VOLUME EDITOR
DR SURANJALI TANDON

A GREEN DEAL FOR THE GLOBE:

European Union External Action and International Just Transition

COLLEGE OF EUROPE IN NATOLIN
WARSAW 2024

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Natolin Nests Series vol. 2
A green deal for the globe: European Union External Action and International just Transistion

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A GREEN DEAL FOR THE GLOBE:

European Union External Action and International Just Transition

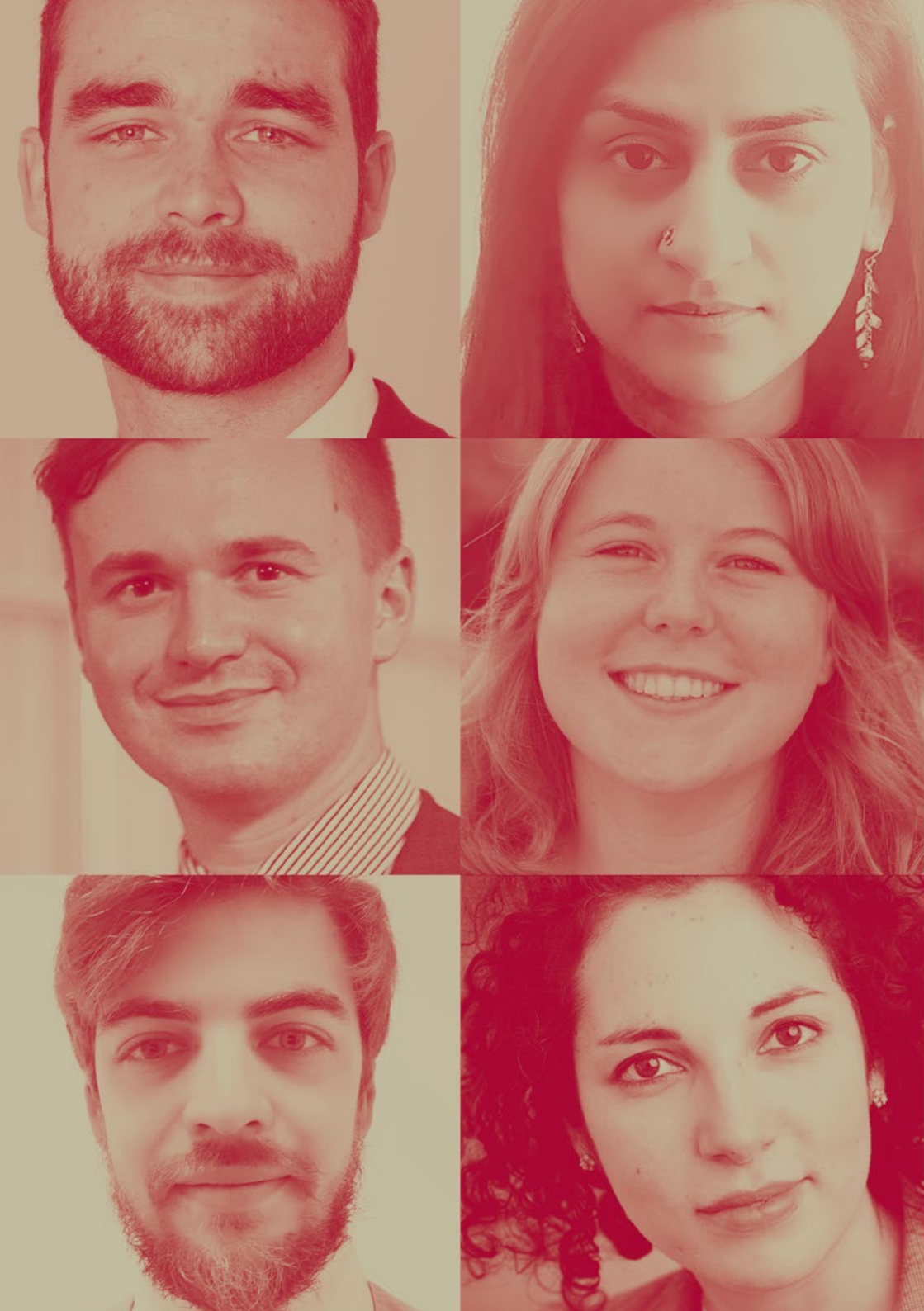
NATOLIN NESTS SERIES VOL. 2

SERIES EDITOR
DR BARBARA BOBROWICZ
College of Europe in Natolin

*Dear Students of the **Energy & Climate Governance Nest** at the College of Europe in Natolin, **Mário SOARES** Promotion 2020/2021, I really appreciate the effort you have put into making this international annual conference happen. Bringing together different viewpoints leads to great results.*

*Stay **energized** –*

EWA OŚNIECKA-TAMECKA,
VICE-RECTOR OF COLLEGE OF EUROPE



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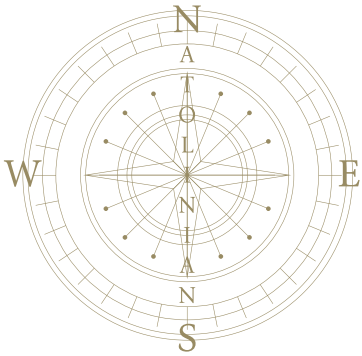
Since 2018 the Natolin Energy and Climate Nest aims to provide a balanced and comprehensive understanding of energy's role in global politics and environmental sustainability. Our mission encompasses the critical examination of energy policies, the dynamics of energy markets, and the approaches to climate change. The Nest is committed to integrating academic study with practical experiences, including participation in significant conferences, professional encounters with energy experts and exchanges with various energy and climate stakeholders. The approach is to equip students with a well-rounded perspective that appreciates both the complexities of transitioning from fossil energy and the socio-economic considerations involved. By engaging in diverse topics such as green finance, the energy and climate governance, and specific case studies like Ukraine's energy sector, Natolin Energy and Climate Nest strives to foster informed discussions and research that contribute to a balanced and forward-thinking learning in energy and climate.

Artur Lorkowski
Mentor of the Natolin Energy and Climate Nest



FOREWORD

BY KEVIN LE MERLE

When the European Green Deal was first announced in December 2019, many saw in it a beacon of hope; after 50 years of climate science, policymakers were finally taking into account humanity's principal existential challenge and acknowledging the scope and breadth of the transformation that would be needed to face it

The cohort of students of the Mário Soares Promotion arrived at the College of Europe in Natolin while the pandemic was still raging, shortly after the environment and climate ministers from across Europe had agreed that the European Green Deal should act as a compass for the EU's recovery, suggesting that crisis would not derail the EU's emphasis on the climate and environmental policies necessary to protect its citizens in the short and long term.

At the College of Europe in Natolin, an international postgraduate institution attracting 130 students from over 30 countries studying European Affairs each year, some students came to the conclusion that the European Green Deal's success would hinge on it fulfilling its aim to be fair. Therein lay the beating heart of the EU's pioneering project.

The concept of Just Transition, which originated in trade-unions, had already began to be coopted and used by EU policymakers. The use of the term stressed that siloed thinking on climate and environment policy was no longer possible, but that climate policy would need to steer societies and economies in a just way. A group of students, aware of the urgency of the climate crisis and the imperative for policymakers' response to it to be fair and just, joined the Natolin Energy and Climate Nest at the College of Europe in Natolin. In doing so, we were all faced with one of the central questions of climate justice: who should bear the costs of the socio-economic transformation needed to meet the EU's climate targets?

The Natolin Nests are platforms at the crossroads of academic teaching and research, characterized by student-driven input, with support and involvement of external partners and the College of Europe in Natolin. Participation in the Natolin Energy and Climate Nest helped us promote our initiative to dig deeper into the topic of EU external action and the global Just Transition.

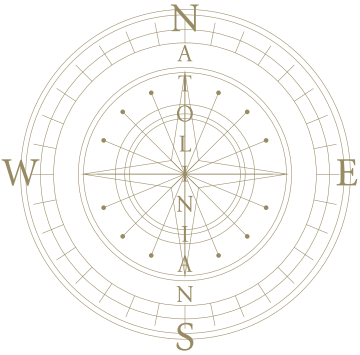
Indeed, it had been identified that in a world of economic interdependencies, and with the EU's core mandates remaining market-based policy instruments, the implementation of the European Green Deal would have knock-on effects on global supply chains, trade relations, and international investment and taxation dynamics. The potential for the EU's

climate policies to have deleterious effects on climate vulnerable countries of the "Global South", with a lower historical responsibility in the climate crisis, called for strategic foresight that could only be acquired through further research on the topic of global just transition. With this in mind, students of the Natolin Energy and Climate Nest set up a scientific committee composed of Ms Katarzyna Szwarc (co-chair), H.E. Ambassador Artur Lorkowski (co-chair), Dr Matthew Agarwala, Prof. Christian Egenhofer, Dr Suranjali Tandon, Ms Vonda Brunsting, and Prof. Dirk Buschle. Thanks to their invaluable expertise, students were able to collect, and evaluate dozens of research papers on the topic. Selected papers were presented at a conference on 21 June 2021. The conference was titled "A Green Deal for the Globe: European Union External Action and the International Just Transition" where researchers were able to present their findings and discuss the links between their respective policy fields and the external impact of the EU's green agenda. A warm thank you to the conference committee, as well as the staff of the College of Europe in Natolin for their commitment, time, and inputs which helped bridge academic and policymaking circles.

The conference culminated in the book that you hold in your hands today. The volume covers topics ranging from the transformation of trade policy for environmental reasons, to the geopolitical tensions surrounding critical raw material supplies. It addresses both the technical and policy challenges of investment gaps, and sustainable taxation, but above all, it recontextualises the European Green Deal into the complexity of global climate action in a non-ideal world.

As an interdisciplinary collection of perspectives from different policy fields, all of which focus on tackling the global issue of climate change, it tells us of the EU's actorness on the world stage. Beyond rhetoric this collection takes a look at the EU's concrete policy practices. Whether the EU's policy practice is in line with its high ambition of leading the way on the global Just Transition agenda remains to be seen. However, this book gives us a glimpse of the pitfalls the EU will have to face to reach that ambition, notably making sure that the measures serving its domestic Just Transition do not unexpectedly jeopardise the potential for a global Just Transition.

Far from suggesting the complexities of climate action warrant reducing ambition and slowing down, the collected papers give us some of the necessary tools to face its manifold challenges head-on – neither war, nor pandemics, should prevent the EU from thinking inclusively about securing a perennial and healthy life on earth for everyone.



CHAPTER 1

Introduction

BY SURANJALI TANDON

SURANJALI *TANDON*

Suranjali Tandon is Associate Professor at NIPFP where she leads the work on direct taxation and sustainable finance. She is currently a member of the T20 task force on Refuelling Growth: Clean Energy and Green Transition. She has been a special invitee to the task force on sustainable finance, India set under the aegis on Ministry of Finance and is an expert invitee to International Financial Services Centre Authority's sub-committee on sustainable finance related to disclosures. She has worked in the past on many projects with the Department of Revenue and Department of Economic Affairs on key policy issues. She is Chevening Financial Services Fellow 2019 at King's College London and has a PhD in Economics from Jawaharlal Nehru University, India.

1. INTRODUCTION

The European Union (EU) is an important actor in green transition. It has taken the lead by setting ambitious targets for itself and tethering its policies to its commitments. This ambition is demonstrated by is the EU's move to price carbon emissions. The EU's emission trading system is a template for pricing carbon, and while it may have fallen short in some ways, it also demonstrates the path that a region or country may take to decarbonize. The policy makers in the EU are conscious that this is an economy-wide transition and that there will be social ramifications. It looks beyond just the technical aspects of the transition but also the communities and jobs to ensure no one is left behind. There are key policies around the Just Transition that the EU has adopted. Just Transition Mechanism (JTM) ensures that the transition towards a climate-neutral economy happens in a fair way, leaving no one behind. It provides targeted support to help mobilise around €55 billion over the period 2021–2027 in the most affected regions, to alleviate the socio-economic impact of the transition. Then there is Just Transition Fund, which will be spent on territories that are identified through dialogue with the Commission. To support and coordinate efforts, the EU has set up a Just Transition Platform as a single access point and helpdesk. All this signals that the EU is prepared internally. However, while looking inwards the EU also looks outwards through its trade and investment relations. As the EU ramps up its efforts to price emissions, the Fit for 55 program and to ensure that its efforts are not diluted by corporate responses that subvert the rules, it has announced the Carbon Border Adjustment Mechanism (CBAM). This has caught the attention of scholars and policy makers around the world. While it furthers the internal agenda, there are legal concerns as well as reservations as to whether this is just in the international context. This book is an effort to articulate the role of the CBAM in the international economic context. The book also examines whether redistribution measures such as a sustainable tax can be used to fund the African Union's development. Such measures, it is imagined, can legitimise the EU's approach to externalise its agenda.

The CBAM is just one of the many ways in which the EU interacts with the world. Standards of sustainability are applied through the free trade agreements and investment treaties, and it is possible to transpose such just transition mechanisms into the national contexts of treaty partners through dialogue and negotiations. Solidarity and Just Transition Silesia

Declaration and the Initiative for Coal Regions in Transition in the Western Balkans and Ukraine are examples of this approach. This book provides insights on the operationalization of sustainability as a concept within the investment agreements with China, its trade

agreements and even its use in soft law. The book covers these aforementioned topics to understand the EU's external approach on JT. s.

The approach to the transition also must be forward looking. It is not enough that the EU uses its external approach to popularise the agenda through its agreements and their enforcement. There is a need to think strategically about the access to critical resources and whether there are inequities in the new world. This aspect of access to critical minerals and role of developing economies such as China is also discussed in the book.

As the EU marches towards meeting its ambition to decarbonize, it will need to remain cognizant of the context and repercussions on other countries. At the same time, it can leverage its economic relations to work towards its Just Transition. This book provides a new perspective on the EU's approach to Just Transition as it looks exclusively at its external approach to assess if it is just.

2. WHAT IS JUST TRANSITION?

There are alternative definitions of just transition. It was developed by North American trade unions to provide a framework for discussions on social and economic policies that are necessary to secure workers' livelihoods while the economy transitions.[1] Just Transition involves maximising the social and economic opportunities of climate action, while minimising and carefully managing any challenges through effective social dialogue among all groups impacted and respect for fundamental labour principles and rights, among others. Ensuring a just transition is important for all countries at all levels of development. It is also important for all economic sectors – by no means limited to energy supply – and in urban and rural areas alike".[2] It is often succinctly referred to as a process by which it is ensured that in the transition to low carbon intensive processes no one is left behind. The notion of what is just is context specific. While some regions may see the early retirement of fossil fuel-based assets as unjust, the continued acceleration of emissions in other countries is perceived unjust. The difficulty lies in trying to integrate the various definitions. The way just transition is defined depends on the level of development, resource, especially fossil fuel, dependence and revenue sourced from levies on fossil fuels. In this book, there are examples of how the EU engages with the world and can externalise the concept of Just Transition but, as will be demonstrated, it is not easy given the conflict between the ideas of Just Transition.

1 Scottish Government, 'Just Transitions: A Comparative Perspective' (7 September 2020).

2 International Labor Organisation, 'Frequently Asked Questions on just transition' (22 October 2021) ILO.

3. IS CARBON BORDER ADJUSTMENT MECHANISM COMPATIBLE WITH GLOBAL JUST TRANSITION?

The European Union plays a critical role in climate policy. Its proactive stance in pricing carbon and now applying a trade-based measure indicates that the region will be moving swiftly to change the status quo and developing countries will have to respond to the measures.

On 10 May 2023, the Council of the European Union and European Parliament signed the regulation implementing the EU Carbon Border Adjustment Mechanism (CBAM). The Mechanism took effect starting 1 October 2023. The early or transitional phase for any implementations of the measures of the new system needs to be laid out and will cover only imports of selected products. This phase aims to gather information about these products and will help setting out the direction for the pricing of carbon emissions. This also entails figuring out how the existing tax systems interact with the CBAM and procedural requirements that need to be fulfilled. An importer in an EU member state is required to, prior to importing, apply for a status of a CBAM declarant and consequently the declarations will have to be made by an authorised customs declarant. There will be a CBAM registry in place which will carry all the information and a common central platform for sale and repurchase of CBAM certificates whose price will be set by the Commission in line with ETS certificates but the markets will differ from ETS which allows for tradability. The transitional phase will conclude by end of 2025 and phasing in will begin by 2026-34.[3] From May 2027, the authorised declarants will have to report and will have to be verified. While this is a transitional phase there will be an opportunity for countries to tailor their response and to assess the impact of the system. The finer details of the system are being put together and it is fair to say that Europe's approach under the Fit for 55 works well for a system that has evolved in the EU's context but imposes its own pace of transition on developing countries.

As a solution, scholars argue that the revenues from CBAM should be used to fund low-income countries.[4] Whether the equity concerns can be addressed through such measures needs to be examined. In the second chapter of the book, Le Merle argues that by using the ability-to-pay principle, it is possible for developed countries to support low-income countries. In the author's view, the CBAM may lead to marginal emissions

3 Ana Royuela, Albert Arenas, 'European Union: "Fit for 55"- Carbon Border Adjustment Mechanism Regulation Signed' *Global Compliance News* (18 May 2023).

4 Clara Brandi (project leader), 'Priorities for a Development-Friendly EU Carbon Border Adjustment Mechanism (CBAM)' 2021 German Institute of Development and Sustainability (IDOS).

reductions, however, their immediate welfare cost is noticeable and urges the reader to think of the EU proposal in the global context and within the burden-sharing justice framework. The CBAM falls short on such a framework and it is argued that countries such as China would indirectly be asked to bear the costs for pollution that mostly continues to benefit consumers in the EU. On the other hand, China does have the ability to pay for climate action. Even so, CBAM would make China pay disproportionately more than the EU. Therefore, the EU's policy looks through the lens of self-interest. India's exports too are likely to be impacted. The end of free allowances and higher carbon prices is thus being imposed on the world. CBAM is motivated by domestic Just Transition considerations whereas at the international level the principles of Just Transition do not apply proportionately. These asymmetries will be more prominent as the system transitions, therefore requiring a deeper examination of what Just Transition means in a multilateral setting. This intricately links back to financing mechanisms for transition, that have fallen short of estimated requirements.

There is ample discussion around whether the CBAM is compliant with the current WTO rules[5], while the EU states that it has been designed in such a way as to be compliant.[6] In Chapter 3, Pietras examines the issue and suggests that irrespective of the design, the CBAM will distinguish goods on the basis of their origin. There is a tension between the Article XX and Article III of the GATT. The former allows restricting import based on environmental conditions, whereas the latter mandates non-discrimination. There are other risks along with the immediate concerns of the tension with the WTO.

Beyond the palpable trade tensions, tax and tariff systems around the world are not foolproof. Despite the digitalization and reform of tax administration, there is continued evidence of trade misinvoicing[7] that is undertaken to circumvent the rules. It is possible that exporters to the EU may be able to avoid CBAM. Pietras, reminds the reader of the onerous rules of origin and requires exporters to provide such documents and the non-existence of such a system elsewhere among trading partners. Developing countries in the process must raise their ambition which is at conflict with the common but differentiated responsibility. The Common But Differentiated Responsibilities (CBDR)

5 Tori Smith, 'U.S. Carbon Border Adjustment Proposals and World Trade Organization Compliance' (8 February 2023) American Action Forum.

6 European Commission, 'European Green Deal: Agreement reached on the Carbon Border Adjustment Mechanism (CBAM)' (13 December 2022).

7 Global Financial Integrity, 'Trade-Based Money Laundering: A Global Challenge.' Fedesarrollo, Transparency International Kenya and ACODE, January 2023.

principle provides that all states are responsible for global environment destruction but developed countries are expected to take the lead. The differences in the capabilities to address it must guide the response of countries. The CBAM however, on account of its linking to the emission trading system, would set prices that are above the current effective carbon rates in many developing countries. The OECD's effective carbon rates database estimates that developing countries such as India have priced about 9% of the emissions at EUR 60 per tonne of $CO_{2.}$[8] On the other hand, countries such as France and Germany cover 55% and 41% of the emissions respectively. Pietras argues that when the EU becomes carbon neutral in 2050, the imports that are not carbon neutral would not be accepted and the CBAM would be even more important. The Net Zero targets however are not set at 2050 for all economies which raises the question of the meaning of Just Transition in the international context.

In Chapter 4, Richter and Bartoszewski add a dimension of sustainable taxation that complements the CBAM and the goals set out under the green deal. The authors recommend that an EU-wide carbon tax would indeed be useful in creating a level playing field between conventional and renewable energy. It is also suggested that the CBAM may be used to influence investment partners and as a means to enhance cooperation proceeds from carbon tax to be dedicated towards investment in green infrastructure and development in the African Union. Such an approach can help co-opt partners in the global south. The redistribution of CBAM revenues is a hotly debated issue. However, one needs to explore if any potential redistribution patterns are compliant with the uses prescribed for these revenues. While the EU did talk about the use of revenues to support low-income countries, in its final design the kind of support that can be extended beyond technical assistance and the budgetary allocation possible will need to be examined. In cases where any financial support is extended, it is likely that there may be concerns of legitimacy within the EU.

Another aspect of the carbon levy is that its impact will not be limited to trading partners. Conceivably, the effects may be only restricted to the first-round effects of the import contraction from emitting countries. However, this will set in motion supply contraction and could have significant price and output effects within the EU. It is possible that the EU locks itself out of value chains thus impacting jobs adversely. It is important that a 'Just Transition' is fully comprehended, even within the EU.

8 OECD, 'Effective Carbon Rates' <https://stats.oecd.org/>.

4. CAN GLOBAL JUST TRANSITION BE PROMOTED VIA INTERNATIONAL ECONOMIC RELATIONS?

The EU interacts with the world through its agreements and the book discusses some of these as EU's engagement on Just Transition with the world. In Chapter 6, Mazzotti explores the potential approach that the EU could follow in its relations with China. In December 2020, the EU and China reached an agreement in principle on investment. The Comprehensive Agreement on Investment (CAI) was to make sure that EU companies compete with Chinese firms on an equal footing and China has committed to ambitious provisions on sustainable development which includes commitments on forced labour and ratification of the relevant International Labour Organisation's (ILO) fundamental conventions.[9] As the energy transition is a whole economic transformation and the guiding principle of Just Transition is that no one is left behind, it is worth examining if such treaties can promote a Just Transition around the world.

Mazzotti argues that the CAI might have been the first occasion for the Commission where a synergy between the European Green Deal and environmental and trade policies was achieved. Yet, the promise of the agreement to change the EU's approach is over-emphasized as the author demonstrates the agreements shortcomings with respect to Trade and Sustainable Development Goals (SDGs) chapters and recommends that it may be possible to strengthen the compliance with obligations by making economic concessions in Free Trade Agreements (FTAs) conditional on meeting the standards and by introducing Paris Agreement to EU FTAs. Such an approach has been discussed in the past. It is important to understand if the said approach can work in changing the status quo. In the US-Guatemala case where the SDGs chapters carried an enforcement mechanism, i.e., a sanction based system, it was seen that the tools were not adequate to address non-compliance with labour and environmental standards.[10] Even in the EU's own case, the agreements with Peru did not succeed in improving compliance in a number of areas.[11] Instead a cooperative approach that includes enhanced capacity building is recommended.[12]

9 European Commission, 'EU and China Reach Agreement in Principle on Investment' (30 December 2020) <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2541>.

10 Katerina Hradilová, Ondrej Svoboda, 'Sustainable Development Chapters in the EU Free Trade Agreements: Searching for Effectiveness' (2018) 52 Journal of World Trade.

11 Jan Orbie, Lore Van den Putte, 'Labour Rights in Peru and the EU Trade Agreement: Compliance with the Commitments under the Sustainable Development Chapter' (2016) 58 Working Paper ŐFSE.

12 Hradilová, Svoboda (n 10).

In Chapter 5, Rumst also looks at the external actions by the European Parliament and its FTAs as a means to address Just Transition. The author argues that the European Parliament and domestic parliament have proven their potential over the negotiation of FTAs to push for inclusion of sustainable development within the agenda. The Parliament has recognizable potential to enhance their role as currently the trade and sustainable committees or regulatory cooperation committees implement the agreement. Parliamentary involvement in negotiation can amplify the voice of the civil society and the public. The Parliament proposed the Just Transition Fund in 2016. However, the Just Transition Mechanism was established in 2020, which is a part of the Sustainable Europe Investment Plan, to support and manage social impacts in countries that are reducing their fossil fuel dependence.[13] The Commission took a broader approach than the Parliament[14] which may have to address domestic or national concerns. This is in line with the stakeholder consultation approach necessary for a Just Transition.

