

Sustainable Development Commitments and Compliance Mechanisms in Treaties with Investment Provisions: Prevalence, Effectiveness, and Desirability



Arian Pashah
Ashleigh Dowling
Li Jian Sze
Samuel Wilson
Tayla Gleeson
Xavier Reimers

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ABBREVIATIONS

AU-UK	Australia - United Kingdom Free Trade Agreement (2021)
CAFTA-DR	Dominican Republic - Central America Free Trade Agreement (2004)
Canada-Colombia	Canada-Colombia Agreement on Labour Cooperation (2008)
Canada-Honduras	Canada - Honduras Free Trade Agreement (2013)
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) (2018) ¹
DAG	Domestic Advisory Group
EFTA	European Free Trade Association
EU	European Union
EU-Georgia	European Union - Georgia Association Agreement (2014)
EU-Korea	European Union - Republic of Korea Free Trade Agreement (2010)
EU-NZ	European Union - New Zealand Free Trade Agreement (2023)
ILNUK	Iceland - Liechtenstein - Norway - United Kingdom Free Trade Agreement (2021)
NAAEC	North American Agreement on Environmental Cooperation (1994)
NAALC	North American Agreement on Labor Cooperation (1994)
NAFTA	North American Free Trade Agreement (1992)
RRM	Rapid Response Mechanism
TIP	treaty with investment provisions
TPP	Trans-Pacific Partnership (2016)
TSD	trade and sustainable development
UK	United Kingdom
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
US	United States of America
USMCA	United States - Mexico - Canada Agreement (2018)
US-Peru	United States - Peru Trade Promotion Agreement (2006)
USTR	United States Trade Representative

¹ CPTPP incorporates TPP. The provisions on compliance mechanisms only appear in TPP, hence the body text and footnotes only refer to TPP.

DISCLAIMER

This report does not represent the views of the beneficiary organisation or any of its staff.

EXECUTIVE SUMMARY

This report is about TSD commitments in TIPs. The first part of the report presents findings from a mapping exercise of 57 TIPs, which involved fifteen metrics relating to the inclusion and nature of TSD commitments. The findings are presented in the form of graphs.

The second part of the report draws upon these findings along with the wider literature and analyses the effectiveness of TSD compliance mechanisms namely public submissions, DAGs, committees, periodic reports, unilateral mechanisms, and binding and non-binding adjudicatory mechanisms. These mechanisms have different permutations across TIPs leading to varying degrees of effectiveness. Perhaps counterintuitively, there is evidence that binding dispute settlement mechanisms are largely ineffective at inducing compliance, and that cooperative mechanisms are more effective. Taking the perspective of developing country governments, the report considers the desirability of a mechanism, determined by assessing the advantages and disadvantages it presents. The report finds that a mechanism that imposes a resource or institutional burden upon a developing country government is less desirable and recommends that when these mechanisms are established by TIPs between developed and developing countries, support should be provided to developing countries by developed countries. The report also recommends that greater opportunity to be afforded to developing countries to remedy a breach before the breach is made public given the greater adverse impact that reputational damage sustains upon developing countries.

I. INTRODUCTION

Since the inclusion of sustainable development commitments in NAFTA in 1992, chapters specifically addressing the environment and labour have increasingly become part of TIPs. This report considers the various compliance mechanisms that exist in respect of TSD commitments and analyses their effectiveness and desirability from the perspective of developing countries.

For the purposes of this report, effectiveness is defined as the extent to which a particular compliance mechanism contributes to the realisation of the TSD commitments in the relevant agreement. Desirability is determined by evaluating the advantages and disadvantages that the mechanism presents for a developing country's government. According to the UNCTAD Classifications, developing countries are those in Africa, Latin America and the Caribbean, Asia apart from Israel, Japan, and South Korea, and Oceania apart from Australia and New Zealand.²

II. GRAPHS

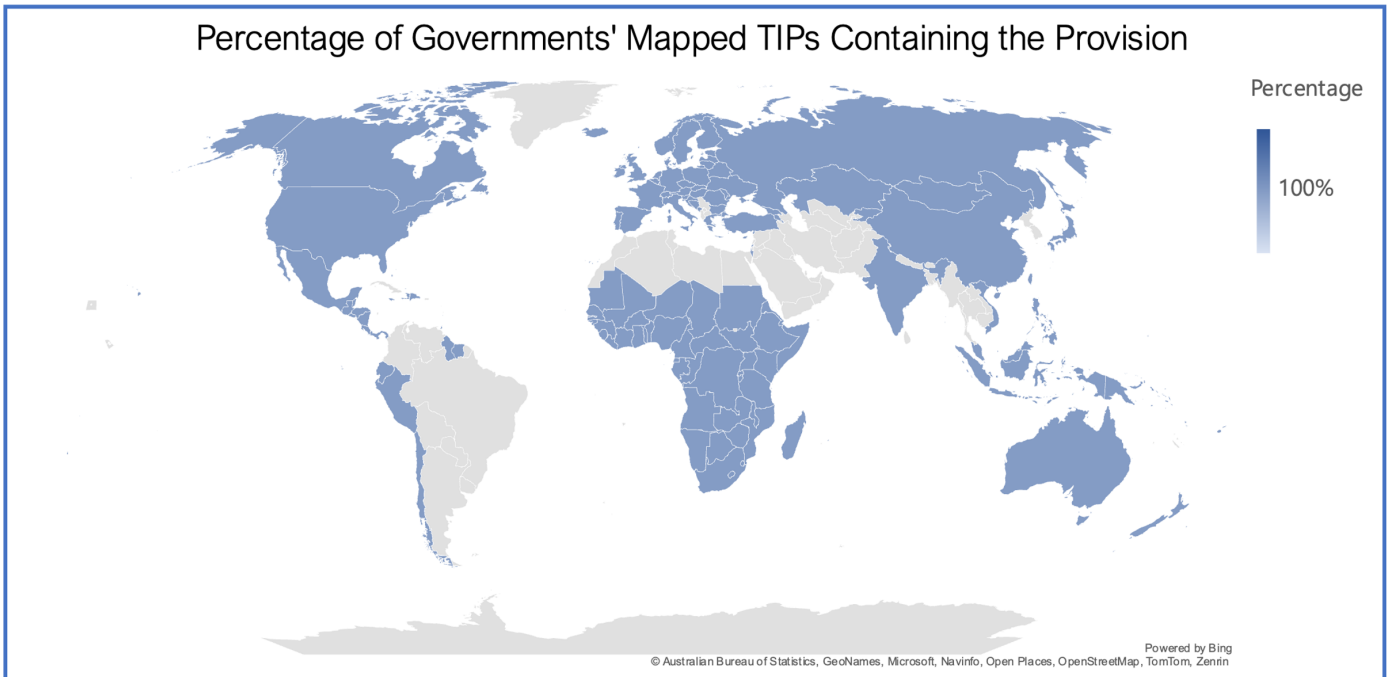
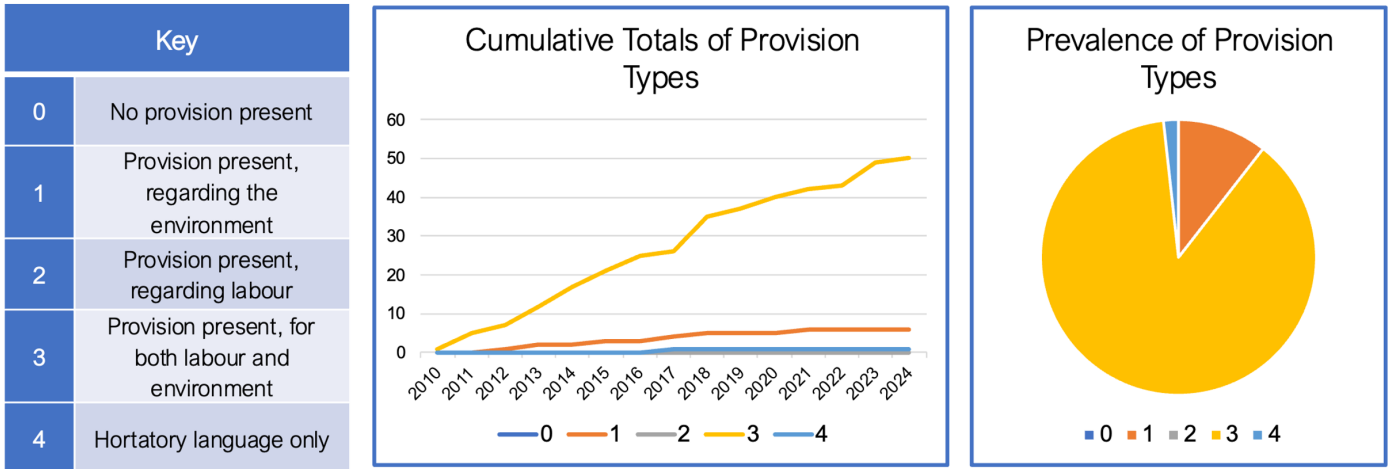
This section contains charts generated from the mapped TIP data set in Annex A (page 45). The pie charts visualise the prevalence of different provision variations across the whole data set. The line charts visualise the cumulative totals of each provision variation over the time period covered by the mapping data (2010-2024).

The map charts visualise the percentage of mapped agreements signed by each country that contain the provision in any form. There were no TIPs in the dataset for the greyed-out countries on the map charts and all percentage values should be considered alongside the number of TIPs that were mapped for each country. Please refer to the mapped TIP data set in Annex A for further detail.

² 'Classifications', UNCTAD (Web Page) <<https://unctadstat.unctad.org/EN/Classifications.html>>. Note that the World Bank prefers to classify countries into four income groups – low, lower-middle, upper-middle, and high income – rather than using the developing/developed classification. Most developing countries fall into the low and lower-middle categories but some, particularly in Asia and Oceania are in the upper-middle range. See 'The World by Income and Region', The World Bank (Web Page) <<https://datatopics.worldbank.org/world-development-indicators/the-world-by-income-and-region.html>>.

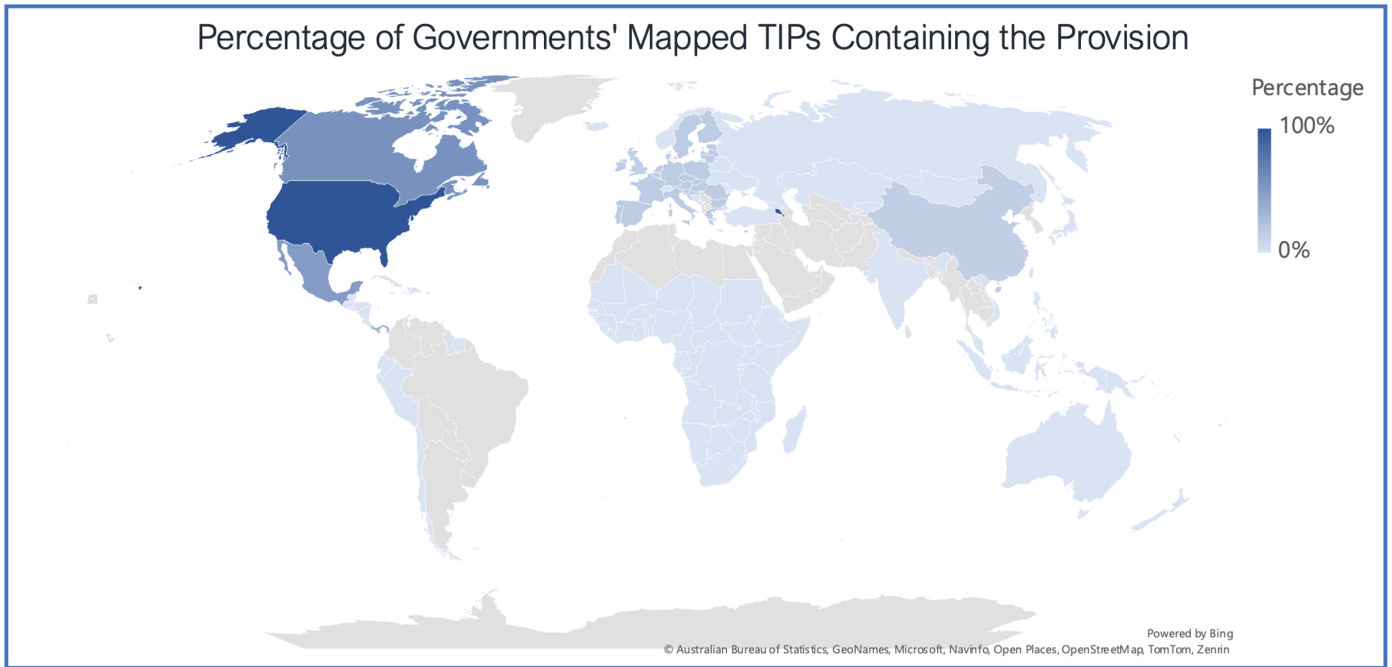
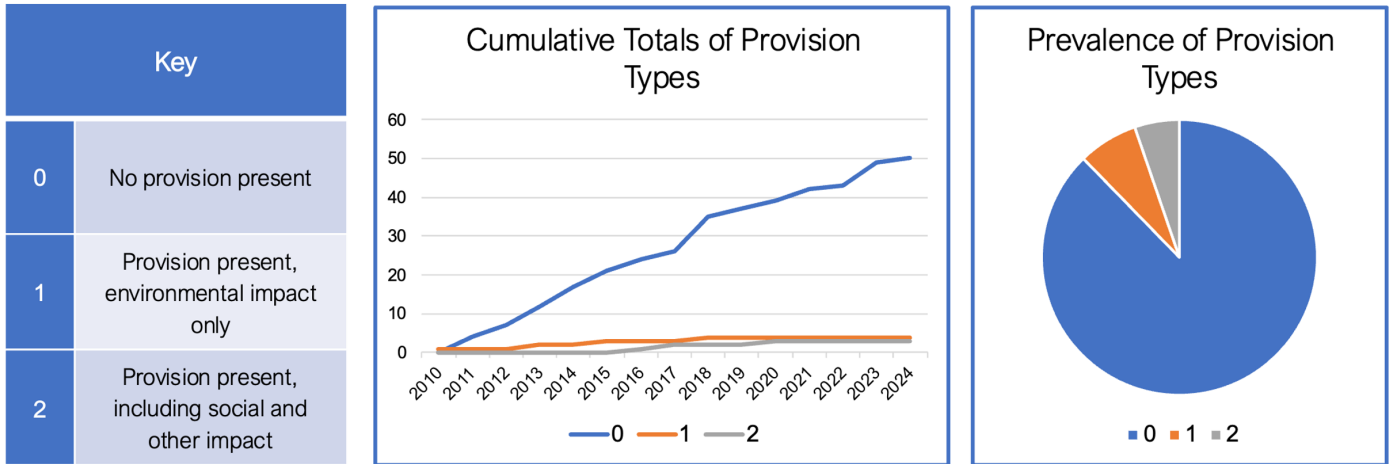
1. Not Lowering Standards of Commitments (in Enforcement of Laws)

These provisions oblige the parties to not derogate from or weaken their environmental and/or labour laws in order to encourage trade or investment between the parties.



