

What is There to Enforce? Multilateral Agreements and Standards in the Trade and Sustainable Development Chapters of the EU Free Trade Agreements

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Chapter 7

What is There to Enforce? Multilateral Agreements and Standards in the Trade and Sustainable Development Chapters of the EU Free Trade Agreements



Saide Esra Akdogan

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Abstract For years, the discussions on the enforceability of the Trade and Sustainable Development (TSD) chapters of the European Union (EU) Free Trade Agreements (FTAs) focused on the shortcomings of the institutional mechanism. Stakeholders have criticized the collaborative approach where no sanctions were available for breaches, combined with the exclusion from the general Dispute Settlement Mechanism (DSM) of the FTA. In 2022, the European Commission announced a more assertive approach to remedy these shortcomings. Long-awaited developments in the procedural area raise questions about the substantive content of the TSD chapters. This Chapter aims to provide the needed reality check on to what extent this assertive approach in the procedure is backed up by the substance of the obligations.

This chapter is based on the Chapter 5—Article bringing obligations regarding multilateral agreements and standards in Akdogan, S. E. (2024). *Decrypting Sustainability in EU Free Trade Agreements: Substantive content and the enforceability of the Trade and Sustainable Development chapters*. [Thesis fully internal (DIV), University of Groningen]. University of Groningen. In detail analysis of the substantive content of other TSD articles can be found in the other chapters of the said dissertation.

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Through textual analysis, the Chapter scrutinizes multilateral labor and environmental standards articles under all the FTAs with a TSD chapter to date and assesses the commitments to explore the trends in the EU's approach. It looks at the clarity of the language used; the substance, nature, and the enforceability of the obligations.

Keywords European Union · Free trade agreements · Trade and sustainable development chapters · European Commission · Enforceability · Substantive obligations · MEAs · ILO conventions

7.1 Introduction

Currently, TSD chapters are excluded from the general Dispute Settlement Mechanism (DSM) of EU Free Trade Agreements (FTAs).¹ Instead, the parties have recourse to a Panel of Experts (PoE) which is the main body of a TSD DSM if government consultations fail.² The PoE can provide suggestions³ but there is no follow-up mechanism or sanction for non-compliance. This *status quo* led to intense criticisms towards the enforcement of TSD chapters, and the '*compliance gap*' between the commitments undertaken and their realization has become the center of the discussion.⁴

The Commission engaged in dialogue with stakeholders several times over the years to improve the TSD chapters which resulted in non-papers and communications.⁵ A need for a more assertive approach has been a recurring theme. Several stakeholders, including the European Parliament, had called for expanding the standard DSM of the FTAs to the TSD chapters and recourse to trade sanctions in the event of breaches.⁶ Up until now, the Commission has rejected these suggestions.

The communication of the Commission of June 2022 changed this situation.⁷ The new assertive approach will extend the compliance stage of the DSM of the FTA to monitor the implementation of the PoE report.⁸ Additionally, for the first time, the use of trade sanctions has been named as a possible last-resort option for breaches of the Paris Agreement and fundamental ILO conventions.⁹ However, for all EU FTAs

¹ See for example Article 13.16, Free trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, Official Journal of the European Union, L 127, 14 May 2011, available at <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=OJ%3AL%3A2011%3A127%3ATOC>, last access in 05.11.2022 [South Korea FTA].

² See for example Article 13.15 (1), South Korea FTA.

³ See for example Article 13.15 (2), South Korea FTA.

⁴ See for example Prévost and Alexovičová 2009; European Economic and Social Committee 2018; Gruni and Bronckers 2019; Harrison et al. 2019; Krämer 2021.

⁵ European Commission 2017; 2018; 2022.

⁶ European Parliament 2016.

⁷ European Commission 2022.

⁸ European Commission 2022.

⁹ European Commission 2022.

that are currently in force, the procedure remains the same until they are updated. This is except for the New Zealand FTA, which came into force on May 1, 2024, fleshing out the new approach in an FTA for the first time.¹⁰

These procedural improvements to the TSD enforcement system are certainly hopeful. These changes, however, can only have a meaningful effect on the enforcement of the TSD chapters if they are backed up by legally binding obligations in the substantive articles. The question, therefore, remains whether the TSD content also needs a stepping up to match the new procedural approach. Only then can we talk about the integrated assertiveness of the TSD chapters.

Against this background, this Chapter addresses the following question: “*What is the level of enforceability of TSD chapters substantive obligations regarding multi-lateral labor and environmental standards?*” It looks at multilateral labor standards and agreements and the multilateral environmental agreements articles which are one of the main sources of substantive obligations regarding labor and environment in the TSD chapters with a comparative perspective based on doctrinal constructivism.¹¹

This necessitates an interpretive exercise.¹² Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT) are accepted to reflect customary international law on treaty interpretation and applied as such by international courts.¹³ Although the scope of VCLT in principle only covers the international agreements of states,¹⁴ The Court of Justice of the European Union (CJEU) has consistently applied VCLT rules of interpretation to the international agreements of the EU.¹⁵ International agreements of the EU also include the EU FTAs. Accordingly, they

¹⁰ EU-New Zealand FTA, available at https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/new-zealand/eu-new-zealand-agreement_en, last access on 13.05.2024 [New Zealand FTA].

¹¹ Von Bogdandy 2009; van Gestel and Micklitz 2011.

¹² “*Whenever a subject of international law invokes, applies or goes about implementing a treaty, it can only do so on the basis of a certain understanding of its terms, ergo on the basis of an interpretation.*” Dörr and Schmalenbach 2018, p. 567.

¹³ For an example of ICJ’s case law see: Territorial Dispute (Libyan Arab Jamahiriya/Chad), 1994, para 41; Oil Platforms (Islamic Republic of Iran v. United States of America), 1996, para 23). A Kasikili/Sedudu Island (Botswana v. Namibia) “*Customary international law found expression in Article 31 of the Vienna Convention*”, para 18. For an example of WTO Appellate Body’s case law see I.3.1.1 US—Gasoline, p. 17, DSR 1996:I, para 16.

¹⁴ Article 1, VCLT, United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331. [VCLT] is titled *Scope of the present convention* and states that “*The present Convention applies to treaties between States*” and Article 2 (1) (a), VCLT defines a treaty as “*an international agreement concluded between States [...]*.” For the international agreements of international organization, a separate agreement was adopted by ILC in 1986: Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (VCLT-IO) which is yet to come in force. Some authors have noted the gap in CJEU’s reasoning as to why it is the Article 31 VCLT and not the identical Article 31 of VCLT-IO that applies, see for example Odermatt 2021. In practice it makes little difference to which Convention the CJEU refers to. The CJEU applies the Article 31 VCLT in its capacity to reflect customary international law and Article 31 VCLT-IO, as it is identical to Article 31 VCLT, necessarily shares this status.

¹⁵ Agreement on the European Economic Area 1992, OJ 1994 L 1/3 (Case T-115/94, Opel Austria).

should be interpreted “*in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*”¹⁶

The novelty of the study lies in its focus on the substantive obligations under the TSD chapters and the background of the recent assertive approach the EC has announced for the procedural aspects that the study tests this substantive content against. The doctrine¹⁷ almost exclusively focused on the procedural shortcomings surrounding the TSD chapters, and policy suggestions on improvements. Studies of this nature often focus on either labor standards or environmental protection. Two studies have been identified that also cover some of the substantive content.¹⁸ In both studies, the substantive content is a short part of the articles before moving on to the procedural aspects.

The present Chapter aims to add to these studies through an extensive coverage of all EU FTAs with a TSD chapter to this date, both environmental and labor-related obligations, and through its exclusive focus on the substantive content of these articles and their clarity and enforceability. Additional value is provided with an outlook on an integrated assertiveness of the TSD, both procedurally and substantively, following the recent approach of the European Commission.

Before the analysis of the substantive obligations, the role of the PoE within the TSD system should be looked at. The PoE is the second tier of the TSD DSM after the first tier of government consultations.¹⁹ However, being the only body of the TSD DSM, the PoE naturally gains the function of being an interpretive body. Where the articles of the TSD chapter fail to provide clarity, the interpretation made by the PoE is key in understanding the obligations under the articles and subsequently increasing their enforceability. Hence, the only example of the TSD DSM being triggered to date, the EU-South Korea dispute²⁰ regarding the multilateral labor standards and the report delivered thereunder will be referred to throughout the analysis below.