In Chapter 7, Mclaughlin takes an internal and external policy view of the Just Transition movement within the EU. The author finds that though at an early stage, the internal Just Transition dialogue within EU, can facilitate EU-led decarbonisation and can minimise general resistance. It is expected that the EU's global engagement on Just Transition will increase over time through the European Commission. The use of such tools as the United Nations Framework Convention on Climate Change (UNFCCC) as well as treaties/agreements governing external relations can be instrumental in shaping the EU's role in ensuring a global Just Transition. The representation of the non-EU voices still needs to be devised. The externalisation of the EU's domestic approach, which also varies among the EU members, is one way to scale up the EU's role. It is however important for the EU to illustrate well the benefits of its approach as many developing countries view the idea of Just Transition as foreign and deeply connected with coal decommissioning.

In literature, there has been an extensive discussion on the frequent use of soft law in the climate policy by the European commission.[15] In Chapter 8, Sperra and Leucci also find that the EU is known to use bilateral soft law frequently to achieve its environmental objectives in external relations. However, using the examples of the Joint Declaration

13 'European Union's Just Transition Mechanism: Transnational Funding and Support for a Just Transition' World Resources Institute 1 April 2021.

14 Ibid.

15 Ionescu Danai and Mariolina Eliantonio, 'Soft Law behind the Scenes: Transparency, Participation and the European Union's Soft Law Making Process in the Field of Climate Change' (2022) 14 European Journal of Risk Regulation'.

by India and EU on Indo-European Water Partnership the authors illustrate how the non-binding nature of the instrument can raise legal challenges which include issues regarding rule of law and compliance with human rights standards. They set the tone for future research as they suggest the use of economic and legal analysis of the application of soft law.

Yet another example of the EU's engagement on climate change with other countries is through its negotiations in International Maritime Organisation (IMO). In Chapter 9, Miskulin looks at the EU's position in the IMO, a specialist organisation of the UN responsible for regulating shipping. There are suggestions to impose a carbon tax on shipping industry,[16] as it is among the most significant contributors to global emissions (2.9%).[17] At the EU level, the maritime emissions are quite substantial and therefore the EU's role in IMO gains significance. Miskulin examines the discussions at the IMO's Maritime Environment Protection Committee (MEPC). The study draws a number of policy conclusions including a proposition that the EU could perform better through diplomatic outreach, especially considering its good relations with the United States and it could leverage its market power and financial mechanisms to minimise intra-EU differences.

Overall, the EU has tried to use available legal frameworks to engage on just transition, within EU and with other countries. Yet, there remains scope to engage better, understanding well that other countries are catching up with the realities of the transition and many bilateral partners are externally dependent for investments.

5. ARE THERE FINANCIAL PARTNERSHIPS THAT CAN FOSTER THE EU'S EXTERNAL RELATIONS?

Other than the legal and trade measures, finance is another way EU can engage with partners on Just Transition. The book does not cover this aspect in detail but it is expected that if countries respond to the transition in manner that leaves no one behind, financial support may be necessary, as has been expressed at the UNFCCC.

Another form of multilateral collaboration that is gaining traction is the Just Energy Transition Partnerships (JET_P). Some of the EU economies are making economic contributions to developing countries. At COP26, France, Germany, United States, and the

16 Rachel Kyte, 'Comment: Paris Summit Needs to Heed Mia Mottley's Call for Shake-up of Global Climate Finance' *Reuters* (21 June 2023).

17 Ibid.

United Kingdom signed a JET-P with South Africa promising US$ 8.5 billion and at COP27 South Africa published a plan which included priority investments in electricity, new energy vehicles and the green hydrogen sector. Although, the contribution of the JET P to finance is limited as it is estimated that South Africa will require US$ 98 billion in funding.[18]

At the G20 leaders' summit in Bali, Indonesia's JET-P deal was announced as per which it would receive US$20 billion over 3-5 years. The JET-P lays down an emissions trajectory. Therefore, JET-Ps are one way in which countries in the EU can engage with specific countries and contribute to the energy transition while allowing for tailored approach. The recently signed JET-Ps are a way of externalising policies with South Africa, Indonesia and Vietnam. Different countries define the just element in their JET-Ps[19] differently and this depends on macroeconomic factors. How these partnerships have fared in externalising the EU's approach though in a calibrated manner, will need to be assessed as more information becomes available.

While there is enough discussion on the reform of Multilateral Development Banks (MDBs) it seems to be a target with many moving parts. There has been growing displeasure with the structure and formalities of these institutions that are designed to suit the requirements of the funders and investors. The lack of access and shortfalls in contribution have left the developing countries worried about funding gaps. With the Just Transition agenda gaining traction, it is critical to devise ways of funding the policy once it is externalised by the EU while defining it more practically. MDBs have initiated internal thinking on just transition, for example ADB has launched its Just Transition Support Platform. An immediate response would be to identify MDBs or Development Financial Institution (DFIs) as such sources but the funding facilities may also have to be regional. For example, the EU could support trading partners to mitigate the economic feedback loop that impacts its domestic economy adversely. This would add currency to EU"s external approach.

18 Katherine Krameron, 'Just Energy Transition Partnerships: An Opportunity to Leapfrog from Coal to Clean Energy' (7 December 2022) International Institute for Sustainable Development <https://www.iisd.org/articles/insight/just-energy-transition-partnerships>.

19 Haley Dennis, 'One Year on – 5 Takeaways from South Africa's Just Energy Transition Partnership (JET-P)', Institute for Human Rights and Business.

6. WHERE WILL THE CRITICAL MINERALS BE SOURCED FROM?

The declining demand for fossil fuels does not mean that there will be no dependence on minerals or would offer a relief from commodity price volatility. It is expected that critical minerals essential for green transition will be equally concentrated. To put into perspective, the kind of resource requirement that will be necessary for supporting clean energy technologies – electric vehicles require six times more mineral inputs than conventional cars and an onshore wind plant requires nine times more mineral resources than a gas fired plant.[20] The minerals used in clean energy technologies consist of copper, nickel, zinc and silicon depending on the source of renewable energy. It is suggested that China is the main player in the refining and consumption of goods needing critical minerals and it has considerable control over their reserves and production along with Vietnam and Russia (70%)[21]. It is therefore important to imagine what constitutes a just transition with respect to access to the raw materials. In Chapter 10, Gao examines this issue in detail. According to the author, the security of critical raw materials is of paramount importance to the EU and dependence on China for rare earth materials can potentially present political and economic risks. While the EU has safeguarded its interests through access to Sub-Saharan Africa, the authors anticipate that the approach is not obstacle free as there is growing investments in the region by China. The concentration of the minerals either on the account of location or that of ownership can present a situation that may be as difficult, if not more, as coping with energy monopolies. Just Transition therefore also means that such access is available not just to the EU but other countries. One way to circumvent the problem could be through the development of technological alternatives that may be less resource dependent/intensive. This technology should not be restricted, and transfers must be encouraged between the proverbial south and north.

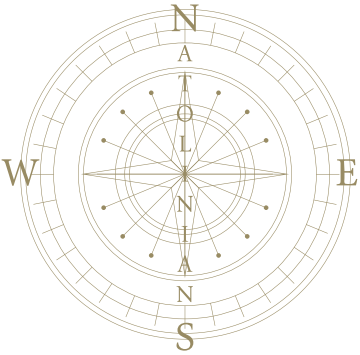
20 International Energy Agency, 'The Role of Critical Minerals in Clean Energy Transitions. Executive Summary – Analysis IEA' (May 2021).

21 Luc Leruth, Adnan Mazarei, 'Who Controls the World's Minerals Needed for Green Energy?' (9 August 2022) PIIE <https://www.piie.com/blogs/realtime-economic-issues-watch/who-controls-worlds-minerals-needed-green-energy>.

7. CONCLUDING REMARKS

There are different ways in which the EU engages with the world and it is observed that its approach to the Carbon Border Adjustment Mechanism has caught attention. The CBAM comes into play much after the EU put behind a long period of free allowances and with carbon emission prices having risen significantly and developing countries watching closely, there are many questions regarding how the system is transposed into law and implemented with regard to trading partners. While this is one approach it is not the only one. There are investment agreements, free trade agreements and international maritime organisations where EU articulates its stance on sustainability but, as is observed in many cases, national interests assume precedence which may seem natural for political reasons. Would a just transition then mean that international interests are put above domestic concerns, which is seldom the case? There is a need to carefully balance these interests. The war between Russia and Ukraine demonstrates this, as countries such as Germany compensated for the shortage in gas through coal. Therefore, it is disappointing that the standards set by developed countries do not apply to them in the same way.

One aspect that will be particularly critical in this regard is that there are countries that today rely significantly on fossil fuel revenues and these will taper off over time. Any articulation of transition without a conversation about spatial diversity in endowment is incomplete and cannot be said to be aligned to the overall commitment to just transition. An important tension that runs through all discussions is that the ambitions of developing countries may be set more into the future than the EU's. The harmonisation of these timelines may be difficult but there is a need for further discussion and negotiation between countries on what the transition by 2050 entails for other countries. In a recent paper by India's Central Bank, there is discussion about Net Zero by 2050 being the least costly scenario, yet there are factors that limit the achievement of the target. The first is that there will be social implications of the tax that can be immeasurable. Moving ahead, it is also important to think of resource gaps that will exist and the related political economy. Would critical minerals be located in specific jurisdictions and how would this pan out in terms of access not just for the EU but also for the world? As was demonstrated, the rising price of fossil fuels, due to crisis or war, can amplify social crises. Therefore, as the EU seeks to look outwards and promote a policy that discourages a race to the bottom, it is also important that it be calibrated to keep in mind the difficulties that exist with matching ambitions across the world. The book is a thorough review of the EU's external actions as authors identify challenges and suggest ways in which the EU's interactions with the world can be more constructive.



CHAPTER 2

Applying Climate Ethics to Policy: The Case of an EU China Carbon Border Adjustment Mechanism

BY KEVIN LE MERLE

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1. INTRODUCTION[1]

Carbon Border Adjustment Mechanism (CBAM) has taken up a significant amount of breath and political discourse in international policy circles and decision-making fora since 2008.[2] Recently, this has been heightened by the publication of the Fit for 55" policy package by the European Commission (EC) as part of the European Green Deal (EGD) which sets forward the ambitious goal of reaching climate neutrality by 2050.[3] Indeed, the policy package includes the first concrete European iteration of CBAM.[4] Climate change is a pressing global issue which calls for immediate concerted political action on a global level. The European Union (EU) has clearly acknowledged this, and its response is the EGD, a green growth strategy spanning the upcoming decades. The EGD fits into a complex institutional climate diplomacy architecture, with the Paris Agreement at its masthead.

CBAM has proved controversial in many respects. Not least because they have a bearing both on economic and trade policy, and on climate and energy policy. The EGD inscribes itself in the stated aim to enact a Just Transition, whereby people are equipped "to address the social, and economic […] impacts of the transition towards a climate neutral economy".[5] This involves caring for social inclusivity and the general well-being of the least well-off. However, this transition can only be termed as "just" on an international level if EU emissions are not simply exported to other countries. The EU cannot ask its producers to internalise a high carbon cost that other international producers do not face, because of the risk of putting EU producers at a clear competitive disadvantage. This entails addressing the issue of carbon leakage head-on. That is why, although deemed

1 The author would like to thank Director Philippe De Lombaerde, Prof. Dirk Buschle and Prof. Christian Egenhofer, Dr. Carl Knight and Professor Matthew Agarwala for their inputs and suggestions. The views expressed in this paper are those of the author(s) and may not represent the position of the UN, UNU or UNU-CRIS.

2 Aaron Cosbey, 'Border Carbon Adjustment', in *Seminar Publication, Copenhagen June 18–20* (International Institute for Sustainable Development Trade and Climate Change 2008).

3 European Commission, 'Communication: The European Green Deal' (Brussels 2019) <https://ec.europa.eu/info/sites/info/files/european-green-deal-communication_en.pdf> accessed 24 May 2023.

4 European Commission, 'Proposal establishing a carbon border adjustment mechanism' (Brussels 2021) <https://eur-lex.europa.eu/legalcontent/en/TXT/?uri=CELEX:52021PC0564> accessed 24 May 2023.

5 European Commission, 'Proposal for a Regulation Establishing the Just Transition Fund'(14 January 2020) Article 2 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020PC0022> accessed 24 May 2023.

politically unfeasible by many (like Nick Butler[6] or Zachmann and McWilliams[7]), CBAM is being pushed for by the EU.

Despite the instrumental importance of ethical principles in the very value-laden field of climate diplomacy discourse, little research measures the practical implementation of fundamental principles of global distributive climate justice in policy outcomes. More specifically, Henrik Horn and André Sapir identified this research need when the conversation around CBAM had gained traction at the EU level. At the time this came under different names ranging from Border Carbon Adjustments (BCA) to Border Carbon Taxes (BCT). Horn and Sapir state that "it is equally important that the measure be perceived as fair in terms of the international distribution of costs and benefits that it entails"[8] In very simple terms, global distributive justice concerns itself with the economic inequalities between individuals at an international level.[9] Global distributive climate justice focuses on how climate change, and by extension climate policy, reshuffles the world's resources for better or for worse, and asks who should bear the costs. The purpose here is to evaluate the distributive impacts of climate change according to axiomatic moral principles most comprehensively defined by Simon Caney.[10]

Key to this is the implementation of CBAM with China. In 2019, China was responsible for the highest incremental annual increase of CO_2 emissions in absolute terms,[11] and its emissions were equivalent to 28% of global emissions,[12] which makes it a high-stakes player in efforts at carbon emission reductions. On top of this, China is the biggest net

6 Nick Butler, 'A "climate-neutral continent" beyond the EU – A conversation with Ukraine, Turkey and Russia' (2021) Centre for European Policy Studies Lecture.

7 Georg Zachmann and Ben McWilliams, 'A European carbon border tax: much pain, little gain' (2020) 5 Bruegel Policy Contribution.

8 Henrik Horn and André Sapir, 'Can Border Carbon Taxes Fit into the Global Trade Regime?' (2013) 7 Bruegel Policy Brief.

9 Michael Blake and Patrick Taylor Smith, 'International Distributive Justice' (Summer 2022) The Stanford Encyclopedia of Philosophy <https://plato.stanford.edu/entries/international-justice> accessed 24 May 2023.

10 Simon Caney, 'Two Kinds of Climate Justice: Avoiding Harm and Sharing Burdens' (2014) 22 (2) Journal of Political Philosophy, Special Issue: Philosophy, Politics & Society 125-149.

11 Hannah Ritchie and Max Roser, "China: CO_2 Country Profile" in Our World in Data by Global Data Lab (Oxford Martin School 2022) <https://ourworldindata.org/co2/country/china?country=CHN~USA~OWID_WRL~RUS> accessed 7 May 2022.

12 Uta Steinwehr, 'Fact check: Is China the main climate change culprit?' (2021) Deutshe Welle. <https://www.dw.com/en/fact-check-is-china-the-main-climate-change-culprit/a-57777113> accessed 24 May 2023.

exporter of goods in the world.[13] Additionally, China is the EU's main trade partner. In 2020, exports from China to the EU amounted to EUR 383.5 billion, accounting for aproximately 15.1% of China's total exports and 22.4% of the EU's total imports.[14] As such, as pointed out by Aaron Cosbey[15] CBAM is widely understood to target China.[16] The EU will need to pull its diplomatic weight when it comes to the implementation of CBAM with China to ensure that they do not, in the end, antagonise China, and jeopardise otherwise mutually beneficial climate negotiations.[17]

Initially, it had been calculated that CBAM could cost China 4% of its GDP.[18] When it comes to the EC's initial CBAM proposal which does not include indirect emissions and has a relatively narrow sectoral scope, the effects would be milder but not insignificant. Moreover, if the initial legislation is successfully implemented it seems likely that its sectoral scope and emission coverage will increase.[19]

This explains China's vehement rejection of CBAM and threats of retaliation in the form of trade sanctions in 2019,[20] and more recently, Chinese ministers' articulation of grave concerns and depiction of the measure as a unilateral trade barrier at the 30th BASIC Ministerial Meeting on Climate Change in April 2021.[21] This begs the question: Does CBAM respect fundamental principles of global distributive climate justice?

13 The World Bank, 'Exports of Goods and Services (Current US$)' <https://data.worldbank.org/indicator/NE.EXP.GNFS.CD?most_recent_value_desc=true> accessed 24 May 2023.

14 Eurostat, 'China-EU – international trade in goods statistics' (Eurostat Luxembourg 2021) <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=ChinaEU_-_international_trade_in_goods_statistics#EU-China_trade_by_type_of_goods> accessed 24 May 2023.

15 Aaron Cosbey, Andrei Marcu, Michael Mehling, 'Border Carbon Adjustments in the EU: Sectoral Deep Dive' European Roundtable on Climate Change and Sustainable Transition. (ERCST Brussels, 2021), 18.

16 Ibid 2.

17 Ibid 6.

18 Stavros Afionis et al., 'Consumption-based carbon accounting: does it have a future?' (2017) 8 (438) WIREs Clim Change, 12.

19 Sanna Markkanen et al., On the Borderline: the EU CBAM and its place in the world of trade (Cambridge Institute for Sustainability Leadership 2021) 20.

20 Carbon Pulse, 'China lashes out at EU carbon border adjustment initiative ahead of climate talks' (27 November 2019), <https://carbon-pulse.com/87558/> accessed 24 May 2023.

21 Christopher Kardish et al., 'The EU carbon border adjustment mechanism (CBAM) and China: Unpacking options on policy design, potential responses, and possible impacts' (2021) 16 Adelphi. <https://www.adelphi.de/en/system/files/mediathek/bilder/20210610%20PolicyPaperCBAM%20China_Final.pdf> accessed 2 June 2022.

To answer this question, I will complete a case study exploring the socioeconomic consequences of implementing CBAM between the EU and China. By taking a closer look at the overlap between notions of Just Transition and research outputs from climate ethics, this paper intends to connect fundamental ethics, policy discourse, and policy outcomes. The overarching goal of this paper is to bridge the increasingly disconnected field of political philosophy (more specifically what moral philosophy has to say on climate ethics), with policy practice. The first section discusses quantitative studies and provides the empirical context of implementing CBAM with China. The second section seeks an ethical justification for CBAM according to Harm-Avoidance Justice frameworks. The third does this according to Burden-Sharing Justice frameworks, notably by referring to the Polluter Pays Principle (PPP), and the Ability to Pay Principle (ATP). The conclusion explores the need for ethical justifications in climate diplomacy.

CBAM is a complex object of study because of its ethical, political, and economic dimensions. Therefore, research into the ethical implications of deploying CBAM should strive towards integrating perspectives from different policy areas. As such, the methodology deployed in this paper is hybrid in nature. This is achieved in two respects. First, interviews with practitioners and policymakers from these different fields enabled an analysis of the role and socio-political significance of principles of climate ethics and burden-sharing justice within policy and public discourses on CBAM.[22] Second, the moral philosophy aspect of my work draws on the Rawlsian methodology of reflective equilibrium.[23] This paper mutually adjusts the particular judgments and general principles that surround the discussion of the ethical implications of CBAM with China in political, legal, and economic disciplines.

22 Given the level the interviewees worked at, most asked to be anonymised. Moreover, anonymising all interviews minimised the risk of performance bias. The handling of the information was done in compliance with the General Data Protection Regulation. Each interviewee was informed of their right to pull out of the study or retract their answers at any stage during the study. Participants were sourced both from academia and policymaking circles according to relevant expertise. The academics involved were chosen based on either local political involvement or a close connection to relevant policy circles. Open questions were asked to avoid receiving guided answers. The interviews were conducted with a Senior Climate Advisor to the European Commission, a Senior United Kingdom (UK) Civil Servant, and Climate Advisor, a Commentator, Advisor, and Analyst on EU-China Affairs, an Environmental NGO Policy Officer, leading the NGO's response to the EC's Public Consultation on CBAM, an Environmental NGO Policy Officer, expert in Just Transition and the EU ETS, an Associate Professor of Law specialised in Mechanisms of Transnational Cooperation and Dispute Resolution (China based), an Environmental NGO Policy Officer, a Professor in Anthropology specialised in Globalisation and Climate Change, panelist in a European Climate Pact discussion.

23 Carl Knight, 'The Method of Reflective Equilibrium: Wide, Radical, Fallible, Plausible' (2006) 35 (2) Philosophical Papers 205-229.

2. CBAM AND THE CASE OF CHINA

2.1. Defining CBAM in practice

To avoid confusion this paper uses the term Carbon Border Adjustment Mechanism (CBAM) to refer to carbon border adjustments in a general sense as policy measures that can be structured and implemented in various ways. A distinction is drawn between this general conceptualisation and a more specific term EU Carbon Border Adjustment Mechanism (EU CBAM), which is used to refer to the actual mechanism that would be implemented based on the current EU proposal. The latter does not limit itself to the proposal fixed by the Commission but also considers changes that are likely to emerge from interinstitutional negotiations to provide a more comprehensive view.

CBAM is succinctly defined as the "carbon pricing of imports".[24] Importers either must pay an import tax or purchase certificates in an amount proportional to the embedded carbon of the goods being imported.[25,26] Broadly speaking, CBAM can be considered as an equalisation measure to ensure similar carbon pricing is internalised in domestic and imported goods for the covered sectors.[27]

In the case of the EU CBAM, the Commission's proposal indicates it will begin by covering the direct emissions of the following sectors: cement, iron and steel, aluminium, fertilisers, and electricity. However, the ENVI committee in the European Parliament adopted a report on 17 May 2022 advocating for the inclusion of hydrogen, organic chemicals and polymers, and more significantly the coverage of indirect emissions.[28] At the time of writing, this points towards a clear political will to broaden both the sectoral and emission scope of the EU CBAM, therefore increasing the potential adverse effects on the EU's trade partners.

24 Cecilia Bellora and Lionel Fontagné, 'Possible carbon adjustment policies: An overview' International Trade Committee, European Parliament (April 2020) 6. <https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/603500/EXPO_BRI(2020)603500_EN.pdf> accessed 24 May 2023.

25 European Commission, 'Proposal for a Regulation of the European Parliament and of the Council establishing a carbon border adjustment mechanism' COM/2021/564 final. (Brussels: European Union, July 2021) <https://eur-lex.europa.eu/legalcontent/en/TXT/?uri=CELEX:52021PC0564> accessed 24 May 2023.

26 Bellora and Fontagné (n 24).

27 Markkanen et al. (n 19) 10.

28 European Parliament, 'Report of the Committee on the Environment, Public Health and Food Safety (A9-0160/2022)' (2022) Amendment 27, Proposal for a regulation, Recital 346 <https://www.europarl.europa.eu/doceo/document/TA-9-2022-0248_EN.html> accessed 24 May 2023.

In its current formulation, the EU CBAM would work in conjunction with the Emissions Trading System, in the sense that importers would be required to purchase certificates covering the embedded emissions in the concerned goods, and that the price of these certificates would be equivalent to the price of weekly average prices of ETS (Emissions Trading System) allowances sold at auction. To avoid a double subsidy to European producers of equivalent goods, free allowances would be phased out. Lastly, consideration for the carbon price paid in producers' home jurisdiction will be taken into account, with the possibility to be exempt from the purchase of CBAM certificates if a domestic emission trading scheme has been linked up to the EU ETS.[29]

2.2. The predicted impact of CBAM on the Chinese economy

To begin, it is important to understand the impact of CBAM on China's economy. A case study of the ethical and normative justification for CBAM with China can be justified through three simple facts. The first is that China is the most important emitter in the world with 11,68 gigatonnes of carbon dioxide emissions in 2020.30 China is also responsible for high incremental increases in global emissions.31 In 2017 China was notably responsible for 28% of fuel combustion emissions, in 2018 China recorded the highest increase of these emissions.32 This makes China the key player in enacting successful global climate action. The second is that China has a carbon intensive and open economy. China is the largest primary energy consumer on the planet and despite relative gradual decreases, still overly relies on coal in its energy mix (57% in 2020).33 Its economy has also become more reliant on trade, with a ratio of trade to GDP increasing from 24% in 1990 to 37% in 2018.34 This also means that the adverse effects of CBAM would most strongly be felt in China. Early studies using Computational General Equilibrium modelling calculated that a CBAM

29 Markkanen et al. (n 19) 21.

30 Monica Crippa et al., 'GHG emissions of all world countries', (2021) Publications Office of the European Union.

31 Hannah Ritchie and Max Roser, "CO_2 Emissions" in Our World in Data by Global Data Lab (University of Oxford, 2022) <https://ourworldindata.org/co2-emissions> accessed 24 May 2023.