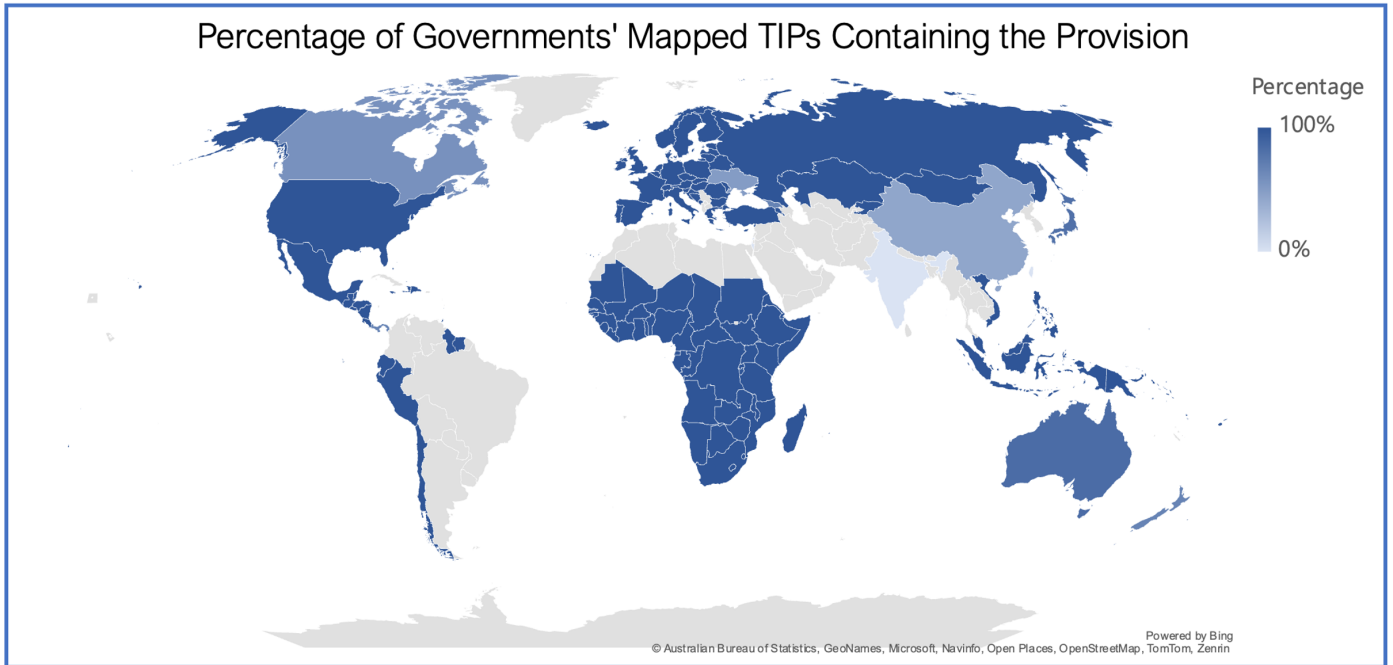
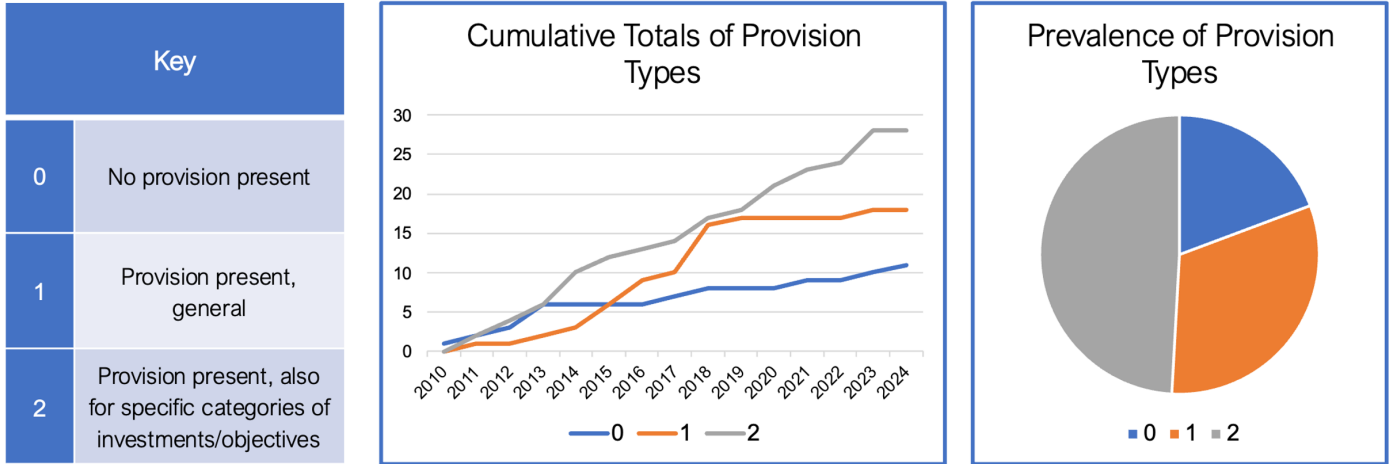
2. Environmental Impact Assessment (Government's Commitments)

These provisions oblige the parties to establish and follow procedures for assessing the environmental impacts of proposed projects under their central government's jurisdiction. This may also include conducting social and other impact assessments.



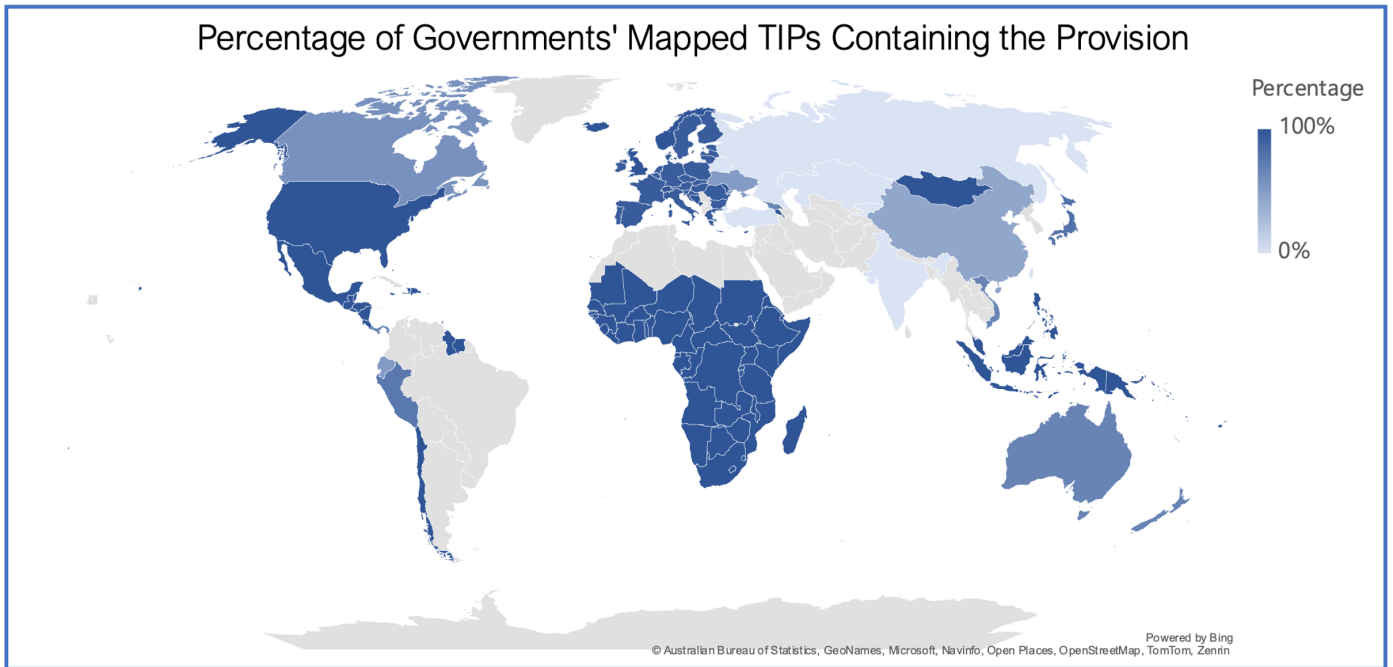
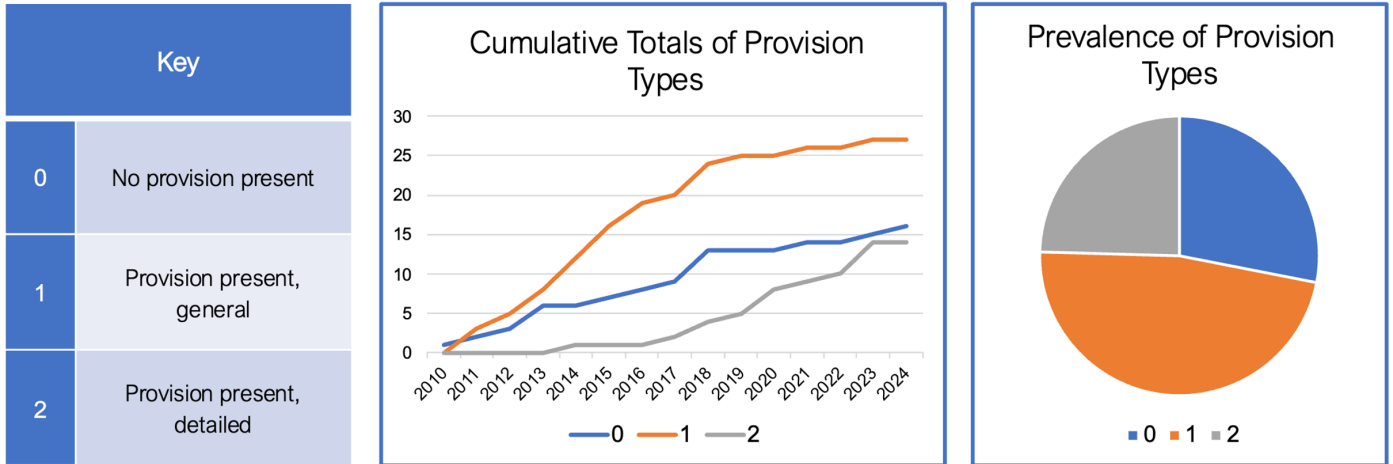
3. Promotion/Facilitation of Sustainable Investment (Scope)

These provisions oblige the parties to promote and facilitate investments that support sustainable development. This may include promoting and facilitating environmental goods and services, public health, climate change and other specific objectives.



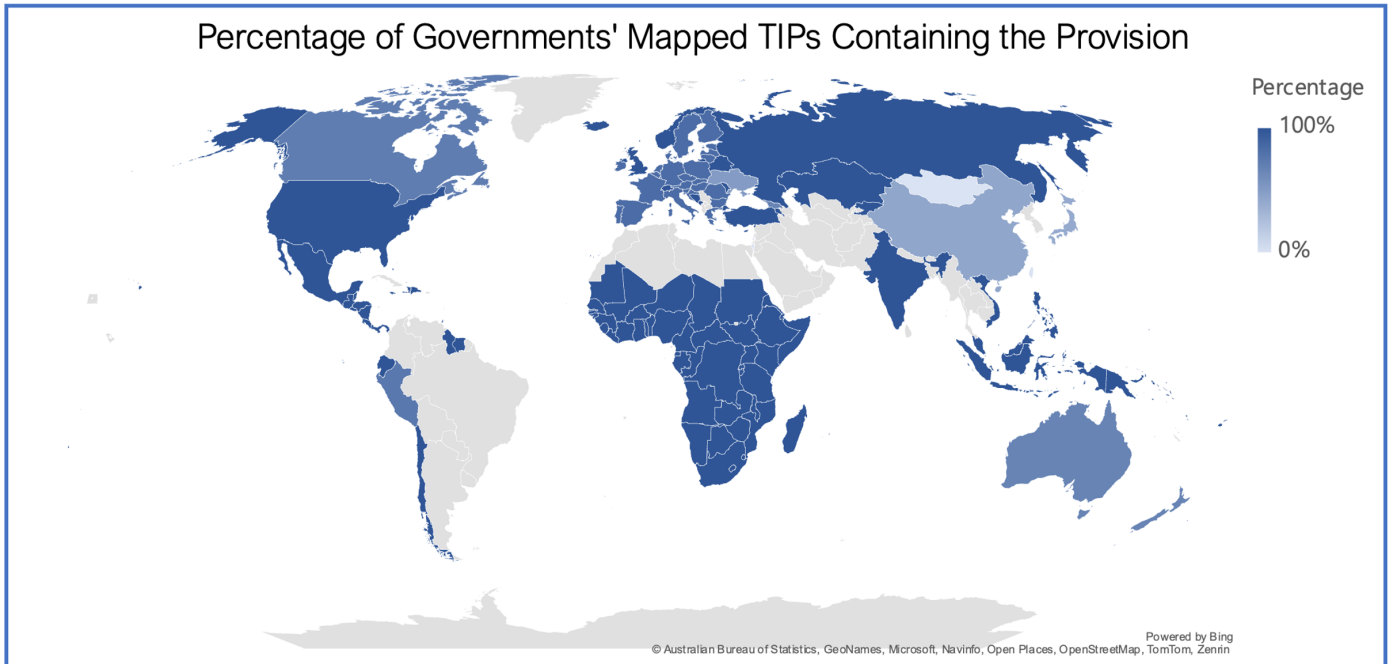
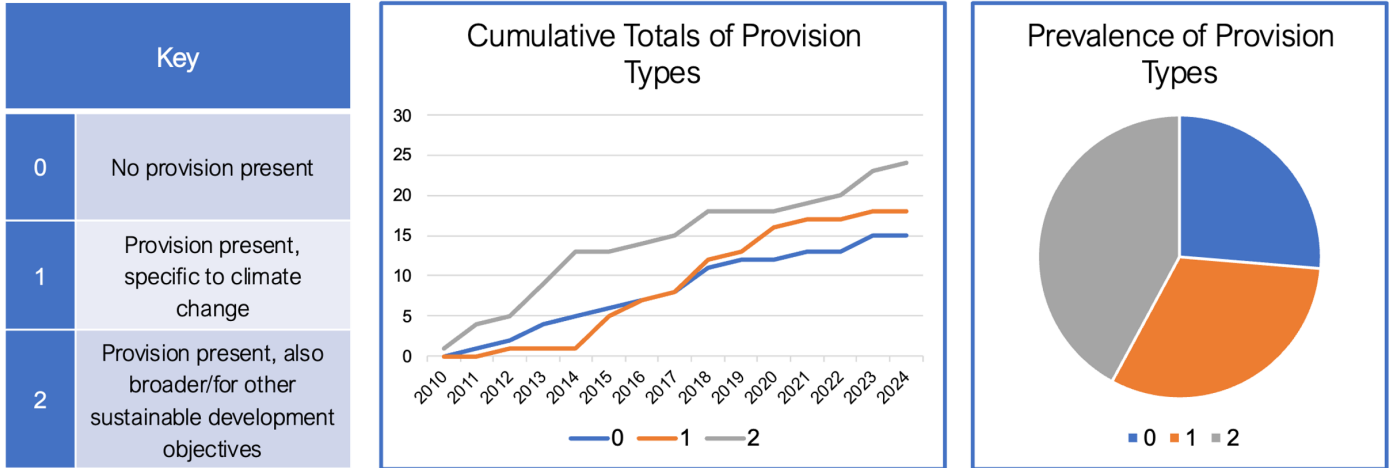
4. Promotion/Facilitation of Sustainable Investment (Activities)

These provisions oblige the parties to promote and facilitate sustainable investments through specific activities. This may include reducing greenhouse gas emissions, encouraging renewable energy and fostering increased cooperation on biodiversity.



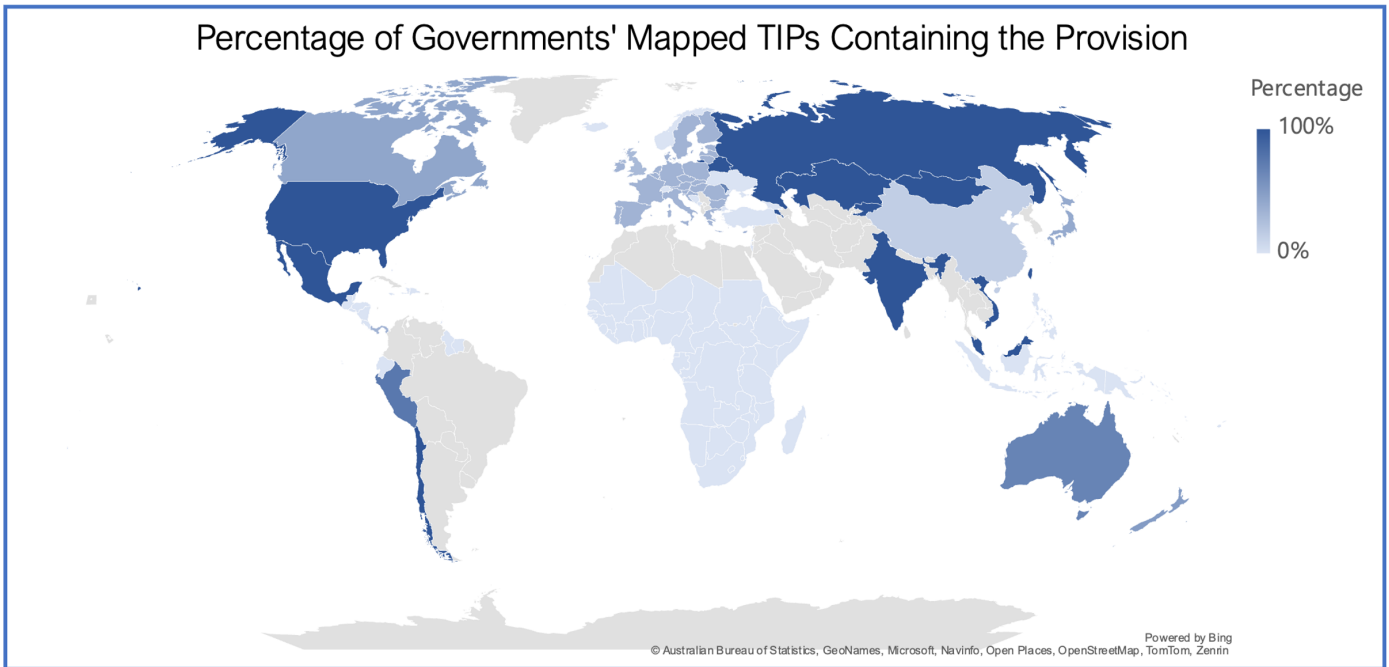
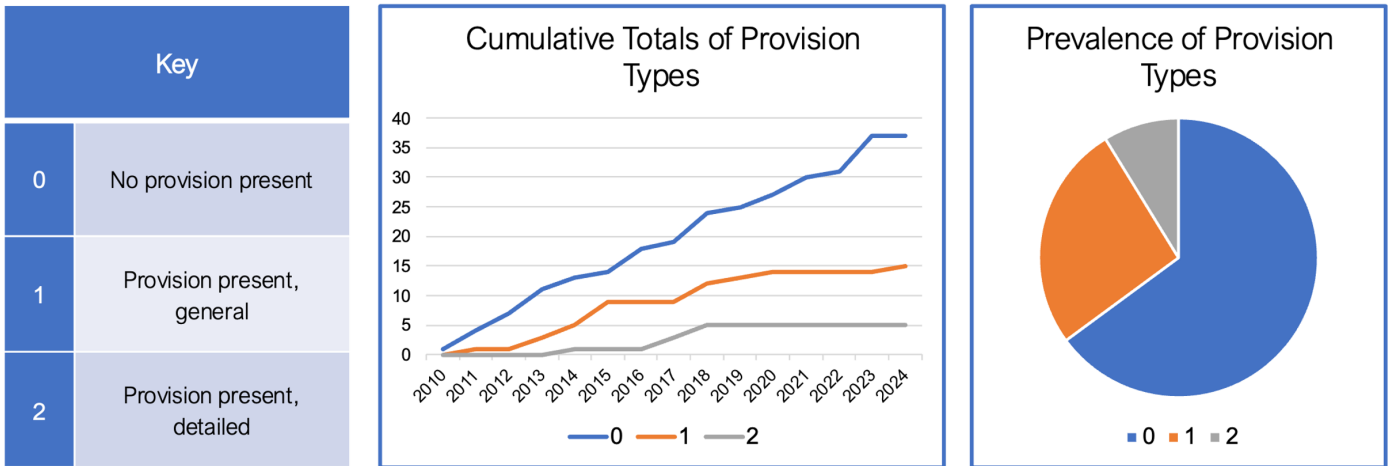
5. Sustainable Technology Commitments

These provisions oblige the parties to strengthen cooperation and policy in order to better promote and utilise sustainable technologies. This may include sustainable technologies that are particularly relevant to climate change.