Although preferable to no guidance or interpretation at all, clarity through the DSM has disadvantages. Firstly, the interpretations of PoE are dependent on a dispute being brought before the PoE on a specific provision. Considering the scarce number of disputes so far with only a single example and the hesitance of the parties to

GmbH v. Council of the European Union [EU:T:1997:3]), Brita v Hauptzollamt Hamburg Hafen, C-386/08, EU:C:2010:91, para 7.4; IATA and ELFA, C-344/04, EU:C:2006:10.

¹⁶ Article 31, VCLT.

¹⁷ See Prévost and Alexovičová 2019; Harrison et al. 2019; Van den Putte 2015; Nissen 2022.

¹⁸ Van't Wout 2022; Bronckers and Gruni 2021; Füller 2018.

¹⁹ For example, see Article 13.16, South Korea FTA: “*For any matter arising under this Chapter, the Parties shall only have recourse to the procedures provided for in Articles 13.14 and 13.15.*” For more information on the dispute settlement mechanism of the TSD chapters see Velut et al. 2022.

²⁰ For a timeline and all documents of the dispute see Bilateral Disputes> Korea Labour Commitments on the website of the European Commission, available at https://policy.trade.ec.europa.eu/enforcement-and-protection/dispute-settlement/bilateral-disputes/korea-labour-commitments_en, last access on 22.11.2022.

trigger the process, this is likely to be a long wait before a set of PoE reports on TSD accumulate.

Secondly, PoEs are established per dispute on an *ad hoc* basis.²¹ There is no permanent institution. This is a challenge for the consistency of interpretations if different PoEs interpret the same words or articles differently. Investment treaty arbitration, for example, has faced this problem chronically.²² Decentralized DSM, broad legal terms, and the investment law being a relatively new area of law have been identified as contributing factors to the inconsistency of arbitral awards.²³ The parallels in these characteristics make it very likely the same problems to be experienced by the TSD system as well in a future where more PoE have issued reports.

For these reasons, the ideal situation is for the primary law, the articles themselves, to provide clarity itself. It is therefore crucial that the EC does not only step up the procedural aspects of the TSD but also its substantive content and opt for making clearer and better enforceable versions of the articles in the future. With this in mind, we will now look at the substantive content of the TSD obligations.

7.2 Multilateral Labor Standards and Agreements

The first paragraph of the *Multilateral Labour Standards and Agreements* article typically reaffirms the importance of international cooperation in labor rights matters. The *2006 Ministerial Declaration on Full Employment and Decent Work*,²⁴ which appears in some FTAs seems to be abandoned and replaced with “*full and productive employment and decent work for all*” instead. Such a first paragraph shows preamble characteristics in operative articles. Following this reaffirmation, the *Multilateral Labour Standards and Agreements* article typically goes on and regulates two main categories of obligations:

- Ratification obligation: Ratifying fundamental and non-fundamental ILO conventions.²⁵

²¹ For example see Article 13.15 (3), South Korea FTA.

²² See Franck 2004; Kaufmann-Kohler 2008, p. 541; Cate 2012, p. 418.

²³ International Bar Association 2018.

²⁴ 2006 Ministerial Declaration of the UN Economic and Social Council on Full Employment and Decent Work, available at <https://digitallibrary.un.org/record/593242>, last access on 13.07.2023.

²⁵ Initially, eight ILO conventions were classified as fundamental ILO conventions by the Governing Body of the ILO. With the amendments over the years, there are currently eleven of them: (1) Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), (2) Right to Organise and Collective Bargaining Convention, 1949 (No. 98), (3) Forced Labour Convention, 1930 (No. 29) (and its 2014 Protocol), (4) Abolition of Forced Labour Convention, 1957 (No. 105), (5) Minimum Age Convention, 1973 (No. 138), (6) Worst Forms of Child Labour Convention, 1999 (No. 182), (7) Equal Remuneration Convention, 1951 (No. 100), (8) Discrimination (Employment and Occupation) Convention, 1958 (No. 111), (9) Occupational Safety and Health Convention, 1981 (No. 155), (10) Promotional Framework for Occupational Safety and Health Convention, 2006 (No.

- Implementation obligation: Respecting, promoting, and realizing certain principles in parties’ laws and practices.²⁶

7.2.1 *Implementation Obligation*

To illustrate, the related paragraph in the EU—South Korea FTA²⁷ reads as follows:

“The Parties, in accordance with the obligations deriving from membership of the ILO and the ILO Declaration on Fundamental Principles and Rights at Work²⁸ and its Follow-up, adopted by the International Labour Conference at its 86th Session in 1998, *commit to respecting, promoting, and realizing*, in their laws and practices, the principles concerning fundamental rights, namely:

- (a) freedom of association and the effective recognition of the right to collective bargaining;
- (b) the elimination of all forms of forced or compulsory labor;
- (c) the effective abolition of child labor; and
- (d) the elimination of discrimination in respect of employment and occupation.

The Parties reaffirm the commitment to effectively implementing the ILO Conventions that Korea and the Member States of the European Union have ratified respectively.”²⁹

Commitment to respect, promote, and realize these fundamental rights are repeated in each TSD. While the wording differs slightly under some agreements, the essence of the obligation stays the same. The PoE of the EU-South Korea dispute dealt with what is meant by this article which is a good place to start in understanding the obligation.

187). More information available at <https://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/>, last access on 22.11.2022.

²⁶ According to the VCLT “*ratification [...] means the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty.*” (Article 2 (1) (b), also see Article 14) Implementation however regards to the timeframe after the ratification of a treaty where the parties are to perform obligations they undertook by ratifying. While ratification is a single procedural act, implementation regards to the functioning of the treaty and a process where the parties make necessary changes to their domestic law and practices to adhere to the articles of the treaty.

²⁷ Article 13.4 (3), South Korea FTA.

²⁸ The ILO Declaration on Fundamental Principles and Rights at Work which was adopted in 1998 and amended in 2022 affirms the obligations and commitments that are inherent in membership of the ILO which are listed below under the 13.4 of the South Korea FTA. See ILO Declaration on Fundamental Principles and Rights at Work, available at <https://www.ilo.org/declaration/lang-en/index.htm>, last access on, 05.11.2022.

²⁹ These rights are enshrined under the initial eight fundamental ILO conventions. See *supra note 30*. A safe and healthy working environment was added to the ILO Declaration on Fundamental Principles and Rights at Work through the amendment of June 2022 as a fifth fundamental principle. See *supra note 38*.

The EU claimed that South Korea failed to “*respect, promote and realize*” certain aspects of freedom of association as understood in the ILO system: the definition of workers under South Korea labor law, the eligibility for trade union leader candidacy, and workers’ protection due to union membership.³⁰ South Korea claimed that the word *to commit* only expressed an aspiration to “*engage in good faith behavior toward the overall objective of respecting, promoting and realizing the principles,*”³¹ thus suggesting an effort obligation. South Korea stated that “*“commit to respecting, promoting, and realizing’ means something less than ‘shall respect, promote and realize’.*”³²

The PoE rejected this interpretation of the word *to commit* and declared that the ordinary meaning of the word is “*to bind oneself to a course of action*” and that the article represents a legally binding obligation.³³ The choice to use the word “*commit*” instead of, for example the word “*will*” was appropriate as the Parties are referring to an already existing external obligation arising from ILO membership. This referral however does not prevent the obligation of respecting, promoting, and realizing from being a stand-alone obligation under the FTA. The PoE found that the parties “*reaffirm the existing obligations [...] as a separate and independent obligation*” under the TSD chapter.³⁴

Therefore, the PoE affirmed the word “*commit*” does not only show an aspiration or require a showing of efforts towards the general aim of the principles, but creates a separate, independent, and binding legal obligation arising from the TSD. Thus, the legal obligation on this matter arises not from the 1998 ILO Declaration but from Article 13.4.3 of the FTA, i.e., the multilateral labor standards and agreements article.³⁵

The PoE then went on to analyze the meaning of the words respecting, promoting, and realizing and found the following:

- respecting: a negative obligation to “*show respect for, refrain from injuring, harming, insulting, interfering with, or interrupting*”³⁶
- promoting: a positive obligation to “*further the development, progress, or establishment of (a thing), encourage, help forward, or support activity*”³⁷
- realizing: “*commitment to attain or make real*”³⁸

³⁰ PoE of Experts Proceeding Constituted Under Article 13.15 of The EU-Korea Free Trade Agreement Report of The PoE of Experts, 20 January 2021, available at https://trade.ec.europa.eu/doclib/docs/2021/january/tradoc_159358.pdf, last access on 05.11.2022, pp. 53–70 [Report of the PoE of Experts].