32 International Energy Agency, 'IEA Atlas of Energy: CO_2 Emissions from Fuel Combustion' (Paris 2022) <http://energyatlas.iea.org/#!/tellmap/1378539487> accessed 24 May 2023.

33 British Petroleum, 'Statistical Review of World Energy: China's energy market in 2020' (London 2020) <https://www.bp.com/content/dam/bp/business-sites/en/global/corporate/pdfs/energy-economics/statistical-review/bp-stats-review-2021-china-insights.pdf> accessed 24 May 2023.

34 Macrotrends, 'China Trade to GDP Ratio 1960-2022' (Washington 2022) <https://www.macrotrends.net/countries/CHN/china/trade-gdp-ratio#:~:text=China%20trade%20to%20gdp%20ratio%20for%202020%20was%2034.51%25%2C%20a,a%200.74%25%20increase%20from%202016> accessed 24 May 2023.

with a wide scope could cost China 4% of its GDP.35 According to one such quantitative study, the associated welfare losses would also be highest in China.36 Here, welfare losses are estimated using the ratio of Hicksian equivalent valuation in GDP terms.[37]

More recent literature using Input-Output modelling specific to the cost of an EU-CBAM offers lower estimates due to the restricted scope of the original proposal from the Commission.[38] It is important to note that the EU-CBAM has the vocation of widening its sectoral and emission coverage scope after a successful initial phase.

Due to this China is deeply antagonistic to CBAM. This brings me to the third fact. As China is the EU's largest trading partner in goods and resources, this antagonism will be felt in Sino-EU trade relations. These three facts make the case study of the impact of CBAM in China a priority on the emerging research agenda that aims to evaluate the global distributive justice implications of exporting the EGD.

On average, 40% of Chinese GDP derives from industry.[39] Industrial goods are energy intensive, and in China, this means carbon intensive due to an overreliance on coal. In terms of trade, China accounts for significant proportions of the EU's imports in carbon intensive goods, most significantly 8% for ferrous metals (crude steel), 9% for non-ferrous metals (primarily aluminium),[40] and 6.7% for chemicals, the first two being included in the initial proposal. There is also a certain dependency from China vis à vis the EU market for covered goods, with the EU being China's third top importer of cement clinkers and the fifth top importer of fertilisers.[41]

35 Afionis (n 18) 12.

36 Aijun Li, 'How large are the impacts of carbon-motivated border tax adjustments on China and how to mitigate them?' (2013) 63 Energy Policy 931.

37 Ibid. 931.

38 Kardish (n 21) 18.

39 C. Textor, 'Distribution of the gross domestic product (GDP) across economic sectors in China from 2011 to 2021', (2021) <https://www.statista.com/statistics/270325/distribution-of-gross-domestic-product-gdp-across-economic-sectors-in-china> accessed 24 May 2023.

40 Aaron Cosbey et al., 'Border Carbon Adjustments in the EU: Sectoral Deep Dive' (March 2021) SSRN 18, 29, 33, 41 <https://ssrn.com/abstract=3817779 or http://dx.doi.org/10.2139/ssrn.3817779>.

41 World Integrated Trade Solution, 'Fertilizers, mineral or chemical; potassic, potassium chloride imports from China in 2019' (2020) WITS World Bank. <https://wits.worldbank.org/trade/comtrade/en/country/All/year/2019/tradeflow/Imports/partner/CHN/product/310420> accessed 24 May 2023.

This means that even if the EU stands alone on CBAM, their application between the EU and China would still have significant socioeconomic consequences. The impact of CBAM will be especially high for sectors that are export-oriented and carbon intensive, which is why industry immediately comes to the fore.[42] Because of their differentiated impact CBAM risks significantly internally restructuring and reshuffling the Chinese economy. Although the direct impact of export losses might be strongest in coastal areas more open to international trade, because landlocked provinces usually serve as upstream suppliers to coastal regions, a negative demand shock could create non-negligible income losses for these provinces who would therefore suffer in the added value of their industrial production.[43] Existing interregional inequalities, notably in the burden of national carbon prices, mean that these losses could be felt more strongly in welfare terms.[44] Indeed, in recent years, China has promised environmental leniency to firms willing to relocate to inland poorer rural areas in order to attract foreign direct investment but also to decentralise the distribution of wealth.[45] With CBAM, the development benefits and employment obtained by the relocation of polluting companies would need to be foregone in favour of different strategies to boost the economic attractiveness of poorer rural areas.[46] Regardless, on a granular scale, the job losses of the economic sectors that are hurt will mostly concern the least well-off in Chinese society.

2.3. Climate action and diplomatic considerations

Without an ethical and normative justification for the implementation of CBAM, the EU might find themselves in a diplomatic impasse: accused of pushing their own economic interests regardless of the common good. This is especially true when considering the EU is calculated to increase its output thanks to CBAM, while simultaneously causing marginal reductions in outputs in the rest of the world.[47]

This would be an untenable position for an actor who seeks to maintain the image of a "force for good",[48] and the EU has an interest and duty to keep China at the negotiating

42 Jiarui Zhong, Jiansuo Pei, 'Beggar thy neighbor? On the competitiveness and welfare impacts of the EU's proposed carbon border adjustment mechanism' (2022) 162 Energy Policy, Article 112802, 1-18.

43 Ibid 9.

44 Ibid 10-11.

45 Lee Liu, 'A critical examination of the consumption-based accounting approach: has the blaming of consumers gone too far?' (2015) 6 WIREs Clim Change, 25.

46 Ibid 5.

47 Zhong and Pei (n 42) 6.

48 Lisbeth Aggestam, 'Ethical Power Europe' (2008) Vol 84, No. 1 International Affairs.

table as far as this is beneficial to climate action. Therefore, contra Helm et.al.,[49] instead of being a game changer that spurs climate negotiations onward, CBAM could harm these negotiation efforts and induce diplomatic retaliation that would be counterproductive to the success of international climate action efforts.[50] Recent studies indicate that the EU CBAM effectively shifts the environmental burden from the EU to non-EU countries.[51] One criticism levelled at the EU by several respondents was its lack of consultations with trade partners to jointly design CBAM.[52] Given China's national ETS made a debut on 16 July 2021, there is hope that diplomatic concordance will still be possible thanks to the exemptions and reductions clause of the EU-CBAM designed to account for domestic carbon prices.[53] However, opposition to the measure thus far suggests the EU must tread carefully.

China's vehement criticism of CBAM made the headlines in 2019 when they "lash[ed] out at EU […] ahead of climate talks".[54] EU-China relations specialists have stressed that diplomatic feasibility entails CBAM design must be "scientific" and bar the possibility of protectionist abuses.[55] The minister Zhao Yingmin asserted CBAM would hurt international climate action endeavours and embodied "climate protectionism," which was also reiterated in the April 2021 BASIC ministerial meeting.[56] What is more, this criticism was couched in ethical justifications, notably, an implicit reference to the Polluter Pays Principle (PPP) and Ability To Pay Principle (ATP).[57] Reference to the climate justice principles enshrined in the Paris agreement was used discursively to defend China against the implementation of CBAM. This overlapped with Xie Zhenhua Special Advisor for Climate Change Affairs (MEE) of China's appearance at the European Business Summit 2020 who

49 Dieter Helm, Hepburn C and Ruta G, 'Trade, climate change, and the political game theory of border carbon adjustments' (2012) 28 (2) Oxford Review of Economic Policy 390.

50 Cosbey (n 2) 6.

51 Zhong and Pei (n 42) 1.

52 Interview 3, Commentator, Advisor, and Analyst on EU-China Affairs 16.4.2020.

53 International Institute for Sustainable Development, 'Trading Begins under China's National ETS' (2021). <https://sdg.iisd.org/news/trading-begins-under-chinas-national-ets> accessed 24 May 2023.

54 Carbon Pulse, 'China lashes out at EU carbon border adjustment initiative ahead of climate talks' (27 November 2019), <https://carbon-pulse.com/87558/> accessed 24 May 2023.

55 Interview 3, Commentator, Advisor, and Analyst on EU-China Affairs 16.4.2020.

56 Cate Cadell, 'China says CO_2 border tax will damage global climate change fight' (27 November 2019) Reuters, <https://www.reuters.com/article/us-climate-change-accord-china/china-says-co2-border-taxwill-damage-global-climate-change-fight-idUSKBN1Y105T> accessed 24 May 2023.

57 Ibid.

spoke of the legacy issues of article 6 of the Paris Agreement in relation to carbon markets.[58] This calls for an evaluation of this ethical defence in both economic and legal terms.

2.4. Relevant criteria for ethical judgement

The two paradigms from a moral and political philosophy that were used were Harm-Avoidance Justice and Burden-Sharing Justice.[59] While harm-avoidance justice focuses on the rights of future generations and distributing duties to effectively prevent avoidable harm, Burden-Sharing Justice seeks the most equitable way of distributing duties so that each party bears a fair portion of the costs.[60] The two principles that emerge from Burden-Sharing Justice are the well-known PPP and the ATP.[61] The first simply requires those responsible for the problem to pay.[62] The second requires those with more capability to pitch in more.[63] By and large, both principles overlap, with those having polluted benefitting and therefore having a proportionally higher capability to pay for climate-related harm.[64]

3. CBAM AND HARM – AVOIDANCE JUSTICE

3.1. Climate policy effectiveness as harm avoidance

Having established the principles and their relevant application to the EU-China case, it is time to turn to the evaluation of CBAM with China against the set ethical criteria. In the field of climate ethics, there are two main constituent paradigms. One of these is Harm-Avoidance Justice which:

> takes as its starting point the imperative to prevent climate change, and (…) works back from this to deduce who should do what. Its focus is primarily on ensuring that the catastrophe is averted (or at least minimised within reason). This perspective is concerned with the potential victims — those whose entitlements are threatened — and it ascribes responsibilities to others to uphold these entitlements. [65]

58 Shada Islam, 'European Business Summit' (2020) <https://www.ebsummit.eu>accessed 24 May 2023.

59 Caney (n 10) 125.

60 Ibid.126.

61 Ibid.

62 Ibid.

63 Ibid.

64 Ibid.

65 Ibid. 125.

This self-explanatory definition can be complemented and analysed by stating that Harm-Avoidance justice benefits from a forward-looking perspective.[66] It indexes principles of justice on their ability to fulfil the ethical obligation of preventing avoidable harm. In this sense it prioritises efficiency. This can be contrasted to Burden-Sharing Justice which will be the subject of the next section. Harm-Avoidance Justice has a legal standing in the overarching 2°C target enshrined in article 2 of the Paris Agreement.[67]

Two worlds can be imagined. The first is a world without the implementation of CBAM with China (A), and the second is a world with the implementation of CBAM with China (B). If B has higher carbon emissions than A, this means the policy of CBAM fails to mitigate emissions. Given the severity of climate change and the long-term damage measured in terms of human well-being, it is expected to create, if B is a world with higher emissions than A, then the policy fails to meet the imperative of harm-avoidance justice. Note that the emphasis should not be on CBAM's capacity to reduce carbon leakage, but on its capacity to reduce global emissions. Carbon leakage should only matter as far as it prevents effective climate change mitigation. As we will see with the phenomena of "consumption leakage" and substitution, reducing production-based carbon leakage does not mean carbon efficiency, and is too often conflated in the literature. As such, my subsequent discussion of CBAM is premised on their specific design, actively participating in creating a carbon-efficient world.[68]

However, this must be complemented with economic considerations given they also have a bearing on global well-being. If climate action creates rampant poverty (and therefore harm), it is hard to justify it through reference to a criterion of harm-avoidance justice. The prime motivation for mitigating climate change for decision-makers is usually to prevent long-term harm to human populations.[69] In this sense, if the immediate effects of climate policies are expected to be worse than the predicted effect of climate change, they *de facto* have no *raison d'être* or ethical justification. Measuring whether CBAM are ethically justified by relying on Harm-Avoidance Justice, therefore, implies analysing two empirical realities: the policy effectiveness of CBAM in reducing emissions and the level of

66 Ibid.

67 United Nations Framework Convention on Climate Change, 'Decision on the Adoption of the Paris Agreement' (29 January 2016) FCCC/CP/2015/10/Add.1 <https://ec.europa.eu/clima/policies/international/negotiations/paris_en> accessed 16 April

68 Horn and Sapir (n 8) 4.

69 Interview 1, Senior Climate Advisor to the EC.; Interview 2. Senior United Kingdom (UK) Civil Servant, and Climate Advisor; Interview 3. Commentator, Advisor, and Analyst on EU-China Affairs.

the welfare losses created by CBAM measured against scenarios of climate catastrophe. For the second one, if welfare losses are minor compared to those expected with 2°C global warming, the policy still stands a chance of finding an ethical justification.

3.2. Emission reductions

Justifying CBAM through the argument of carbon leakage often limits itself to an understanding of it being strongly driven by climate policies; direct (through relocation of carbon-intensive production); and positive (increasing emissions in other countries).[70] However, a study conducted by the Cambridge Institute for Sustainability Leadership in close collaboration with Cambridge Econometrics found that there was an insufficient body of literature to assert with confidence that carbon leakage of this type had occurred thus far on a significant scale.

Instead, it is possible that negative carbon leakage occurred through technology transfers (meaning a reduction in overall emissions), which is a phenomenon that goes, for the most part, unquantified.[71] Additionally, the EU CBAM proposal does not consider perverse supply chain effects in the EU, whereby a narrow sectoral scope could mean finished goods with a high carbon footprint (not covered in the proposal) are imported instead of the primary materials (covered by the proposal) being used for local manufacturing. This could happen if the price of importing manufactured goods using cheaper carbon-intensive material outside the EU becomes much cheaper than using domestic but cleaner (and CBAM vetted) imports for domestic production of manufactured goods. From the reference framework of other countries, the perverse supply chain effects of the application of CBAM can cause positive indirect carbon leakage. One such example is that it has been found that the loss of export-based income for China and the impact on its balance of payments could require countervailing measures that reduce imports in favour of domestic substitutes.[72] These domestic substitutes could have a higher carbon intensity. In the literature, this is also referred to as "consumption-based leakage," or "reverse carbon leakage".[73] The existence of such phenomena reduces the predicted effectiveness of CBAM in mitigating emissions, and therefore in realising a harm-avoidance justification of CBAM. There is a consensus in the modelling literature that CBAM will at best achieve modest emission reductions, with both IO, E3ME, and CGE models rep-

70 Markkanen et al. (n 19) 14.

71 Kathy Baylis et al., 'Negative Leakage' (2014) no. 1 Journal of the Association of Environmental and Resource Economists 51.

72 Liu (n 45) 5.

73 Horn and Sapir (n 8) 5.

licating findings[74,75,76,77]. A recent example of the first set of global emission reduction rates is between 0.10% to 1.51%,[78] while a recent example of the second sets this global carbon emission reduction at 0.023%.[79] Older quantitative studies using CGE modelling find that emission reductions in the countries targeted by CBAM would to some extent be compensated by emission increases in the Organisation for Economic Cooperation and Development (OECD) countries implementing them.[80] This stems from the competitiveness gains made by OECD countries, which would increase OECD countries' outputs.[81] The study finds that the increase in emissions in OECD countries would not be higher than the emission decrease in the countries targeted by CBAM.[82] Therefore, overall CBAM would still result in emission reductions.[83] Of course, these estimations are liable to change with the final policy design of a given CBAM, specifically its emission coverage.

3.3. Welfare implications

This needs to also be put into perspective with the associated short and mid-term welfare costs of CBAM. The 2022 IO study by Jiarui Zhong and Jiansuo Pei on the EU CBAM found that the burden would fall more heavily on developing countries, notably China, India, Russia, and Turkey. This is comparable to findings from previous CGE studies, notably those focusing on a CBAM implemented by OECD countries, which found that out of Brazil, India, and China, China would suffer the most. The study unveiled a forecasted 2.62% welfare loss calculated for a 4% loss in GDP,[84,85] estimated using the

74 Markkanen et al. (n 19) 23-36.

75 Li (n 36) 927.

76 Qin Bao et al, 'Impacts of border carbon adjustments on China's sectoral emissions' (2013) 24 China Economic Review 77.

77 Zhong and Pei (n 42) 1.

78 Ibid 5.

79 Markkanen et al. (n 19) 27.

80 Li (n 36) 931.

81 Ibid.

82 Ibid.

83 Ibid.

84 Afionis (n 18) 12.

85 Christoph Böhringer et al., 'Embodied carbon tariffs' (2021) 2 National Bureau of Economic Research Working Paper.

ratio of Hicksian equivalent valuation in GDP terms,[86] while OECD countries would see a positive increase in welfare.[87] In one scenario, the 2022 IO study finds that output in the rest of the world would decrease by 0.1%, while EU output would increase by 0.38%.[88] The 2021 E3ME model with the assumption of a narrow sectoral scope estimates that any output loss in other countries would cause GDP reductions that are well below 1%, therefore revising previous findings downwards.[89] However, even with the carbon price officially operational in the national Chinese carbon market in 2021 leading to reductions or exemptions in the purchase of EU-CBAM certificates, the impact would remain significant with a possible export loss of $US12,621M, whose negative welfare impacts are predicted to fall more heavily on poorer landlocked provinces.[90]

Again, in the mid-term, these trends are likely to deepen if a fuller sectoral and emission scope is pursued. An example of a model that includes a broader sectoral coverage of 14 sectors, including complex finished products, estimated that China could lose 6.8% to 11.6% of its export value, depending on the scale of the emissions.[91]

3.4. Assessing trade-offs

To compare and contrast the short and mid-term welfare costs of CBAM versus the long-term benefits of the marginal decrease in emissions they bring about, would require fuller datasets that unfortunately do not exist at the moment. This assessment would also change according to the ethical theoretical framework used to weigh policy outcomes. For instance, if we view the problem through a prioritarian lens, the impact of CBAM on the least well-off would be given greater weight.[92] Through a sufficientarian lens, if some individuals are left without a bare minimum because of CBAM, it would be hard to find an ethical justification for them.[93] An example of a neighbouring, and more applied conception of sufficientarianism takes shape in the form of the Green-House Development Rights, which

86 Ibid. 81.

87 Ibid.

88 Ibid. 77.

89 Markkanen et al. (n 19) 27.

90 Ibid. 77.

91 Tero Kuusi et al., 'Carbon Border Adjustment Mechanisms and Their Economic Impact on Finland and the EU' <https://researchportal.helsinki.fi/en/publications/carbon-border-adjustment-mechanisms-and-their-economic-impact-on-> accessed 24 May 2023.

92 Derek Parfit, Equality or Priority? (The Lindley Lectures The University of Kansas 1995).

93 Harry Frankfurt, 'Equality as a Moral Ideal' (1987) 98 Ethics 21–42.

take into account the distribution of income within countries to give each individual with a minimal income the right to develop and be exempt from the costs of climate policies.[94]

Levels of analysis are key at this stage of applied ethical inquiry. If we look at the nation-state level, then China, as the second largest economy in nominal GDP, certainly has the capacity to bear the burden of CBAM and will not fall below the poverty line because of them. A CBAM with the restricted sectoral and emission scope suggested in the Commission proposal would barely make a dent in this respect.[95] At an intra-state and domestic level, however, if the impact of CBAM is more strongly distributed among the lower classes of the population, then this makes it harder to find an ethical justification for them in prioritarian or sufficientarian frameworks of harm-avoidance justice. As outlined previously, the impact of CBAM is likely to exacerbate existing centre-periphery dynamics and deepen regional inequalities in China.[96] Moreover, the international level also points in this direction. CBAM risks opening the door to protectionist back-sliding. It has often been associated with "green protectionism" or "eco-imperialism." A recent survey found that a majority of Asia-Pacific policymakers perceive CBAM as protectionist and discriminatory against developing countries.[97] Although China is on its way to becoming a high-income economy by 2023[98;99], this feeling remains, and was corroborated by two respondents who expressed that China was "weary, uneasy, and uncertain" when it came to CBAM.[100,101] We saw that the EU registers competitiveness gains, while China suffers losses.[102] If CBAM does indeed become a form of protectionism (and perhaps leads to

94 Paul Baer et al., 'Greenhouse Development Rights: towards an equitable framework for global climate policy' (2008) 21 (4) Cambridge Review of International Affairs 649.

95 Markkanen et al. (n 19) 27.

96 Ibid 6-8.

97 Konrad Adenauer Stiftung, Perception of the Planned EU Carbon Border Adjustment Mechanism in Asia Pacific — An Expert Survey (KAS2021) 3.

98 MathiasLarsen, 'China Will No Longer Be a Developing Country After 2023. Its Climate Actions Should Reflect That' The Diplomat 2021 <https://thediplomat.com/2021/07/china-will-no-longer-be-a-developing-country-after-2023-its-climate-actions-should-reflect-that/> accessed 24 May 2023.

99 World Bank and the Development Research Center of the State Council, the Peoples Republic of China, China 2030: Building a Modern, Harmonious, and Creative Society (World Bank, 2013) <http://doi.org/10.1596/978-0-8213-9545-5>.

100 Interview 3, Commentator, Advisor, and Analyst on EU-China Affairs.

101 Interview with Associate Professor of Law specialised in Mechanisms of Transnational Cooperation and Dispute Resolution (China-based).

102 Ibid. 77.

a retaliatory trade war), then this will cost the international system in terms of efficiency. Protectionism creates losses for consumers, which would deepen the current living-cost crisis.[103,104] This in itself is not enough to discard CBAM as a policy option or counter their ethical justification in terms of harm-avoidance justice, only to underline that they need to be World Trade Organisation (WTO) compatible, driven by emissions reduction and not competitiveness concerns. This could come about with reform of, and renewed faith in, the multilateral trade system.[105]

Now whether it is serious to place any of these socioeconomic consequences on the same scale as climate change related harms is also a difficult question. The WWF states the "negative climate change impacts are felt most strongly by the most vulnerable".[106] Moreover, climate change related harms risk being catastrophic. Scientific studies find that in a Representative Concentration Pathway (RCP).4.5. intermediate scenario of 2 to 3°C of global warming by 2100 "climate change would adversely affect future air quality for >85% of China's population (~55% of land area)".[107] Smog caused 49 000 deaths in Beijing and Shanghai even as the pandemic reduced air pollution worldwide.[108] For Shanghai, the economic cost of this fallout was US$19 billion.[109] If we look at RCP.8.5 (a worst-case scenario with 4.3° increases by 2100, often referred to as "business as usual"), these consequences are far worse. Worryingly, Dr Duffy, former Obama administration Senior Advisor on climate change, shows that in the short-term, the world has almost exactly

103 Helm et al. (n 49) 384-387.

104 Ian Smith, 'Cost of living crisis: What are European countries doing to avoid soaring energy bills?' (2022) Euronews <https://www.euronews.com/next/2022/02/03/cost-of-living-crisis-how-are-european-countries-responding-to-soaring-energy-bills> accessed 24 May 2023.

105 Fabrizio Botti, 'Trade and Finance in Renewing Multilateralism for the 21st Century: the Role of the United Nations and of the European Union' (2020) 38 Foundation for European Progressive Studies <https://feps-europe.eu/wp-content/uploads/downloads/publications/policy-report_multilateralism-2020-09-15-pp.pdf> accessed 24 May 2023.

106 WWF-European Policy Office, 'Toolkit for Assessing Effective Territorial Just Transition Plans', (2021) Brussels WWF 4.

107 Chaopeng Honga et al., 'Impacts of climate change on future air quality and human health in China' (2019) 116 (35) Proceedings of the National Academy of Sciences, 17194.

108 David Stanway, 'Smog causes an estimated 49,000 deaths in Beijing, Shanghai in 2020 – tracker' Reuters (9 July 2020) <https://www.reuters.com/article/china-pollution-idUSL4N2EG1T5> accessed 24 May 2023.