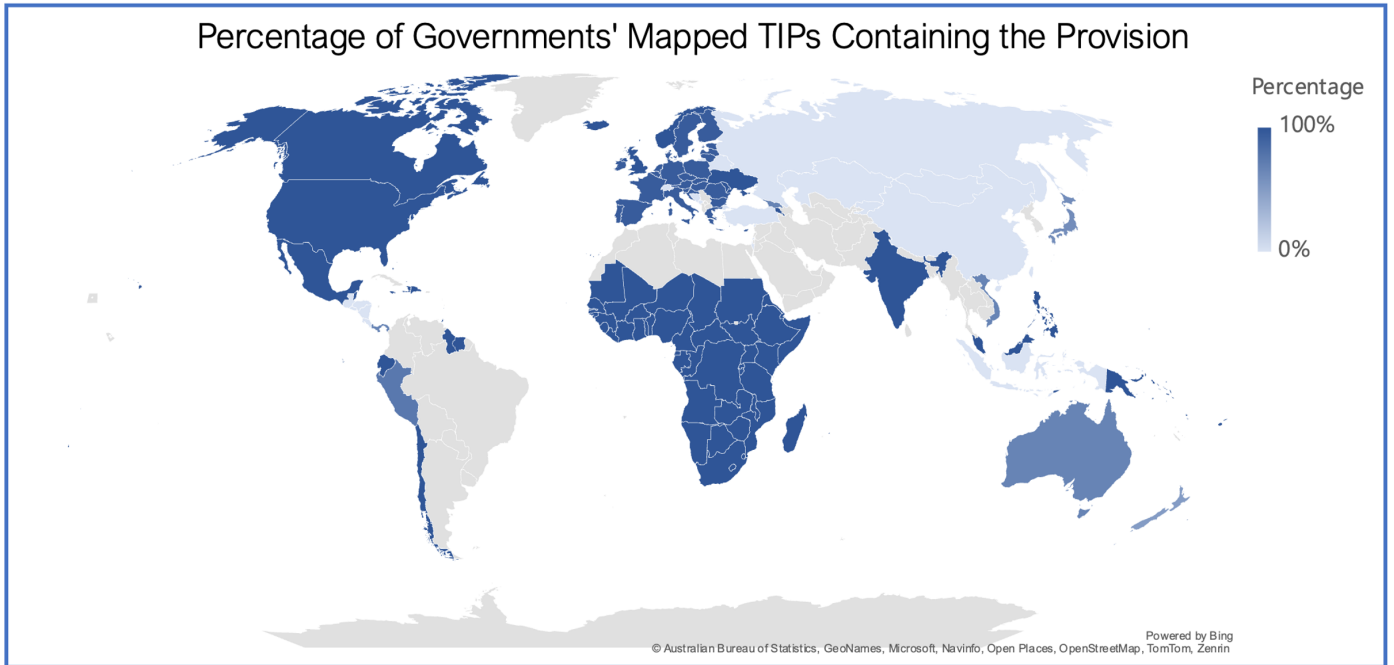
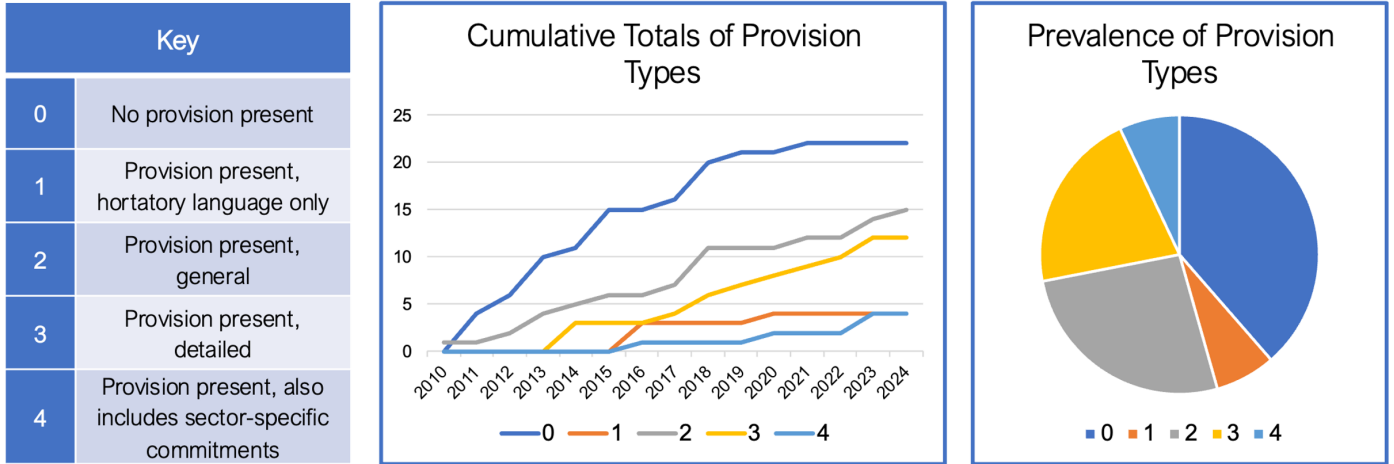
6. Human Capital Development Commitments

These provisions oblige the parties to enhance their cooperation and national policies on human capital development. This may include exchanging information on skill gaps, promoting lifelong learning and supporting training to support transitions to sustainable economies.



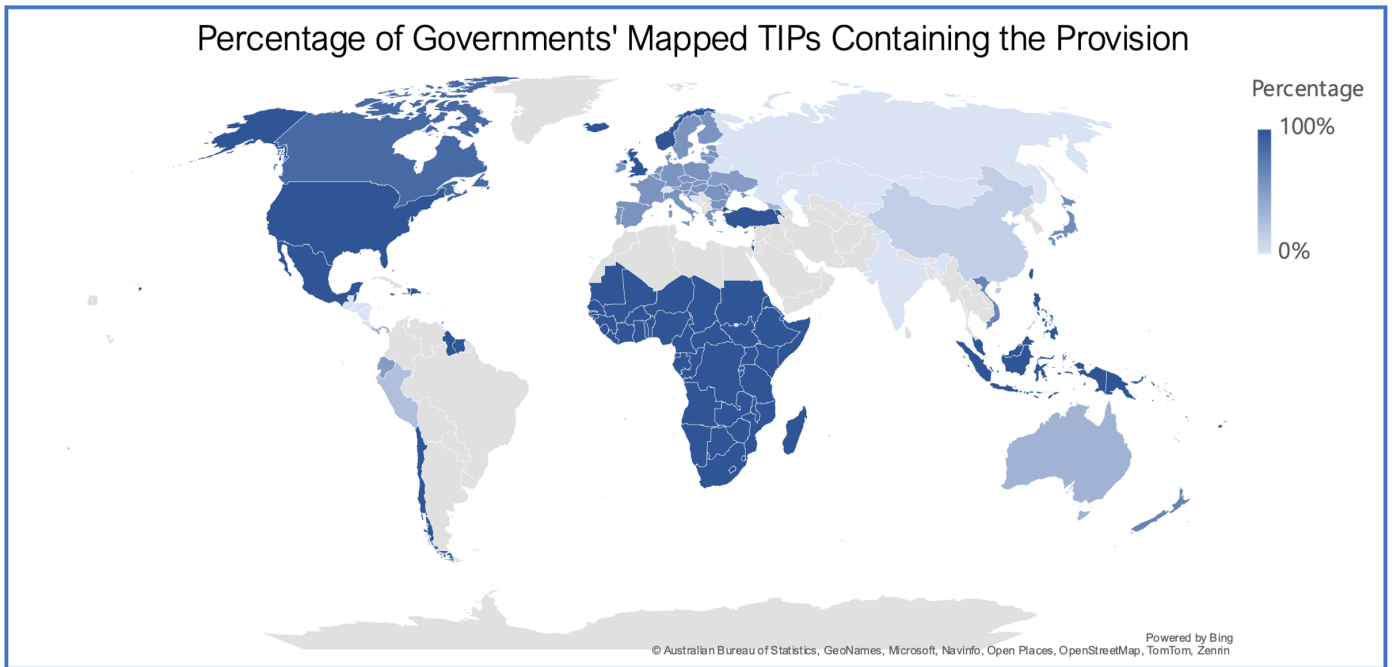
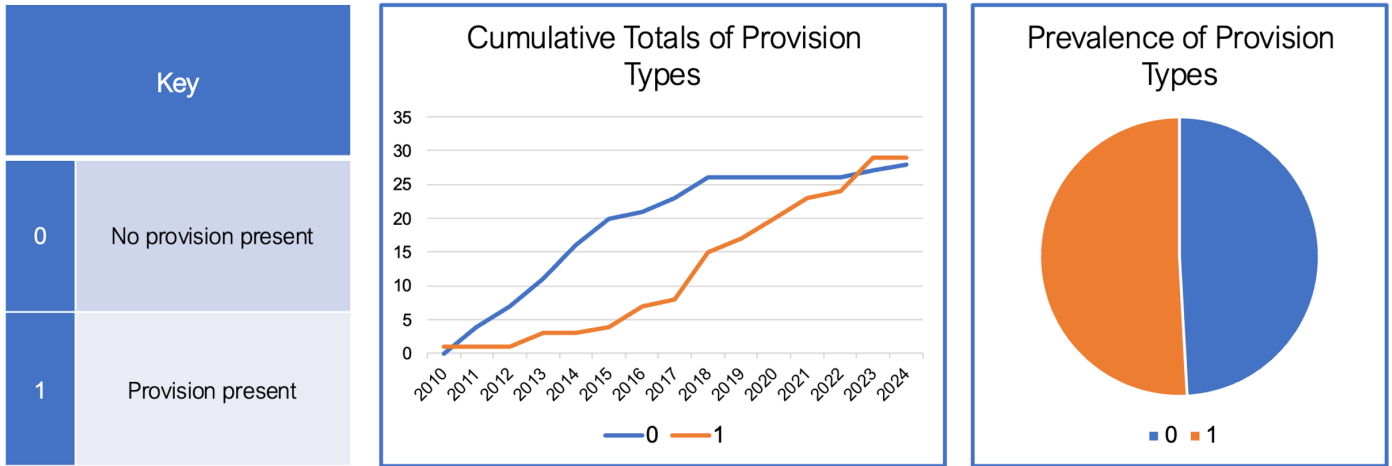
7. Corporate Social Responsibility (Governments' Commitments to Encourage)

These provisions oblige the parties to encourage enterprises to adopt corporate social responsibility practices like responsible supply chain management. This may involve cooperating on, supporting and promoting internationally recognised guidelines.



8. Voluntary Sustainability Standards (Governments' Commitment to Encourage)

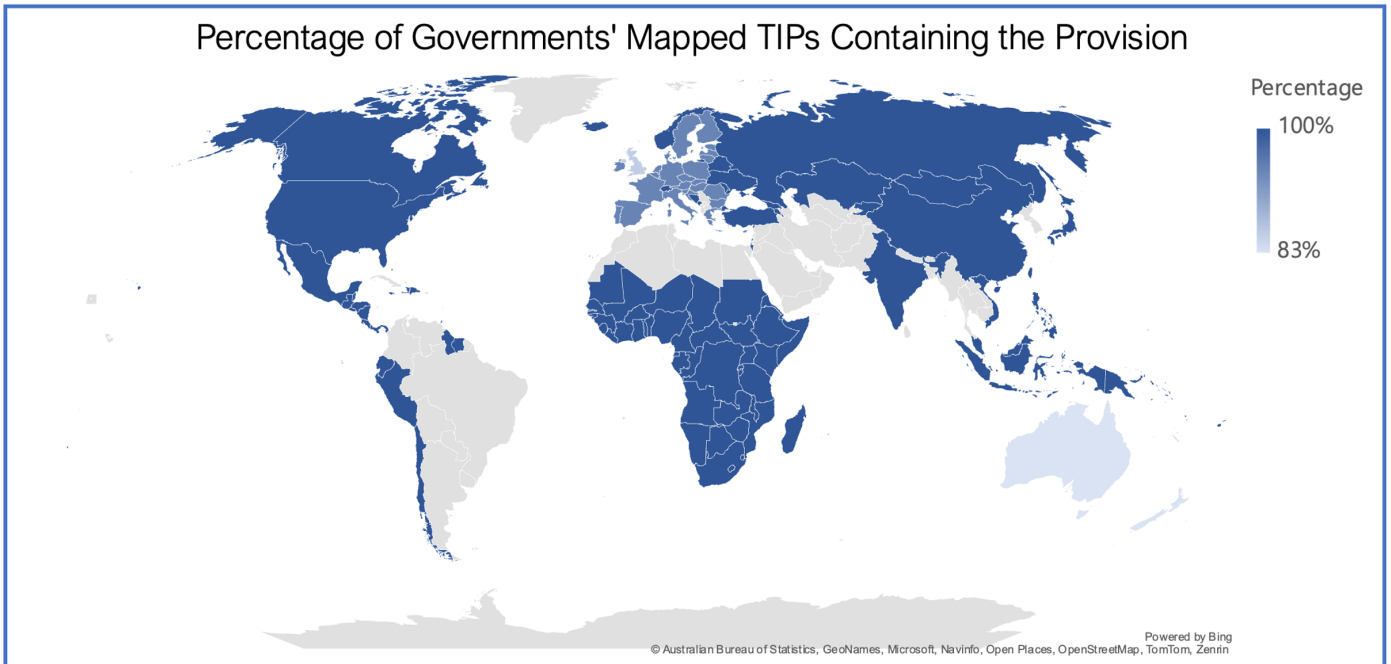
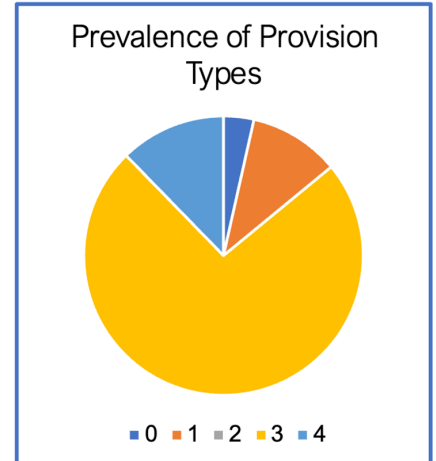
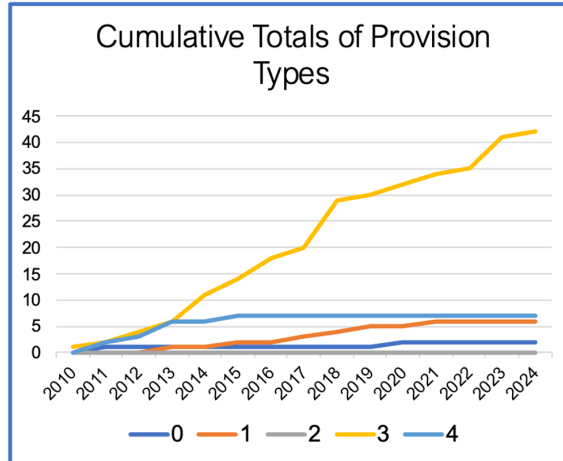
These provisions oblige the parties to promote voluntary mechanisms for environmental protection. This may include auditing, partnerships and supporting the development of evaluation criteria for these mechanisms.