³¹ Report of the PoE of Experts, para 126, Korea Written Submissions para 41.

³² Ibid.

³³ Report of the PoE of Experts, paras 124–126.

³⁴ Report of the PoE of Experts, para 107.

³⁵ Ibid.

³⁶ Report of the PoE of Experts, para 131.

³⁷ Report of the PoE of Experts, para 132.

³⁸ Report of the PoE of Experts, para 133.

In this context, an obligation to respect, promote, and realize involves both a negative obligation to refrain from interfering or harming as well as a positive obligation to further develop, progress and make necessary changes. Thus, any law or common practice that intervenes with these fundamental rights should be rectified by the state as well as being on course for further improvement.

It is important to point out how the PoE depends its analysis only on the ordinary meaning of the words used in the article. VCLT Article 31 has other elements of interpretation as well: the context, object and purpose of the treaty at hand. While interpreting a treaty article, all these elements must be taken into account equally, with the same status and authority.³⁹ None is superior or inferior to the others.⁴⁰ They are not a list of steps but rather constitute as a single exercise where they are to be applied cumulatively.⁴¹

The PoE is not alone in giving more weight to the ordinary meaning and regards others “*as discretionary or supplementary*.”⁴² Even the International Court of Justice (ICJ), in some cases, stated “*interpretation must be based above all upon the text of the treaty*.”⁴³ Some find that VCLT Article 31 indeed follows a “*textual primacy*”⁴⁴ and that the text of a treaty “*obviously counts more*”.⁴⁵ Such a deduction can only be possible by an overly textual interpretation of Article 31 itself⁴⁶ which is an “*excessive molecularization*” of Article 31.⁴⁷ Without diving further into public international law, this discussion suffices to reasonably conclude that the PoE exhibited an overreliance on the ordinary meaning of the terms used.

Alongside the preambles and articles on the objectives of the FTA in general, each TSD chapter starts with an article titled *Context and Objectives*.⁴⁸ These should, as per the regime of Article 31 VCLT, be considered while interpreting a TSD. PoE could have provided a stronger ground for its arguably liberal interpretation of implementation obligation through the importance given to sustainable development by the context of the FTA and its objectives regarding sustainable development.

Having noted this, on the EU’s claim regarding South Korea’s failure to respect, promote, and realize related principles, the PoE ruled that South Korea indeed was in breach of this obligation under the TSD chapter and advised South Korea to make the necessary changes to its domestic law. These changes included the removal of certain provisions and amending the definitions of certain terms. Thus, the remedy of a breach of this article appears to change the domestic law and bring the measure in question in conformity with the ILO Conventions.

³⁹ Regan 2017, p. 1050.

⁴⁰ Jennings and Watts 1992, p. 114.

⁴¹ Gardiner, p. 172.

⁴² For possible reasons for such behavior see Villiger, pp. 115–117.

⁴³ ICJ, Territorial Dispute, para 41; Legality of Use of Force, para 100.

⁴⁴ Orakhelashvili, p. 309.

⁴⁵ Ratner p. 82.

⁴⁶ Villiger p. 122.

⁴⁷ Ibid.

⁴⁸ For example Article 13.1, South Korea FTA.

In addition to these fundamental rights, under some FTAs⁴⁹ the parties reaffirm their commitment to effectively implement other ILO conventions and recommendations that they are party to. In later FTAs, the conventions covered by the effective implementation obligation are listed as “*the fundamental, the priority and other ILO conventions*”.⁵⁰ Formulation of this obligation under the Agreement in Principle (AiP) with Mexico⁵¹ stands out with its binding language, which uses the word *shall*, and states that the parties “*shall respect, promote and realize*”⁵² these other ILO documents. Effective implementation obligation and what it entails is dealt with below under the Multilateral Environmental Agreements (MEAs) article where it has a more central role.

For now, it suffices to underline that in the light of the interpretation of the PoE of the word *commit*, both *shall* and *commit* are binding and create obligations for the parties. Bearing in mind the aforementioned disadvantages of providing clarity through PoE reports, another PoE could adopt a less/non-binding interpretation of the word to *commit*, similar to what South Korea claimed. The word *shall* doubtlessly create a binding obligation, is therefore less likely or prone to be interpreted fundamentally differently by another PoE, and as such should be preferred over the word *commit* in future FTAs.

7.2.2 Ratification Obligation

The second category of obligations regarding the multilateral labor standards is the ratification obligation. One of the four claims raised by the EU in the EU-South Korea dispute regards this obligation. The degree of clarity and the language used vary per agreement and category of ILO conventions, i.e., fundamental, and non-fundamental.⁵³ Three versions of the article are observed under different FTAs which can be seen in Table 7.1. An analysis of each version of the article follows.

⁴⁹ See Table 7.1 for the exact distribution. FTAs with Georgia, Central America, Singapore, Moldova, Vietnam.

⁵⁰ Priority conventions are a set of conventions that The ILO Governing Body has designated as governance (priority) instruments and encourages the member States to ratify them. Currently there are four priority conventions: Labour Inspection Convention, 1947 (No. 81), Employment Policy Convention, 1964 (No. 122).

Labour Inspection (Agriculture) Convention, 1969 (No. 129), Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144). See <https://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm>, last access on 28.11.2022.

⁵¹ EU-Mexico The agreement in principle as announced on 21.04.2018, available at https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/mexico/eu-mexico-agreement/agreement-principle_en, last access on 05.11.2022 [Mexico AiP].

⁵² Article 3(3) under Chapter XX, Mexico AiP.

⁵³ See supra note 26.

Table 7.1 Different levels of commitment to ratify ILO conventions chronologically. *Source* Author

Year of the FTA	FTA	Fundamental ILO conventions		Non-fundamental ILO conventions		
		Continued and sustained efforts	Exchange of information	Continued and sustained efforts	Consideration	Exchange of information
2011	South Korea	X		X		
2013	Central America					X
2013	Andean Community					X
2016	Moldova				X	X
2016	Georgia				X	X
2017	Ukraine				X	
2018	Singapore	X	X		X	X
2018	Armenia				X	X
2019	Vietnam	X	X		X	X
2019	Japan	X	X			X
2020	Canada	X	X			X
2023	New Zealand	X	X			X
2023	Kenya	X	X			X
–	Mexico	X	X			X
–	Australia	X	X			X
–	Mercosur	X	X	X		X
–	India	X	X			X
–	Chile		X			X
–	Indonesia		X			X

In the context of this study ‘non-fundamental ILO conventions’ are used to cover any ILO convention that is not fundamental, thus both priority and other conventions. The consideration obligation in the Singapore FTA is weaker than the others. “*Parties will also consider the ratification [...], taking into account domestic circumstances.*” Domestic circumstances can be used as an argument as to why a party has not considered ratification. Similarly, the continued and sustained efforts obligation in the Japan EPA is weaker than the rest. The commitment is left to the parties’ initiative for the agreements they consider appropriate. As even the South Korea version of the article, which has a clear obligation not left to parties’ appreciation was not enough to convince the PoE of a violation amid a specific schedule, the author believes that successfully enforcing this article is not possible.