109 Greenpeace, 'Tracking the Cost of Air Pollution: New technology estimates the health impact of air pollution in real time' (2020) <https://www.greenpeace.org/international/campaign/tracking-cost-air-pollution/> accessed 24 May 2023.

followed the projections simulated by RCP.8.5. thus far.[110] Even in the face of uncertainty, the precautionary principle gives a legal precedent in international law to justify CBAM if they (even marginally) participate in avoiding catastrophic harms.[111]

In brief, a tentative harm-avoidance ethical justification of CBAM can be advanced premised on their projected success in leading to emission reductions. Key to this is measuring their policy effectiveness in avoiding harm. Because climate change causes catastrophic harms, CBAM's effectiveness is contingent on its ability to reduce emissions. This should be prioritised over competitiveness and carbon leakage issues when assessing CBAM. This stance is corroborated by Helm et.al. who authoritatively state that "the risks to humanity from catastrophic climate change have both a higher probability of occurring and greater impact should they occur than the risks to the trading regime from CBAM".[112] This also goes to show CBAM, focused on competitiveness and carbon leakage, is less likely to pass the threshold for a harm-avoidance based ethical justification. For one, avoiding carbon leakage does not always mean reducing overall emissions. Secondly, as pointed out by Horn and Sapir "one country's gain in competitiveness is another country's loss. A change in the pattern of competitiveness, therefore, does not create any gains per se from an international perspective".[113] A CBAM targeted at competitiveness concerns would likely increase harm by shifting economic benefits away from the rest of the world and towards the EU, including away from regions with high inequalities where the loss of these benefits creates significant harm, without necessarily significantly reducing overall emissions.[114,115,116]

If CBAM is to be ethically justified through harm-avoidance justice, the question of their revenues also needs to be addressed. The implementation of CBAM will generate a significant amount of revenue for the EU. If this revenue were to be invested either in climate action or efforts to mitigate China's welfare losses this has the potential to provide

110 Bob Berwyn, 'The Worst-Case Scenario for Global Warming Tracks Closely With Actual Emissions' (2020) Inside Climate News <https://insideclimatenews.org/news/03082020/climate-change-scenarios-emissions/> accessed 24 May 2023.

111 J. Cameron, J. Abouchar, 'The Status of the Precautionary Principle in International Law' in D. Freestone and E. Hey (eds.), The Precautionary Principle and International Law The Challenge of Implementation (Kluwer Law International 1996) 50.

112 Helm et al. (n 49) 383.

113 Horn and Sapir (n 8) 3.

114 Li (n 36) 928.

115 Markkanen et al. (n 19) 27.

116 Ibid 77.

further justification for them in harm-avoidance frameworks. However, in EU policy circles CBAM revenue is presented as a means to fund the domestic COVID-19 recovery,[117] or to boost territorial just transition plans in struggling Member States (MS). This is far from promising, as this needs to be done globally rather than domestically given CBAM will have its greatest impact on China, India, and Turkey's least well off.[118,119,120]

4. CBAM AND BURDEN SHARING JUSTICE

4.1. Relevant principles and legal background

A better-known paradigm in climate justice is burden-sharing justice. According to Caney, it focuses on "how the burden of combating the problem should be shared fairly among the duty-bearers. An agent's responsibility, then, is to do her fair share".[121] Unlike Harm-Avoidance Justice, Burden-Sharing Justice can neatly be further divided into principles. The two main principles of burden-sharing justice are the PPP and the ATP.[122] The PPP holds that those who are at the root of the problem of climate change should be the ones to pay to resolve it.[123] The ATP dictates that those with a greater capacity to pay should contribute more.[124]

These principles are not simply issued from climate ethics but are also enshrined in the international legal climate architecture. In article II.2. of the Paris Agreement the logic of the PPP and ATP are accommodated using Nationally Determined Contributions. These flow out of the principle of "common but differentiated responsibilities and respective capabilities, in the light of different national circumstances." Although vehemently debated, some consider CBDR [Common But Differentiated Responsibilities] a principle of

117 European Commission 'The Commission proposes the next generation of EU own resources' (December, 2021). <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_7025> accessed 24 May 2023.

118 Ibid (n 77)7-8.

119 Interview 1. Senior Climate Advisor to the EC.

120 Institute for European Environmental Policy 'What can Least Developed Countries and other climate vulnerable countries expect from the EU Carbon Border Adjustment Mechanism (CBAM)?' (2021) IEEP. <https://ieep.eu/uploads/articles/attachments/0f93d0de-8ac8-491f-9756-31fc93cba720/What%20can%20climate%20vulnerable%20countries%20expect%20from%20the%20EU%20CBAM%20-%20IEEP%20et%20al%20briefing%20(002).pdf?v=63791839851> accessed 24 May 2023.

121 Ibid. 59.

122 Ibid.

123 Ibid.

124 Ibid.

customary international law. Minimally, it is a soft law principle. The PPP and ATP are not only ethical criteria but have been consecrated, in different forms, in international environmental law. As put by Ladly, the CBDR principle:

> recognizes the unequal contribution to environmental degradation of developed countries as well as their enhanced ability to address the challenges presented by such degradation and, as a consequence, requires that they undertake more onerous obligations with respect to climate change mitigation.[125]

Hence, CBDR simply formulates the ATP and the PPP together. Ladly corroborates this by emphasising the omnipresence of the issue of fairness in environmental law. To this end, they state: "the principle of CBDR, which is fundamentally an equitable principle, may be understood as one expression of the considerations of equity underlying international environmental law".[126] Encyclopaedia Britannica provides a fuller picture of the link between CBDR and the ATP, and the PPP.[127] It states CBDR emerged from "the need to establish variegated levels at which different states can effectively enter into a collective response, according to both their capacities [ATP] and their levels of contribution to the problem [PPP]". These two objectives had been recognised prior to the Paris Agreement, as early as the Stockholm Declaration of 1972.[128] CBDR emerged as a middle ground between developing and developed countries.[129]

4.2. CBAM and the polluter pays principle

The PPP was first adopted in 1972 by the OECD.[130] 20 years later it became key to climate action with the 1992 Rio Declaration on Environment and Development which places emphasis on "the approach that the polluter should, in principle, bear the cost of pollu-

125 Sarah Davidson Ladly, 'Border carbon adjustments, WTO-law and the principle of common but differentiated responsibilities' in International Environmental Agreements: Politics, Law and Economics (Springer 2012) 65.

126 Ibid.

127 Charlotte Epstein, 'Common but differentiated responsibilities' in Encyclopaedia Britannica (2015) <https://www.britannica.com/topic/common-but-differentiated-responsibilities> accessed 24 May 2023.

128 Ibid.

129 Ibid.

130 OECD, 'Recommendation of the Council on Guiding Principles concerning International Economic Aspects of Environmental Policies', OECD/LEGAL/0102

tion".[131] In a nutshell, it can be understood as "clean up your own mess".[132] The principle has become increasingly accepted and has generally been considered as a moral guide to climate action since.[133] The PPP is commonly understood as an argument for historical responsibility.

The WWF lists "respect the polluter pays principle" as the 6th criterion for assessing the effectiveness of a Territorial Just Transition Plan. At a local level, the principle is fundamental as it seeks to protect the least vulnerable from actors that would cause environmental harm for gain with impunity. The goal is to not burden the wider community with costs that should be internalised by high emitters. It is interesting to judge how this can be applied to CBAM in an effort to judge the EU's respect for the potential for an international Just Transition.[134]

Indeed, CBAM is meant to make carbon-intensive industries pay. The Commission proposal suggests making importers pay a carbon price in the form of CBAM certificates. This is intuitively in line with the PPP, as it disincentives importing high-carbon products and, in doing so, reduces the market shares of highly polluting producers and exporters. If applied equally to everyone, the only factor would be that the polluter pays, at least in international trade. As mentioned previously, China is the actor that is responsible for the largest increases in emissions. On a domestic, or finer grain level, those economic actors with high levels of emissions would end up bearing the cost. This is close to the spirit of the PPP.

Two points emerge against such justification of CBAM through the PPP. For one, different levels of analysis provide different answers. On an international level, the implementation of CBAM would cancel out the historical dimension implications of the PPP. The former EU-28 are historically responsible for 22% of global cumulative emissions (33% for Europe).[135] This is no slim share, and with the PPP, the EU would have a lot to pay

131 United Nations, 'Conference on Environment and Development.' 1992 Agenda 21, Rio Declaration, Forest Principles. (New York: United Nations).

132 Henry Shue, 'Global Environment and international equality' (1999) 75 International Affairs 533.

133 Interview 1. Senior Climate Advisor to the EC.

134 College of Europe in Natolin, 'A Green Deal for the Globe: European Union external action and the international Just Transition' (22 June 2021) <https://www2.coleurope.eu/fr/events/online-conference-green-deal-globe-european-union-external-action-and-international-just> accessed 24 May 2023.

135 Hannah Ritchie, 'Who has contributed most to global CO_2 emissions?' in Our World in Data by Global Data Lab, (Oxford Martin School 2019) <https://ourworldindata.org/contributed-most-global-co2> accessed 24 May 2023.

in climate action efforts to account for this historical responsibility. With CBAM, China, which is responsible for 12.7% of total global cumulative emissions, would pay more despite cumulatively lower emissions than the EU. The EU would stand to gain from CBAM despite cumulatively higher emissions. As such, this transgresses the PPP. A narrative that fails to account for historical responsibility would be problematic. The colonial world order was largely structured in ways that made gain possible for the developed world, often at the expense of the developing world.[136] Even if China will not be considered a developing country for much longer, historical responsibility has a strong bearing on the application of the PPP given emissions are a transboundary but also transtemporal and cumulative phenomenon. CBAM would apply to polluting producers and companies but completely obfuscate the phenomenal benefit incurred by past polluting actors, and hence their tactical advantage on the market. Moreover, the application of CBAM would be a burden on the Chinese economy (a heavier or lighter burden depending on the scope or achieved exemptions), and existing socioeconomic distributional issues would signify that the community would *in fine* end up paying too. Unlike in Territorial Just Transition plans, it cannot be said that a PPP-driven CBAM would necessarily protect the community from bearing the cost.

The second point is that if different modes of accounting are adopted, it becomes clear that the high global emission rates are still largely imputable to the consumption of the developed world.[137] More specifically to the current case study, China is the largest exporter of embodied emissions, while the EU is the largest importer.[138] While the EU's per capita emissions are decreasing under the production-based accounting model, the EU is still a net importer of emissions.[139] With CBAM it is projected the emissions of OECD countries, historically responsible for climate change, to increase (through competitiveness gains which lead to higher outputs), while those in China and the developing world decrease.[140] More specifically, the EU's emissions would increase by an estimated 2.1 Million tonnes of carbon dioxide, while those in the rest of the world would decrease by

136 Gernot Köhler and Arno Tausch, *Global Keynesianism: Unequal exchange and global exploitation* (Nova Science 2002).

137 Daniel Moran et al., 'The Carbon Loophole in Climate Policy: Quantifying the Embodied Carbon in Traded Products, report' (2018) 6 Climate Works Foundation <https://www.climateworks.org/wp-content/uploads/2018/09/Carbon-Loophole-in-Climate-Policy-Final.pdf> accessed 24 May 2023.

138 Ibid. 10.

139 Ibid. 17.

140 Li (n 36) 931-933.

12Mt.[141] This already transgresses the idea that the developing world should have an equal if not greater entitlement to the remaining emissions.[142]

This leads us to reconsider the intuitive justification of CBAM by the PPP and place the reflection of CBAM justification back into the legal context of the PPP. As demonstrated in the previous section CBDR provides a recognised legal avenue for the PPP to have a bearing in international environmental law. Therefore, I can now turn to the legal discipline to assess whether CBAM fulfils the obligations of the PPP on a less superficial level. As I have outlined in my previous section, WTO-compatibility is fundamental in ensuring CBAM can be justified from a harm-avoidance perspective, which remains the most important argument in their favour. Without WTO-compatibility, CBAM risks being reduced to a backwards protectionist measure that undermines carbon emission mitigation and welfare through increased international and domestic trade inefficiencies. Yet, Sarah Davidson Ladly, suggests that a WTO-compatible formulation of CBAM likely transgresses the principle of common but differentiated responsibility.[143] If a WTO-compatible CBAM design transgresses CBDR, which by and large embodies the PPP in MEA, this means they are much less likely to secure ethical justification in terms of the PPP.[144] Ladly's legal reasoning deserves closer inspection. The overarching Most-Favoured Nation clause of article I:1 of the GATT dictates that:

> any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.[145]

A simple understanding of this is that discrimination on like products is legally prohibited to parties in the WTO, all parties must be treated equally. Unfortunately, as pointed out by Ladly et.al., the MFN in WTO law requires that: "a CBAM would still be applied

141 Markkanen et al. (n 19) 27.

142 David Miller, Global Justice and climate change: how should responsibilities Be Distributed? The Tanner Lectures on Human Values (Beijing Tsinghua University 2009) 125.

143 Ladly (n 125) 63.

144 Institute for European Environmental Policy, 'What can Least Developed Countries and other climate vulnerable countries expect from the EU Carbon Border Adjustment Mechanism (CBAM)?' 1 <https://ieep.eu/publications/what-can-climate-vulnerable-countries-expect-from-the-cbam/?utm_campaign=coschedule&utm_source=twitter&utm_medium=IEEP_eu>.

145 'General Agreement on Tariffs and Trade' (30 October 1947) 61 Stat. A-11, 55 U.N.T.S. 194.

in a consistent manner to all imports meeting the relevant criteria (e.g., comparable domestic emission reduction programs), without regard to their country of origin".[146]

This would prevent the application of CBDR, given that countries with less historical responsibility would by and large need to be treated in the same way as more historically responsible countries. A WTO-compatible CBAM would then likely violate any PPP-motivated implications present in the CBDR. The consensus in the literature is then that a WTO-compatible CBAM design would need to be based on the general exceptions of the GATT.[147] XX(b) or XX(g) could be called on to justify unilateral CBAM in the WTO.[148] Even if these two clauses provide policy space for CBDR-compliant CBAM the chapeau nalysis of XX reveals this would come at administratively prohibitive costs whereby a country implementing CBAM with another would have to provide a full review of their lack of equivalent domestic climate policies to justify the implementation of CBAM.[149]

Moreover, this solution would not resolve the underlying tension between the conflicting normative frameworks of international environmental law and international trade law, with one being driven by considerations of equity, and the other by considerations of efficiency.[150] For China, which diplomatically advances its right to develop further through historical arguments, the clash that arises between the MFN and CBDR on CBAM precludes their legal and ethical justification according to the PPP. However, it appears seminal that these two seemingly diverging priorities of trade and climate law be integrated within the same framework. A political coalition building support for CBAM might be tempted to argue, in line with many environmental economists and international environmental lawyers, that the WTO must be reformed to better account for the need to protect environmental goods. There is a clear valuation problem when it comes to environmental goods. Here, Dietrich Helm et.al provide a plausible economic analysis which states that free trade can only be perceived to be beneficial in the face of negative externalities if inputs are appropriately priced.[151] The problem of environmental valuation shows that inputs (negative externalities) are not being appropriately priced.[152] This lends

146 Ladly (n 125) 75.

147 Ibid.

148 Ibid.

149 Ibid. 77.

150 Ibid 79-81.

151 Helm et al. (n 49) 368.

152 Ibid.

some stock to the discourse that the WTO should be reformed. Helm et.al show that it is not against the spirit of neoliberal economic theory to seek to better price environmental goods, and that this seeks to rectify pre-existing distortions of environmental valuation present in the international trade system rather than further skew the system in an inefficient protectionist fashion.[153] Making sure that efficient trade also means carbon-efficient trade would be a first step in the direction of integrating considerations of equity and efficiency. In a neoliberal order with appropriately priced negative externalities (viz. a carbon price), international inefficiency would have a carbon cost in itself, and this would enable economic measures to solve climate-related problems of equity through free trade rather than against free trade.[154]

In this part, I have shown that at first sight, CBAM satisfies an ethical justification, according to the PPP. They target polluting industries and companies. However, if we turn to other levels of analysis, notably the international level with the nation-state as its unit, and considerations of historical responsibility it is less clear that CBAM fully complies with the PPP. Ethical justification can still be found on the international level if the policy cost of CBAM remains limited to highly polluting economic actors (transnational corporations) and is not made to be felt in terms of the well-being of the worst-off in the general population. This imperative emerges from the Just Transition rationale. In this part, I explored the conflicting obligations of international environmental law and international trade law. After reviewing the necessity for WTO-compatible CBAM to also comply with the customary or soft law of CBDR, I find that designing such CBAM would prove extremely difficult both from an administrative and legal standpoint. It emerges that WTO-compatible CBAM would likely fail to satisfy the implications of historical responsibility that underpin the PPP as countries would pay from CBAM disproportionately to their historical responsibility. What is worse: those most responsible for climate change could stand to benefit from a CBAM policy. At the international level and based on the global architecture of the multilateral trade regime, as well as that of the multilateral environmental regime, it appears CBAM cannot hope for a clear-cut ethical justification through the PPP.

153 Ibid.

154 Ibid.

4.3. CBAM and the ability to pay principle

The ATP highlights that countries with the ability to contribute to climate change efforts should do so. The best and most intuitive moral reasoning behind the ATP can be found in Simon Caney's work. He states that "if someone sitting next to you at a table suddenly becomes seriously ill and you're well placed to help, then we tend to think that you should do so".[155] In the case of China, an additional difficulty emerges because of its contentious status as a developing nation.[156] As stated previously China is on track to be considered a high-income economy in 2023, however deep socioeconomic inequalities mar this success with an extremely poor rural in-land periphery and a wealthy urban centre on the coastline.[157,158].

Recognizing these inequalities, their ATP can be considered low, and therefore their responsibility reduced. This would make CBAM hard to justify according to the ATP. However, if China is considered the economic powerhouse of the world with its GDP of $12.238 trillion and its 6.1% GDP growth in 2019[159]China would not be exempt from paying for climate action through CBAM, provided other economies also pay according to their level of capability.[160] In substance, previous sections make it evident that this would not be the case. From a purely GDP per capita perspective, CBAM transgresses the ATP principle. However, a GDP account of the ATP fails to discriminate between economic wealth and correlated well-being.

As argued in Le Merle 2021, the most cogent version of the ATP would be measured in terms of capability.[161] Sharing costs proportionally according to income or GDP fails to account for the differing impacts of a 1% cut to GDP in a less developed country and

155 Simon Caney, 'Climate change and the duties of the advantaged' (2010) 13 (1) Critical Review of International Social and Political Philosophy 216-217.

156 Veronika Ertl and David Merkle, China: A Developing Country as a Global Power? (Konrad Adenauer Stiftung 2021) 1-2.

157 World Bank and the Development Research Center of the State Council, the Peoples Republic of China, China 2030: Building a Modern, Harmonious, and Creative Society (World Bank, 2013). <http://doi.org/10.1596/978-0-8213-9545-5>.

158 Larsen (n 98).

159 World Bank, 'GDP Growth (annual%) China', and 'Current GDP China' <https://data.worldbank.org/indicator/NY.GDP.MKTP.KD.ZG?locations=CN> accessed 24 May 2023.

160 United Nations Framework Convention on Climate Change, 'Decision on the Adoption of the Paris Agreement' (29 January 2016) FCCC/CP/2015/10/Add.1

161 Kevin Le Merle, 'From Burden-Sharing Justice to Harm-Avoidance Justice: A Normative Evaluation of the Ability to Pay Principle and the Polluter Pays Principle' (2021) 1 Duodecim Astra 164 – 178.

a first-world country.[162] In a least developed economy, such a cut would create unacceptable levels of hardship, whereas depending on domestic configurations, a 1% cut could have few repercussions in other countries (even median economies).[163] As such, to obtain a prioritarian ethical justification, the ATP should not be a question of aggregate GDP or proportions of GDP, rather it should be measured in terms of the impact of climate action measures and policies on the well-being of populations, with extra weight given to the least well-off. This is how a country's capability should be understood, which is why domestic socioeconomic inequalities in China matter in understanding ethical justification according to the ATP.

This gives CBAM a larger chance of passing the threshold of ethical justification through the ATP. Few would deny China has climate action capabilities. In that respect, it would not be immoral for China to pay according to those capabilities. Its current claim to a developing nation status cannot become a licence to continue to pollute a bit longer.[164] Especially because China now has little other reason to maintain this status beyond preserving the political weight and international advantages that come with it.[165]

That being said, even if CBAM results in China paying an amount commensurate with its capabilities, it does not seem they would make the EU or OECD countries pay an amount commensurate with their capabilities. This double standard appears sufficient to discard a justification through the ATP. The only saving grace would stem from the EU pledging any additional revenue from CBAM to palliate the negative socio-economic externalities in China that come from their implementation, or using these revenues to promote initiatives that promote climate action, such as technology transfers for instance. As stated previously, it is unlikely this will happen. Furthermore, the revenue raised by CBAM is not limited to levied taxes,but is also enmeshed in complex issues surrounding competitiveness.

When it boils down to legal considerations, my previous part has demonstrated there is a prima facie conflict between the WTO and CBDR compliance of CBAM. This is driven home by the chapeau analysis of Article XX in the GATT 1949.[166] Therefore, the WTO-com-

162 Shue (132) 537.

163 Ibid 538.

164 Interview 1. Senior Climate Advisor to the EC.

165 Ertl and Merkle (n 156) 2.

166 Ladly (n 125) 77.

patible CBAM designed by the EC cannot find ethical justification according to the ATP either, as I have shown the ATP is implicitly embodied in CBDR. All in all, CBAM does not sit well with the ATP.

5. CONCLUDING REMARKS

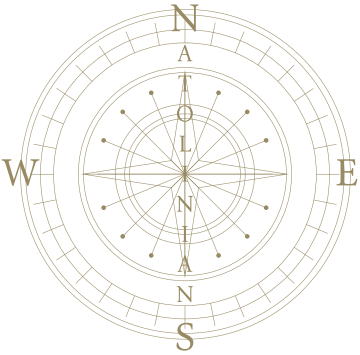
This paper has predominantly concerned itself with unveiling the ethical quandaries at the heart of the implementation of CBAM between the EU and China. In doing so, it has also presented a roadmap for the application of ethical principles to policy design and implementation that can serve as a methodological basis for future research. I have found that CBAM only secures a weak justification according to Harm-Avoidance Justice: their associated emissions reductions are projected to be only marginal, yet their immediate welfare cost is noticeable. In Burden-Sharing Justice frameworks, CBAM also stands on murky grounds. In the short run, the PPP would make highly polluting Chinese companies pay through their loss of market shares, but this would be limited to companies who export their products to the EU. Meanwhile, on an international level, it emerges the Chinese community would indirectly be asked to bear the costs for pollution that mostly continues to benefit consumers in the EU. On the ATP side, China does have the capability to pay for climate action, and CBAM would make them pay. However, CBAM would make China pay disproportionately more than the EU, which stands to generate revenue and record welfare gains through CBAM. This transgresses the ATP principle. In conclusion, ironically, CBAM is motivated by domestic Just Transition considerations: making sure to safeguard economic actors that will be worst hit by the transition by levelling the playing field of international trade. Yet, at an international level, the foreign policy dimension of the EGD, notably CBAM, does not respect the values and principles of Just Transition. The externalisation of discursively constructed values and principles needs to be integrated into a self-reflexive understanding of the EU's instrumental use of ethics. In the case of this paper, the ethical principles called upon are enshrined in international agreements that also account for the interests of developing countries. Despite its ambivalent status at the juncture, the case of China stands out as a priority given its increasing share of emissions and the effects of CBAM on its economy. The diplomatically fraught nature of CBAM also has a bearing on their ethical justification. If CBAM harms climate efforts overall, finding ethical justification for them will be impossible.