9. Institutional Framework for Cooperation

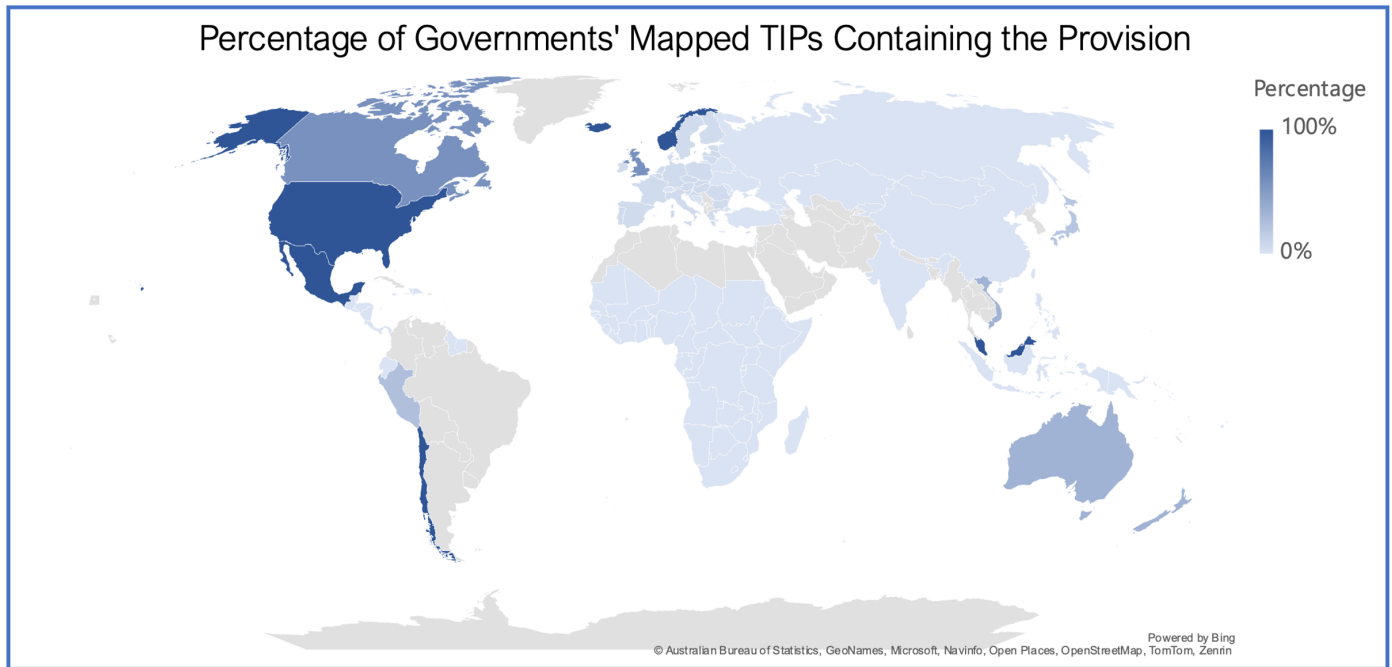
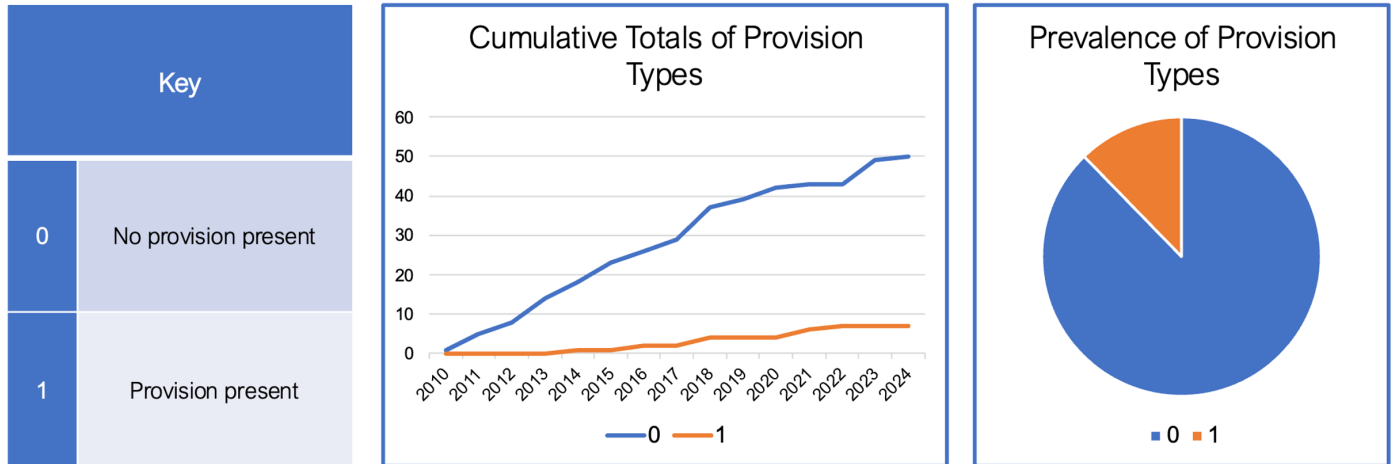
These provisions establish a body to oversee and coordinate the implementation of environmental, labour and/or trade and sustainable development chapters. This may be a specialised committee, contact points or a general TIP committee.

Key	
0	No provision present
1	Provision present, regarding the environment
2	Provision present, regarding labour
3	Provision present, for both labour and environment
4	Contact points only/as part of the work of general TIP committee only



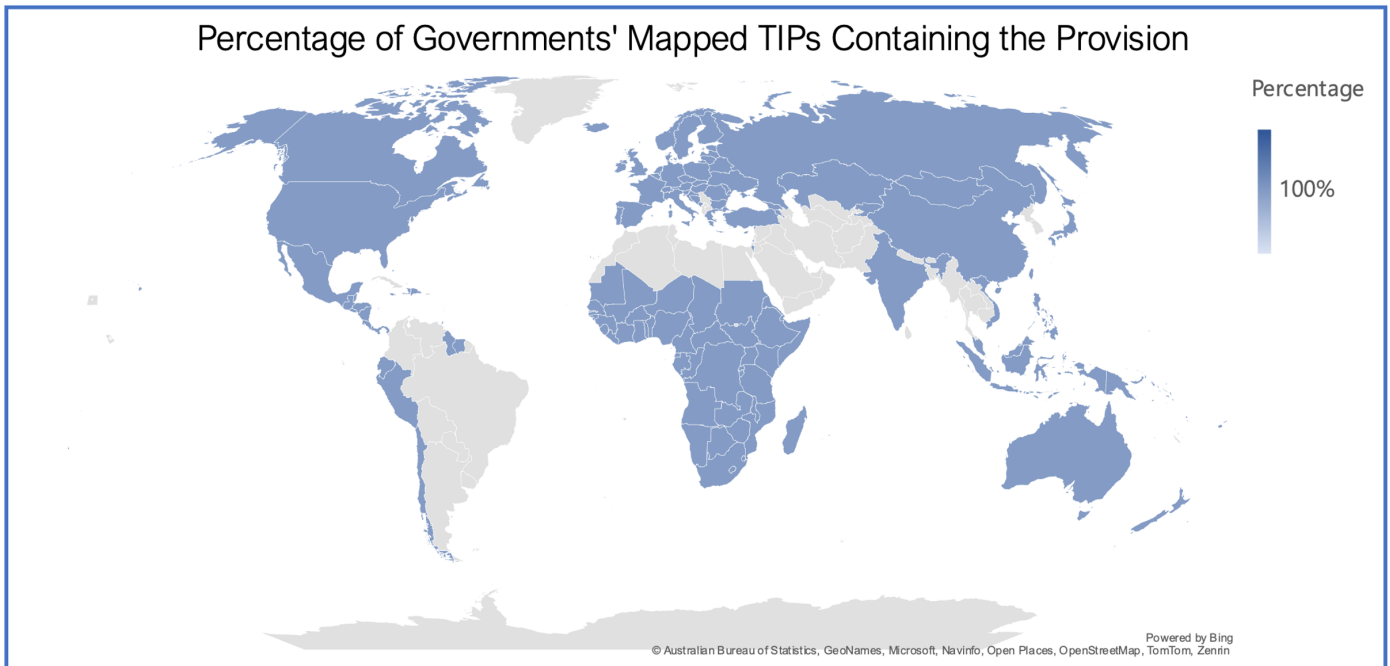
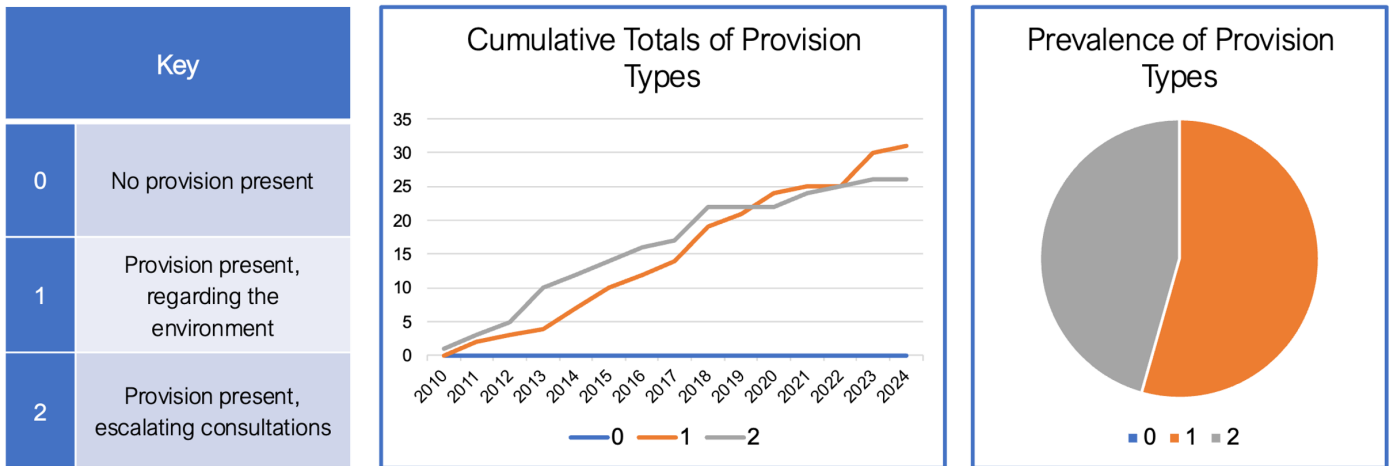
10. Public Submissions on Compliance for Environmental Commitments

These provisions oblige the parties to establish a mechanism for receiving and considering public submissions on the implementation of and compliance with environmental commitments.



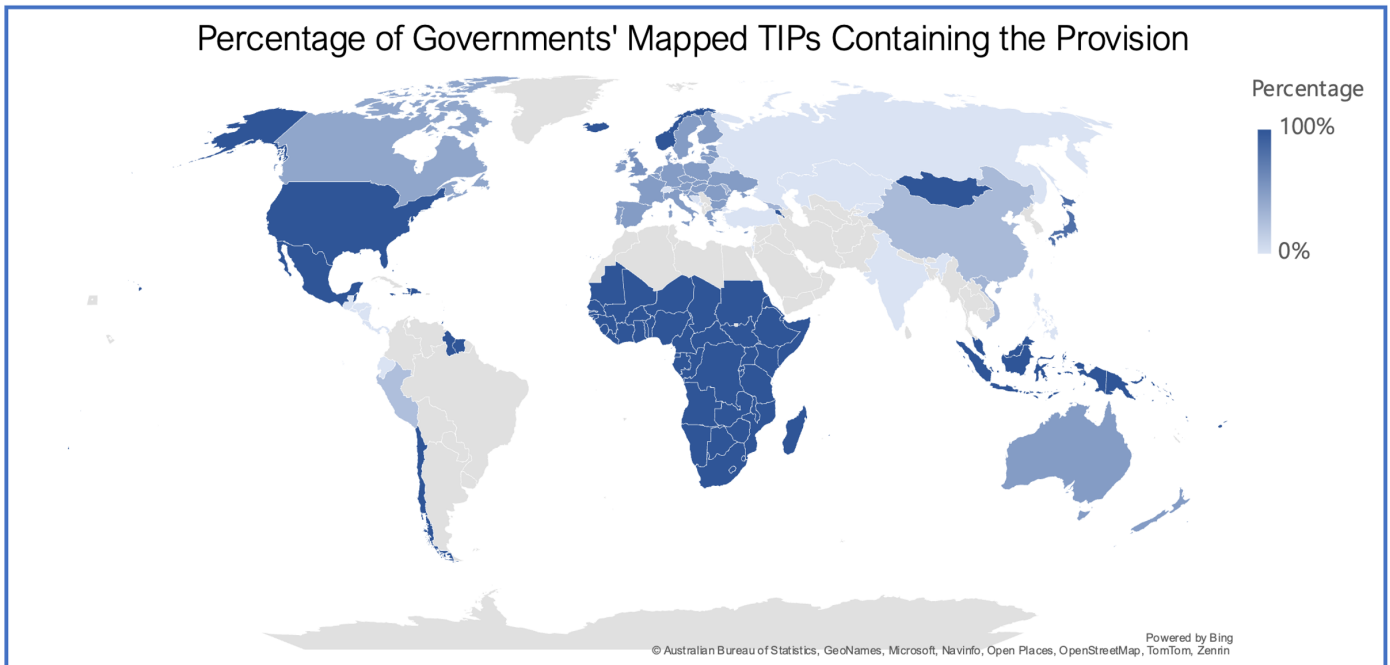
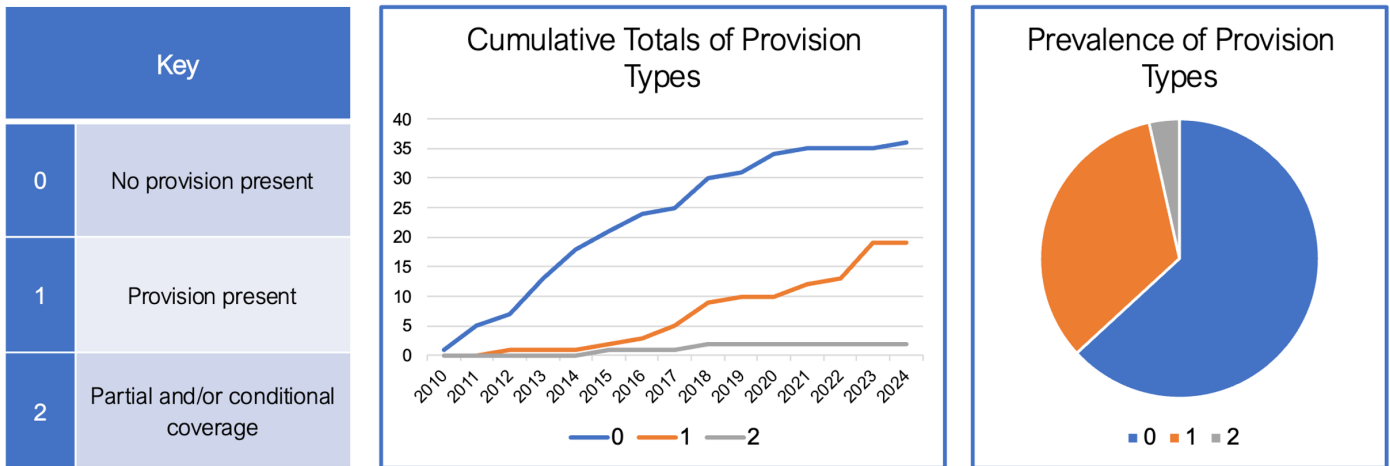
11. Government-Government Consultations for Environmental Commitments

These provisions oblige the parties to engage in consultations to resolve issues related to environmental commitments. This may include an escalating process whereby complaints are heard by progressively more senior bodies until a mutually satisfactory decision is reached.