7.2.2.1 Continued and Sustained Efforts

Different categories of ILO conventions are subject to different terms regarding their ratification by the parties. The strongest language among the versions of the article reads as follows:

“The parties will make continued and sustained efforts towards ratifying the fundamental ILO conventions.”⁵⁴

As seen in Table 7.1, except for FTAs concluded between 2013–2017, this version is dominant for the Fundamental Conventions. The highest priority seems to be given to these conventions by the parties. What does this highest priority entail? “*Continued and sustained efforts*” is a formulation that requires the party to show efforts. Also called a “*best endeavor obligation*”,⁵⁵ it demands no result. Therefore, a party not ratifying the relevant conventions will not constitute as a breach as long as it can show that proper efforts were made. In other words, a party is obliged to merely show efforts towards ratification but the ratification itself is not guaranteed or promised. Thus, in case of a breach, the required remedy would be for the breaching party to start showing efforts. The question that naturally arises from here is: when are continued and sustained efforts demonstrated or, more importantly, when are they not? When has a party failed to show such efforts? What is the legal threshold for a breach?

The EU-South Korea dispute settlement proceedings are once again a useful tool to answer these questions. Firstly, South Korea contested that the word *will* is less strong than the word *shall* and indicated more of an intention. However, the PoE found that considering the absence of any evidence to suggest otherwise and the general rules of treaty interpretation, these two words are used interchangeably,⁵⁶ and *will* establish a binding legal obligation.⁵⁷

Regarding the interpretation of the phrase *continued, and sustained efforts*, the threshold applicable for the required efforts is one of the most central parts of the PoE report. South Korea asserted a passive meaning of not sliding back from the *status quo* or not taking measures jeopardizing future ratification.⁵⁸ The EU submitted a more active interpretation of taking all appropriate measures uninterruptedly.

The PoE opted for an interpretation somewhere in the middle of what the parties claimed. Accordingly, while the Article creates an ongoing legally binding obligation,⁵⁹ it requires ‘*best endeavors*’ from the parties to ratify the fundamental ILO conventions. Without specific targets or a schedule foreseen, the obligations are aimed at the efforts and not at results. According to the PoE, this is a standard higher

⁵⁴ Article 13.4 (4) South Korea FTA.

⁵⁵ Bronckers and Gruni 2021, p. 26.

⁵⁶ Report of the PoE of Experts, para 263.

⁵⁷ Report of the PoE of Experts, paras 268–269.

⁵⁸ Report of the PoE of Experts, pp. 73–74.

⁵⁹ Report of the PoE of Experts, p. 75.

than merely protecting the *status quo* or taking minimal steps but lower than taking all measures available.⁶⁰

The PoE interpreted this phrase as requiring ‘*best endeavors*’ from the parties. Without specific targets or a schedule, there being no ratification of any of the four conventions in question within the eight years of the FTA being in force did not amount to a breach of the article, although it was “*less than optimal.*”⁶¹ The PoE pointed to efforts made by South Korea “*at least since 2017*” which were also acknowledged by the EU.⁶² Among these efforts are the foundation of an expert group to analyze the differences between the ILO conventions and the national law and putting the ratification of the conventions into the agenda of the parliament.⁶³ The PoE found that while slow, these satisfied the legal threshold,⁶⁴ without mentioning what happened between 2011 and 2017.

There are several aspects of the decision of the PoE that will have a positive effect on the EU’s TSD enforcement. Being the first of its kind and, therefore a precedent, the establishment of jurisdiction by the PoE carries a lot of importance for similar future proceedings. South Korea claimed that the issues brought forward by the EU were not covered by the TSD chapter because they had no direct effect on trade.⁶⁵ It based this argument on Article 13.2.1 of the FTA stating that ‘*Except as otherwise provided in this Chapter, this Chapter applies to measures adopted or maintained by the Parties affecting trade-related aspects of labor and environmental issues.*’

The PoE rejected this argument and assumed jurisdiction. According to the PoE, Article 13.4.3 regarding the ratification of ILO conventions is one of these exceptions for issues having to relate to trade.⁶⁶ A decision otherwise would have ruled out the option to invoke DSM foreseen for TSD chapters unless a direct and provable link with trade is present. Such a link is a hard, if not impossible, bar to reach, as seen in the example of the US-Guatemala labor dispute.⁶⁷

Similarly, the establishment of breaches of South Korea regarding freedom of association is an important win and will enable various actors, from the EU to local NGOs, to increase the pressure on South Korea for improvement. From the EU perspective, it is also meaningful that the EU finally showed some teeth regarding TSD enforcement. This is an important message to other countries that the EU can and will initiate proceedings for TSD breaches.

⁶⁰ Report of the PoE of Experts, para 277.

⁶¹ Report of the PoE of Experts, para 292.

⁶² First Written Submission by the European Union, available at <https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/487dcb44-facd-4634-b3bf-1c1f29a156f7/details>, last access on 13.07.2023, paras 79–80 and 93–94.

⁶³ Report of the PoE of Experts, paras 80–82.

⁶⁴ Report of the PoE of Experts, para 293.

⁶⁵ Report of the PoE of Experts, para 56.

⁶⁶ Report of the PoE of Experts, para 63.

⁶⁷ In the very first labour dispute arising from a trade agreement in history the arbitral PoE interpreted the phrase “*in a manner affecting trade*” strictly. The decision of the PoE has been commented on as a “*failure by design*” in Cross 2017 and as making “*it difficult or unworkable to prove*” any breach had such a connection to trade in Banks 2020.

Seen these aspects, a *prima facie* reading can lead some to think of the decision as a victory for the EU. Surely the EU itself sees it that way.⁶⁸ A closer look into the decision reveals, if not the opposite, quite a different picture.

The most important negative outcome of the decision is the PoE's finding no breach of the commitment to show best endeavors for ratification. Some commented that this sends a strong and unfortunate message to other trading partners of the EU.⁶⁹ The message is that despite the calls from the EU and civil society, stalling and showing no effort to ratify the ILO conventions for eight full years is excusable if the trading partner shows '*less than optimal*' efforts in the last few years leading to the proceedings. If the absence of efforts to ratify did not amount to a breach under the oldest new-generation FTA, it is highly unlikely that a more recent one will for a long time to come.

One cannot help but wonder what would have happened had the EU brought the claims of a breach before 2017, before South Korea started showing efforts. Would the PoE then have found a breach of the ratification obligation faced with eight years of inaction and no recent change in this behavior? Considering the central role the efforts since 2017 played in the reasoning, this could have very well been the case. The takeaway for the Commission should be not to be reluctant to trigger the TSD DSM in the future.

The importance of this commitment should also be underlined within the big picture of the TSD chapter. Ratifying the ILO conventions is one of the clearest obligations under TSD. Vagueness and unclear formulation of the articles under the TSD have been a central point in the debate regarding their enforcement. What is vital to see here is that if even one of the most clearly worded articles of these chapters is not enough to establish a breach, the rest surely is not. In this context, the decision has been commented on as showing the need for a stronger language,⁷⁰ as opposed to the EU's narrative of it showing the effectiveness of the cooperation-based approach.⁷¹ A way to remedy these shortcomings and overcome similar future decisions is for the EU to consider including a concrete schedule for the ratification of the ILO conventions and other obligations into the future FTAs.

Some have identified ratifications that took place within a short time after the conclusion of the FTA negotiations as ratifications that "*can be reasonably linked*

⁶⁸ The press release of the EU on the PoE report reads as follows: "*The experts also agreed that the commitment to take steps towards the ratification of fundamental ILO Conventions requires ongoing and substantial efforts. Finally, the PoE confirmed the [obligation] is legally binding.*" It fails to communicate that, despite indeed accepting the legal bindingness of the ratification obligation, the PoE did not find a breach of it, available at https://ec.europa.eu/commission/presscorner/detail/en/ip_21_203, last access on 13.05.2024.

⁶⁹ Gruni 2017; Peers 2021.

⁷⁰ Ruling confirms strong language is needed in TSD chapters, available at <https://www.ogroupforanimals.org/news/ruling-confirms-strong-language-needed-tds-chapters>, last access on 15.07.2023.