It emerges that CBAM will only marginally reduce emissions and might act as a smoke screen for more significant action on the EU's part. This means CBAM only have limited justification in harm-avoidance frameworks. On the burden-sharing front, it appears

CBAM is ethically unacceptable. If the WTO is not reformed, WTO-compatible CBAM prima-facie transgresses CBDR. CBDR is both the legal expression of the PPP, and the ATP. Therefore, CBAM fails to pass the threshold of ethical justification of a burden-sharing approach. Many might contest the very premise of this paper and argue that politics are pragmatic and that ethics will not have such a strong bearing on the issue of CBAM. However, an ethical justification is instrumentally important diplomatically, legally, and politically. This imperative need for ethical justification was maybe best explained in an interview with one of the EU's lead negotiators who said: "We need to push the boundaries of what policy can achieve. But in order for a policy to be accepted by the actors to whom that policy will apply, they have to perceive it as being fair".[167]

Without a case to prove CBAM are not protectionist and self-serving, the EU will face actions through the WTO. Without CBDR compliance, the EU will face diplomatic fire for failing in its commitments to the Paris Agreement. These are not only legal questions, but ethical questions concerned with populations' well-being. Politically, public opinion, both domestic and foreign, will not stand firm behind the EU in the face of policies that transgress widely accepted ethical criteria like the PPP and ATP.

167 Interview 1. Senior Climate Advisor to the EC.



CHAPTER 3

Carbon Border Adjustment Mechanism as a Trade Policy Instrument to Achieve Global Climate Neutrality

BY DR JAROSŁAW PIETRAS

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1. INTRODUCTION

The European Green Deal sets an ambitious aim for the EU to achieve climate neutrality by 2050 which means it seeks to become an economy with net-zero greenhouse gas emissions. To make it happen, the EU has to reinforce existing instruments addressing carbon discharge and establish new measures. It is not an easy task, and it may require far-reaching interventions in economic mechanisms. Motivation to achieve it is based on environmental consideration and climate science. However, from this point of view responding to climate challenge requires global actions as climate changes are caused by world-wide emissions. The EU therefore has to make sure that other regions are engaged. Measures applied in Europe leading to climate neutrality in 2050 would require radical adjustment of production of some European industries. They fear that as consequence of increased prices of CO_2 emissions, a carbon leakage will negatively affect EU economy. Even if it is disputable whether there is clear evidence of carbon leakage and the extent to which its negative effects can be observed, industries have concerns of such developments in the future when the price of carbon could be much higher.

There is a wealth of literature on how to address carbon leakage and how to form effective response to asymmetrical costs of carbon between trading nations and to prevent relocation of production as a consequence.[1] Much of the research aims to verify the scale of observed carbon leakage frequently concluding that until now and in the short term, the phenomenon is not really a reason for concern.[2] Until recently, the price of carbon was relatively low and, in a past few years, it has increased to over 50 euros per CO_2 ton. It has also been the period of still important, however diminishing free allocations to the manufacturing sectors particularly threatened by carbon leakage. During this stage of the ETS system and with relatively low price of carbon credits until recently, there was not enough momentum to address it except for the distribution of free allowances. The carbon leakage was not otherwise addressed at the border. With the Commission's New

1 See for example: Andrei Marcu (project leader), 'Carbon Leakage: An overview' (2013) No. 79 CEPS Special Report; Susane Dröge et al., Tackling Leakage in a World of Unequal Carbon Prices (Climate Strategies 2009); Christiane Kraus, Import Tariffs as Environmental Policy Instruments (Springer 2000) Larry Parker, Jeanne Grimmett, 'Climate Change: EU and Proposed U.S. Approaches to Carbon Leakage and WTO Implications'(4 November 2009) Congressional Research Service,; Trevor Houser et al., Leveling the carbon playing field: international competition and US climate policy design (Peterson Institute for International Economics World Resources Institute 2008).

2 Frédéric Branger, Philippe Quirion and Julien Chevallier, 'Carbon Leakage and Competitiveness of Cement and Steel Industries Under the EU ETS: Much Ado About Nothing' (2016) Vol. 37, No. 3 The Energy Journal 109-135; Shon Ferguson, Mark Sanctuary, 'Why is carbon leakage for energyintensive industry hard to find?' (2019) 21 Environ Econ Policy Stud 1–24.

European Green Deal initiative, the situation is going to change as it proposes to legislate and implement the Carbon Border Adjustment Mechanism (CBAM).

The announced purpose of CBAM is to prevent carbon leakage and to provide a level-playing field for European producers of goods whose costs of emission allowances in production are significant. CBAM is to be introduced as just one component of the EU's Green Deal initiative, which is the most ambitious, most comprehensive and genuinely transformative set of measures motivated by environmental and climate concerns. Addressing carbon leakage by introducing CBAM has to be seen in this context. It has to play a role among other instruments, and it has to contribute to effectiveness and integrity of the EU's effort to achieve climate neutrality by 2050. The introduction of CBAM is nevertheless linked to very specific preoccupations related to the competitiveness of some sectors of the European economy, and in this sense, it is not different from traditional objectives of trade policy.

The EU Carbon Border Adjustment Mechanism, as a component of the EU Green Deal, is legislated and will be gradually implemented to reach its final shape. There have been many different formats discussed and reviewed (the most comprehensive one by the ERCST[3]) but what was proposed in the draft legislation by the Commission has been changed during the legislative process, in particular in the negotiations between the Council and European Parliament. Whichever mechanism is drafted by the European Commission and agreed by the Council and EP, it will result in making the supplies from area outside of the EU ETS area subject to a mechanism, which would aim to make sure that the cost of carbon is also included in the price of imported products. Irrespective of the final format of this mechanism after implementation and testing phases it will add cost to carbon intensive imports, similarly, as is done by any other trade policy instrument. Such additional costs of imports create barriers to trade. In the international economic literature, there are well established methods of analysis of such barriers to international trade. The major focus is generally to determine to what extent such barriers affect international trade flows, how they influence domestic supply and demand and impact a country's income.

This paper assumes that irrespective of the motives, actual scheme of functioning of CBAM should also be considered in simple economic terms, as a trade policy tool, how-

3 See: Andrei Marcu, Michael Mehling, Aaron Cosbey, 'Border Carbon Adjustments in the EU. Issues and Options' (2020) European Round Table on Climate Change and Sustainable Transition as well as Andrei Marcu, Michael Mehling, Aaron Cosbey, 'Border Carbon Adjustments in the EU. Sectoral Deep Dive' (2021) European Round Table on Climate Change and Sustainable Transition.

ever it will be implemented, with the view to reach climate neutrality by European economies. Whatever the motives, it will have implications for trade flows and affect trading conditions. Trade operators react to price signals and when they face additional charge, they will ultimately alter their behaviour correspondingly.

Imports, exports and European production of goods/services covered by CBAM can be strongly affected depending on the price level of the carbon emissions allowance.[4] As this price might, in the course of evolution of the carbon markets, reach prohibitive levels.[5] The question will appear in the future whether it would be necessary to extend application of CBAM to other imported products, which also contain significant proportion of carbon intensive inputs in their production.

There is a specific feature of the products considered in the context of carbon leakage. A differentiation must be made between same products made using different technologies. These are de facto identical goods or goods being close substitutes, which differ only because of the contribution of the production process to the CO_2 emissions. We must consider that the correct mechanism of preventing carbon leakage will have to treat differently products like electricity, hydrogen, steel, aluminum cement etc. depending on whether the technologies used in the production process have been climate neutral or those based on fossil fuels producing significant CO_2 emissions. The physical features of "green" electrons, or "green" molecules of hydrogen are the same, but the difference lies with the methods of production. Steel can be produced using coal and iron ore in a process emitting more CO_2, or it can be obtained from metal scrap in kilns using the electric arch. Even more significantly when renewable electricity is used instead of fossil fuels, the same technologies may appear as low emitting or climate neutral. The mechanism proposed by the Commission in the draft legislation of CBAM allows foreign producers to provide data on embedded emissions in the goods imported to the customs territory of the Union and the price of carbon paid in the other countries. Therefore, it is necessary to consider trade mechanism which will create a level playing field in terms of carbon costs for products which are close substitutes or, as it is in some cases, identical.

4 The price of carbon will be under downward pressure with diminishing cost of carbon abatement (mostly related to technological development and its application) and with the upward pressures due to increasing scarcity of allowances.

5 The current price (May 2021) over 50 Euros per tonne has already bypassed the level in the prudent Commission scenario for 2030 in preparation of the Green Deal. For example Jean Pisani-Ferry and Clemens Fuest cite scenarios of carbon price in the range of 85 -200 Euros per tonne in 2050 See: Jean Pisani-Ferry, Clemens Fuest, 'Financing the European Union: new context, new responses' (2020/16) Bruegel.

Finally, the overarching aim of the EUs climate policy is to become climate neutral by 2050. It means that the level playing field between domestic production and imports will be linked to total suppression of carbon intensive technologies used for the production in the EU and the corresponding suppression of imports of goods whose production contributed significantly to CO2 emissions. CBAM by 2050, or any other additional mechanism, will have to become a de facto instrument of preventing imports of products manufactured and delivered with a high level of negative impact on climate. It would be difficult to imagine imports of such products, even with additional cost of carbon price, into the carbon neutral European economy. In such a situation, CBAM might not be sufficiently effective to limit carbon leakage.

2. RELEVANCE OF BORDER MEASURE MECHANISMS

There are at least a few factors which make discussion concerning carbon leakage and the proposed border measure more relevant at this stage. First, the ETS being a relatively new mechanism, with prices of carbon credits at this early period being less significant, has not resulted in radically altered short term business strategies, as companies have recently faced many other market shocks and uncertainties. Secondly, the allocation of free allowances, which cushioned the impact of the price of carbon, is subject to gradual elimination, which, for companies, means less shelter from trade competition originating abroad, especially from countries where the price of carbon is not considered at all. Moreover, because of the characteristics of the sectors concerned (such as energy, iron and steel, aluminum, cement, fertilizers etc.) which are based on large installations with huge capital investments, the production continues over a long period of time, irrespective of market prices in a given moment. Reducing production when prices are temporarily lower or competition from producers from other countries stronger, could make invested capital stranded. However, in the longer run, the new investment decisions will take fully into account current and future market conditions including the evolution of carbon price in the EU and elsewhere.

The most significant, it seems, is the political determination to reach climate neutrality by 2050 confirmed at the highest level, with the intermediate ambition, surely leading to tightening of climate goals and implementing legislation. With the current legislative framework, and the ETS based on a diminishing cap for total EU emissions, industries must adjust rapidly already now. But a new framework is in the making which will pose

even more exigent requirements.[6] For the sectors exposed to carbon leakage, the clarity about the pathway of changes is now even more important as installations are constructed to function and be economically active for decades. Before installations are retired, they should prove to be able to compete in the EU market, possibly also outside, and they should offer return on the capital invested. From this point of view, the date 2050 is very close and the evolution of carbon market from now to the target date is decisive for the modalities and functioning of the sectors concerned.

During the period of around 30 years from now, up to 2050, the European market may undergo many new developments, especially in the field of technology. But for sectors like energy, steel, cement and aluminum, the rollout of new technologies takes time. A clear pathway accounting for the evolution of market conditions and import competition will be key.

The pathway includes many parameters, of which only some depend on political action and legislative framework. The evolution of the cost of carbon is one of such unknowns. With consecutive tightening of the permitted emissions levels, the price of carbon will depend on the speed of technological transformation, change of consumers preferences etc. However, it would be safe to assume that at least for some moments, the carbon price might be considerably higher than today and there may be a vast difference between the cost of carbon in Europe and other countries.

The period up to 2050 is sufficiently long for economic mechanisms to be fully working on the bases of price signals. In the short run or even medium term, particularly in the sectors in question, the price signals might not be followed by an immediate change of operation by the producers. For example, many companies have signed long-term contracts (like in energy) stabilizing deliveries and production levels. There are also ways of hedging against future price developments using the instruments of commodity and financial markets. These are generally capital-intensive industries, which can absorb different price levels over longer run. The response to the worsened market condition due to carbon price cannot be immediately based on limiting production as this might increase the cost of fixed assets per unit of output. Stopping production could leave a substantial amount of assets stranded. Also in the older installations, the investments have already been amortized and the production can run only with return on running costs, which

6 The European Commission is about to propose set of new legislation in order to meet increased intermediate target for 2030 in a form of the Package "Fit for 55". See: European Commission, '2021 Commission work programme – from strategy to delivery. Press release' (19 October 2020) <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1940>.

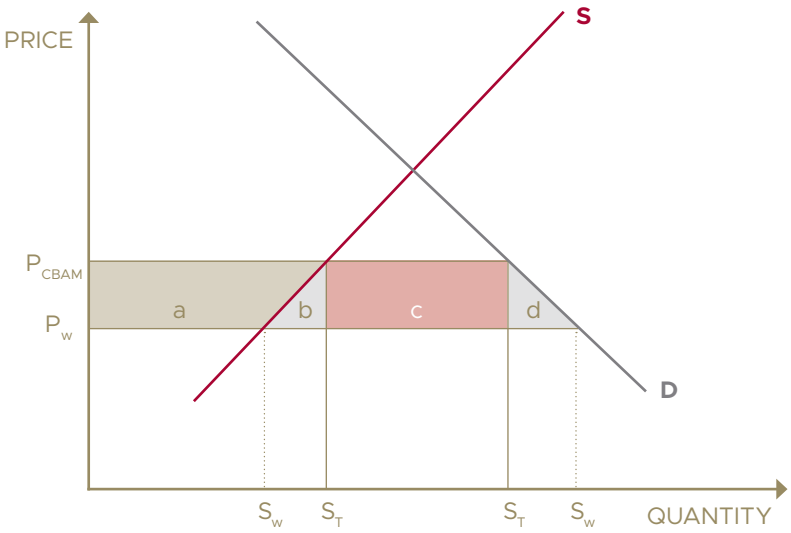
leave them competing with new producers overseas which have to include full costs of capital invested.

In the long run, economic calculation takes precedence. Price signals, and their possible evolution become the most important for economic agents to take decisions on how much to produce, what kind of products should continue to be manufactured, what kind of technologies should be used, and all other decisions on contracts with suppliers of components, scale of production, direction of sales etc.

3. CBAM – IMPACT ANALYSIS

As CBAM is to be in place by and possibly beyond 2050, it is methodologically correct to look at it as one of the trade instruments which affects international flows of traded goods. Applying simple textbook approach, we could look at the implication of using as proxy regular tariff in international trade. CBAM would add cost of carbon to imported products, so – irrespective of its exact construction – it works like a tariff. Therefore, we could use textbook example of the graph explaining impact on demand, supply and changes resulting from the imposition of the tariff.

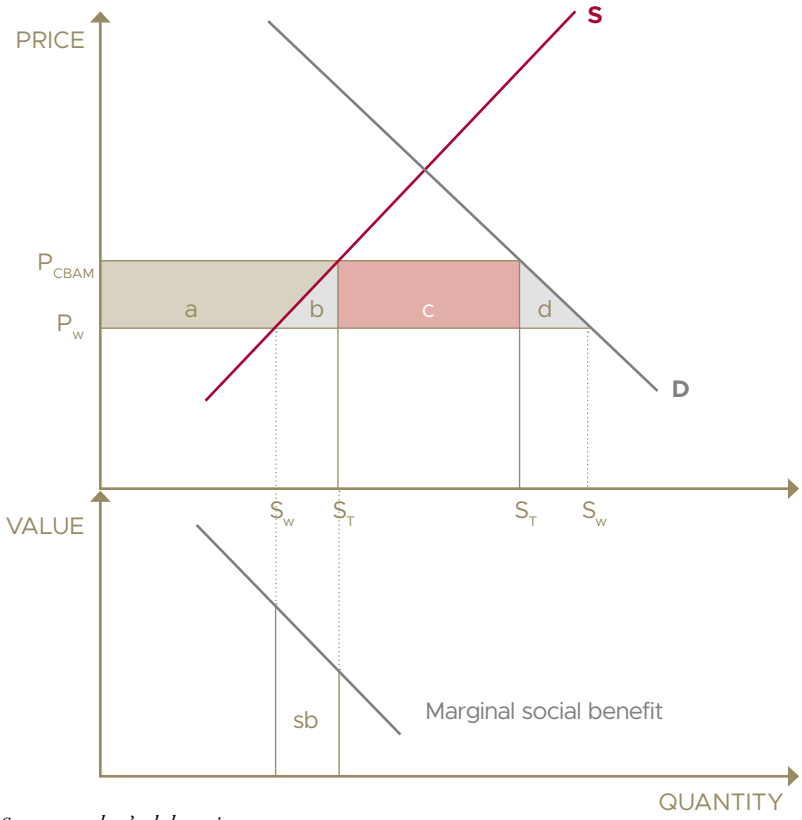
Figure 1: Tariff in International Trade



Source: author's elaboration

This simple graph illustrates the impact of the tariff on the internal price and quantities of products demanded and supplied by domestic as well as foreign producers. Areas a, b, c, d represent changes to consumer and producer surpluses. In a typical case, these changes called production and consumption distortions would be mostly considered as the major result of introduction of tariffs. Theoretically, tariffs are considered as distortions to open trade. The changes to the level and redistribution of wealth might not be the only motive. Tariffs can also be introduced, in case of certain market failure in order to achieve additional social benefit. This is illustrated by the graph below.

Figure 2: Tariff and Social Benefit



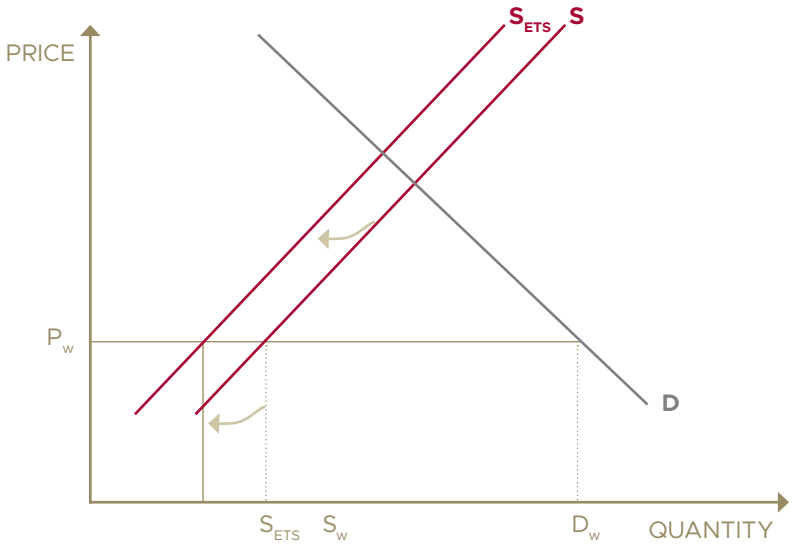
Source: author's elaboration

As illustrated, the area described as sb represents gain in social benefit which is larger compared to the deadweight loss resulting from the tariff represented by areas b and c.

In the case of EU's decarbonisation effort, the reason to consider border measure is exactly to ensure social benefit in a form of reduction of CO_2 emissions. The EU is undertaking serious domestic efforts to establish carbon price which affects domestic producers and avoid undermining of these efforts via imports.

Using again the same graph of demand and supply in a trading economy, we could further illustrate the trade effects of measures taken because of carbon policies. The ETS system imposes on domestic companies a charge in relation to carbon emissions, which results in increasing costs of supplying products to the domestic EU market. In the graph, it is represented by the leftward shift in the "Supply" line. As production by the Rest of the World (RoW) is not subject to this constraint, the volume of imports would increase (with the possible increase of production in the RoW). This could be called carbon leakage.

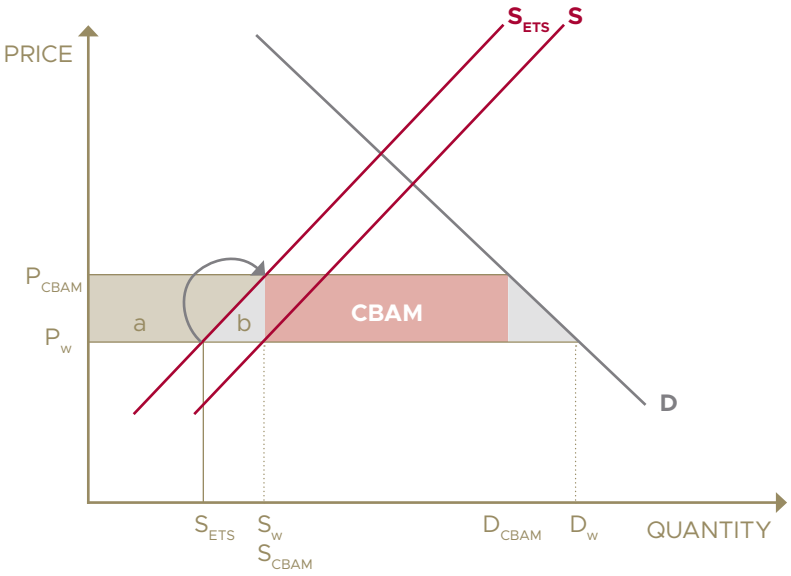
Figure 3: Illustration of Carbon Leakage



Source: author's elaboration

The justification for CBAM is therefore quite straightforward. The ETS aims at reducing emissions by raising the costs of domestic production with the use of production processes and methods (PPMs) which involve carbon emissions. As ETS targets production and installations which differ in PPMs and not necessarily their outcomes in physical form of the manufactured products in a quite complex system of registering carbon emissions, it is difficult to extend it to imports. Therefore, making sure that imports are charged as well, and introducing CBAM would add costs to imports of competing products. However, it will involve increase of domestic price for consumers, meaning that producers are able to recuperate at least part of ETS costs, i.e., capture part of the consumer surplus. The producer surplus represented in the graph below by the area a and b could obviously be used for new carbon efficient investments, but also will help this companies to continue production in existing facilities, as they would be at least partially compensated for payments for ETS allowances by increased prices of the products covered by CBAM.

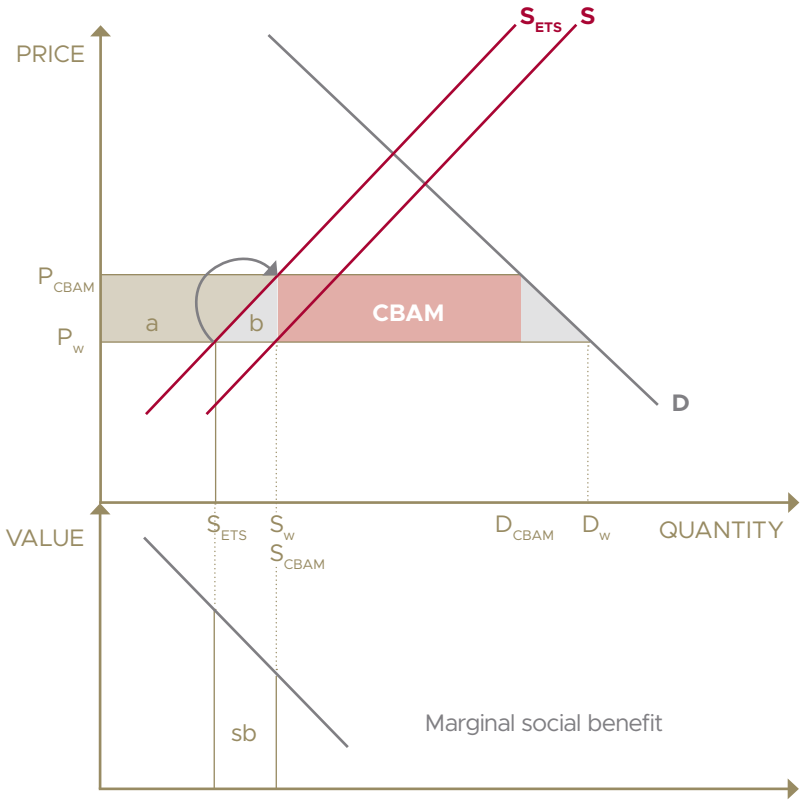
Figure 4: Carbon Leakage and CBAM



Source: author's elaboration

If the reason for introduction of such a border mechanism is not only to adjust competitive position of producers, but also to address market failure (i.e. preoccupation concerning climate), the obtained social benefits might be greatly reduced, if not nullified, unless some other measures are taken.