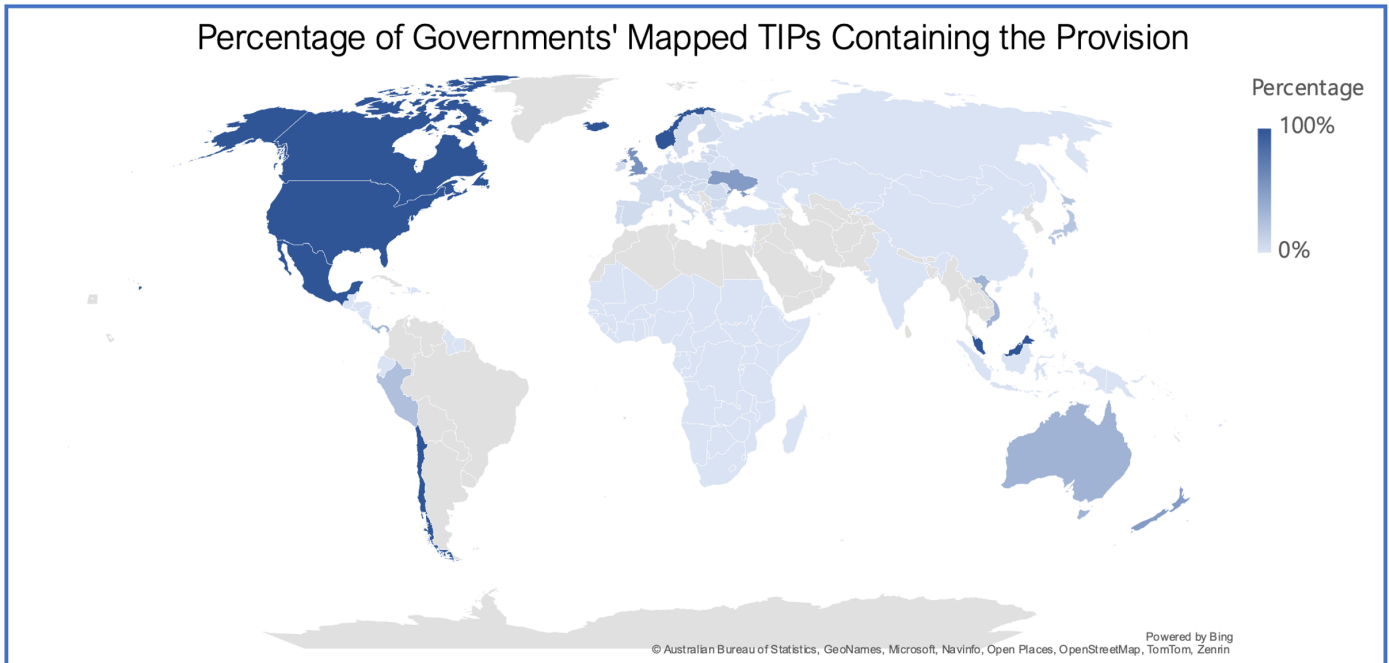
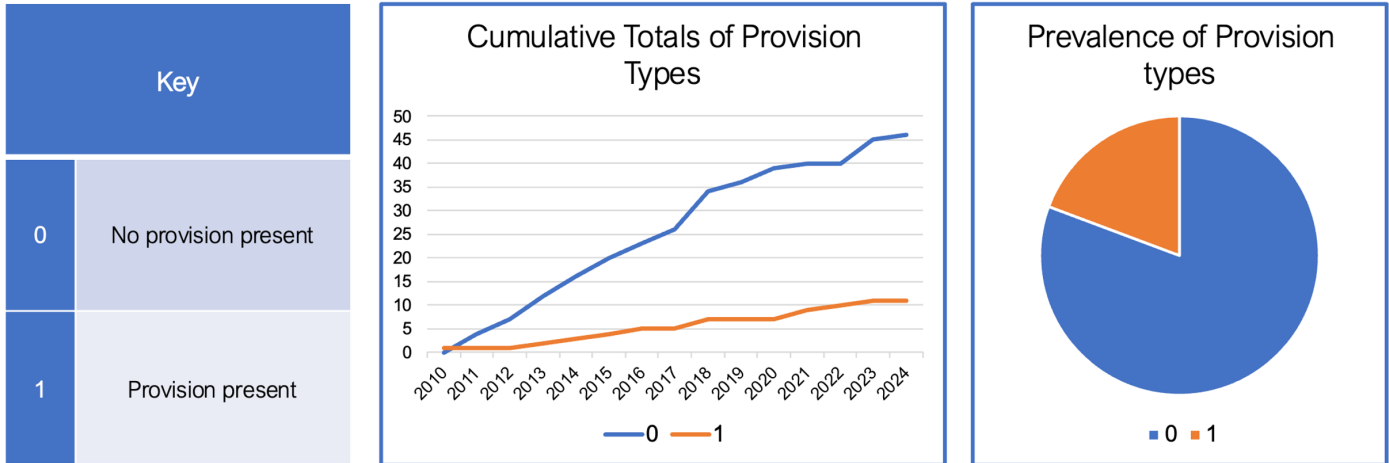
12. Government-Government Dispute Settlement for Environmental Commitments

These provisions specify that environmental commitments are subject to Government-Government dispute settlement. Depending on the type of provisions, dispute settlement may only be applicable during a certain time period or if the breach is sustained and recurring in a manner affecting trade and investment.



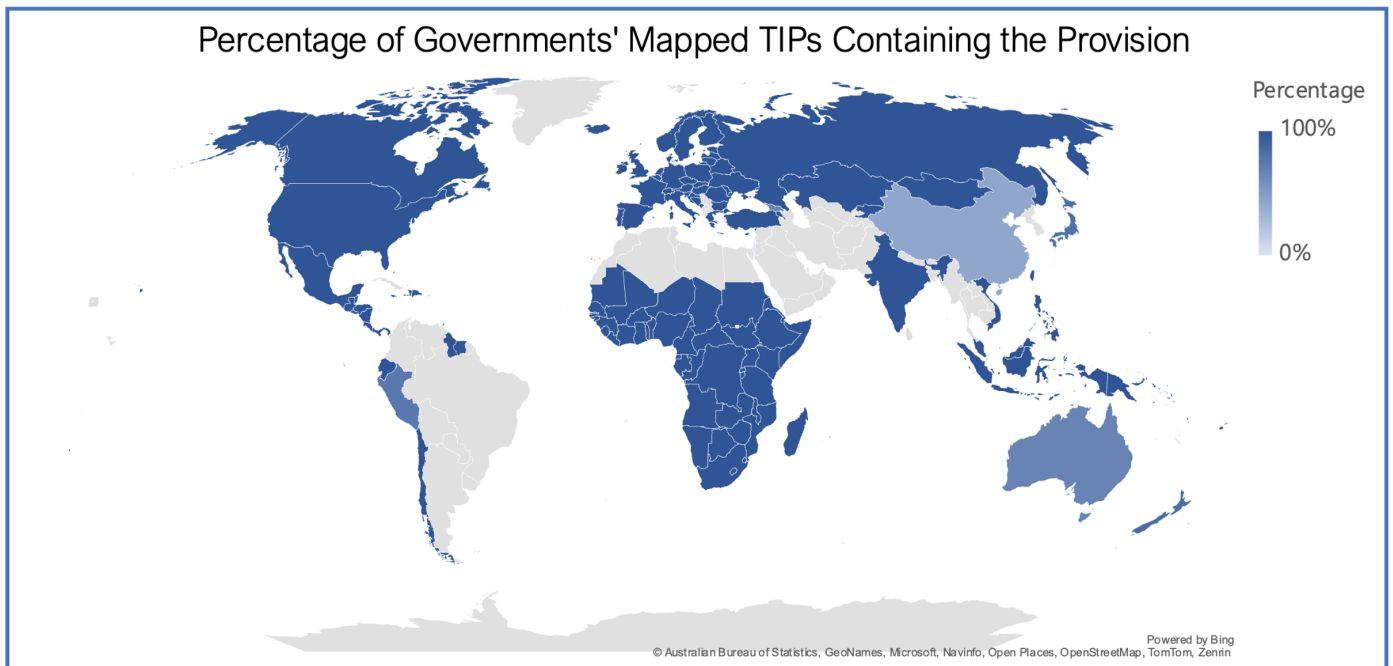
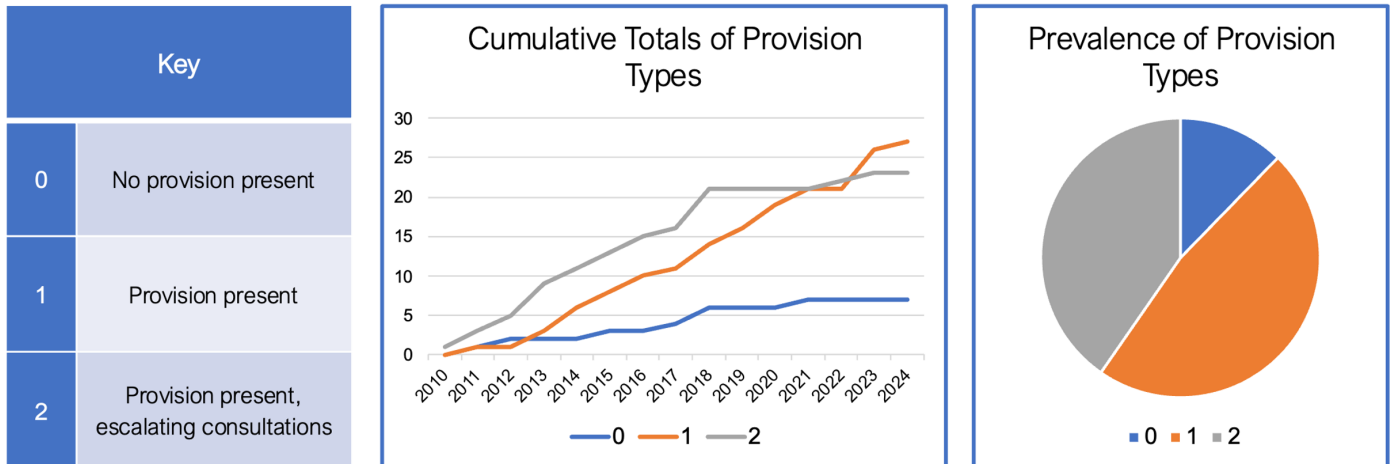
13. Public Submissions on Compliance for Labour Commitments

These provisions oblige the parties to establish a mechanism for receiving and considering public submissions on the implementation of and compliance with labour commitments.



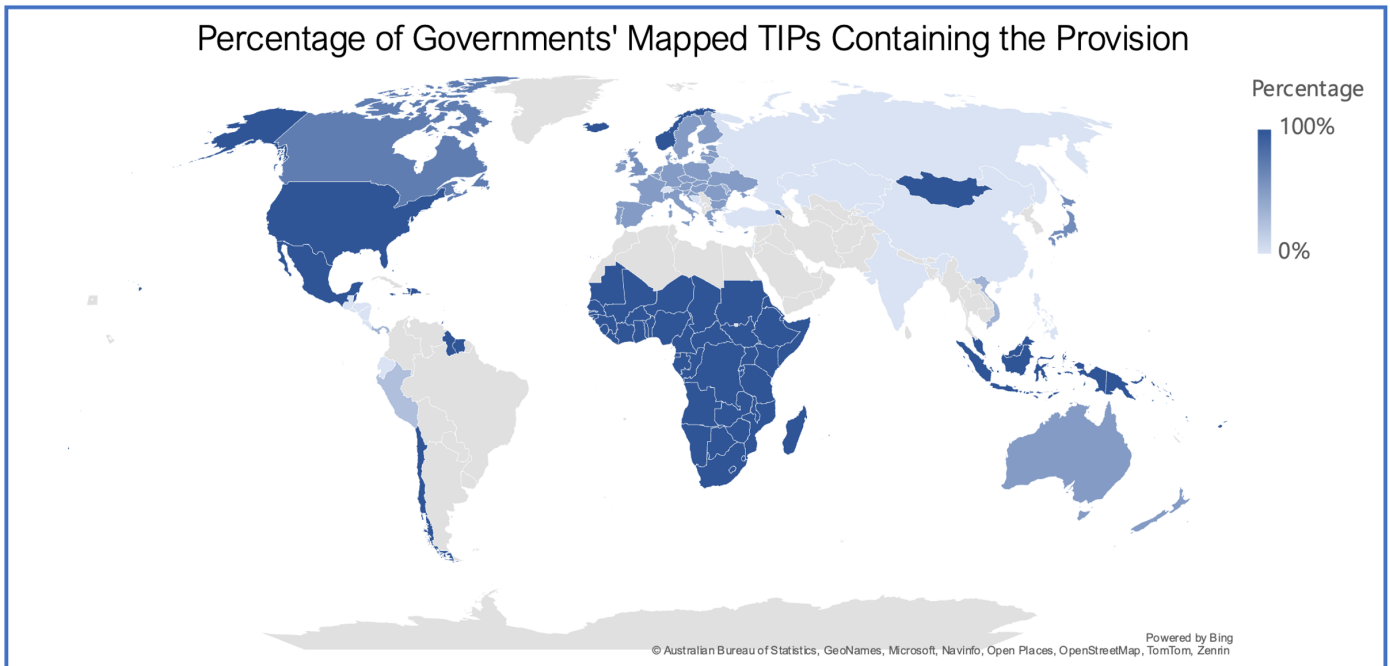
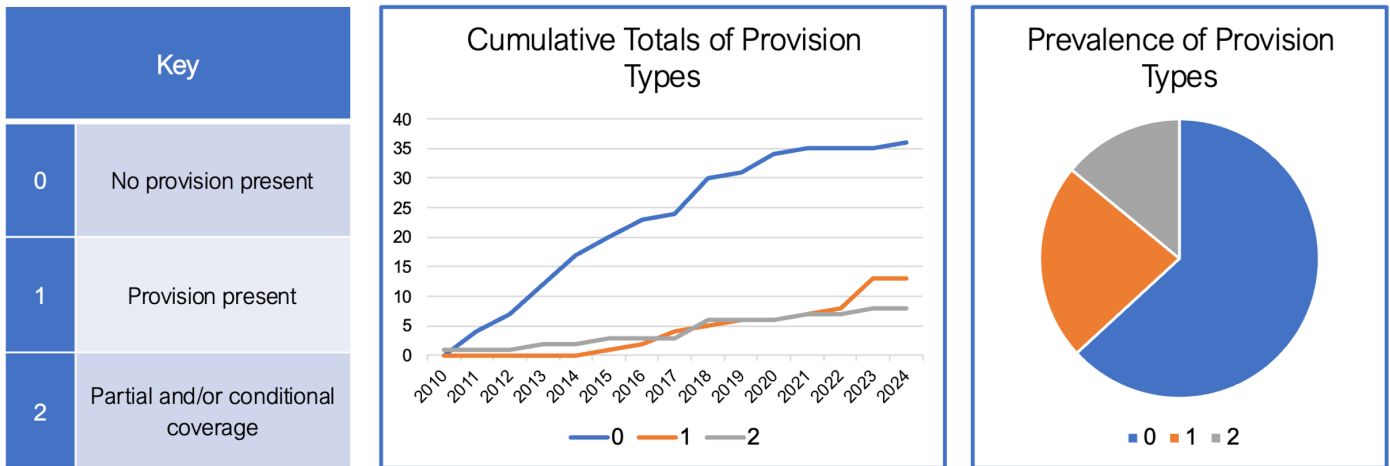
14. Government-Government Consultations for Labour Commitments

These provisions oblige the parties to engage in consultations to resolve issues related to labour commitments. This may include an escalating process whereby complaints are heard by progressively more senior bodies until a mutually satisfactory decision is reached.



15. Government-Government Dispute Settlement for Environmental Commitments

These provisions specify that environmental commitments are subject to Government-Government dispute settlement. Depending on the type of provisions, dispute settlement may only be applicable during a certain time period or if the breach is sustained and recurring in a manner effecting trade and investment.



III. COMPLIANCE MECHANISMS: EFFECTIVENESS & DESIRABILITY

Part III of the report will build upon the foundation laid above by the mapping analysis and graphs. It will delve deeper into the types of compliance mechanisms existing in TSD chapters and compare their form, use, and effects for developing as opposed to developed countries, followed by a discussion of the advantages and disadvantages that each mechanism presents for developing countries.

1. Civil Society Mechanisms

Two mechanisms that facilitate civil society involvement in monitoring and encouraging a party's compliance with TSD obligations under TIPs are public submissions and DAGs.

1.1. Public Submissions

The first inclusion of a public submission mechanism was in NAFTA, more specifically within its side agreements, the NAAEC³ and the NAALC.⁴ NAFTA has since been superseded by USMCA, but the mechanism has endured. It has also spread to many other TIPs, including other US TIPs, Canadian TIPs, and UK TIPs.

The nature of the procedure differs between TIPs. For example, USMCA has a particularly comprehensive public submission procedure in its environment chapter (which is replicated across other TIPs to which US is party). It incorporates a specific channel whereby submissions are filed with a secretariat, who will determine whether the submission should give rise to a 'factual record', a report detailing the facts of an investigation into the party's enforcement efforts which is made publicly available.⁵ A factual record does not include recommendations but can be used as a tool for the submitters or other interested parties to follow up on the issue. In comparison, the TPP leaves the procedure for the receipt of public submissions relating to the environment or labour to the discretion of each party.⁶

Another point of difference is who is eligible to make a submission and against which party or parties. Some TIPs only allow for submissions to be made to a party regarding its compliance by person of that same party (a vertical approach). Other TIPs only allow persons of a party to make submissions to their home country against the other party or parties (a diagonal approach). Others allow for persons of any party to the agreement to make submissions to their home country regarding any

³ NAAEC arts 14, 15.

⁴ NAALC art 16.

⁵ USMCA arts 23 and 24.

⁶ TPP art 19.9(1).

party (a combined approach). In some agreements, the public submissions mechanism for environmental matters follows the vertical approach while the mechanism for labour matters takes the combined approach.⁷ This suggests that ensuring compliance with labour obligations is more of a priority than ensuring compliance with environmental obligations. Instead of to a particular country government, some submissions might be made to a cross-party body set up by the agreement, such as the secretariat under USMCA.

While EU TIPs do not include a public submissions mechanism in the treaty text, the European Commission runs a complaints system for breaches of TSD commitments under all its TIPs. This approach is unique to the EU. Submissions can be made by EU Member States, businesses, trade unions, DAGs, NGOs, or citizens/permanent residents of EU Member States.⁸ This submissions procedure follows the diagonal approach.⁹

1.1.1. Effectiveness

The public submission procedure has had some success in contributing to the realisation of TSD commitments. Two examples of its modest success are the Sumidero Canyon II case and the Canada-Colombia Labour Cooperation Agreement case.