⁷¹ The EU has portrayed the report of the PoE as a victory. Executive Vice-President and Commissioner for Trade, Valdis Dombrovskis, stated that the PoE report "*shows the effectiveness of our cooperation-based approach to trade and sustainable development.*" Available at https://ec.europa.eu/commission/presscorner/detail/en/ip_21_203, last access on 14.07.2023.

to the FTA”.⁷² South Korea ratified three of the four fundamental ILO conventions that were the subject of the dispute with the EU within the same year of the PoE report.⁷³ These ratifications of South Korea can be reasonably linked to the report.⁷⁴ Despite the current lack of a compliance mechanism, a PoE report finding a breach can still have the so-called “naming and shaming”⁷⁵ effect and induce change. However, this effect seems to remain incidental. Seven *ratification gaps* remain present for the following countries, each of which has an FTA with the EU, besides the one remaining of South Korea: Singapore, Japan, and Vietnam⁷⁶ are also certainly hopeful for the actual impact of the TSD chapters in improving the labor standards in trading partners’ countries. This can be shown as a success of the soft approach to the TSD enforcement the EU has pursued so far. When all of the ratification gaps disappear remain to be seen.

7.2.2.2 Consideration or Exchange of Information

There are two other versions of the ratification obligation available: obligation to consider the ratification of non-fundamental ILO agreements and exchange of information obligation on the ratification status.

Consideration obligation appears as a standard under the FTAs in the period from 2016 to 2019, starting with the Moldavian FTA and ending with the Vietnamese FTA. The only example outside of this period is the Armenian FTA of 2021. This obligation usually takes the following form: “*The Parties will also consider the ratification of the remaining priority and other conventions [...]*.”⁷⁷

Concerns regarding the enforceability of the “*continued and sustained efforts*” version of the article have already been expressed. Keeping in mind the already low level of enforceability of requiring efforts, the consideration version goes even lower than this level. It requires not even effort but a mere consideration. What naturally comes to mind is how can a state show that it has considered ratifying the related conventions. Considering the interpretation of the PoE for the effort obligation and the standard to meet it, requiring only a consideration does not predict a very bright future for its enforcement. Proving a party failed to consider ratification does not seem possible as this would require proving the absence of consideration altogether. It therefore overlaps with the “*continued and sustained effort*” obligation as to the

⁷² Blot et al. 2022, p. 10.

⁷³ ILO, Ratifications for Republic of Korea, available at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:103123, last access on 05.11.2022.

⁷⁴ Blot et al. 2022, p. 10.

⁷⁵ García 2022, pp. 58–67.

⁷⁶ Blot et al. 2022, p. 10.

⁷⁷ Article 365.4, Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part OJ L 260, 30.8.2014, p. 4-738, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2014.260.01.0004.01.ENG, last access on 05.11.2022 [Moldavian AA].

need to show complete inaction, although the absence of effort should be easier to show than the absence of consideration. The remedy to the breach of consideration is as vague as the obligation itself. If a breach is established, the failing party should start “*considering*” ratification. Exhibition of any consideration should satisfy. This can be the reason why the EU has abandoned the use of the consideration articles.

The trend seems to be going back to the effort obligation for the ratification of fundamental ILO conventions if there is a ratification gap and an exchange of information obligation for the ratification of both fundamental and non-fundamental ILO conventions. The first example of an exchange of information obligation is found under the Central American Association Agreement (AA): “*The Parties will exchange information on their respective situation and advancement as regards the ratification of the other ILO Conventions.*”⁷⁸

This additional obligation can be beneficial to improve the transparency for TSD chapters should this information be made publicly available. However, its enforceability depends on the type of ratification obligation it regards. When combined with consideration, it is unlikely that the exchange of information obligation will create any additional incentive for parties as a simple notification of “*Ratification is considered but no ratification has taken place.*” seems to satisfy this obligation. Thus, even though the obligation to exchange information itself is defined clearly, this does not automatically mean high enforceability. The only possible scenario of claiming and successfully enforcing a breach would be if one of the parties completely disregards the obligation and does not provide any information on the ratification status.

Exchange of information, in combination with continued and sustained efforts towards ratification, however, is clearer in terms of the content of the communication and thus easier to enforce. The parties need to exchange information about the ratification status where they need to show continued and sustained efforts. Therefore, the information should necessarily include what efforts are being shown toward ratification.

The Vietnam and Singapore FTAs seem to be the overlapping era of two versions of the article, regarding ratification as they foresee an effort obligation for the fundamental ILO conventions and a consideration obligation for the other conventions. The proposed text for an AiP with Mercosur on the other hand stands out as the strongest structure for multilateral labor standard obligations so far.⁷⁹ It has a continued and sustained efforts-obligation for all ILO conventions, fundamental and non-fundamental alike, for the first time since the South Korea FTA. In addition, it brings an exchange of information obligation for the ratification of all of the ILO conventions.

⁷⁸ Article 286.3, Agreement establishing an Association between the European Union and its Member States, on the one hand, and Central America on the other, OJ L 346, 15.12.2012, p. 3-2621, available at <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A22012A1215%2801%29>, last access on 05.11.2022 [Central American AA].

⁷⁹ Agreement in Principle announced by the European Commission, 28.06.2019, available at https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/mercosur/eu-mercosur-agreement/text-agreement_en, last access on 05.02.2023 [Mercosur AiP].

This strong version is, however, not repeated in the FTAs that followed. The drafts with India and Kenya go back to the trend of effort obligation for fundamental ILO conventions and exchange of information for other ILO conventions. Chile and Indonesia stand out by only having exchange of information obligation for all ILO conventions, despite both countries having unratified fundamental ILO conventions.⁸⁰ This illustrates the fluctuating and non-uniform treaty practice of the EU. Such weak obligations are quite unlikely to incentivize ratification.

7.3 Multilateral Environmental Agreements

Each TSD chapter in EU FTAs has an article that regulates parties' obligations regarding MEAs. The obligations under this article can be categorized into three whose overview can be seen in Table 7.2.

1. Effective implementation obligation for (certain) MEAs,
2. Ratification obligation and exchange of information on ratification status for certain MEAs,
3. Commitment to the ultimate objective of the United Nations Framework Convention on Climate Change (UNFCCC) and other certain MEAs.

It is important to note that there is no more enforceable-less enforceable relationship between most of them, unlike the obligations regarding multilateral labor agreements. Only the effective implementation obligation has more than one version. For other obligations, there is almost always a single version and the difference between the FTAs is whether or not this version appears.

7.3.1 *Effective Implementation Obligation*

All the TSD chapters bring an obligation for the parties to effectively implement the MEAs, protocols, and amendments that they have ratified. An example of it can be found under the South Korea FTA:

“The Parties reaffirm their commitments to the effective implementation in their laws and practices of the multilateral environmental agreements to which they are party.”⁸¹

⁸⁰ Chile has not ratified C155—Occupational Safety and Health Convention 1981; Indonesia has not ratified C155—Occupational Safety and Health Convention, 1981 (No. 155); P029—Protocol of 2014 to the Forced Labour Convention, 1930. See https://www.ilo.org/dyn/normlex/en/f?p=1000:11210:0::NO:11210:P11210_COUNTRY_ID:102588 and https://www.ilo.org/dyn/normlex/en/f?p=1000:11210:0::NO:11210:P11210_COUNTRY_ID:102938.

⁸¹ Article 13.5 (2), South Korea FTA.

Table 7.2 Categories of obligations regarding MEAs. *Source* Author

Year of the FTA	FTA	Effective implementation			Ratification	Exchange of information on ratification	The ultimate objective of UNFCCC and others
		Reaffirm commitment	Shall	UNFCCC and Paris Agreement*			
2011	South Korea	X					X
2013	Central America	X			X		
2013	Andean Community	X					
2016	Moldova	X				X	X
2016	Georgia	X				X	X
2017	Ukraine	X					
2018	Singapore		X	X			X
2018	Armenia	X		X		X	
2019	Vietnam	X		X		X	
2019	Japan	X		X		X	X
2020	Canada	X				X	
2023	New Zealand		X	X		X	
2023	Kenya		X	X		X	
-	Mexico		X	X		X	
-	Mercosur	X		X		X	
-	Australia		X	X		X	
-	India		X	X		X	
-	Chile		X	X		X	
-	Indonesia		X	X		X	

*Effective implementation of the UNFCCC and the Paris Agreement is always regulated under the separate “Trade and Climate Change” article

However, the varied language changes the nature of the obligation per FTA. Most of the agreements follow the above-given example of the South Korea FTA. What this phrase entails is dealt with below.