Figure 5: Carbon Leakage, CBAM and Social Benefit



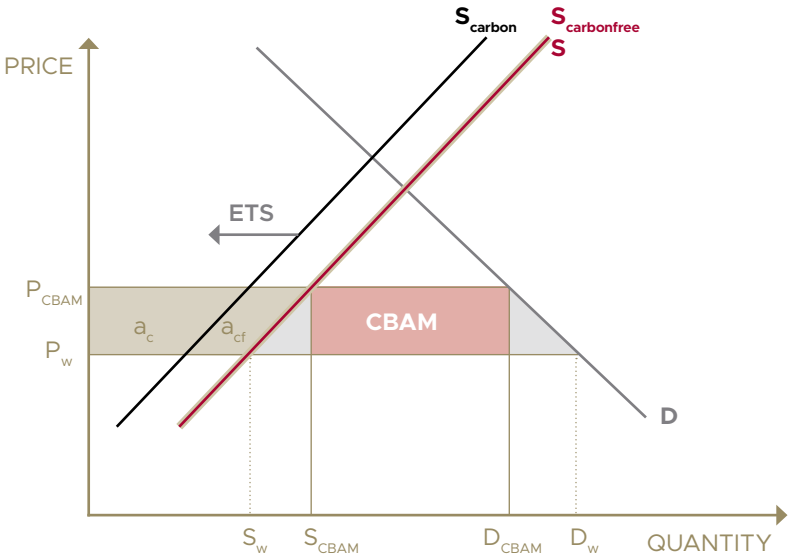
Source: author's elaboration

This leads to to an observation that, at least in the short run, the contribution of CBAM to climate goals might be limited as existing EU emitters of CO_2 will find it

easier to withstand foreign competition and could continue production in the existing facilities. However, it will also be easier for producers with higher costs but using less emitting technologies.

Therefore, if the mechanism of carbon adjustment at the frontier is to be effective from the point of view of climate goals, it should be considered in the context of the difference between production processes and methods. The same product (energy, steel, cement etc.) can be obtained in the production which involves CO_2 emissions and use of different technologies which are carbon free. An illustration using the same graphical concepts as above should distinguish carbon-intensive and carbon-free production when supplying the market. As product remains the same, the demand curve is not really changed. However domestic supply is composed of two sets of production possibilities providing, in sum, total supply. ETS might be costly for carbon intensive suppliers, whereas those who use carbon free technologies would be saved from paying for allowances. Even if initially these technologies might be more costly the advantage might be sufficient for these industries to expand. However, it is more significant if border measure related to imports remains. Otherwise, these manufacturers would compete with carbon-cost-free imports.

Figure 6: CBAM and Effects of Distinguishing PPM

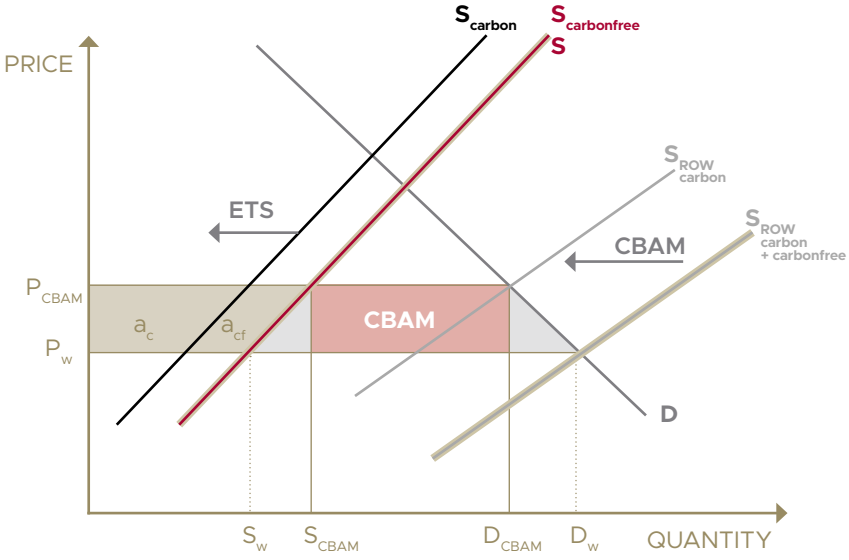


Source: author's elaboration

There would be a difference in competitive position between companies obliged to include carbon cost and those who do not pay for emissions. This would make the supply curve of carbon intensive products shift leftwards. With time and with increased price for emission allowances the incentive to continue production using carbon-intensive technologies might disappear.

Even if this happens, and carbon-free production becomes dominant in Europe, the question remains whether similar processes can happen in relation to imports. If there were no CBAM, the imported goods would be supplied from sufficiently competitive sources irrespective of whether it involves carbon-free or carbon-intensive production. When uniform CBAM is put in place, it changes competitive situation of all imports. But the construction of this measure could differentiate between products imported from different sources. In the graph below, this is illustrated using carbon-free and carbon-intensive (Rest of the World supply curve). In such a situation, imports of products obtained in carbon-intensive processes is under pressure moving the respective supply curve leftwards.

Figure 7: CBAM and effects of distinguishing PPM in Rest of the World



Source: author's elaboration

In light of these explanations, it is also worthwhile to consider issues related to compatibility with the WTO obligations. The WTO rules might permit barriers motivated by the need to protect the environment, or introduced to even out charges introduced internally, however, under the condition of respecting general GATT principles, like non-discrimination, national treatment or most favoured nation.

Therefore, to meet these requirements, the treatment of like domestic products and imported ones should be comparable. Until it is not permitted in the EU to use carbon-emitting technologies without compensating for their removal, it would be difficult to argue that such technologies cannot be used elsewhere in order to deliver products to the EU. One has to be clear that even if the WTO accepted the distinction based on different "Non-Product Related Production Processes and Methods" (NPR PPMs)[7], it would always result in a lengthy process and the need to respect the WTO fundamental principles as confirmed by the shrimps/turtle judgment.[8] In the case of CBAM, it would be even more complicated as EU continues carbon-intensive production in Europe even under the ETS. If the product imported to the EU is subject to similar carbon costs in the producing country it would be difficult to argue that it should be subject to CBAM. If the products in the EU are obtained in a process which involves emissions of CO_2 for which there is an obligation to surrender allowances, the imported similar products obtained in the process involving even greater levels of emissions cannot be treated differently if the price of carbon is included into its costs of production.

It should be noted that because, under ETS, it is the company which surrenders allowances in relation to the emitted amounts of CO_2 by its installation, it is on that company level that the cost of carbon has to be internalized. The difference relates to the situation of installations (not even firms) which in the process of production emit different amounts of CO_2. If, for example, the site of aluminium-based production is connected to hydropower, the emissions of such installation might be very low. Steel processing with the use of the electric arc can have different CO_2 emissions depending on whether electricity is produced in a carbon-free manner or not. If companies make new investments in low-carbon- facilities, they reduce their cost of carbon. It should be matched by CBAM, i.e., if the exporter to the EU is expanding facilities by adding new, carbon-free or by low emitting capacity, it should be recognized by CBAM. Otherwise, there would be little

7 More on that issue: Erich Vranes, 'Carbon taxes, PPMs and the GATT' in Panagiotis Delimatsis (ed.) Climate Change and Trade Law (Research Handbook 2016).

8 WTO Appellate Body Report and Panel Report pursuant to Article 21.5 of the DSU, WT/DS58/23 (26 November 2001).

incentive to invest in carbon-efficient technologies outside the EU if exporting to Europe.

CBAM, therefore, should be focused on market operators, companies producing and exporting to the EU. This would mean that the incentive to change production methods or processes are directly targeted at the origin of imported products. When the applied mechanism is tilted towards public authorities as the main addressee of the requirements of the mechanism to prevent carbon leakage then, if the authorities are slow or not interested in the introduction of a carbon price system, individual companies operating in such exporting countries would not be incentivized to adopt radical reductions of carbon emissions in their installations and production processes. They themselves could do little to avoid costs of CBAM. Companies would have to face CBAM until own government or trade authorities will finally introduce a charge on carbon on their territory that would be approximately equivalent in height to the European one.

The level of the restrictiveness of CBAM could be varying in line with movements of price of allowances within ETS, or it could be established in relation to ETS but remain stable for a longer time. Certainly, it depends on its construction. In the draft legislation proposed by the European Commission, there is a reference to weekly average of the price of allowances. There would be an obvious difference for importers if CBAM level is constant or fluctuating over a certain period of time.[9] The issue of compatibility with the WTO rules becomes important again.[10] If CBAM would be, at some moments, much higher than the price of carbon paid by the EU producers, it might be considered as excessively protecting EU industries. And as the cost of carbon in the EU depends on current market conditions and can change instantly, the CBAM costs might be quickly out of sync with internal EU carbon pricing, either being too high, or too low. If significantly higher for longer periods, they might provoke a reaction from trading partners claiming that CBAM is used for protectionist purposes. If not sufficiently high, they might not be efficient in limiting inflow of imported products produced with high carbon emissions technologies.

4. CARBON PRICE EVOLUTION

The possible future evolution of carbon price in the coming years is difficult to predict. It may change substantially as more difficult adjustments will have to take place. Assuming

9 It is not novelty. It the past we had example of the EU levy in international trade for agricultural products covered by CAP that was for quite some time variable.

10 Erich Vranes, 'Climate Change and the WTO: EU Emission Trading and the WTO Disciplines on Trade in Goods, Services and Investment Protection'(2009) 43 (4) Journal of World Trade.

that EU firms are not very successful in the transition to carbon neutral economy, it may provoke a radical increase in the price of allowances if the speed of reduction of cap for carbon is not matched by significant reductions in demand for them. One has to be sure that when the carbon price level is high, and at the same time, the difference between the cost of carbon-intensive and carbon-neutral production is extreme, there is an adequate charge on carbon intensive imports. With extreme levels of carbon price, there might be a disproportionally large difference between prices inside and outside of the EU and encouragement to supply the EU market from outside. A CBAM corresponding to the carbon price in the EU would be indispensable.

There are also counterarguments to the above logic, for example, if the expansion of wind, solar or similar sources of energy makes the price of renewable energy sufficiently low compared to the price of energy derived from fossil fuels. As energy is a significant component of carbon emission in the production of goods in question, using a large proportion of renewable energy would limit demand on the carbon market. One, therefore, may safely assume that in such a situation, the price for carbon allowances within ETS would drop to low levels. If CBAM is to correspond to the European price of carbon, it would follow the same direction. At the same time globally, due to smaller demand for fossil fuels,[11] especially used in the production of energy, the price of products obtained with use of carbon intensive technologies could be significantly diminished. Cost of carbon emissions and the production of carbon-intensive products elsewhere might become cheaper. Consistently with the lower level of carbon price within the ETS and the lower level of CBAM, these developments could make again the EU internal market less protected and global efforts to lower emissions less effective, contrary to the intentions behind the design of the carbon market.

CBAM does not make distinctions between products of different origin. As we can hear, especially in a political debate, the countries with a high level of climate action and possibly high level of carbon cost should not be targeted. Justification is quite obvious as the intention behind CBAM is to address the preoccupation that the EU's efforts should not be significantly undermined via trade in products sourced from countries with low climate action. However, the way it could be done requires careful examination for several reasons.

11 It might be significant impact on prices if large European economy and similar like-minded countries would reduce their demand for fossil fuels.

Firstly, the justification for CBAM could be related to Article XX of GATT which allows measures restricting imports on environmental and other considerations compatible with the WTO requirement of non-discrimination. It means that it should, as required by the GATT Article III, accord national treatment, as well as based on GATT Article I, accord the tariff and regulatory treatment given to the product of any one Member at the time of import or export of "like products" to all other GATT Members. There is a possibility provided by Article VI (regional integration) but it applies only to trade arrangement (free trade areas, or customs unions) which cover essentially all the trade.

Secondly, there is the question of circumvention. CBAM will be carefully considered by producers and traders seeking the most profitable arrangement related to the production and exports of a given product. If the price of carbon stays low and, consistently, the level of CBAM insignificant then the incentive to avoid cost of CBAM will be low. However, the carbon price in the ETS is intended to make a fundamental change in European production, therefore, most likely it should be considerable to be effective and the corresponding CBAM will also be substantial if is to provide a level playing field. Therefore, incentive to seek ways how to get into European market without the full cost of CBAM might be equally significant.

Thirdly, there is also a practical issue, as customs/tax/administrative procedures should make it clear which products are covered by CBAM and which are not. It is already a complication created by the fact that the ETS is focused on installations and producers, and CBAM on imported products and puts bigger emphasis on obligations of importers and not foreign producers and their installations. The Commission's draft of the CBAM proposal avoids differentiating between importers with the exception of countries which are directly linked to the EU ETS. This may be changed in the legislative process. If imports from some countries are exempted from CBAM and import from another is covered by CBAM then the origin of products will have to be established to make sure from where the given product really originates. The responsible authorities within the EU should have a clarity whether it is or not subject to CBAM.

Normally in the case of any preferential arrangement, origins of traded products are established by the application of rules of origin as established by such a preferential trade arrangement. The WTO has also worked on the non-preferential rules of origin, which can be applied together with WTO compatible instruments like anti-dumping, anti-subsidy or countervailing measures. In all these situations, clarity which products, depending on their origin, are subject to such measures or to preferential treatment. Rules of origin

included in preferential agreements are not harmonized, and they are different depending on the agreeing parties. Even the rules developed by the WTO are not providing uniform and highly harmonized approach. Therefore, it raises the question which of the rules establishing origin of the products subject to CBAM and those exempted should be applied. Are they anyhow designed in a manner to be directly applied to procedures related to CBAM, or they need to be adjusted and in which way.

The rules of origin applied either within regional trading arrangement or in relation to some trade instruments are very complex administratively and cumbersome to use. Generally, products originate from a given exporting country when they have been "wholly made" on its territory, or "mostly" produced, i.e., exceeding a predefined threshold of added value of components of these products, or when certain production processes have been carried on the territory of the exporting country and when the processing of inputs in changing classification of the products within so called Harmonised System (HS) at the level of a subheading, heading or chapter. Frequently specific products can have additional detailed descriptions of the conditions to be met before they can be considered as "originating".[12]

Therefore, establishing origin of the imported product, is not a simple process, and it requires an exporter to deliver appropriate certification documents. There is a valid question in relation to CBAM, whether rules of origin should be applied, and if so, which ones are sufficient. If CBAM, even potentially, reaches high levels, the incentive to bypass this trade cost will be equally high. Involved administration, frontier or not, must have proper bases to decide upon application of any carbon related charges on every shipment of goods into the EU market.

If any of the EU's trading partners would introduce an identical system of carbon border adjustment, imposing, like the EU, a carbon cost on imported like products, the current origin rules applied in trade with this country could be sufficient. But it assumes that the climate ambition would be similar to the extent that the form, coverage, and level of border measures related to carbon would be clearly comparable.13 At this stage, as we do not have operating carbon border measures neither in the EU, nor in the trading partners countries, we cannot judge how similar they can be when introduced, and it is very

12 The WTO deals only partially with that issue as there is patchwork of rules in numerous different regional or bilateral preferential agreements. The complexity of it is well explained for example in a book, Stefano Inama, *Rules of Origin in International Trade* (Cambridge University Press 2009).

13 See conditions described by Simone Tagliapietra and Guntram Wolff, 'Form a climate club: United States, European Union and China' (2021) vol 591 Nature.

difficult to take such equivalence for granted. Moreover, goods formally originating (i.e., meeting all the necessary criteria of the standard rules of origin) in the countries which have recognized the high climate ambition may contain carbon intensive components originating elsewhere. Even being of high carbon content, but in value added terms, or any other criteria used to determine the origin of the product, they could still be considered to have originated from the country of high climate ambition.

The UK is a country with policies even exceeding the ambition level of the EU. Import of products originating from the UK could be considered as eligible for the exemption of CBAM. But the rules of origin in the EU-UK Trade and Cooperation Agreement (TCA) state that "Once a product has gained originating status, it is considered 100% originating. This means that if that product is incorporated in the production of a further product, its full value is considered originating, and no account is taken of non-originating materials within it". In the detailed guidance on the rules of origin, downloaded from the webpage of HM Revenue & Customs, Version 1.0 (29 December 2020), one can find the following example:

> Manufactured goods example:
> HS code: 2701
> Product: Coal briquettes
> Rule: Production from non-originating materials of any heading
>
> Coal and briquettes of coal dust are classified in the same heading. The process to transform coal into briquettes (including applying intense pressure) goes beyond the processes listed in 'insufficient processing' and so the briquettes can be considered 'UK originating' regardless of the originating status of the coal used to produce the briquettes.[14]

There is also an important aspect which relates to exports by EU's trading partners. Even if they establish similar border measure, they still might continue to support exports of own products as, with additional costs, they might not be competitive in the world markets. Any support measure to export by the country of high climate ambition could alter commonality of the situation in mutual trade. One has to be sure that any export scheme is not diminishing or nullifying the mechanism of the carbon adjustment.

14 HM Revenue & Customs, 'Detailed guidance on the rules of origin' Version 1.0 (29 December 2020) <https://brc.org.uk/media/676687/the_trade_and_cooperation_agreement__tca__-_detailed_guidance_on_the_rules_of_origin__29_december_2020_.docx>.

In most of the discussions related to CBAM, the basis for exempting imports into the EU from carbon duties seems to be partner countries' ambition level as evidenced by internal system of evaluating efforts to reduce emissions. While being fully understood in political discourse, it might be not be sufficient for the realities of the trading world. Between most likely trading partners which have high climate ambition and potentially could introduce carbon border adjustment like the EU, USA, Japan or Canada there is a lot of trading in products, like steel, non-ferrous metals including aluminium, clinker, fertilizers and chemicals, wood pulp and similar. It is also not always true that technologies used in these countries are the most up to date. For some of the products, the most modern and energy-efficient technologies are used at production sites in countries which do not necessarily have high climate ambition.[15] In the sectors most likely covered by CBAM such as energy, steel, aluminium, cement, etc. the production is run by large companies – frequently transnational – and with many installations in different locations. Companies can easily shift a part of their production between installations or countries, it can sometimes be even limited to the reorganization of structures and documentation, if this allows optimization of the costs related to export or import. Thus, all significant loopholes can be easily exploited.

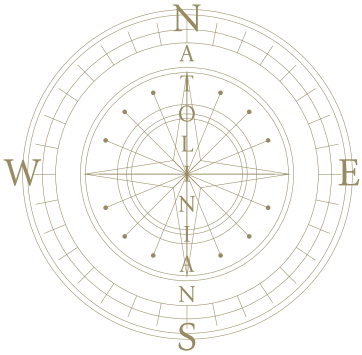
The question is whether the currently applied rules of origin can be used with certainty to level the playing field when deciding on application or exemption from carbon adjustment. As the rules of origin may differ between agreements with various EU trading partners, it is appropriate to check whether they can be sufficient if not being ideal. It would allow to use the same documents accompanying imported products without any additional problems both for trade partners and administration. Even if it was more cumbersome and administratively complicated, the system based on certified emission as a basis for establishing a corresponding level of carbon border adjustment with the documents accompanying every shipment from every partner would provide much less space for circumvention. It should also take into account the documentation of the price of carbon paid at the source in the exporting country which then could be deducted from overall bill.

15 See for example: Rob Bradley et al., Leveling the carbon playing field: international competition and US climate policy design (Peterson Institute for International Economics World Resources Institute 2008).

5. CONCLUDING REMARKS

When the EU reaches climate neutrality in 2050, it will mean that the emissions of greenhouse gases in the production and consumption on the European soil should become insignificant. There will therefore be no place in Europe for production capacity which is unable to curb emissions, by using totally new emission-free technologies, or by continuing same technologies with capture and removal of CO2 currently emitted. But, by the same token, there should be no willingness to accept imports of products which are linked to emission of greenhouse gases in their production. At this not so distant stage, the management of import of products which are produced with differing degrees of carbon emissions will become even more valid. Hopefully, the global efforts to prevent climate change may bear fruits but as the EU is currently leading the way and have the most ambitious plans for 2050, it should be assumed that there still will be a large part of the global economy where the issue of emissions will not be entirely addressed and the cost of production will not fully contain the price of carbon.

When Europe becomes fully climate neutral and other countries not yet, it would not be acceptable to allow the importation of products obtained in the processes which involve uncompensated emissions of CO2. Therefore, it means that the frontier measures, including prohibitive CBAM, after 2050 could be even more indispensable.



CHAPTER 4

Sustainable Taxation in the Service of the European Green Deal and the Global Just Transition

BY MICHAEL MARTIN RICHTER
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1. INTRODUCTION

The European Green Deal[1] is the EU's take on the Green New Deal movement, which advocates for a comprehensive public policy approach towards progressing climate change. While the initiative originated in the United States, its development there was stalled in February 2019 when the 116th Congress failed to embed the ideas of Green New Deal into legislation.[2] Yet, the idea soon found its supporters on the other side of the Atlantic: the advent of the new EU Commission presided by Ursula von der Leyden in December 2019 was accompanied by the flagship initiative of refurbishing Europe's social and economic life by redefining its relationship with nature.[3] Europe was envisioned to become the global champion of energy transition, a mission which the new Commission has embarked on decisively. Ever since, the European Green Deal has been described by the EU Commission's President, Ursula von der Leyen, as "the EU's man on the Moon moment".[4] More often than to the Apollo 11 Mission though, parallels have been drawn to Franklin D. Roosevelt's New Deal. The close similarity is not only visible in their name, but also in the promise that each deal carries. In particular, nothing less than an overhaul of the entire political and economic system is foreseen as part of the Green Deal of the EU today. This echoes the impact that the New Deal had on the functioning of the American socio-economic system almost a century ago. Just as the New Deal was created as a response to the economic crisis of the 1930s, the current Deal was born in the face of an enormous challenge – climate change.[5]

While Roosevelt's New Deal redefined state-society and state-business relations, the current Deal redefines human-nature relations, yet still covering the former two levels of relations. There is no doubt that the challenge of climate change is a threat and an opportunity at the same time, not least for businesses and the future position of Europe on the global economic map. This position will also define Europe's status as a soft power, able to exercise normative influence and shape global rules in a human-centric and inclusive way. In short, the Green Deal's exact answer to climate change will eventually impact all these fields mentioned before. It is therefore of highest relevance to discuss policy design and its instruments, as many pathways may lead to climate neutrality, but for Europe's future

1 Referred to as "Deal" or "Green Deal".

2 Dimitris Valatsas, 'Green Deal, Greener World' Foreign Policy (USA, 17 December 2019).

3 Ibid.

4 Jonas Ekblom and Gabriela Baczynska, 'EU trumpets Green Deal as its "man on the moon moment' Reuters (11 December 2019) <https://www.reuters.com/article/us-climate-change-eu-idUSKBN1YF1NA>.

5 David M. Kennedy, 'What the New Deal Did' (2009) 124(2) Political Science Quarterly 251-268.

position in the world it is mandatory to find the most efficient way there. In the underlying context this means that the Green Deal must not only reshape our human-nature relations in a sustainable and harmonic way, but also give the proper incentives to turn the challenge of climate change into an opportunity whilst mitigating the threat. Hence, as we will argue throughout this paper, the Green Deal must impose as much action as necessary with as little intervention as possible.

As the Green Deal is a collection of various policies grouped around the ultimate goal of achieving climate neutrality by 2050, we want to contribute to the current debate on the specific policy design of that framework. In particular, we propose a concept called "sustainable taxation" that bundles two mutually complementary mechanisms. Their ultimate and undisputable goal remains climate neutrality, as laid out in the European climate law. Yet, our proposal differs from current and prospective legislations insofar as it is non-arbitrary, easy to apply, as well as comes along with an incentive structure that sets the stage for Europe to become synonymous with green technology innovation as well as increased collaboration between countries to foster climate change. This mechanism constitutes in its entirety an effective compromise. All involved actors in the European political economy system benefit and lose at the same time, whilst the environment and future generations are the ones to benefit comprehensively.

This approach stems from a thorough analysis in the field of political economy. The domestic key actors in the European system as well as external partners are assessed and crucial developments outlined. The Green Deal's current design is critically examined under the light of economic competitiveness and global normative influence. Contrary to a strictly economic approach it avoids "figure crunching" and tries to apply a designated solution to the real-life context and assesses its immediate impact as well as its corresponding spillover effects. On the other hand, contrary to a strictly political approach, it takes economic rationalities into account and demonstrates the importance of economic incentive structures to bring about a beneficial redefinition of human-nature relations without compromising state-business relations.