In 2011, a Mexican community organisation filed a submission under NAAEC alleging that the Mexican government was failing to effectively enforce its environmental laws in relation to mining activities allegedly damaging a national park. This submission was made after the community had spent over ten years filing complaints with various institutions and bringing legal actions in response to the mining with minimal consequences for the quarrying company. The NAAEC secretariat found Mexico's response to be lacking and that a factual record was warranted.¹⁰ The factual record was published four years after the complaint. A NGO presented the factual record to the Mexican Commission of Human Rights, which recommended to the Attorney-General for Environmental Protection that measures be taken to stop the harm caused by the quarrying. The Attorney-General ordered the company to cease its activities, and the local health authority ordered the full closure of the facility. While this is celebrated as a success story of the submissions process,¹¹ there eight years passed between the submission being made and the remedying of the breach, which casts some

⁷ NZ-UK Free Trade Agreement (2022) arts 22.21(1), 23.15(1).

⁸ 'Operating Guidelines for the Single Entry Point and Complaints Mechanism for the Enforcement of EU Trade Agreements and Arrangements', European Commission (Web Page, December 2023) 2 <https://trade.ec.europa.eu/access-to-markets/en/form-assets/operational_guidelines.pdf>.

⁹ Ibid 1.

¹⁰ 'Sumidero Canyon II', Commission for Environmental Cooperation (Web Page) <<http://www.cec.org/submissions/registry-of-submissions/sumidero-canyon-ii/>>.

¹¹ 'How SEM Process Can Help Protect Communities', Commission for Environmental Cooperation (Web Page) <<http://www.cec.org/submissions/>>.

doubts on the efficiency of the process. It might be helpful for the factual record to go further than merely being available as a tool for civil society to wield and instead articulate recommendations to relevant parties to reduce the need for civil society intermediaries, who can be slow to act and, in some cases, might not act at all.

In 2016, the largest Canadian labour organisation alongside five Colombian labour organisations made submissions to a Canadian government agency under the Canada-Colombia Labour Cooperation Agreement,¹² alleging that Colombia was failing to effectively enforce its labour laws. The Canadian government subsequently published recommendations directed to the Colombian government,¹³ and requested ministerial consultations.¹⁴ The ensuing consultations resulted in the Colombian government making commitments to remedy its non-compliance. The parties entered into an action plan containing further steps that Colombia would undertake over the period from 2018 to 2021, with its progress to be assessed by Canada.¹⁵ However, despite these promising developments, it appears that labour non-compliance remains an issue in Colombia, with Canada continuing to assess Colombia's progress beyond 2021 and reporting in 2024 that important reforms were still being discussed internally.¹⁶

1.1.2. Desirability for Developing Countries

An advantage of the public submissions mechanism for developing countries is that it leverages civil society in a monitoring capacity, mitigating the burden on government facing capacity constraints. In pursuit of redress, citizens or other stakeholders will draw attention to non-compliance with TSD commitments.

However, the necessary system of receiving, reading, and responding to submissions does require government resources. In some cases, developed countries will resource this system, such as for EU TIPs, whereby the European Commission deals with all of the submissions. In other cases, each

¹² Canada-Colombia art 8.2.

¹³ Employment and Social Development Canada, Review of Public Communication CAN 2016-1: Report Issued Pursuant to the Canada-Colombia Agreement on Labour Cooperation (Report) <<https://www.canada.ca/en/employment-social-development/services/labour-relations/international/agreements/2016-1-review.html>>.

¹⁴ Canada-Colombia (n 12) art 12.

¹⁵ 'Action Plan 2018-2021 – under the Canada-Colombia Agreement on Labour Cooperation', Government of Canada (Web Page, 3 April 2013) <<https://publications.gc.ca/site/eng/9.856476/publication.html>>.

¹⁶ 'Progress Update', Government of Canada (Web Page, 12 April 2024) <<https://www.canada.ca/en/employment-social-development/services/labour-relations/international/agreements/colombia/progress-update.html>>.

country commits to handling submissions themselves.¹⁷ Sometimes, all parties jointly resource the body that responds to submissions.¹⁸

Another potential disadvantage of this mechanism for developing countries is that it poses a risk of damaging their reputations vis-à-vis other governments, investors, or agencies that control or influence access to credit. Reputational damage can have more significant economic ramifications for developing countries than for developed countries. Foreign investors may be dissuaded from investing. Other governments might not want to enter into trade agreements or might include harsher enforcement mechanisms, perpetuating a vicious cycle. Reputational damage vis-à-vis agencies that control access to credit could put a developing country at risk of economic collapse. To mitigate the risks of reputational damage and its potentially detrimental consequences, the public submissions mechanism could be modified to ensure developing countries are first given an opportunity to remedy non-compliance in private, with the support of the developed country to maximise the chance of success prior to the issue being widely publicised. Another helpful modification could be enabling submissions to be directed to problematic private corporations themselves rather than only to governments, to confine reputational damage to private actors in these circumstances, which would not pose the same economic risks as sullyng the reputation of the entire government.

1.2. Domestic Advisory Groups (DAGs)

DAGs are civil society advisory bodies, comprised of representatives of trade unions, businesses (employers and employees), non-governmental organisations, and occasionally academic institutions. The mechanism was created by the EU, first appearing in the EU-Korea Free Trade Agreement. It has not yet spread to non-EU agreements.

Each party in a TIP will have its own DAG. The role of the DAGs is to monitor all parties' compliance with TSD commitments. Their output might include reports, studies, declarations, and recommendations. Some TIPs include a mechanism whereby the parties can request consultations (a mechanism discussed in Part 2.2.) regarding a communication of the DAG.¹⁹

1.2.1. Effectiveness

¹⁷ Canada-Panama Free Trade Agreement (2010); Canada-Honduras.

¹⁸ USMCA.

¹⁹ EU-Korea art 13.14(1).

The effectiveness of the DAG mechanism is debatable. Recommendations by DAGs are non-binding and according to a survey of EU TIP DAG members, governments mostly do not act upon them.²⁰ DAG members also reported that they did not have adequate financial resources or logistical support to fulfil their mandate, particularly non-EU DAG members.²¹

A DAG's effectiveness can be further undermined by a lack of recognition from the government, which appears to be a risk for developing countries. Lack of government endorsement means weak dialogue channels between the DAG and government authorities, further undermining the DAG's ability to meaningfully engage.²²

However, the DAG mechanism is regarded as being effective in relation to the role it played in the EU-Korea Labour dispute. The EU initiated the complaint in response to several requests by the EU DAG.²³ Non-EU DAG members have acknowledged that EU DAGs particularly have influence over non-EU governments, who are more responsive to international than domestic pressure.²⁴ This suggests that DAGs might be most effective when responding to the non-compliance of another party rather than their own.

1.2.2. Desirability for Developing Countries

DAG members perform their roles in a voluntary capacity. However, given that the DAGs still rely upon government resourcing, developing country governments may view them as a financial burden.

DAGs could also present reputational risks to a developing country's government as they will often widely publicise breaches. It might be preferable for developing countries for the DAG mechanism to include a period of private consultations whereby a developed country party seeks to privately help the developing country party to remedy any breach prior to making public comments relating to the breach.

²⁰ Deborah Martens, Diana Potjomkina and Jan Orbie, Domestic Advisory Groups in EU Trade Agreements: Stuck at the Bottom or Moving up the Ladder? (Report, November 2020) 28 <<http://hdl.handle.net/1854/LU-8690502>>.

²¹ Ibid 15.

²² Ibid 13.

²³ Aleydis Nissen, 'Not That Assertive: The EU's Take on Enforcement of Labour Obligations in Its Free Trade Agreement with South Korea' (2022) 33(2) European Journal of International Law 607, 616.

²⁴ Martens, Potjomkina and Orbie (n 20) 37.

2. Dialogic Processes

2.1. Periodic Reviews

Since their advent in NAFTA, periodic reviews have been incorporated into TIPs to encourage and monitor the implementation of agreement obligations. These assessments, typically carried out by a joint or specialised committee established under the agreement or by a government agency overseeing it, regularly evaluate how well countries are fulfilling their TSD obligations or complying with the TIPs as a whole. Government agencies in some US agreements provide recommendations and technical assistance to the other party or parties,²⁵ whilst the EU regularly engages with its trading partners to review the implementation of TSD commitments within their TIPs.²⁶

2.1.1. Effectiveness

There is clear evidence that periodic reviews contribute to improved compliance, as seen in reports published by the US across several of its TIPs with developing countries. These public reports often include comprehensive recommendations tailored to the partner nation. For instance, in the second periodic review of its TIP with Peru, the US assessed progress on labour rights and law enforcement. The review recognised substantial progress and the efforts made to address the issues highlighted in the first review.²⁷ However, it also identified areas that still require further action.²⁸

2.1.2. Desirability for Developing Countries

By regularly assessing the implementation of agreements, this mechanism can proactively identify and address compliance issues before they escalate into adjudication involving significant legal fees, expert consultation costs, and administrative expenses.²⁹

Moreover, government agencies in developed countries likely have the necessary expertise and knowledge to assist developing countries in meeting their TSD commitments. Therefore, the inclusion of a periodic review mechanism in TIPs can not only highlight the TSD shortfalls in

²⁵ Iulianna Romanchyshyna, 'Chapter 19: Tackling Labour Rights and Environmental Protection through Trade and Sustainable Development Chapters - the European Approach' in Michelle Egan et al (eds), *Contestation and Polarization in Global Governance* (Edward Elgar Publishing, 2023) 343, 351.

²⁶ Ibid; 'Sustainable Development in EU Trade Agreements', European Commission (Web Page) <https://policy.trade.ec.europa.eu/development-and-sustainability/sustainable-development/sustainable-development-eu-trade-agreements_en>.

²⁷ 'Second Periodic Review of Progress to Address Issues Identified in the U.S. Department of Labor's Public Report of Review of Submission 2015-01 (Peru)' (Web Page, 20 April 2018) <<https://www.dol.gov/sites/dolgov/files/ILAB/legacy/files/Peru-FTA-Submission-Second-Review-Statement-Final.pdf>>.

²⁸ Ibid.

²⁹ See Part 4.1.2.

developing countries but also provide a structured framework for ongoing capacity building and technical assistance. This process can ultimately help developing countries gradually adapt their policies and practices over time to fully comply with their TIP obligations.

However, the extent to which a developing country is able to implement the recommendations from a periodic review may be constrained by limited funding and institutional capacity.³⁰ Without the resources to implement change, periodic reviews may not lead to meaningful improvements, becoming mere formalities.³¹ As such, periodic reviews' impact may remain limited without significant financial support and institutional strengthening.

From the perspective of developing countries, an effective periodic review mechanism should involve the creation of a specialised joint body, explicitly outlined within the TIP, rather than a vaguely defined committee or a one-sided executive body. This joint body should guarantee equal participation from all parties and conduct thorough reviews of the TSD chapters. Moreover, recommendations should be supported by financial and technical assistance to help the developing country implement meaningful changes. It is also crucial that any reports by the joint body remain confidential to prevent the negative economic and reputational consequences associated with public naming and shaming.

2.2. Dispute Prevention Processes

Dispute prevention processes facilitate compliance with TSD commitments. Dispute prevention processes encompass consultations (state-to-state consultations, and labour or environment consultations)³², combined with dialogue that occurs within specialised and joint committees.³³

Consultations are negotiations between parties that aim to resolve disputes without recourse to adjudication mechanisms.³⁴ Consultations are present in every TIP mapped by this report indicating that parties are willing to sign agreements providing for this process. They occur behind closed doors.³⁵ Some TIPs provide for a single round of ministerial consultations, and some provide for

³⁰ Carlos de Miguel and Jeannette Sánchez, 'Environment and Sustainable Development: Contemporary Challenges for ECLAC and Latin America and the Caribbean' [2023] (141) CEPAL Review 121, 128.

³¹ Anti-Slavery International, *Sitting on Pins and Needles – A Rapid Assessment of Labour Conditions in Vietnam's Garment Sector* (Report, 2018) 38.

³² Katerina Hradilová and Ondrej Svoboda, 'Sustainable Development Chapters in the EU Free Trade Agreements: Searching for Effectiveness' (2018) 52(6) *Journal of World Trade* 1019, 1035.

³³ Emanuel Castellarin, 'The Joint Committees Established by Free Trade Agreements and Their Impact on EU Law' in Isabelle Bosse-Platière and Cécile Rapoport (eds), *The Conclusion and Implementation of EU Free Trade Agreements* (Edward Elgar Publishing, 2019) 203, 206.

³⁴ *Ibid* 207.

³⁵ Vincent Beyer, 'Dispute Settlement in Preferential Trade Agreements and the WTO: A Network Analysis of Idleness and Choice of Forum' (2021) 32(2) *European Journal of International Law* 433, 452.

specialised environment and labour consultations followed by one or more rounds of high-level consultations if required.³⁶ Some TIPs establish specialised committees where the consultations may occur.³⁷

Specialised committees are comprised of technical experts from each party who engage in policy dialogue and give specialised advice to governments surrounding the implementation of a specific chapter in the TIP.³⁸ For the purposes of this report, any reference to specialised committees will be referring to TSD committees, or labour and environment committees (typically seen in US agreements). In the absence of a TSD committee, a joint committee will attempt to perform this function, although the specific role of the committee will vary depending on the treaty.³⁹ Joint committees are presided over by ministers from each party to the TIP.⁴⁰

2.2.1. Effectiveness

Specialised committee dialogue is more likely to promote compliance because it involves discussions between TSD experts, rather than government ministers who discuss the functioning of the entire TIP at a high level, likely with limited time to address TSD issues in any depth.⁴¹ Thus, these bodies engage in informed discussions that may have increased sway over high level officials who do not possess the same level of technical expertise.

There is no publicly available information surrounding consultations being initiated under TSD chapters of TIPs. However, under WTO law, consultations have proven to be an effective mechanism enabling parties to resolve issues before they escalate into a diplomatic dispute.⁴² They remain a vital part of the dispute settlement process, despite the existence of binding adjudicatory mechanisms (discussed in Part 4.1.).⁴³ This is because a mutually agreed upon solution often allows states to

³⁶ Hradilová and Svoboda (n 32) 1035.

³⁷ Denise Prévost and Iveta Alexovičová, 'Mind the Compliance Gap: Managing Trustworthy Partnerships for Sustainable Development in the European Union's Free Trade Agreements' (2019) 6(3) *International Journal of Public Law and Policy* 239, 245.

³⁸ Castellarin (n 33) 206.

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² Robert Alilovic, 'Consultations under the WTO's Dispute Settlement System' (2000) 9 *Dalhousie Journal of Legal Studies* 279, 280.

⁴³ *Ibid.*

retain benefits they otherwise would not be entitled to.⁴⁴ Consultations often facilitate the timely and cost-effective resolution of disputes in the WTO context,⁴⁵ and therefore, it is possible to predict they would provide similar benefits in the TSD context.

2.2.2. Desirability for Developing Countries

Multiple rounds of consultations and specialised committee dialogue prevents developing countries from suffering wider reputational damage. By facilitating extensive, specialised discussion at a lower level, these dialogic processes should encourage issues to be resolved without the need for ministerial intervention.⁴⁶ This prevents the issue from escalating into a full-blown dispute with attendant consequences for developing countries.⁴⁷

Similarly, dispute prevention processes such as consultations, are held privately.⁴⁸ Thus, the developing country is shielded from reputational, and consequential economic damage, because there is minimal chance that the developing country's lack of compliance will be made available to the public.

Dispute prevention processes are also beneficial for developing countries because they facilitate open dialogue between parties.⁴⁹ This discussion provides developing countries with the flexibility to negotiate a practical solution to compliance issues that accommodate their lower development levels and capacity.⁵⁰ Therefore, parties can renegotiate the timelines relating to compliance with specific TSD obligations if necessary.⁵¹ Furthermore, as the developing country can make the other party aware of compliance issues, the other party is given the opportunity to provide financial, or other assistance, to the developing country to help them comply.⁵² This is extremely beneficial for developing countries because they can fulfil their TSD obligations using the assistance provided by the other party, therefore avoiding the financial burden that compliance may otherwise carry.

⁴⁴ Ibid.

⁴⁵ Ibid 290.

⁴⁶ Castellarin (n 33) 206.

⁴⁷ See Part 1.1.2., which discusses reputational consequences and their flow-on economic effects on a country.

⁴⁸ Beyer (n 35) 452.

⁴⁹ See, eg, the discussion of committees in Prévost and Alexovičová (n 37) 245.

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² Ibid.

Similarly, specialised committees give the developing country access to capacity building opportunities. Developing countries may not have access to experts or institutions with specialised knowledge on TSD issues.⁵³ Therefore, specialised committees facilitate the sharing of expertise from the other party with the developing country. This expertise sharing is essential in building the developing country's capacity to meet its TSD obligations. For example, the EU-Vietnam TSD Committee met in 2021 and was able to conduct detailed discussions about nationally determined contributions to the Paris Agreement.⁵⁴ This discussion included exchanging views on national climate and biodiversity action plans and the agreement of jointly agreed cooperation initiatives.⁵⁵ This emphasises the improved access that specialised committee meetings provide to developing countries. Increased access to education and expertise increased Vietnam's knowledge surrounding nationally determined contribution targets and improved compliance with the Paris Agreement.⁵⁶

For this reason, specialised committees are preferable over joint committees for developing countries. Without the expert dialogue provided by the TSD committee, Vietnam would not be able to engage with experts to set NDC targets for climate change under the Paris Agreement. Therefore, specialised committees play an important role for developing countries, and joint committees should be supported by specialised committees in TIPs for developing countries. Similarly, TIPs should provide for multiple levels of consultations to facilitate early resolution of issues. Ultimately, the capacity building role provided by dispute prevention processes, particularly specialised committees, is the most beneficial dialogic process for developing countries. It induces compliance without the financial burden that compliance often carries.