The second and stronger version of the article appears consistently in the recent FTAs and only the Singapore FTA among those already in force. This version states that the parties “shall effectively implement” the MEAs that they are parties to which defines the legal obligation more clearly and imperatively and necessitates the result of effective implementation. Parties are not only under a negative obligation to refrain from contradicting the aims of the MEAs but also an active obligation to carry out their effective implementation and enact changes to their national laws if necessary.

The trend of the EU choosing this version in her new FTAs is, therefore, a welcomed one.

Most of the TSDs formulate the obligation to effectively enforce MEAs in an open list where all the MEAs the parties have ratified are covered. All the MEAs the parties ratify in the future automatically fall under the scope, making the article future-proof. On the other hand, this might induce reluctance to agree to this version of the article.⁸²

One exception to this is the Andean FTA which adopted a closed list of MEAs that the parties reaffirm their commitment to effectively enforce.⁸³ This list can be changed by the Trade Committee founded under the FTA.⁸⁴ No future MEA is automatically covered. As the Trade Committee decisions require a positive vote from both parties,⁸⁵ one of the parties could keep future MEAs out of the scope of the effective implementation obligation. Thus, this version is not future-proof. Where possible the treaty makers should opt for the open list approach.

It must be underlined that the recent FTAs of the EU all have a new article titled “Trade and Climate Change” which states that each party “*shall effectively implement the UNFCCC and the Paris Agreement established thereunder.*”⁸⁶ In addition, newer FTAs all have the “*shall*” version of the effective implementation obligation for the MEAs that they are party to. The possible consequences of this will be discussed further below under Section 2.2.1.4.

The Paris Agreement was adopted in December 2015⁸⁷ and the FTAs dated before that naturally do not mention the Paris Agreement but the Kyoto Protocol in the

⁸² This effect relates closely to complementary jurisdiction, i.e., an act of a state constituting a breach not only under the relevant MEA but also the FTA through this article. The notion of complementary jurisdiction is explained further below.

⁸³ Article 270 (2), Trade Agreement between the European Union and its Member States, of the one part, and Colombia, Peru and Ecuador, of the other part, OJ L 354, 21.12.2012, p. 3-4065, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02012A1221%2801%29-20181213>, last access on 05.02.2023 [Andean FTA], reads as follows: “*The Parties reaffirm their commitment to effectively implement in their laws and practices the following multilateral environmental agreements: the Montreal Protocol on Substances that Deplete the Ozone Layer adopted on 16 September of 1987, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal adopted on 22 March 1989, the Stockholm Convention on Persistent Organic Pollutants adopted on 22 May 2001, the Convention on International Trade in Endangered Species of Wild Fauna and Flora signed on 3 March 1973 (hereinafter referred to as “CITES”), the CBD, the Cartagena Protocol on Biosafety to the CBD adopted on 29 January 2000, the Kyoto Protocol to the United Nations Framework Convention on Climate Change adopted on 11 December 1997 (hereinafter referred to as “Kyoto Protocol”) and the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade adopted on 10 September 1998.*”

⁸⁴ Article 270 (3), Andean FTA.

⁸⁵ Article X, South Korea FTA.

⁸⁶ Article 6 (2) (a), Mercosur AiP.

⁸⁷ More information on the Paris Agreement can be found at <https://unfccc.int/process-and-meetings/the-paris-agreement>, last access on 13.07.2023.

effective implementation obligation. CETA stands out as the only FTA that does not mention the Paris Agreement, even though it is dated 2020.⁸⁸

Some of the newer FTAs also include a cooperation obligation, which will not be covered in this study. With these initial considerations, words used in this article should be analyzed to understand what obligation the parties undertake.

7.3.1.1 “Effectively Implement”

To start with, what ‘*effective implementation*’ entails, i.e., when implementation is effective should be defined. This notion is not defined in the TSD itself or has been the subject of a PoE report. Thus, we have to look elsewhere for a possible answer. EU law, where the effective implementation notion also exists, can be an inspiration and show how such a notion is understood at least by one of the FTA partners.

The EU Member States have to implement the directives into national law in an effective way⁸⁹ but are free to choose the form and methods.⁹⁰ Under international law, states undertake to ensure that their domestic laws conform with the international agreements they are party to⁹¹ ensure the applicability and enforceability of the rights arising from these agreements.⁹² This means that the content of the obligation can only be known once put into the context of the obligations arising from a specific MEA.

Thus, parties to the FTAs should ensure that their domestic law conforms with the MEAs that they are parties to, while they are free to choose the means to do so. In case of a failure, the remedy would be removing or amending the domestic law that conflicts with the MEA or putting an end to the domestic practice that is breaching the MEA.

7.3.1.2 “Commitment”

Under the second version of the effective implementation obligation where the parties “*reaffirm their commitment to effectively implement*” the MEAs, we need to look at the meaning of the words ‘*reaffirm*’ and ‘*commitment*’. There is no report of a PoE to guide the interpretation.

⁸⁸ Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, OJ L 11, 14.1.2017, p. 23-1079, available at [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:22017A0114\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:22017A0114(01)), last access on 06.02.2023 [CETA].

⁸⁹ Article 197, Consolidated version of the Treaty on the Functioning of the European Union. OJ C 326, 26.10.2012, pp. 47-390, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT>, last access on 05.11.2022. [TFEU] More on this see: Dimitrakopoulos 2001.

⁹⁰ Article 288, TFEU.

⁹¹ Villiger 2009; Buergenthal and Murphy 2007.

⁹² Neudorfer and Wernig 2010, p. 415.

As parts of the same chapter of the same agreement, it is reasonable to interpret the same words under the MEA article the same way as the labor rights article. This stems from the integrity of the TSD chapter and context as understood in VCLT. It is reasonable to assume that for similar articles in the same chapter of the FTA, the treaty makers understood the same thing from the same or similar words. When dealing with identical or similar phrases as in the EU–South Korea dispute, the interpretations of the PoE should be followed, so long as there is no different interpretation warranted by the nature of the covered area. In this regard, the word “*commitment*” should be interpreted as not showing only an aspiration but as creating a legally binding obligation.⁹³

This interpretation of the PoE is also in line with the words used in the versions of the FTAs in other official EU languages⁹⁴ where the “*binding oneself to a course of action*” meaning is clearer than the English word *commitment*. For example, in the Dutch version, the word “*verbintenis*” is used⁹⁵ which is interpreted by several Dutch courts as requiring “*prestatie*”⁹⁶ which translates as performance, achievement⁹⁷: therefore, a result. Thus, even if the interpretation of the PoE on the labor standards obligation was not applied to environmental obligations, the word “*commitment*” should be understood as creating a binding obligation of result.

⁹³ For detailed discussion of the PoE of Experts, see Section 2.1.1.

⁹⁴ Article 33 of the VCLT is titled *Interpretation of treaties authenticated in two or more languages*, third paragraph of which states that. “*The terms of the treaty are presumed to have the same meaning in each authentic text.*” All the agreements of the EU are authenticated in all of its 24 official languages of the EU, see Šarčević 2013. Multilingual law-making and legal (un) certainty in the European Union. *International journal of law, language & discourse*, 3(1), 1–29. Shelton states that “[...] *a comparison of different texts may help to resolve an ambiguity inherent in a term or phrase used in one language, making clearer the intention of the drafters.*” in Shelton 1996. Thus, when the meaning of an article in one language version of an FTA is unclear, other languages versions can and should be consulted. For an in-depth analysis of multilingualism in the EU see Otero Fernández 2020.

⁹⁵ Article 13.5 (3), South Korea FTA in its Dutch version reads as follows: “*De partijen herbevestigen hun verbintenis ten aanzien van het bereiken van de uiteindelijke doelstelling van het Raamverdrag van de Verenigde Naties inzake klimaatverandering en het bijbehorende Protocol van Kyoto.*” Similarly, Article 13.5 (3), South Korea FTA in its German version uses the word “*Verpflichtung*” and reads as follows: “*Die Vertragsparteien bekräftigen ihre Verpflichtung auf das oberste Ziel des Rahmenübereinkommens der Vereinten Nationen über Klimaänderungen und des beigefügten Kyoto Protokolls.*”

⁹⁶ “Dit maakt dan de vraag relevant tot welke prestatie de verbintenis verplicht.”, Arrest Hoge Raad: ECLI:NL:HR:2020:141, available at <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:PHR:2019:962>, last access on 23/11/2022; “Heeft de prestatie niet aan de verbintenis beantwoord, dan wordt deze vergoeding [...]”, Arrest Rechtbank Noord-Holland: ECLI:NL:RBNHO:2021:8937, available at <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBNHO:2021:8937>, last access on 23/11/2022.

