Chile FTA merely reproduces GATT Article XX with some exclusions. The Brazil-Chile and EU-Mercosur FTAs expressly encompass a wider scope of environmental measures as 'justifiable reasons' to exempt trade violations. The EU-Mercosur FTA goes a step beyond by establishing measures adopted towards the implementation of MEAs as justifiable reasons in the sense of GATT Article XX(b).

The expansion of GATT Article XX(b) in the context of the EU-Mercosur FTA is especially relevant in light of the derivative commitments in that FTA – the EU-Chile FTA does not even have a provision recalling or referencing multilateral commitments.

Overall, the provisions on MEAs in the Brazil-Chile and EU-Mercosur FTAs primarily contain 'soft measures' which leaves their effectiveness up to the discretion of the parties. The EU-Mercosur FTA, though, expressly indicates the fulfilment of multilateral agreements and their underlying principles as a key area of concern and also requires that the parties effectively implement

them. Yet, because there is no enforceable mechanism within the FTA, ensuring parties' compliance with these provisions will be challenging. Nevertheless, taking reference to the provisions on MEAs in combination with GATT Article XX (might) enable parties to implement unilateral measures for environmental protection, specifically by means of GATT Article XX(b) as defined by Article 13.2 of the EU-Mercosur FTA's Trade and Sustainability Chapter.

With regard to domestic regulation, this report found that the Brazil-Chile and the EU-Mercosur FTAs both recognize the right of each party to develop policies, priorities, and levels of domestic environmental protection. However, the EU-Mercosur FTA clearly establishes non-regression and non-enforcement clauses, while the Brazil-Chile FTA does not contain any specific provisions in this sense. As for the EU-Chile FTA, it does not make any reference to the right to regulate on environment-related commitments.

The inclusion of the precautionary principle in the EU-Mercosur FTA is also noticeable. According to Article 10 of the Trade and Sustainability Chapter, parties shall ensure that, when establishing or implementing measures aimed at protecting the environment that affect trade or investment, they must be based on relevant scientific and technical evidence from recognized technical and scientific bodies. Yet, where the evidence is insufficient and there is a risk of serious environmental degradation, a party may adopt measures based on the precautionary principle. This additionally allows for the unilateral enforcement of environmental measures that may have impacts on trade.

Finally, with respect to the aspirational clauses, this report found that it would be difficult to ascertain the effective implementation of these higher degrees of protection. Moreover, the immediate effects of these aspirational clauses can be questioned, especially when compared to obligations based on existing international standards or obligations related to existing domestic legislation.

Regarding the structure of the dispute settlement mechanisms provided under the FTAs, their core premise is that matters pertaining to trade and sustainability (environment-related commitments) do not fall within the scope of the standard, trade-related, and adjudicative means of dispute resolution. These matters fall upon the general consultation mechanisms prevalent in the Brazil-Chile and EU-Mercosur FTAs. At the beginning of the consultations,

parties must assert, for instance, (i) what measure is being challenged; and (ii) what provision of the respective FTA has allegedly been breached.

In this sense, it would not matter if a party relied on a defensive clause in the sense of GATT Article XX to justify its breach of core trade obligations. The discussion would still hinge upon a core trade obligation, even if environmental concerns are submitted as defences.

Nevertheless, purely environmental concerns, i.e., those arising out of the specific trade and sustainable development chapters, fall outside the scope of the respective dispute settlement mechanisms – in the case of the Brazil-Chile and EU-Mercosur FTAs, they are subject to non-adjudicative and unenforceable means of dispute resolution.

The Brazil-Chile FTA provides for an alternative means of resolving disputes related to its environmental commitments that essentially amounts to several rounds of negotiation between the parties. The EU-Mercosur FTA provides for procedurally similar means of resolving both trade and environmental disputes. However, trade-based disputes are to be resolved by an Arbitral Tribunal with powers to determine measures towards compliance with the FTA, whereas strictly environmental disputes are to be resolved by a Panel of Experts whose findings can only be implemented upon the parties' mutual consent.

Thus, holding parties accountable to the few mandatory transnational standards for environmental protection (e.g., EU-Mercosur FTA's effective implementation of the Paris Agreement) can be difficult as binding Reports can only be issued under an Arbitral Tribunal resolving a trade-related dispute. In this sense, parties that try to push environmental protection forward on a national level may feel legally uncertain about whether such national regulations are allowed or not, especially if these clash with trade obligations under the FTAs. It would seem like parties would be limited to suspending trade benefits and conditions granted under the FTAs as a result of breaches of core trade obligations themselves.

While an attempt to suspend benefits or request economic compensation would, in environmental matters, be subject to the adoption of non-binding recommendations issued by a Panel of Experts, the weight and the effects of an award from a panel of experts should not be completely disregarded. The

Panel of Experts recommendations can, for instance, attain reputational repercussions detrimental to the parties' foreign policies and investments.

Overall, the FTAs lack a comprehensive legal framework to uphold/enforce environmental protection standards. Nonetheless, the EU-Mercosur FTA allows for potential interplay between its trade obligations and environmental commitments. For instance, environmental concerns may be invoked as defence arguments in response to trade restrictions, if adopted towards the implementation of MEAs (within the context of Articles 5(3) and 13.2 of the EU-Mercosur FTA's Trade and Sustainability Chapter). This interplay may, however, trigger ostensible conflicts between trade obligations and environmental commitments (within the context of Article 2 of the EU-Mercosur FTA's Trade and Sustainability Chapter), or enable unilateral measures in application of the precautionary principle (within the context of Article 10 of the EU-Mercosur FTA's Trade and Sustainability Chapter). The parties may therefore explore the trade and environment interplay according to their interests, putting pressure on trade partners by reason of environmental policies or concerns.

The exact effects of those interplays are hard to predict because of the voluntary character of most of the provisions and the lack of binding character of reports by panels of experts (e.g. a Report issued by a Panel of Experts declaring that Brazil has effectively breached its environmental commitments under the EU-Mercosur FTA may not be directly enforceable, but it could have reputational repercussions that could sour future trade relations). In conclusion, Brazil (and the other parties to the FTAs at issue) should be mindful of the specific nature and ramification of their environmental commitments when negotiating and concluding FTAs.

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