By applying the research design as outlined above, our main findings are threefold and constitute the core of what we call "sustainable taxation". First, instead of using a broad range of sometimes arbitrary measures, such as subsidies and a selective emission trading system, the idea of a Europe-wide carbon tax is superior. It creates the direct incentive structure to reduce emissions without arbitrary selection and intervention in an environment of high uncertainty regarding the effects of this interference. Rather, it generates

a neutral level playing field, whose sine qua non condition is the internalisation of the economic costs of pollution to such an extent which will ensure the accomplishment of the 2050 targets. Second, by creating a strict carbon border adjustment mechanism, the EU "exports" the internalisation of economic costs. To achieve this, the Union makes use of its most impactful weapon, namely the access to the common market. Initiatives like the General Data Protection Regulation (GDPR) have demonstrated that the rules set by the Union are often subsequently adopted beyond the Union itself.[6] Third, by initiating a redistribution mechanism of the income from the carbon tax to developing countries, particularly those in Africa, the EU generates an effective and predictable mechanism. This sets the stage for meeting its green development aid goals as well as creating a long-lasting transformation partnership with Africa, which will likely materialise in a democratic and competitive continent of the future.

2. SUSTAINABLE TAXATION: ADVANTAGES VIS-A-VIS CURRENT POLICY PROPOSALS

While the European Green Deal still resembles more a general strategy than a concrete action-plan, there are several elements of it that can already be subjected to a debate. One of them is the investment pillar of the strategy, the European Green Deal Investment Plan (EGDIP), also referred to as the Sustainable Europe Investment Plan.[7] Constituting the vast majority of the European Green Deal's financial firepower, EGDIP aims to mobilise at least €1 trillion in sustainable investment spread over a decade.[8,9] A significant component of the plan is the Just Transition Mechanism in which €100 billion will be dedicated to alleviating the socioeconomic effects of the energy transition in the most carbon-dependent regions.[10] Yet, importantly, the EGDIP is complementary with the InvestEU program, both of which aim at supporting investment into environmentally

6 Foo Yun Chee, 'Yet to show its teeth, landmark EU privacy law already a global standard' Reuters (22 May 2019) <https://www.reuters.com/article/us-eu-dataprotection-idUSKCN1SS1JU>.

7 European Commission, 'The European Green Deal Investment Plan and Just Transition Mechanism explained.' (14 January 2020) <https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_24> accessed 28 August 2023.

8 Ibid.

9 European Commission, 'Europe's moment: Repair and prepare for the next generation.' (27 May 2020) <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_940> accessed: 28 August 2023.

10 European Commission, 'The European Green Deal Investment Plan and Just Transition Mechanism explained.' (14 January 2020) <https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_24> accessed: 28 August 2023.

friendly projects across the European Union.[11] The current strategy anticipates that the EU budget will provide €503 billion to the EGDIP, which will trigger additional national co-financing of around €114 billion.[12] On the other hand, the InvestEU initiative is tasked with leveraging around €279 billion for private and public climate and environment related investments.[13]

The grand scale of the financial resources amassed in the idea of EGDIP clearly account for an ambitious project designed to make a lasting impact on Europe's history. Such aspirations also reflect the geopolitical reality of the modern world, which becomes increasingly multipolar and characterised by interstate competition. This requires a visionary attitude towards policy making that the European Green Deal clearly displays. However, for the European Green Deal to succeed, this ambition must be supported by a firm economic foundation that is sustainable in the long run. The current plan of launching an EU-led mass-scale of investment into environmentally friendly projects clearly implies targeted funding. In the case of developing green innovation, necessary for creating renewable energy sources that can compete with fossil fuels, such an approach is tantamount to offering subsidies to selected technologies. While we do not completely reject this direction of the Commission's policy, we argue that subsidies come with significant flaws which are especially important in the context of developing new technologies. For this reason, we advocate for modifying the economic pillars of the European Green Deal with a complementary policy.

Subsidies are among the preferred policymaking tools that are available to governments around the world. They are easy to enact, simple to organise and can be distributed swiftly, such as the famed ethanol subsidy described later in this article. Yet, it is these features that also constitute subsidies' fundamental shortcomings. In essence, subsidies are tantamount to redistributing financial resources to certain causes. While the advancing climate changes makes support for environmental innovation far from debatable, the exact mechanism of doing so should be discussed. Previous economic studies have shown that subsidies, regardless of their cause, are prone to the influence of lobbies and interest

11 Ibid.

12 Ibid.

13 European Commission, 'The European Green Deal Investment Plan and Just Transition Mechanism explained.' (14 January 2020) <https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_24> accessed 28 August 2023.

groups.[14,15,16,17] Such vulnerability stems from the very nature of subsidies: rather than leaving the selection process of the viable technologies to the market, they vest the decision-making power in the hands of a selected group of people. Whether such a group is composed of experts or politicians, this structure results in a degree of arbitrariness which explains why sometimes technological subsidies are more like a beauty pageant than an organic process of developing ground-breaking innovation.[18] For the European Green Deal to succeed, it is imperative to avoid the imperfections of an innovation policy based primarily on subsidies and targeted funding.

The shortcomings of subsidies are well illustrated by an example drawn from the United States. The Energy Independence and Security Act of 2007 was a well-intended attempt to increase American energy security while introducing a seemingly environmentally-friendly solution.[19] The goals of the law were bifold, as it aimed to reduce dependency on imported petroleum and to curb greenhouse gas emissions by supporting fuels that can serve as an alternative to oil.[20] One of the results of this law was a substantial subsidy to ethanol production. While corn producers continue to receive a $0.45 per gallon of ethanol from a federal subsidy, studies have shown that the environmental benefit of this policy has turned out to be negligible.[21] On the other hand, the increased demand for corn used in ethanol production in the US has contributed to unintended consequences: a sharp spike in the prices of food worldwide.[22] Not only has this particular policy failed to yield the expected environmental outcomes, but it also resulted in creating a powerful lobby that keeps it in place and caused negative spill-over effects outside of the US bor-

14 Greetje Everaert, 'The Political Economy of Restructuring and Subsidization: An International Perspective' (2003) 130 LICOS Discussion Paper.

15 Vibhuti Garg et al. 'Kerosene Subsidies in India: The status quo, challenges and the emerging path to reform' (2017). International Institute for Sustainable Development.

16 Carolyn Fischer, 'Strategic subsidies for green goods. Resources for the Future' (2016) Fondazione Eni Enrico Mattei.

17 Cees Van Beers and Jeroen Van Den Bergh, 'Environmental harm of hidden subsidies: global warming and acidification' (2009) 38 (6) AMBIO: A Journal of the Human Environment 339-341.

18 James M. Griffin, Smart energy policy: an economist's Rx for balancing cheap, clean, and secure energy. (Yale University Press 2009) 141-142.

19 James M. Griffin, 'U.S. Ethanol Policy: Time to Reconsider?' (2013) 34(4) The Energy Journal 1–24.

20 Ibid.

21 James M. Griffin, and Maricio C. Soto, 'U.S. Ethanol Policy: The Unintended Consequences' (2012) 3(1) The Takeaway - Policy Briefs from the Mosbacher Institute for Trade, Economics, and Public Policy.

22 Ibid.

ders.[23] In addition to that, the economic theory also reminds us about the opportunity cost of not having implemented another policy instead of subsidies.

The lesson that the EU might take for its European Green Deal from the American case is that not all well-intended policies lead to good outcomes. This is especially true for subsidies. Yet, we do not advocate for their complete abolishment, as targeted funding might be a powerful tool for advancing European energy transition strategy especially in the case of large infrastructural projects which require such supranational patronage. Instead, we argue that subsidies are a bad choice in the realm of supporting technological innovation and they should be replaced by a mechanism that is less arbitrary, and thus more sustainable. We see such a mechanism in the form of the carbon tax, which enables for sustainable taxation.

The carbon tax is a tax on fuels imposed per ton of CO_2 emissions that result from their usage.[24] If the goal of the European Green Deal is to promote technological innovation that will eventually result in inventing technology making renewable energy sources cheaper than fossil fuels then the carbon tax is the best policy tool available for achieving this task. The first and most obvious virtue of this solution is its simplicity, which also accounts for its other advantages. The carbon tax does not require organising competitions aiming to find the most promising technologies of the future and leaves no room for the actions of lobbyists and groups of interests. Rather, it does the job by discriminating against carbon-intensive energy sources and favouring more environmentally friendly ones.[25] In this way the carbon tax levels the playing field: it adds the real social cost of carbon pollution to carbon-intensive fuels, making them equal to or more expensive than their ecological counterparts.[26] This policy addresses the issue of price disparity, which appears to be the most universal problem of all renewable energy sources. As renewables remain more expensive than fossil fuels, they are unable to compete in the market conditions. Subsidies provide an umbrella of security which enables growth and makes renewables appear inexpensive, however, they do not actually make them cheap.

Levelling the playing field through the carbon tax creates conditions in which renewables can successfully compete against fossil fuels and become a real alternative for the mass-

23 Ibid.

24 M. Griffin (n 18)141-142.

25 Ibid.

26 Ibid.

es, rather than just a choice of the environmentally aware rich. This removes the need for socially engineered innovation by leaving it up to the market forces to choose the winners and losers among competing technologies. Furthermore, as we might not know some technologies, the carbon tax enables the market forces to uncover them by ensuring equal competition between renewables and fossil fuels. The simplicity of the solution also makes it invulnerable to lobbies and groups of interests that are likely to form around the enormous amount of money that will be involved in the implementation of the European Green Deal. Other benefits of the carbon tax include the fact that it is simple to introduce, it requires small amounts of bureaucratic red tape and it is easily measurable, making the energy transition easier.[27] It comes without a surprise that the carbon tax is a policy that gains a lot of support among economists.[28] The carbon tax might also be utilised to supplement and eventually supersede the current Emissions Trading System (ETS). While ETS has been often hailed as a policy success story, it has also been rebuked for its flaws. These include relative arbitrariness of the emission allocation process, vulnerability to accounting manipulations and high price volatility.[29] The carbon tax is immune to all these structural defects, thus likely making it the policy of the future.

For these reasons we argue that sustainable taxation in the form of the carbon tax should become one of the pillars of the European Green Deal to ameliorate the existing investment strategy. The carbon tax can be introduced gradually, at a pace that will provide for an ample amount of time for the transition to happen without drastic consequences. The economic dimension of such results includes rising energy prices and the political ones - rising Euroscepticism as a result of economic distress. Apart from considerations of purely economic character that account for this policy, the top EU decision makers also need to consider the danger of lobby formation stemming from the sheer size of the project. It is in our best interest to ensure that the project advanced by the current Commission will truly turn out to be a turning point in European and world history, rather than a spectacular debacle followed by a financial calamity. This requires the most meticulous approach towards the technical details of the plan that will yield sound policymaking. Furthermore, proceeds from the carbon

27 J. M. Griffin (n 18) 144-146.

28 See: Pembina Institute 'The B.C. Carbon Tax: Backgrounder' (2014); Joseph Aldy, Eduardo Ley and Ian Parry, 'A tax–based approach to slowing global climate change' (2008) 61(3) National Tax Journal 493-517; Dale Jorgenson et al., 'Carbon taxes and economic welfare' (1992) 23 Brookings Papers on Economic Activity, 393-454; Bernard Herber and Jose Raga, 'An International Carbon Tax to Combat Global Warming: An Economic and Political Analysis of the European Union Proposal.' (1995) 54 (3) American Journal of Economics and Sociology 257-267.

29 J. M. Griffin (n18) 142-144.

tax open a range of possibilities for financing initiatives crucial for the advancement of the EU's strategic autonomy.

One of such mechanisms can be the reinvestment of funds in a competitive framework on a regional (NUTS-3) level. Since fighting climate change is not a task for businesses only, a complex approach is needed on a level that takes into account broader societal developments on a regional level. In the ideal case, on this level efforts will be streamlined in such a way that economic growth is not outplayed against emission reduction but rather enhanced in a mutually beneficial way. The exact path to reach that goal remains open and therefore it allows us to consider local specifications. Once again, such an approach will ensure that a non-arbitrary incentive is created that gives space for creativity, this time on the regional level, to reduce emissions. In practical terms, three factors, namely relative economic growth, employment development as well as emission reduction would be taken into account on a regular basis and each NUTS-3 region would be ranked according to the weighted sum of these factors. Following from this ranking, designated funds from the carbon tax and border adjustment mechanism would be given out to these regions in a descending order, that is, the higher the rank, the higher the award. As a result, an effective competition for sustainable and competitive socio-economic models on a regional level is created.

3. EXPORTING THE LEVEL PLAYING FIELD AND ENVIRONMENTAL STANDARDS

Undoubtedly, the EU's biggest asset in foreign relations at this moment is the Single European Market. In the latest "Future of Europe" survey by the European Commission, respondents singled out this aspect as the second most important asset of the EU in its entirety, right after its respect for democracy and the rule of law.[30] Constituting the biggest consumer market in the world, it carries an astonishing soft power through which it can shape global rules. Most recently, the case of the GDPR demonstrates how the introduction of a European standard gives the incentive for companies in other continents to equally adapt to this rule globally. This incentive stems from the direct benefits that access to the Single Market grants. Considering the subsequent adaptation and switching costs between different standards, companies might simply resort to adopting a European norm as their universal one. This is also the basic mechanism through which the border adjustment mechanism will function. In order to avoid carbon leakage, this instrument is meant to expand the intra-EU level-playing field beyond its borders.

30 Eurobarometer, 'Special Eurobarometer 500 – Future of Europe, First Results' (2021).

Particularly in light of an equally ambitious proposition from the US President, who in the context of climate change actions considers a carbon border tax to be one of its promising tools, a joint EU-US "green economic space" is a viable solution. As such, goods coming from third countries could be taxed equally in the EU and the US. Although this does only apply to the internalisation of the economic costs of pollution at first, it constitutes a significant step forward and de-facto brings about a common external "green tariff". By the sole dimension of this green economic space, which would cover almost half of the world's GDP, a meaningful incentive is created for companies from the rest of the world to limit their emissions in order to keep their competitiveness on these important markets. A potential "green economic space" will ensure a level playing field on both sides of the Atlantic and could be embedded into a broader trade agreement, spurring therefore Transatlantic integration. This is also an important question in the context of the West's long-term position in the world. One of the major advantages of the envisioned TTIP agreement was its rule-defining power.[31] blocs. Following from that, global rules on environment standards could be included, making use of both trading blocs' unmatched economic power. Among the top 10 countries worldwide with the highest levels of environmental protection are exclusively European ones.[32] The more the EU manages to export these standards, similar to the way it did with the GDPR, the more the climate will benefit from it worldwide. However, the impact of the EU's own approach to "exporting the level playing field" can be complemented by acting with our closest allies, cementing and enhancing our strategic autonomy.

This is particularly important when taking into account the overall timeframe that climate change actions take. They are not meant to be introduced today and abolished tomorrow. Rather, they are meant to stay and the crucial year 2050 shows the long-term horizon that these actions are to reach. However, the potential impact of external climate change actions that the EU can undertake is highly dynamic and – therefore – difficult to predict. In particular, this refers to the importance of the European continent. This represents a double-edged sword: only in a situation of strategic autonomy can the provisions and goals of the European Green Deal make a global impact. Otherwise, the provisions will be overruled by the actions and solutions imposed by other actors, who might not be led by the rationale of a sustainable and harmonic redefinition of human-nature relations but rather by their own national interests. What defines our future position is the question on how we will be able to develop our most valuable asset, namely the Single Market.

31 Daniel Hamilton and Steven Blockmans, 'The Geostrategic Implications of TTIP'(2015) CEPS special report 105.

32 Yale University and Columbia University, Environmental performance index (New Haven 2018).

Here, the proposed mechanisms of the carbon tax and a border adjustment mechanism offer incentives and income that might be used for this goal. On the one hand, this refers to the already mentioned competitive subsidy mechanism on the regional level, which is expected to spur innovation and boost competitiveness. All this simultaneously to the overall incentives introduced by the carbon tax.

On the other hand, it is also clear that the European project is not completed from an economic perspective. Economists point to the lack of fully-fledged integration that hampers European growth and limits its long-term potential.[33] However, it is worth looking back at the times when European integration made its biggest steps forward. The economic integration started as a way to overcome a significant long-term threat to Europe, that is, the terror of ultra-nationalism that paved the way to the second world war. Analogically, the decision to issue common debt in a somewhat limited frame following the Covid crisis has been hailed as the EU's "Hamiltonian Moment".[34] Similarly, we believe that the unprecedented threat that climate change poses, can be an additional incentive to depart on a new path of integration. Already today almost a third of the European public believes that climate change will be best tackled exclusively or mainly on the EU level and when asked about where the Union should be in ten years the most common answer from Europeans is that the EU should be handling more than today. Even more so, when rational and functioning solutions, such as the sustainable taxation mechanism are brought forward, which are clearly long-term oriented and strengthen the most important asset of the EU, its Single Market and its corresponding competitiveness, this aspect might constitute a new push towards deeper integration. An EU-wide carbon tax might then be a likely next step, as it combines all the previous mentioned priorities. From a neo-functionalist perspective, this might then give way to further integration processes that are beneficial for Europe as such, but also its competitiveness, creating significant spill-over effects in the long-term.

All these actions together will boost Europe's strategic autonomy and constitute the fuel of an ambitious green transformation that does not compromise or endanger the Union's competitiveness which is crucial to remaining an independent and integral player on the world stage in the future. Rather, it has the potential to boost integration within the Union as laid out before. This is even more true taking into account the significant demographic changes taking place in the future, in Europe as well as elsewhere. Due to these changes, which might even be seen as "tectonic shifts", Europe's position can only

33 Paul De Grauwe, 'The political economy of the Euro' (2013)16 Annual review of political science 153-170.

34 George Calhoun, 'Europe's Hamiltonian Moment – What Is It Really?' Forbes (7 June 2020) <https://www.forbes.com/sites/georgecalhoun/2020/05/26/europes-hamiltonian-moment--what-is-it-really/>.

be upheld if it becomes the most competitive region in the world, something already envisioned in the Lisbon Treaty. Otherwise, tools like the carbon border adjustment mechanism might lose their effectiveness if the European market becomes so irrelevant that it can be easily omitted without noteworthy losses. In such a case, the level playing field will only be functioning internally, but externally other countries might simply keep lower emission standards as a way to boost their economic competitiveness. It is of paramount importance to avoid this, as a race to the bottom with regards to these standards would signify a highly dangerous development in midst of a climate emergency. Yet only an equally strong Single Market in the future can avoid this from happening, which makes the question of competitiveness, hence also income, so crucial to this debate. This is also something clearly felt by the European public. And in the Future of Europe survey climate change comes as the fourth most frequently mentioned main challenge to the EU after migration and social issues, such as unemployment. These worries demonstrate the importance for European policymakers to find a new socio-economic model that is sustainable and competitive at the same time.

4. TRANSATLANTIC PARTNERSHIP WITH AFRICA FOR A GREEN AND DEMOCRATIC FUTURE

When asked, on the other hand, about the most important *global* challenge for the EU, respondents from the Future of Europe survey clearly single out climate change as the major one. However, in light of the universality of climate change, it is important to acknowledge that no continent or country alone can make a sufficient effort on its own. Even with the best of the Union's, and possibly the United States' effort to enhance the incentives of the so far elaborated aspects, they might not be sufficient. Climate change therefore cannot be mitigated or averted by simply relying on the West. Today, the EU's emissions account for 16% of global CO^2 emissions. The previously mentioned tectonic shifts in the world's demographic structure will decrease the impact of Europe and increase this of emerging countries, most notably of Africa. The continent can be seen as the continent of the future, whose subsequent development is not only crucial for its own destiny but also to those of the whole planet. Considering that Africa's population will almost double until 2050,[35] the characteristics of its corresponding economic as well as political development model are of utmost importance for the success of the transformation of climate change from a threat into an opportunity. This is also accounted for in the concept of sustainable taxation. And, as it will be argued, both aspects, namely green and democratic transformation, are crucially intertwined and therefore inseparable.

35 UN Population Division, World Population Prospects (2019).

Today Africa is standing at the crossroads and whether the continent's enormous human capital will materialise in paying off a demographic dividend depends crucially on the development path the continent will embark on. The regime nature of African countries will ultimately determine whether Africa will be a unified and integrated continent, characterised by shared prosperity, or a loosely associated territorial space of mostly autocratic and hybrid states that are dependent on foreign powers and fossil fuels.[36] Which scenario will eventually take place is also dependent on the actions of the external actors. Sustainable taxation lifts this aspect to its highest priority. This is because it not only foresees the creation of EU-wide incentives to innovate in the form of the carbon tax and the export of some of these incentives by the border adjustment mechanism, but also by taking a large share of the income from these instruments and institutionalising the partnership with Africa and other developing regions.

Much has been written recently on "energy democracy". This concept argues that the emergence of green technologies has the potential to positively impact political institutions, or democracy as such, by a "redistribution of political power".[37] This potential is rooted in the very nature of renewable energies as decentralised energy sources. However, this potential also runs contrary to the benefits of vested interest groups, particularly in developing countries, whose wealth and influence is based on fossil fuels. Not surprisingly, there is strong academic evidence on the link running from natural resource endowment to corruption and autocracy. And it is particularly this interlinkage that seems so dangerous for the future of a democratic, unified Africa and climate change action. Rising autocratic superpowers, like China, are not interested in upholding democratic principles, but mostly on their own economic, political, and increasingly also security interests. While this is not necessarily something that must deliberately bring about an autocratic system in a country, it will likely do so as a by-product. This stems from the fact that Beijing might serve as a stabilising factor to undemocratic regimes, as long as these regimes are seen as more beneficial to China's interests than a democratic transition in a given country. Fossil fuels are often intrinsic to these regimes' operations and hence climate change action could be sacrificed for the stability of these Beijing-friendly governments.

It is therefore important to note in that context that the potential interlinkage of many African states and China is characterised by two important features: first, interconnected-

36 See: Harvey Starr, 'Democracy and integration: Why democracies don't fight each other (1997) 34(2) Journal of Peace Research 153-162; Erich Gartzke, 'The capitalist peace' (2007) 51 (1) American journal of political science 166-191.

37 Kacper Szulecki, 'Conceptualizing energy democracy' (2018) 27(1) Environmental Politics 21-41.

ness has drastically increased throughout the recent past. Secondly, the qualitative nature of this interlinkage paves the way for authoritarian stabilisation in some African states as well as a significant degree of leverage of Beijing over these specific states. Already today China is the single largest trade partner of Africa. However, the bulk share of exports going to China are fossil fuels and other raw materials, featuring a low added value. This is also why African scholars themselves conclude that trade between China and Africa "does not correspond to the region's longer-term objectives [and that] for many African countries, the negative effects may outweigh the positive ones."[38]

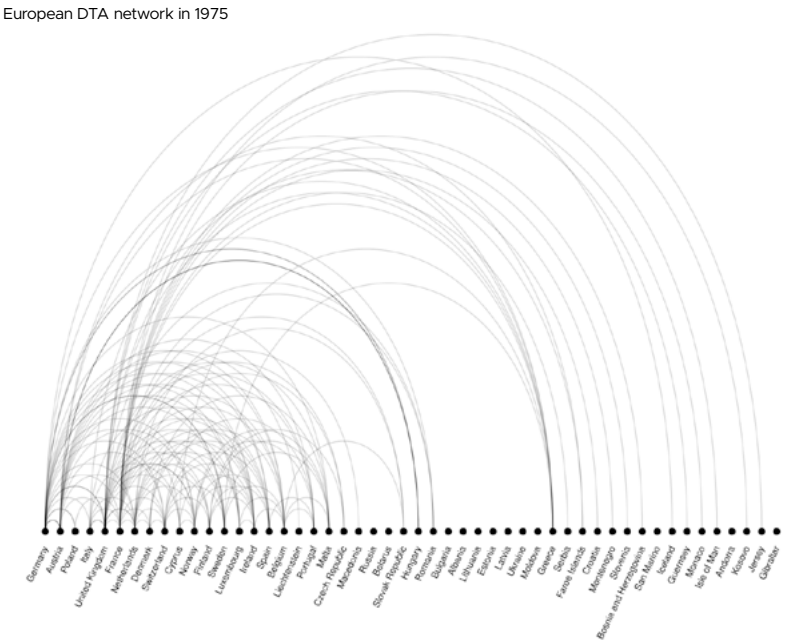
Africa's geographic proximity and its rising economic importance do not let the West stay idle and allow such a decoy to work undisturbed. There is also the moral duty to atone for the deeds of the past through promoting the growth of a prosperous Africa, which has thus far been embodied in developmental aid given to African states. The sustainable taxation concept takes this into account and institutionalised support to Africa in such a way that it far outweighs the offer made by Beijing. If the West intends to prevent China from enforcing its own version of the Monroe doctrine in Africa it therefore needs to counterbalance its influence. One possibility which would respond directly to the current problem of the sovereign debt crisis would be to create a common EU-US framework on green finance, lending and investment to counter China's seemingly attractive offers. A large part of the EU's income from the carbon tax and border adjustment mechanism could in such a way be channelled directly to these countries specifically for the sake of green transformation. The institutionalisation of that also means that it generates a big predictability in the long-term. In that respect, green investment in general empowers local and regional communities in Africa and takes away the autocratic rulers' leverage. If the offer of the West is attractive enough, this can be a game changer that spurs the green and democratic development of Africa.