⁹⁷ Van Dale Woordenboek, available at <https://www.vandale.nl/gratis-woordenboek/nederlands-engels/vertaling/prestatie>, last access on 23.11.2022.

7.3.1.3 “Reaffirm”

The interpretation of the only verb in the sentence “*Parties reaffirm their commitment to effectively implement the [...] MEAs*” is central. Looking at the word *reaffirm* in a similar way the PoE looked at the words that needed further interpretation under the labor standards article, dictionaries are the first place to look at.⁹⁸

The ordinary meaning of the word *reaffirm* appears as “*to affirm (something) again especially to strengthen or confirm*”⁹⁹ or “*to state something as true again*”.¹⁰⁰ In international treaty-making, the word *reaffirm* is usually found in the preamble sections of the treaties which do not create obligation but “*add color, texture and shading*” to the treaty interpretation and show the intention of the treaty makers.¹⁰¹

In the case at hand, the article is located in the operational part of the agreement, where it should have “*the capacity to create rights and obligations for parties.*”¹⁰² The choice of the treaty makers in doing so should have a meaning. In several legal systems, the legislature is assumed to be a rational body¹⁰³ that acts reasonably, consciously, or purposely, having regard to its purpose in making a law.¹⁰⁴ The same should be assumed of the legislators of the treaty as well.

Read in conjunction with the place of the article and the ordinary meaning of the word to *reaffirm*,¹⁰⁵ it should be concluded that if the treaty makers placed such an article into the operative clauses of the treaty, they made the conscious choice to strengthen and confirm their commitments regarding the MEAs under this article of the TSD. By doing so, they incorporated these MEAs and created a separate legal obligation to effectively implement them in the FTA. This can be also seen as an effort of the treaty makers to ensure a level playing field for the matters covered by the other chapters of the FTA: it should be ensured that environmental (and labor) standards are respected by both parties so that the trade can be “*free.*”

⁹⁸ Notwithstanding, the ordinary meaning of words should be constructed within the general context and the object and purpose of the treaty. See above for a discussion on the overreliance of the EU-South Korea dispute PoE on ordinary meaning.

⁹⁹ Merriam Webster Dictionary, available at <https://www.merriam-webster.com/dictionary/reaffirm>, last access on 05.02.2023.

¹⁰⁰ Cambridge Dictionary, available at <https://dictionary.cambridge.org/dictionary/english/reaffirm>, last access on 05.02.2023.

¹⁰¹ WTO-AB Shrimp case.

¹⁰² Rajamani 2016a, p. 343.

¹⁰³ Principle of “*Kanun koyucu abesle iştirigal etmez.*” in Turkish legal system; everything the legislature does has a purpose. In the US legal system: “*Courts must presume that a legislature says in a statute what it means and means in a statute what it says there.*” Connecticut Nat’l Bank v. Germain, 112 S. Ct. 1146, 1149 (1992). “Congress is presumed to act intentionally and purposely when it includes language in one section but omits it in another.” Estate of Bell v. Commissioner, 928 F.2d 901, 904 (9th Cir. 1991).

¹⁰⁴ Middleton 2016, p. 626.

¹⁰⁵ The German version of the Treaty uses the word “*bekräftigung*”, which means “*affirming*”, not reaffirming.

Despite some advising the trade negotiators that using the word *reaffirming* a commitment elsewhere cannot give rise to a binding commitment itself,¹⁰⁶ the only TSD PoE to date also confirms the conclusion of the opposite. For a similarly formulated obligation in the labor standards article, the PoE in the EU-South Korea dispute stated that the FTA “*reaffirms the existing obligations of the Parties under the ILO Constitution, and has incorporated these obligations, as they are defined within the ILO system, as separate and independent obligations under [...]*”¹⁰⁷ the TSD chapter.

Keeping this in mind, this referral to existing obligations of the parties undertaken under MEAs creates separate and independent obligations regarding the MEAs, arising from the FTAs themselves. However, considering the lengthy interpretative exercise needed to reach this conclusion and the possible opposite interpretation, it is a positive development that the EU opts for the word *shall* instead in its recent FTAs.

7.3.1.4 Complementary Jurisdiction for MEAs through Reference in the TSD

A separate and independent obligation regarding MEAs in the TSD has an interesting consequence: complementary jurisdiction.

Complementary jurisdiction refers to the incorporation of MEAs into the TSD chapters, creating an additional layer of enforcement for a breach of an MEA. For the same breach, a party can be held responsible not only for a breach of the MEA through the mechanisms present under the MEA in question but also for a breach of the FTA, through the mechanism available to the TSD chapters. The complementary jurisdiction can bear an even more interesting interplay between the two mechanisms especially when the more assertive approach of the Commission takes its place in the future TSDs. Then the general compliance mechanism of the FTA is also applicable to TSD and there is the possibility of sanctions for certain breaches. Especially when no binding DSM is available under the MEA itself this would be particularly valuable.

Even if the complementary jurisdiction for a less bindingly formulated version that *reaffirms* parties’ commitments to MEA can be questioned or an interpretation otherwise can be argued, complementary jurisdiction is certainly the case for the UNFCCC and the Paris Agreement, at the very least. Remembering that the Parties “*shall effectively implement the UNFCCC and the Paris Agreement*”,¹⁰⁸ we can use this straightforward obligation for illustration. A breach of one of the two agreements shall thus constitute a breach of the FTA as well.

¹⁰⁶ International Institute for Sustainable Development, A Sustainability Toolkit for Trade Negotiators: Trade and investment as vehicles for achieving the 2030 Sustainable Development Agenda, available at <http://www.iisd.org/toolkits/sustainability-toolkit-for-trade-negotiators/3-environmental-provisions/3-1-binding-or-non-binding-commitments/#jump>, last access on 29.11.2022.

¹⁰⁷ Report of the PoE of Experts, para 107.

¹⁰⁸ Article 6 (2) (a), Mercosur AiP.

Imagine that an FTA partner of the EU breaches the Paris Agreement and the action steps in the recent communication of the Commission are part of the TSD chapter. While no sanctions are foreseen under the Paris Agreement itself, the breaching party can face trade sanctions under the FTA due to the breach of related TSD commitments as the Paris Agreement is named explicitly as a breach for which the failing party shall face trade sanctions. This breach can be a country withdrawing from the Paris Agreement, just as the Trump administration did for the US¹⁰⁹ as withdrawing certainly is *not* implementing. The types of breaches depend on the obligations of the UNFCCC and the Paris Agreement.¹¹⁰ For example, under Article 4.2, the parties are to “*prepare, communicate and maintain successive nationally determined contributions [NDCs].*” If a party fails to do so, this will not only be a breach of the Paris Agreement but also the FTA.

Under the same article of the Paris Agreement, the parties also undertake to “*pursue domestic mitigation measures, with the aim of achieving the objectives of such NDCs.*” The legal character of this obligation is discussed in the doctrine as to whether it constitutes an effort obligation.¹¹¹ Bronckers and Gruni stated that the effective implementation obligation under the TSD chapter cleared all the doubts about this obligation regarding the NDC.¹¹² Firmed up by the FTA, the parties shall at the very least need to show best endeavors for domestic mitigation measures and a failure to work towards this goal can be pursued under the FTA DSM.¹¹³

Thus, the incorporation of MEAs into the TSD chapters can lead to an increased compliance of the MEAs. In addition to complementary jurisdiction, it can also clarify the legal character of an obligation under the MEA. This provides a new perspective to the decades-old discussions on trade versus environmental values: trade agreements and MEAs do not only co-exist but also reinforce each other. Considering the different incentives trade agreements give to parties for compliance and the explained disparities of two enforcement systems, this is an interesting avenue that is yet to be explored.