3. Unilateral Mechanisms

3.1. Rapid Response Mechanism

Described as a 'diagonal mechanism',⁵⁷ the USMCA Rapid Response Mechanism (RRM) enables the US or Canada to act directly against a company in Mexico, bypassing state-to-state consultations. This can be initiated when either the US or Canada have a good faith belief that workers in a covered facility are being denied their rights to free association and collective

⁵³ Castellarin (n 33) 206.

⁵⁴ European Commission, Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Implementation and Enforcement of EU Trade Agreements (Report, 11 October 2022) 17 <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022DC0730>>.

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ Kathleen Claussen, 'Trade Law Policing on the Factory Floor: Next Generation Agreements and Their Corporate Accountability Tools' (2024) 13(1) Cambridge International Law Journal 10.

bargaining.⁵⁸ The US also maintains a group of ‘labour attachés’ in Mexico that visit facilities to investigate alleged violations.⁵⁹ When initiated, the US or Canada can suspend the liquidation of imports from the specific facility where the rights violation occurred and request Mexico to investigate.⁶⁰ If Mexico finds wrongdoing, both countries work together to create a remediation plan to restore workers’ rights.⁶¹ If they agree on the remediation plan, the US will resume liquidation of imports. If they cannot agree on a remediation plan or Mexico denies the existence of an issue, a party may request a panel of legal experts for a separate review.⁶²

3.1.1. Effectiveness

The RRM has been invoked 22 times by the US as of June 2024. Often, the resolutions involved remediation plans. In some instances, these have resulted in changes at the facility in question,⁶³ but in other instances the company elected to close the facility, leading to job losses.⁶⁴ Even so, civil society organisations, the US, and commentators assert that the RRM has substantially improved workers’ conditions overall, where capacity constraints have impeded domestic enforcement of labour laws.⁶⁵

3.1.2. Desirability for Developing Countries

The manner in which the RRM directly targets non-compliant companies is arguably more effective than binding adjudicatory mechanisms as it addresses the source of the issue without significant costs or having to go through lengthy consultations first.⁶⁶ However, the RRM has significant

⁵⁸ Ibid 11.

⁵⁹ Ibid.

⁶⁰ Chad P Bown and Kathleen Claussen, ‘The Rapid Response Labor Mechanism of the US-Mexico-Canada Agreement’ (Working Paper No 23-9, Peterson Institute for International Economics, 9 November 2023) 14.

⁶¹ Ibid.

⁶² Ibid.

⁶³ ‘GM Hikes Mexico Plant Wages by 8.5% in Landmark Deal with Union’, Bloomberg (Web Page, 12 May 2022) <<https://www.bloomberg.com/news/articles/2022-05-12/gm-hikes-mexico-plant-wages-by-8-5-in-landmark-deal-with-union>>; Walter Bonne, ‘Unresolved Labor Disputes under the USMCA’s Rapid Response Mechanism: Probing the Applicability of the ATS in Light of Nestle v. Doe Student Note’ (2022) 19(1) New York University Journal of Law and Business 189, 203.

⁶⁴ ‘US Labor Dept “Disappointed” by VU Manufacturing Plant Closure in Mexico’, Thomson Reuters (Web Page, 11 October 2023) <<https://www.reuters.com/markets/us-labor-dept-disappointed-by-vu-manufacturing-plant-closure-mexico-2023-10-10/>>.

⁶⁵ Jonathan Treat, ‘Photo Essay: Defending Territory in Oaxaca’ (2014) 47(1) NACLA Report on the Americas 50; Claussen (n 57) 16.

⁶⁶ See Part 4.1.2.

limitations in its current form. Facilities in the US and Canada are largely shielded from Mexico's review as a result of a limiting condition on the eligibility of facilities for consideration in the agreement text.⁶⁷ This means many temporary migrant workers, despite their crucial role in the US economy, face challenges such as wage theft, discrimination, and poor working conditions without sufficient recourse.⁶⁸

Moreover, the mechanism is controversial as it allows a government to determine the compliance of private actors in another country with domestic laws and impose penalties based on those determinations.⁶⁹ This has given rise to unintended consequences. For instance, there have been reports of violence in local communities where the RRM has disrupted existing power balances amongst groups controlling the social fabric.⁷⁰

From the perspective of developing countries, the RRM can be significantly enhanced. Firstly, to ensure equitable access, the mechanism should be universally available to all governments party to the agreement, regardless of their economic status. Additionally, before initiating formal ratification procedures, the offending facility should at least be afforded the opportunity to address and rectify the issue, promoting a less hostile and more collaborative approach. Lastly, instead of deploying 'labour attachés' in the developing country, the focus should shift toward the developed country providing comprehensive financial and technical support. This support could empower governments to effectively monitor and enforce labour laws within private enterprises, ensuring sustainable compliance and protection of workers' rights.

3.2. The US-Peru Forestry Annex

There is a unique mechanism contained within an Annex of the US-Peru Trade Promotion Agreement, where the US can request Peru to verify shipments of wood products exported to the US to prevent illegal timber production and protect forests, even beyond Peruvian law.⁷¹ If the US deems the verification unsatisfactory, it has the authority to deny entry to the current shipment and potentially prohibit future shipments from the specific enterprise.⁷²

3.2.1. Effectiveness

⁶⁷ Bonne (n 63).

⁶⁸ Ibid.

⁶⁹ Claussen (n 57) 15.

⁷⁰ Ibid; Kathleen Claussen and Chad P Bown, 'Corporate Accountability by Treaty: The New North American Rapid Response Labor Mechanism' (2023) 118 *American Journal of International Law* 98, 117.

⁷¹ US-Peru annex 18.3.4.

⁷² Ibid.

Assessing the effectiveness of this mechanism is challenging due to its limited use,⁷³ and while it is theoretically designed to reduce the export of illegally felled timber to the US, the majority of Peruvian timber is consumed domestically.⁷⁴ Furthermore, the lack of political will to enforce the mechanism in both countries has undermined its potential impact.⁷⁵ Consequently, this mechanism is perceived as having had a minimal effect on reducing deforestation in Peru.⁷⁶

3.2.2. Desirability for Developing Countries

The Forestry Annex mechanism, like the RRM, focuses on holding enterprises accountable rather than governments. This approach can help reduce potential conflicts between governments and directly address the root causes of non-compliance in the forestry sector. However, it may not fully address broader regulatory compliance issues, which are important for preventing future and repeated violations. Additionally, there is the possibility that Peru's timber exports could shift to markets with less stringent regulations.⁷⁷

A potential limiting factor of the mechanism is the fact that developing countries sometimes have legal frameworks that are complex and lack coherence.⁷⁸ This complicates the successful implementation of the Annex's verification mechanism as it requires clear and objective standards for compliance as part of the mechanism's process. Without these standards, verification outcomes may lack consistency and could be influenced by various external factors.

Another challenge is the perceived imbalance in commitments, with the responsibility for forestry monitoring measures falling entirely on Peru. A lack of mutual responsibility is often considered detrimental to the effectiveness of international agreements.⁷⁹ To enhance the effectiveness and fairness of the mechanism from the perspective of developing countries, it could be beneficial to establish shared verification responsibilities to help ease the burden on developing countries, which may have limited resources for verifying and auditing private enterprises. This could involve creating

⁷³ 'USTR Announces Enforcement Action to Block Illegal Timber Imports from Peru', United States Trade Representative (Web Page, 19 October 2023) <<https://ustr.gov/about-us/policy-offices/press-office/press-releases/2023/october/ustr-announces-enforcement-action-block-illegal-timber-imports-peru>>.

⁷⁴ Clint Peinhardt, Alisha A Kim and Viveca Pavon-Harr, 'Deforestation and the United States-Peru Trade Promotion Agreement' (2019) 19(1) *Global Environmental Politics* 53.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ Filippo Del Gatto et al, '9. Trade Liberalisation and Forest Verification: Learning from the US-Peru Trade Promotion Agreement' (Briefing/Policy Paper, Overseas Development Institute, February 2009) 7.

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

a transparent external monitoring system with clear feedback mechanisms, jointly supported by both parties under the TIP ensuring mutual accountability.

3.3. Rebalancing

The EU-UK Trade and Cooperation Agreement permits a party to ‘take appropriate rebalancing measures’ when the other party’s policies and priorities in respect of labour or environmental protection significantly diverge from their treaty commitments.⁸⁰ The sorts of measures are not specified in the TIP but conceivably would include imposing tariffs or suspension of concessions. The responding party can demand that a panel be established to determine whether the measures are ‘strictly necessary and proportionate’, which is a very stringent legal test. The panel is only given 30 days to make their final ruling, after which a party can proceed with the rebalancing measure. 30 days appears to be a short amount of time to consider such an issue. Nevertheless, if the panel eventually finds that the test is not satisfied, the rebalancing party must cease the rebalancing measure.

3.3.1. Effectiveness

The mechanism has not been utilised yet, meaning that its effectiveness cannot be evaluated. It is uncertain exactly how a panel will interpret ‘significant divergences’ and ‘strictly necessary and proportionate’. In fact, the ambiguity of these phrases reinforces that 30 days to decide whether a rebalancing measure is permitted is an insufficient amount of time. The mechanism would likely be more effective if a longer time period was afforded to the panel.

3.3.2. Desirability for Developing Countries

The financial and capacity constraints of developing countries would likely limit their ability to succeed before a panel, meaning they would be more likely to have to endure rebalancing measures or be less likely to successfully implement rebalancing measures. Depending on the circumstances, either outcome could have significant reputational and financial implications. Accordingly, this mechanism appears to be undesirable for a developing country, unless a provision was made for the developed country party or parties to provide support to the developing country during the panel process in pursuit of an equal playing field.

4. Adjudicatory Mechanisms

Many TIPs contain binding or non-binding adjudicatory mechanisms. Binding adjudicatory mechanisms involve adjudication with the availability of remedies where the dispute settlement panel⁸¹ finds that the responding party has failed to comply with its TSD commitments, namely

⁸⁰ EU-UK Trade and Cooperation Agreement (2020) art 9.4(2).

⁸¹ Different permutations of this term appear in different TIPs, including ‘panel’, ‘arbitration panel’, ‘arbitral tribunal’, and ‘review panel’. They all refer to the same type of body.

suspension of concessions⁸² or monetary assessments. In contrast, non-binding adjudicatory mechanisms involve panels of experts that issue non-binding findings and recommendations that do enliven the prospect of a remedy. Some TIPs permit a party to have recourse to the dispute settlement panel/panel of experts only where a commitment has been breached in a ‘sustained or recurring course of action or inaction’ and ‘in a manner affecting trade or investment’.⁸³ Both types of adjudicatory mechanisms have evolved over time to include more detailed rules for dispute settlement and remedies, including the required expertise and duties of panellists, panel procedures, and timeframes.

4.1. Binding Adjudicatory Mechanisms

When a party believes that another party has violated the terms of the TIP, the process begins with consultations between the disputing parties. If these consultations fail to resolve the issue, the matter is referred to a dispute settlement panel for adjudication.⁸⁴ The dispute settlement panel reviews the evidence and arguments from both parties and issues a report with its findings of fact and determinations on the consistency of the measure in question with the TIP.⁸⁵ The responding party is given the opportunity to comply within a reasonable timeframe.⁸⁶ If the dispute settlement panel finds non-compliance based on this final report, remedies such as suspension of concessions and/or monetary assessments are used to enforce compliance, depending on whether the TIP in question contains one, either, or both.⁸⁷

The majority of TIPs only provide for suspension of concessions, which refers to the ability of a party to withdraw concessions granted under the TIP such as raising tariffs or imposing other trade restrictions. The suspension is calculated to be equivalent to the level of nullification or impairment caused by the non-compliance in the sector in which the original violations are taking place.⁸⁸ The responding party has a reasonable period of time to comply with the findings and recommendations,

⁸² Different permutations of ‘suspension of concessions’ appear in different TIPs, including ‘suspension of benefits’ and ‘suspension of obligations’. They all refer to the same type of remedy.

⁸³ CAFTA-DR art 16.2.1(a); EU-Korea art 13.7.1.

⁸⁴ TPP art 28.5.

⁸⁵ CAFTA-DR art 20.11.

⁸⁶ USMCA art 31.18.2.

⁸⁷ See, eg, CAFTA-DR art 20.16 and TPP art 28.20, which provide for suspension of concessions and monetary assessments.

⁸⁸ Wilfred J Ethier, ‘Intellectual Property Rights and Dispute Settlement in the World Trade Organization’ (2004) 7(2) *Journal of International Economic Law* 449, 455; EU-NZ art 26.16(6); USMCA art 31.19.1; AU-UK art 30.16.6.

before suspension takes place.⁸⁹ If suspension of concessions takes place, it is common practice that the complaining party first seeks to suspend concessions in the same sector as those affected by the non-conforming measure,⁹⁰ and if deemed impractical or ineffective, suspension can be sought in other sectors under the same TIP.⁹¹

Some TIPs provide for monetary assessments, which are financial penalties. The purpose of a monetary assessment is to provide a structured and predictable penalty system by a predefined monetary amount,⁹² where the responding party can elect to pay a monetary assessment instead of facing a suspension of benefits. The money can be used in different ways depending on the TIP. Notably, it may be directed towards initiatives that help the responding party comply with its commitments whereby the monetary assessment can be paid into a fund established by the TIP's commission, which then expends the money on appropriate initiatives to facilitate trade between the disputing parties, including reducing trade barriers or assisting in compliance efforts.⁹³

4.1.1. Effectiveness

There have been no instances of suspension of concessions in the TSD context. However, evidence from the use of this tool in relation to trade law more broadly shows that it has not been effective at inducing compliance with relevant norms, including in relation to withdrawal of preferential tariff treatment conditioned on compliance with labour standards.⁹⁴

There appears to be no instance in which a responding party has elected to pay a monetary assessment in lieu of suspension of concessions in the TSD context, which limits the extent to which effectiveness can be evaluated. However, the broader context of other obligations⁹⁵ demonstrates that they are ineffective and perceived as punitive rather than constructive tools for inducing

⁸⁹ See, eg, EU-NZ art 26.14; USMCA art 31.19.1; CAFTA-DR arts 20.16.1, 20.16.2.

⁹⁰ See, eg, USMCA art 31.19.2(a); AU-UK art 30.16; CAFTA-DR art 20.16; TPP art 28.20.

⁹¹ See, eg, USMCA art 31.19.2(b); AU-UK art 30.16.5(b); CAFTA-DR art 20.16.5(b); TPP art 28.20.4(b).

⁹² See, eg, CAFTA-DR art 20.16.6; TPP art 28.20.7.

⁹³ CAFTA-DR art 20.16.7.

⁹⁴ European Commission, 'Trade/Human Rights: Commission Decides to Partially Withdraw Cambodia's Preferential Access to the EU Market' (Press Release, 12 February 2020) <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_229>; United Nations, 'Cambodia's Shrinking Democratic Space Affected Credibility of National Elections: UN Experts' (Press Release, 2 August 2023) <<https://www.ohchr.org/en/press-releases/2023/08/cambodias-shrinking-democratic-space-affected-credibility-national-elections>>. See also Jeanne J Grimmer, WTO Dispute Settlement: Status of U.S. Compliance in Pending Cases (Report, 23 April 2012) 28-30 <<https://sgp.fas.org/crs/misc/RL32014.pdf>>.

⁹⁵ These may include obligations to reduce tariffs, adhere to specific standards, protect intellectual property rights, and ensure fair competition.

compliance.⁹⁶ More broadly, under other international agreements such as the Kyoto Protocol, the evidence demonstrates that this tool is ineffective,⁹⁷ and the successor Paris Agreement omits an equivalent mechanism to monetary assessment rather promoting voluntary cooperation to achieve emission reductions.⁹⁸ This shift may reflect a broader trend towards less adversarial compliance mechanisms, indicating that binding mechanisms such as suspension of concessions or monetary assessments have the unintended effect of causing parties to withdraw from treaties,⁹⁹ and in turn, not complying with broader TSD objectives.

4.1.2. Desirability for Developing Countries

An adjudicatory process resulting in a formal finding of non-compliance may have more significant reputational consequences, which may be undesirable for developing countries. This is particularly relevant when considering the remedies of suspension of concessions and monetary assessments. Developing countries, already vulnerable to economic pressures, face additional risks when subjected to these compliance measures. They often struggle to effectively argue their case due to limited resources,¹⁰⁰ increasing their risk of reputational damage if they are unable to comply with monetary assessments or suspension of concessions as a last resort. Such mechanisms can exacerbate these challenges by publicly highlighting non-compliance and imposing economic strains, making them less desirable for developing countries.