7.3.2 Ratification and Exchange of Information Obligation on Ratification Status

There are two more categories of obligations regarding the ratification of MEAs, quite similar to the ones for ILO conventions: ratification and exchange of information on

¹⁰⁹ Climate change: US formally withdraws from Paris agreement, available at <https://www.bbc.com/news/science-environment-54797743>, last access on 14.07.2023.

¹¹⁰ For an extensive overview of the obligations under the Paris Agreement and their legal character see Bodansky 2016; Rajamani 2016a, b.

¹¹¹ Bronckers and Gruni 2021, p. 21; Bodansky 2016.

¹¹² Bronckers and Gruni 2021, p. 29.

¹¹³ Ibid.

ratification obligations. We will look at these obligations together due to their close relationship.

Only the Central American AA has obligations for the parties to ratify certain MEAs under two separate paragraphs:

“The Parties *undertake to ensure* that they have ratified by the date of entry into force of this Agreement, the Amendment to Article XXI of CITES....” and “The Parties also undertake, to the extent they have not yet done so, to ratify and effectively implement, at the latest by the date of entry into force of this Agreement, the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade.”¹¹⁴

This is one of the most bindingly formulated obligations under the TSD chapters with a clear deadline. Considering the cruciality of schedule in EU-South Korea proceedings,¹¹⁵ such a ratification obligation is more desired and has a better chance of successful enforcement in front of a PoE. The EU could use this version as a sample for stepping up the obligation to show “*continued and sustained efforts*” towards the ratification of multilateral agreements.

All the recent FTAs of the EU since 2018 without an exception have an exchange of information obligation regarding the ratification status of MEAs. This requires a regular dialogue between the parties. Due to the identity of the provisions, the discussions made above in Section 2.1.2.2. for the exchange of information obligation relating to ratification of ILO conventions also apply here and will not be repeated. Thus, a simple notification of “*no ratification has taken place*” would satisfy this obligation.

There are differences between the formulation of two exchange of information obligations. Firstly, the MEA one uses the word “*shall*” while the ILO one uses “*will*”. However, the PoE found that in the absence of specific evidence, there is no difference between the use of these two words in treaty-making and the obligations they bring are equally strong.¹¹⁶

The second and more interesting difference is the word “*regularly*”. This provides some structure to the frequency of the exchanges, compared to the version there is no qualification at all. Once again considering the importance given to there being specified timelines by the PoE, this adds a temporal dimension to the exchange of information obligation. Consequently, a party can claim a breach of this temporal aspect if the other party does not share information regularly. It is unclear what regular entails and how long not sharing information constitutes a breach of the exchange of information. Thus, the treaty-makers should opt for defining the temporal aspects of obligations in a clearer way to increase enforceability, for instance by using “*twice a year*” or “*once every two years*”.

The related paragraph of CETA sheds light onto what an exchange of information under the TSD chapter can entail: “*a) implementation of multilateral environmental agreements, to which a Party is party; b) on-going negotiations of new multilateral*

¹¹⁴ Article 287 (3) and (4), Central American AA.

¹¹⁵ See Section 2.1.2.1. for PoE’s reasoning and the discussion regarding schedule.

¹¹⁶ Report of the PoE of Experts, paras 268–269.

environmental agreements; and c) each Party's respective views on becoming a party to additional multilateral environmental agreements."¹¹⁷ While not binding for other FTAs, it can be used as a guideline.

7.3.3 UNFCCC

Several of the MEA articles under the TSD chapters have a paragraph stating that the parties "*reaffirm their commitment to reaching the ultimate objective*" of the UNFCCC and its Kyoto Protocol¹¹⁸ and the development of a future international framework targeting climate change. The discussion above regarding the meaning of the word "*reaffirm*" and the legal character of the obligation it creates apply here as well.

The content of this article can only be understood by reading it in conjunction with the UNFCCC. The ultimate objective of the Convention is to "*achieve ... stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system [...]*."¹¹⁹

It is unclear what marginal value this article brings. All the agreements that have this obligation also have the effective implementation obligation regarding all the MEAs the parties have ratified, and a separate effective implementation obligation for the UNFCCC and the Paris Agreement.¹²⁰ Considering this, a specific article re-committing parties to their aims is redundant which is possibly why it is abandoned. Explicitly singling out these agreements can show the political importance adhered to.

In general, the commitments regarding MEAs seem to have stabilized into two obligations in recent years: effective implementation and exchange of information. The wording used still varies for effective implementation. The new EU FTAs typically do not bring obligations for ratifying new MEAs other than exchange of information on ratification status. The Andean FTA and Ukrainian DCFTA stand out as the ones with the weakest protection with only effective implementation obligation and no mention of ratifying other MEAs.

¹¹⁷ Article 24.4 (3), CETA.

¹¹⁸ Under the Japan EPA, it is the Paris Agreement. Agreement between the European Union and Japan for an Economic Partnership, OJ L 330, 27.12.2018, p. 3-899, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A22018A1227%2801%29>, last access on 06.02.2023 [Japan EPA].

¹¹⁹ Article 2, UN General Assembly, United Nations Framework Convention on Climate Change: resolution/adopted by the General Assembly, 20 January 1994, A/RES/48/189.

¹²⁰ This is except for the Ukrainian DCFTA which does not name any specific MEA.

7.4 Conclusion

While the new assertive approach announced by the Commission is certainly a step in the right direction procedurally, there is still a long way to go to achieve an integrated assertiveness of the TSD chapters where they are clear and enforceable.

This Chapter showed that several obligations regarding the multilateral agreements and standards under the TSD are bindingly formulated. While an interpretation exercise is needed to see what the obligation entails and what the required remedy would be for a breach, an FTA party can bring a claim of such breach against the other party in front of the PoE. This is particularly important in case of complementary jurisdiction, for example for the Paris Agreement, where a breach of the Paris Agreement will also constitute as a breach of the FTA for which the possibility of trade sanctions were announced under the new assertive approach of the EC. This shows how trade can not only co-exist with environmental protection but can also be used to reinforce it.

Where the FTAs, as the primary law, fail to provide clarity, it is the DSM that has to assume this role. Thankfully, the report of the PoE in the EU-South Korea dispute provides some guidance as to how certain phrases of TSD articles are to be understood. This increases the clarity and enforceability of the obligations, not only for the specific article interpreted by the PoE but also for other articles of the TSD chapter that use similar or identical phrases.

The clarity of the obligations being dependent on DSM has several problems. Firstly, for a PoE to interpret and clarify provisions, there should be cases being brought before it. In over a decade since the TSD chapters existed, there has been only one PoE. Considering the reluctance of the parties to trigger the mechanism the needed influx of disputes is unlikely in the short future.

Secondly, it is currently voluntary whether the parties will follow the recommendations of the PoE. Hopefully, the more assertive approach will solve this by expanding the compliance mechanism of the general DSM to TSD. Still, the possible inconsistency of decisions by *ad hoc* PoEs remains a problem. Of the interpretations possible and claimed by the Parties on certain matters, the PoE has sided with the more liberal and extensive interpretation that gives the TSD the strongest effect possible. This is certainly the case where the PoE established a separate and independent obligation in the FTA through the reference made to external obligations under the ILO system. The fact remains, however, that a different PoE could have easily adopted a more strict interpretation. Just as experienced by investment treaty arbitration, conflicting interpretations will further jeopardize the clarity of TSD articles.

Therefore, the PoE as a source of clarity is far ideal. It should be the primary law that defines the content of the obligation and the legal standard thereof clearly without a lengthy interpretation process. The following are suggested to the treaty-makers to ensure this:

- (a) Abandon preamble-like language such as *reaffirming*. Use *shall* or *will* instead.
- (b) Use language that defines the legal standard clearly so that the parties know what is expected of them and what constitutes a breach.

- (c) Opt for an open-list approach while referring to external agreements where future agreements the parties ratify are covered automatically.
- (d) Where applicable, use clear timelines or schedules when an obligation should be honored.

The content of the TSD should be stepped up and updated accordingly, to include more binding and clearer language with a clear temporal dimension, where appropriate, to increase enforceability. Only then the content of the TSD chapters will match the new assertive procedural approach and produce meaningful change for international sustainability. Until then, the changes made to the procedural mechanism will not have much value.

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