Suspension of concessions imposed on developing countries can cause significant economic harm, limiting their capacity to implement TSD commitments due to resource diversion.¹⁰¹ This economic strain results in decreased revenue and reduced funds for public investments, directly impacting long-term sustainability projects. The enforcement of labour rights and sustainability standards through TIPs often places additional financial burdens on developing countries, and these nations may lack the necessary resources to comply with stringent monitoring and enforcement

⁹⁶ Gregory Shaffer, 'The Challenges of WTO Law: Strategies for Developing Country Adaptation' (2015) 17(3) *Journal of International Economic Law* 697.

⁹⁷ Glenn M Wiser and Donald M Goldberg, 'Restoring the Balance: Using Remedial Measures to Avoid and Cure Non-Compliance Under the Kyoto Protocol' (Paper, Center for International Environmental Law, April 2000) 1 <<https://ciel.org/Publications/restoringbalance.pdf>>.

⁹⁸ Paris Agreement, signed 22 April 2016, OJ L 282/4 (entered into force 4 November 2016) <[https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:22016A1019\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:22016A1019(01))>.

⁹⁹ Canada's Withdrawal from the Kyoto Protocol, UN Doc CC/EB/25/2014/2 (20 August 2014) <https://unfccc.int/files/kyoto_protocol/compliance/enforcement_branch/application/pdf/cc-eb-25-2014-2_canada_withdrawal_from_kp.pdf>.

¹⁰⁰ Noémie Laurens, 'Searching for a Recipe for Success: Environmental Citizen Petitions under Free Trade Agreements' (2024) *Environmental Politics* 1, 15 <<https://doi.org/10.1080/09644016.2024.2347162>>.

¹⁰¹ Axel Marx, Nicolas Brando and Brecht Lein, 'Strengthening Labour Rights Provisions in Bilateral Trade Agreements: The Case of Voluntary Sustainability Standards' (2017) 8(3) *Global Policy* 78, 82 <<https://doi.org/10.1111/1758-5899.12397>>; Prévost and Alexovičová (n 37) 241.

mechanisms, exacerbating the economic strain caused by suspension of concessions.¹⁰² As developing countries often struggle with the dual burden of adhering to international standards and managing internal economic stability, possible suspension of concessions can exacerbate this gap, making it even more challenging for these countries to meet their TSD commitments.¹⁰³ Consequently, the suspension of concessions can lead to broader social and political implications, including reputational damage and loss of investor confidence, further limiting economic growth and development opportunities.

The requirement to prove 'sustained or recurring' conduct 'in a manner affecting trade or investment' in some TIPs sets a high threshold, ensuring that only significant breaches lead to economic penalties. However, in response to the US' failure to prove its allegations against Guatemala in the US–Guatemala case (it could not establish that Guatemala's actions affected trade or investment),¹⁰⁴ the USMCA shifts the burden of proof through a rebuttable presumption that an alleged violation of environmental or labour commitments affects trade or investment.¹⁰⁵ Developing countries may lack the expertise and resources to effectively counter these claims, as proving a negative is inherently challenging. This shift expands the scope of the offence provision in a way that could disproportionately impact developing countries.

Monetary assessment may be more desirable for developing countries as it is a one-off payment that would be less harmful to their economies, particularly where the payment is calculated at a capped amount. For example, CAFTA-DR states that the amount of the monetary assessment is capped at 50% of the level of concessions the dispute settlement panel determines to be of equivalent effect to the non-conforming measure, or if the dispute settlement panel has not determined the level, 50% of the level proposed by the complaining party.¹⁰⁶ Where monetary assessments are directed into a fund that is used to support initiatives aimed at improving compliance,¹⁰⁷ there is significant potential for enhancing compliance within TIPs by addressing the causes of non-compliance, offering a more supportive and constructive path to fulfilling TSD commitments. In contrast, if the complaining party keeps the monetary assessment, this approach does not necessarily support the responding party in rectifying the non-compliance, thus not addressing the underlying issues. Monetary assessments

¹⁰² Ibid 78.

¹⁰³ Prévost and Alexovičová (n 37) 249.

¹⁰⁴ Cathleen D Cimino-Isaacs, 'Labor Enforcement Issues in U.S. FTAs' (Report No IF10972, 23 March 2023) <<https://crsreports.congress.gov/product/pdf/IF/IF10972>>.

¹⁰⁵ Ilaria Espa, 'Enforcing Sustainability Obligations: Adjudication and Post-Adjudication Enforcement' in Geraldo Vidigal and Kathleen Claussen (eds), *The Sustainability Revolution in International Trade Agreements* (Oxford University Press, 2024) 218, 222.

¹⁰⁶ CAFTA-DR art 20.16.6.

¹⁰⁷ CAFTA-DR art 20.16.7.

that flow back to the responding party to assist with compliance may be considered the most favourable option. Despite this, developing countries require significant financial resources and expertise to properly represent themselves in proceedings. Therefore, TIPs should include provisions for capacity-building funded by developed countries to ensure that developing countries can properly deal with their non-compliance.

4.2. Non-Binding Adjudicatory Mechanisms

Like a dispute settlement panel, a panel of experts examines the matter in question, issues a report containing its findings on whether the relevant measure complies with the relevant provisions, reasons for its findings, and recommendations for resolving the matter.¹⁰⁸ If the panel of experts makes a finding of non-compliance, the parties must discuss measures to implement taking into account the report, decide on an action plan to implement it, or make their best efforts to accommodate the recommendations.¹⁰⁹ Depending on the TIP, the responding party must inform the complaining party, DAGs, relevant committee, and/or relevant stakeholders of the follow-up measures or plan, which will be monitored by the relevant committee.¹¹⁰ Dispute settlement panels and panels of experts often comprise independent experts in areas including environmental or labour law,¹¹¹ which may give their decisions and recommendations more credibility.¹¹²

4.2.1. Effectiveness

The complaining party, committee, and/or relevant stakeholders' oversight of the responding party's implementation of follow-up measures is understood to hold the responding party accountable and exert pressure on it to comply without the need for retaliatory measures. For the committee's post-dispute monitoring to be effective, it must meet frequently enough with the responding party; most committees only meet annually.¹¹³ Currently, there is no requirement in any TIP for the committee to make the minutes of these meetings public so that the complaining party, and other stakeholders are informed of the responding party's progress in the implementation of follow-up measures.¹¹⁴ On

¹⁰⁸ ILNUK art 13.34.4; EU-Georgia art 243(7).

¹⁰⁹ Prévost and Alexovičová (n 37) 250.; ILNUK arts 13.34.8; EU-Georgia art 243(8); EU-Korea art 13.15.2.

¹¹⁰ ILNUK arts 13.34.8, 13.34.9, 13.34.10; EU-Georgia art 243(8); EU-Korea art 13.15.2. In some TIPs, both parties must inform each other and their respective DAGs of their follow-up measures or plan.

¹¹¹ See, eg, TPP arts 28.9.5, 28.10.1; CAFTA-DR arts 16.7.2, 17.11.2, 20.7.2 (dispute settlement panels); ILNUK art 13.34.3; EU-Korea art 13.5.3.(panels of experts).

¹¹² Joost Pauwelyn, 'The Use of Experts in WTO Dispute Settlement' (2002) 51(2) *International and Comparative Law Quarterly* 325, 331 <<https://doi.org/10.1093/iclq/51.2.325>>.

¹¹³ Prévost and Alexovičová (n 37) 250.

¹¹⁴ *Ibid.*

one hand, public scrutiny could enhance the prospect of compliance, but on the other hand, as discussed above, reputational consequences can have significant economic consequences for developing countries.¹¹⁵

The effectiveness of the panel of experts is shown by Korea's swift implementation of follow-up measures after the release of the report in the EU-Korea labour dispute.¹¹⁶ Korea quickly ratified three of the core ILO Conventions at issue and was preparing to ratify the fourth one, agreed to undertake a research project to identify the domestic provisions that need to be amended to ensure conformity with the Conventions, reviewed these newly implemented amendments, and held a Civil Society Forum with the EU and Korean DAGs.¹¹⁷ The significant reputational consequences of non-compliance with the report may also have spurred these measures.¹¹⁸

4.2.2. Desirability for Developing Countries

Developed countries' capacity constraints can disadvantage them in a similar way as binding adjudicatory mechanisms with respect to their ability to navigate the dispute settlement process and rectify non-compliance, but non-binding adjudicatory mechanisms are clearly more advantageous for developing countries than binding adjudicatory mechanisms as the former does not involve the prospect of sanctions. Similar to dispute settlement panel proceedings, the 'sustained or recurring action' and 'in a manner affecting trade or investment' limitations in some TIPs shield developing countries from adverse findings by panels of experts in cases where the non-compliance is not significant.¹¹⁹

Like in dispute settlement panel proceedings, developing countries will only be able to effectively represent their interests if they are adequately resourced and advised.¹²⁰ Currently, there is no institutional support¹²¹ to assist developing countries to effectively represent their interests in panel of experts proceedings, which may put them at a disadvantage in the dispute settlement system. Like binding adjudicatory mechanisms, the formal adjudicatory process of a panel of experts may (as noted above) have significant reputational consequences with attendant

¹¹⁵ Ibid.

¹¹⁶ *Espa* (n 105) 226.

¹¹⁷ Ibid.

¹¹⁸ See Part 1.1.2., which discusses reputational consequences and their flow-on economic effects on a country.

¹¹⁹ See Part 4.1.2.

¹²⁰ See Part 4.1.2.

¹²¹ An example of institutional support is the Advisory Centre on WTO Law, which provides legal assistance to developing countries for free or at discounted rates. See 'Developing Countries in WTO Dispute Settlement', WTO Organization (Web Page) <https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c11s2p2_e.htm>.

economic implications.¹²² It would be more desirable for developing countries if developed countries were to assist developing countries to comply with the panel of experts' report. This allows the responding party to draw on the expertise of the other party's institutions for the follow-up measures and plans, which alleviates the fiscal and administrative burden that would otherwise flow from implementing the panel of experts' report.

IV. CONCLUSION

TSD compliance mechanisms across TIPs may use the same name but they can vary significantly in their form and effectiveness. For this reason, it is difficult to draw an overall conclusion on the effectiveness of each mechanism, instead preferable to adopt a case-by-case approach. This report details several case studies of when these mechanisms did indeed contribute to the realisation of TSD commitments.

As evident through these case studies, often compliance mechanisms are not operating in isolation but are instead working alongside one another to achieve results. This suggests that it is important to take a holistic view when examining the effectiveness of compliance mechanisms.

From the perspective of a developing country government, TSD compliance mechanisms present both advantages and disadvantages. Frequently, the resourcing requirements are an added burden for capacity-constrained parties; however, there are also some mechanisms that have capacity-building elements, which is advantageous for developing countries.

Where a compliance mechanism involves harsh economic or reputational penalties, these are likely to be undesirable, particularly for developing countries that are more susceptible to breaching TSD commitments due to lack of resources or the political backdrop. In these cases, the effectiveness of a compliance mechanism and its desirability for a developing country government might be negatively linked, which creates tension in the TSD space.

¹²² See Part 4.1.2.

ANNEX

I. List of Mapped Agreements

TIP Title	Parties	Status	Date Signed
EFTA-India TEPA (2024)	EFTA; India	Signed (not in force)	10/3/2024
EU-Kenya EPA (2023)	EU; Kenya	Signed (not in force)	18/12/2023
Angola - European Union SIFA (2023)	Angola; EU	Signed (not in force)	17/11/2023
ACP - EU Samoa Agreement (2023)	ACP (African, Caribbean and Pacific Group of States); EU	Signed (not in force)	15/11/2023
Canada - Ukraine Modernized FTA (2023)	Canada; Ukraine	Signed (not in force)	22/9/2023
EU - New Zealand FTA (2023)	EU; New Zealand	Signed (not in force)	9/7/2023
EFTA - Moldova FTA (2023)	EFTA; Moldova	Signed (not in force)	27/6/2023
New Zealand - United Kingdom FTA (2022)	New Zealand; United Kingdom	In force	28/2/2022
Australia - United Kingdom FTA (2021)	Australia; United Kingdom	In force	17/12/2021
Iceland - Liechtenstein - Norway - United Kingdom FTA (2021)	Iceland; Liechtenstein; Norway; United Kingdom	Signed (not in force)	8/7/2021
Israel - Republic of Korea FTA (2021)	Israel; Korea	Signed (not in force)	12/5/2021
EU - United Kingdom Trade and Cooperation Agreement (2020)	EU; United Kingdom	In force	30/12/2020
Moldova - United Kingdom Partnership, Trade and Cooperation Agreement (2020)	Moldova; United Kingdom	In force	24/12/2020
Japan - United Kingdom CEPA (2020)	Japan; United Kingdom	In force	23/10/2020
ECOWAS Common Investment Code (ECOWIC) (2019)	ECOWAS (Economic Community of West African States)	In force	22/12/2019
EU - Viet Nam Investment Protection Agreement (2019)	EU; Viet Nam	Signed (not in force)	30/6/2019

EFTA States - Indonesia EPA (2018)	EFTA; Indonesia	In force	16/12/2018
United States-Mexico-Canada Agreement (USMCA) (2018)	Canada; Mexico; United States of America	In force	30/11/2018
EU - Singapore Investment Protection Agreement (2018)	EU; Singapore	Signed (not in force)	15/10/2018
EU - Japan EPA (2018)	EU; Japan	In force	17/7/2018
Georgia - Hong Kong, China SAR FTA (2018)	Georgia; Hong Kong, China SAR	In force	28/6/2018
EFTA - Türkiye FTA (2018)	EFTA; Türkiye	In force	25/6/2018
Ecuador - EFTA FTA (2018)	Ecuador; EFTA	In force	25/6/2018
Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) (2018)	Australia; Brunei Darussalam; Canada; Chile; Japan; Malaysia; Mexico; New Zealand; Peru; Singapore; United Kingdom; Viet Nam	In force	8/3/2018
Central America - Republic of Korea FTA (2018)	Costa Rica; El Salvador; Honduras; Korea; Nicaragua; Panama	In force	21/2/2018
Australia - Peru FTA (2018)	Australia; Peru	In force	12/2/2018
Armenia - EU CEPA (2017)	Armenia; EU	In force	24/11/2017
Australia - EU Framework Agreement (2017)	Australia; EU	In force	7/8/2017
China - Hong Kong CEPA Investment Agreement (2017)	China; Hong Kong, China SAR	In force	28/6/2017
Canada - EU CETA (2016)	Canada; EU	Signed (not in force)	30/10/2016
EFTA - Georgia FTA (2016)	EFTA; Georgia	In force	27/6/2016
EU - SADC EPA Group Agreement (2016)	Botswana; Eswatini; EU; Lesotho; Mozambique; Namibia; South Africa	Signed (not in force)	10/6/2016
EFTA-Philippines FTA (2016)	EFTA; Philippines	In force	28/4/2016
EU - Kazakhstan EPCA (2015)	EU; Kazakhstan	In force	21/12/2015
China - Korea, Republic of FTA (2015)	China; Korea	In force	1/6/2015

Eurasian Economic Union - Viet Nam FTA (2015)	Eurasian Economic Union; Viet Nam	In force	29/5/2015
Korea, Republic of - New Zealand FTA (2015)	Korea; New Zealand	In force	23/3/2015
Japan - Mongolia EPA (2015)	Japan; Mongolia	In force	10/2/2015
Canada - Korea, Republic of FTA (2014)	Canada; Korea	In force	22/9/2014
EU - Georgia Association Agreement (2014)	EU; Georgia	In force	27/6/2014
EU - Moldova Association Agreement (2014)	EU; Moldova	In force	27/6/2014
EU - Ukraine Association Agreement (2014)	EU; Ukraine	In force	27/6/2014
Australia - Korea, Republic of FTA (2014)	Australia; Korea	In force	8/4/2014
Canada - Honduras FTA (2013)	Canada; Honduras	In force	5/11/2013
New Zealand - Taiwan Province of China ECA (2013)	New Zealand; Taiwan Province of China	In force	10/7/2013
China - Switzerland FTA (2013)	China; Switzerland	In force	6/7/2013
Bosnia and Herzegovina - EFTA FTA (2013)	Bosnia and Herzegovina; EFTA	In force	24/6/2013
EFTA - Costa Rica - Panama FTA (2013)	Costa Rica; EFTA; Panama	In force	24/6/2013
Colombia - Korea, Republic of FTA (2013)	Colombia; Korea	In force	21/2/2013
Central America - EU Association Agreement (2012)	CACM (Central American Common Market); EU	In force	29/6/2012
Colombia - Ecuador - EU - Peru Trade Agreement (2012)	Colombia; Ecuador; EU; Peru	In force	26/6/2012
China - Japan - Korea, Republic of Trilateral Investment Agreement (2012)	China; Japan; Korea	In force	13/5/2012
EFTA - Montenegro FTA (2011)	EFTA; Montenegro	In force	14/11/2011
EFTA - Hong Kong FTA (2011)	EFTA; Hong Kong, China SAR	In force	21/6/2011
Korea - Peru FTA (2011)	Korea; Peru	In force	21/3/2011

Australia - New Zealand Investment Protocol (2011)	Australia; New Zealand	In force	16/2/2011
Canada - Panama FTA (2010)	Canada; Panama	In force	14/5/2010