The urgency of the situation is well illustrated by the progress of regional integration processes in Africa. One factor that indicates the degree of economic interconnectedness is the growth of the Double Tax Agreement (DTAs) networks. DTAs are interstate agreements which allocate taxing rights among states, thus removing the burden of double tax-

38 Oyejide Titiloye Ademola et al., 'China-Africa trade relations: Insights from AERC scoping studies' in Spencer Henson and Fiona Yap (eds.), The power of the Chinese dragon: Implications for African development and economic growth (Palgrave Macmillan 2016).

ation which is an inherent obstacle to any international business.[39, 40] A Nigerian company operating in Botswana shall pay a tax on its income only once if the two countries have a DTA in place. However, the same company will be forced to pay taxes twice if there is not such an agreement between Nigeria and Botswana. For this reason, signing DTAs creates a legal environment conducive to integration through economic exchange across borders. This logic explains why DTA networks might be worth looking at when assessing the progress of regional integration. In the case of Africa, the density of the current intraregional network starts to resemble that of Europe in the 1970s, indicating that the path towards regional integration via the African Union is realistic. Yet, this trajectory is far from being certain and might be disrupted by external autocratic influences.

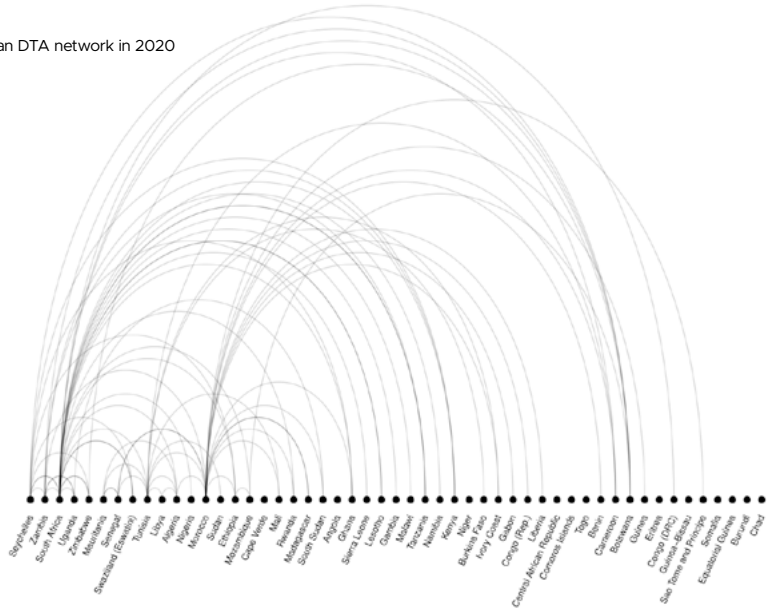
Figure 1: Interregional DTA networks in 1975 in Europe and in 2020 in Africa.



39 Brian Arnold, International tax primer (Wolters Kluwer 2019).

40 Reuven Avi-Yonah, 'Double Tax Treaties: An Introduction' (2009) University of Michigan Law School Scholarship Repository.

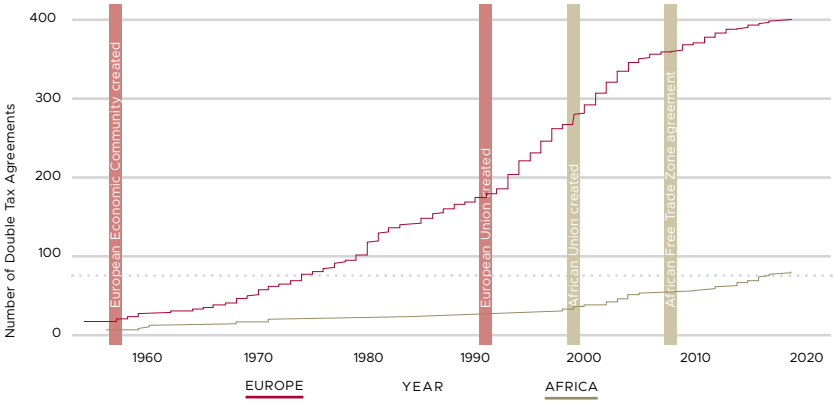
African DTA network in 2020



Economic integration – Africa like Europe in the 1970s
Number of regional Double Tax Agreements in Europe and Africa

Source: author's elaboration in RStudio based on data from the International Bureau of Fiscal Documentation

Figure 2: Integrative events and intraregional DTA networks in Europe and in Africa over time.



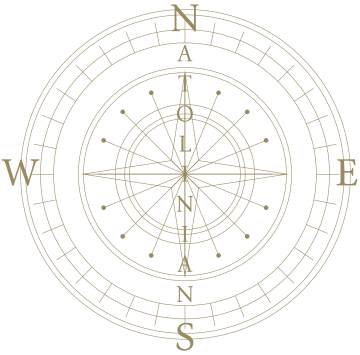
Source: author's elaboration in RStudio based on data from the International Bureau of Fiscal Documentation

This symbolises the meaning of "Africa at a crossroads" and the importance of acting in a way that will empower the continent of the future to embark on a democratic and green development path, ultimately leading to the African Union being not just an organisation but a synonym for real unity in Africa. For the West, this objective would mean the expansion of the "Transatlantic green economic space" to Africa and have a direct and long-term framework for green corporation. An equal case can be made to include exceptions to developing countries from the border adjustment mechanism as long as they follow certain green and good governance provisions. So-called asymmetric free trade agreements are applied e.g. in the case of some Eastern Partnership countries. The timely-limited omission of such an obstacle as the border adjustment mechanism pegged to a strong conditionality to reform and to use the development funds for a green transformation will ensure that once again a strong incentive for action is created, this time abroad from the EU.

5. CONCLUDING REMARKS

The European Green Deal is an unprecedented project which aims to combine Europe's ambitions with its economic might for the cause of materialising a noble, yet idealistic vision. However, it is likely that we have finally reached the point in history as a civilization that we are sufficiently advanced technologically to redefine our relationship with nature. The current Commission's plan clearly signifies a rift with the insofar extractive approach towards our planet. The ambitious character of the plan clearly paves the way for leading other regions by example and possibly making a real change worldwide that is so needed to stop climate change. The leadership aspect of the European Green Deal also makes it a chance for Europe to advance its goal of achieving Strategic Autonomy. This is especially vital in the EU's relationship with Africa, which is currently at the crossroads of either following the insofar trajectory of peaceful and democratic integration or succumbing into the external influences of autocracy. It is in Europe's best interest to support the first path and have a reliable, politically stable and economically prosperous partner in the realms of trade and security. Yet, the success of the geopolitical aspects of the European Green Deal must be first supported by a firm technical foundation. We argue that one of the elements of the current strategy that ought to be amended lies within its investment pillar. Strong emphasis on targeted funding implies subsidies for environmentally friendly projects, which constitutes an economically unsound policy in the context of nurturing innovation. For Europe to become a global hub of developing green technologies, especially in the context of energy, the European Green Deal needs to incorporate a component of sustainable taxation into its strategic pillars. Sustainable taxa-

tion in the form of the carbon tax is likely to level the play field between renewable energy sources and fossil fuels to allow for a fair competition between the two. Such a mechanism creates market conditions in which the winner and losers among competing technologies are determined through an organic process, rather than by a political decision-making body. In this way the carbon tax avoids all the negative characteristics of subsidies, such as arbitrariness in selection and vulnerability to lobbies. The carbon tax not only constitutes a viable mechanism for nurturing Europe's technological prowess in the realm of renewable energy sources, but also provides an additional source of revenue that can be used for advancing the goal of Strategic Autonomy. The proceeds from the carbon tax could be dedicated for building the EU's positive presence in Africa which will support the continent's further integration along the path of democracy. This is especially needed now when African countries are gradually more influenced by autocratic powers such as China. Thus, the European Green Deal is not only an opportunity to protect the natural world, but also a chance to build better societies worldwide. These bifold benefits from the implementation of the plan are not only Europe's potential rewards, but also its moral duty.



CHAPTER 5

European Parliaments as Drivers of the International Just Transition in the Context of the EU's Most Recent Free Trade Agreements

PAULIEN VAN DE VELDE-VAN RUMST

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1. INTRODUCTION: GLOBAL SUSTAINABLE DEVELOPMENT, THE INTERNATIONAL JUST TRANSITION, AND EU TRADE POLICY[1]

Green deal diplomacy is an important part of the Commission's Communication on the European Green Deal and is 'focused on convincing and supporting others to take on their share of promoting more sustainable development'.[2] According to the Green Deal, trade policy provides a platform for the EU, as a global leader, to engage in this green deal diplomacy and to advocate for global sustainable development.[3] Whilst the Commission usually employs the concept of sustainable development in the context of the EU's trade policy, it is not defined in the text of the Green Deal and only referred to in the context of the United Nations' sustainable development goals.[4] This paper will therefore employ the definition of sustainable development in the Commission's more specific Communication on a sustainable European future:

> The EU is committed to development that meets the needs of the present without compromising the ability of future generations to meet their own needs. A life of dignity for all within the planet's limits that reconciles economic prosperity and efficiency, peaceful societies, social inclusion and environmental responsibility is at the essence of sustainable development.[5]

In short, sustainable development thus entails the need for social and environmental protection in the context of economic development. These elements align with the terminology used in the EU Treaties and in individual Free Trade Agreements (FTAs).[6] Moreover, in its communications, the Commission equally puts forward that trade and the green transition have to go together with social justice and social equity.[7] Global sustaina-

1 All opinions expressed herein are solely the author's and do not represent those of the European Ombudsman.

2 European Commission, 'The European Green Deal' (Communication) COM (2019) 640 final 20.

3 Ibid 21.

4 Ibid 3 and 20-21.

5 European Commission, 'Next steps for a sustainable European future - European action for sustainability' (Communication) COM (2016) 739 final 2.

6 Articles 3(5), 21(2)(d) and (f) TEU and, for instance, Article 12.1.2 of the EU-Singapore FTA and the preamble of CETA, the FTA concluded with Canada.

7 European Commission, 'Global Europe: Competing in the world. A Contribution to the EU's Growth and Jobs Strategy' (Communication) COM (2006) 567 final 4-5; European Commission, 'Trade for All: Towards a More Responsible Trade and Investment Policy' (Communication) COM (2015) 497 final 15; European Commission, 'Trade Policy Review - An Open, Sustainable and Assertive Trade Policy' (Communication) COM (2021) 66 final 2.

ble development is therefore connected to the international Just Transition. That is to say, the concept of sustainable development includes the narrower understanding of Just Transition as referred to in the European Green Deal. The Deal namely focuses on a Just Transition in the sense of not leaving the regions and sectors behind that will be most affected by the transition because they depend on fossil fuels or carbon-intensive processes.[8] Given the fact that the EU establishes trade relations with both high and low-income countries, the idea of a Just Transition gains particular importance.

The EU's trade relations are, inter alia, organised bilaterally. Indeed, several trade partners are in bilateral relations with the EU by means of FTAs. The start of the negotiations of the most recent FTAs dates back to 2006. In that year, the Commission launched its Global Europe Communication: a Communication showing how the EU's trade policy can contribute to growth and job creation in Europe.[9] Following this Communication, the Commission committed itself to 'make proposals for a new generation of carefully selected and prioritised FTAs' to be concluded by the EU.[10] The Global Europe Communication was further concretised by the Commission's Trade for All Communication indicating that agreements with the US, Canada, Japan and Southern Asian Countries should be prioritized.[11] Currently, new generation FTAs have been concluded with South Korea; Columbia, Peru and Ecuador; Central American Countries; Canada; Japan; Singapore; Vietnam; New-Zealand and, most recently, Chile.[12] Negotiations have been completed with Mexico, while they are ongoing with Indonesia, India, and the Mercosur countries.[13] In its most recent Trade Policy Review, the Commission explicitly refers to this vast network of bilateral trade agreements to serve as a platform to support the green transition.[14]

8 European Commission, 'The European Green Deal' (n 2) 16.

9 European Commission, 'Global Europe: Competing in the World' COM (2006) 567 final 2.

10 Ibid 12.

11 European Commission, 'Trade for All: Towards a more responsible trade and investment policy' COM (2015) 497 final; Isabelle Bosse-Platière and Cécile Rapoport, 'Negotiating and implementing EU free trade agreements in an uncertain environment' in Isabelle Bosse-Platière and Cécile Rapoport (eds), The Conclusion and Implementation of EU Free Trade Agreements: Constitutional Challenges (Edward Elgar Publishing 2019).

12 European Commission, 'Implementation of Free Trade Agreements 1 January 2018 - 31 December 2018' (Report) COM (2019) 455 final 2 and 5.

13 European Commission, 'Negotiations and agreements'<https://ec.europa.eu/trade/policy/countries-and-regions/negotiations-and-agreements/#_being-negotiated>.

14 European Commission, 'Trade Policy Review - An Open, Sustainable and Assertive Trade Policy' COM (2021) 66 final 12.

Indeed, although FTAs are concluded to advance economic growth, global sustainable development has become an important aspect of these agreements. Considerations in relation to global sustainable development were already present in the Global Europe Communication. The Commission envisaged to include 'co-operative provisions in areas relating to labour standards and environmental protection' in these FTAs so as to strengthen sustainable development through the EU's bilateral trade relations.[15] Indeed, following the Trade for All Communication, the EU's trade agenda is supposed 'to ensure that economic growth goes hand in hand with social justice, respect for human rights, high labour and environmental standards, health and safety protection'.[16] Therefore, provisions on trade and sustainable development have been systematically included in recent FTAs and the EU engages in a cooperative process with its partner countries in their context.[17]

In this vein, the Trade Policy Review explicitly connects the EU's external trade policy with the European Green Deal. The more sustainable growth model that this Deal puts forward, requires 'a new trade policy strategy – one that will support achieving [the EU's] domestic and external policy objectives and promote greater sustainability'. In accordance with the text of this Trade Policy Review, such a new strategy should focus on 'the effective implementation and enforcement of sustainable development chapters in EU trade agreements, to level-up social, labour and environmental standards globally'.[18] The Review makes numerous references to the importance of enforcement of the sustainable development commitments embedded in the EU's FTAs.[19] To monitor these commitments, the Commission wants to work together with the Member States, the European Parliament (EP) and stakeholders.[20]

The Commission hence considers the EU's trade policy an important tool to accomplish global sustainable development and the international Just Transition. The EU's FTAs, as a significant part of this trade policy, include provisions on sustainable development and are a way of engaging trade partners to contribute to a Just Transition when these provisions are effectively implemented. Be that as it may, FTAs are paradoxically criticised for their potential detrimental impact on sustainable development by NGOs, scholars, and

15 European Commission, 'Global Europe: Competing in the World' COM (2006) 567 final 9.

16 European Commission, 'Trade for All: Towards a more responsible trade and investment policy' COM (2015) 497 final 15.

17 Ibid 17.

18 Ibid 10.

19 Ibid 13, 19, 20 and 22.

20 Ibid 19-20.

Parliaments alike. Most of these concerns have been expressed in relation to CETA, the FTA concluded with Canada, and TTIP, the FTA that was in negotiation with the US until 2016. More recently, the EU-Mercosur trade deal has caused strongly negative reactions.[21]

The formulated concerns are related to environmental protection, consumer protection, public health and social protection. Generally, fears have been articulated that agreements such as CETA would cause downward pressure on social, environmental and consumer standards. This would imply that multinational companies would become the main beneficiaries of these new FTAs.[22] Several Canadian and European civil society actors for instance called for a rejection of CETA as it would provide strong rights for corporations to seek legal action against governments over legitimate and non-discriminatory measures by use of the Investor-State Dispute Settlement System (ISDS). It would thus threaten the EU's and its Member States' regulatory power. At the same time, provisions on the protection of the environment, labour, health, consumer protection and safety can only be enforced in the relationship with a partner country through weaker mechanisms such as consultations and examination by a panel of experts.[23] Similarly, the Walloon Parliament and several Dutch Members of Parliament claimed that CETA cannot protect labour and environmental standards, and in Ireland, a member of Parliament brought CETA before the Irish Supreme Court over concerns on environmental standards.[24] In sum, the

21 Amandine Van den Berghe, 'What's Going on with the EU-Mercosur Agreement?' ClientEarth (11 June 2021) <https://www.clientearth.org/latest/latest-updates/news/what-s-going-on-with-the-eu-mercosur-agreement/> accessed 2 November 2021; Susanne Stollreiter, 'A Bad Deal?' International Politics and Society (4 July 2019) <https://www.ips-journal.eu/regions/latin-america/a-bad-deal-3581?tx_web2pdf_pi1%5Baction%5D=&tx_web2pdf_pi1%5Bargument%5D=printPage&tx_web2pdf_pi1%5Bcontroller%5D=Pdf> accessed 20 January 2022.

22 Franz Ebert, 'The Comprehensive Economic and Trade Agreement (CETA): Are Existing Arrangements Sufficient to Prevent Adverse Effects on Labour Standards?' (2017) 33 International Journal of Comparative Labour Law & Industrial Relations 295, 297 and 302–303.

23 'European and Canadian Civil Society Groups Call for Rejection of CETA' Friends of the Earth Europe (28 November 2016) <http://foeeurope.org/European-and-Canadian-civil-society-groups-call-for-rejection-of-CETA> accessed 25 November 2019; 'The Impact of CETA on the Environment, Climate and Health' Foodwatch EN (1 November 2017) <https://www.foodwatch.org/en/campaigns/free-trade-agreements/the-impact-of-ceta-on-the-environment-climate-and-health/> accessed 25 November 2019.

24 Mehreen Khan, 'A Dutch Trade Rebellion' Financial Times (18 February 2020) <https://www.ft.com/content/dfaea7c0-51da-11ea-8841-482eed0038b1> accessed 20 February 2020; 'Il n'y a plus d'obstacle juridique au CETA' RTBF Info (30 April 2019) <https://www.rtbf.be/info/belgique/detail_il-n-y-a-plus-d-obstacle-juridique-au-ceta?id=10208950> accessed 2 March 2020; 'Accord UE-Mercosur, le nouveau combat wallon: "C'est non, nous sommes totalement opposés à ce traité"' RTBF Info (20 January 2020) <https://www.rtbf.be/info/belgique/detail_accord-ue-mercosur-le-nouveau-combat-wallon-c-est-non-nous-sommes-totalement-opposes-a-ce-traite?id=10411472> accessed 18 February 2020; 'Ireland's Top Court Rejects Canada-EU Trade Deal as Unconstitutional' POLITICO (11 November 2022) <https://www.politico.eu/article/irelands-top-court-rejects-canada-eu-trade-deal-as-unconstitutional/> accessed 12 March 2023.

conclusion of FTAs would in practice weaken social and environmental protection and, as a consequence, undermine the EU's commitment to global sustainable development and the international Just Transition.

It is within this paradox, that European Parliaments have profiled themselves as protectors of environmental and social protection standards and global sustainable development more generally. That is to say, understanding the EU's role as a global climate actor requires an examination of which EU actors can fulfil part of this role. It is argued below that both the European Parliament (EP) and the EU's domestic Parliaments have played and continue to play an influential role in furthering global sustainable development by monitoring the consistency between the EU's goal of an international Just Transition and its external trade practices.

The examples below will mainly be drawn from CETA as this agreement is considered the gold standard for other agreements and it attained 'symbolic value for trade policy as a whole'.[25] However, parallels will be drawn with other FTAs. More specifically, this paper contains frequent references to the FTA concluded between the EU and Vietnam and the ongoing conclusion process of the association agreement with the Mercosur countries. References to the former agreement serve to show that Parliaments are drivers for sustainable development regardless of the mixed or EU-only character of an FTA and regardless of their conclusion with a low or high-income country. Examples dealing with the EU-Mercosur agreement show that sustainable development is still a salient issue in trade relations.

Section 2 discusses the negotiation and conclusion of the EU's most recent FTAs and shows how Parliaments have played an influential role in furthering the attention for sustainable development in these agreements. Section 3 argues that this is a role that Parliaments can continue playing in the effective implementation of these agreements. Both sections will subsequently address the European Parliament, domestic Parliaments, and potential common action. Section 4 concludes that there is more (unexplored) potential for Parliaments to reinforce a European trade policy that contributes to the international Just Transition and global sustainable development.

25 Péter Márton, 'How the Debates on Trade Policy Helped Rebalance the Executive–Legislative Relationship in Favour of the European Parliament' in Diane Fromage and Anna Herranz-Surrallés (eds), Executive–Legislative (Im)Balance in the European Union (Hart Publishing 2020) 162 and 171 <http://www.bloomsburycollections.com/book/executivelegislative-im-balance-in-the-european-union> accessed 5 March 2021; 'Joint Statement Canada-EU Comprehensive Economic and Trade Agreement (CETA)' <https://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154330.pdf> accessed 12 April 2021.

2. EUROPEAN PARLIAMENTS FURTHERING GLOBAL SUSTAINABLE DEVELOPMENT IN THE NEGOTIATION AND CONCLUSION OF THE EU'S MOST RECENT FREE TRADE AGREEMENTS

Negotiation and conclusion of FTAs is framed by the procedure of Article 218 of the Treaty on the Functioning of the European Union (TFEU). As FTAs fall within the scope of the EU's Common Commercial Policy (CCP), the more specific provision of Article 207 TFEU should also be taken into account. The Commission is the EU's designated negotiator in the context of the CCP. It is required to report on the progress of the negotiations to a special committee appointed by the Council, the Trade Policy Committee, and to the EP.[26] The EP needs to be asked for its consent to the agreement and should, more generally, be informed at all stages of the negotiations.[27]

Following Opinion 2/15 of the Court of Justice of the EU (CJEU) on the EU-Singapore FTA, FTAs can be concluded as mixed agreements in case these agreements contain provisions on foreign non-direct investment (or portfolio investment) or provisions on ISDS.[28] In case of a mixed agreement, the Member States become Parties to the FTA alongside the EU. The Council decides by Qualified Majority Voting (QMV) on the conclusion of an FTA as a mixed or EU-only agreement.[29]

A crucial consequence of a decision of the Council to conclude an FTA as a mixed agreement, is the need for its approval and ratification by each Member State. This implies a decisive role for their Parliaments and a potentially time-consuming exercise.[30] Hence, the role of domestic Parliaments differs considerably depending on the mixed or EU-only character of an FTA. CETA and the Association Agreement negotiated with the Mercosur countries are mixed agreements whilst the FTA concluded with Vietnam is an EU-only agreement. CETA has not yet been ratified by all domestic Parliaments. Pending the full ratification, the trade

26 European Union, 'Consolidated version of the Treaty on the Functioning of the European Union', Official Journal of the European Union, C326, 26 October 2012. Article 207(3) TFEU.

27 Article 218(6)(a)(v) and 218(10) TFEU.

28 In the case of a mixed agreement, both the EU and its Member States will be parties to the agreement since the EU "will have to combine ('mix') its competences with those that are still in the hands of the Member States so as to cover the full spectrum of the external action at stake" (Joris Larik and Ramses Wessel, 'Instruments of EU External Action' in Ramses Wessel and Joris Larik (eds), EU External Relations Law: Text, Cases and Materials (2nd edn, Bloomsbury Publishing 2020) 122); Opinion 2/15, paragraphs 239-244, 282, 292-293 and 304.

29 Article 218(8) TFEU.

30 Wessel and Larik (n 28) 125.

provisions in CETA have been provisionally applied since 2017.[31] The agreement with the Mercosur countries has not yet been put in front of domestic Parliaments as discussions at the European level are still ongoing. The EU-Vietnam FTA has on the other hand been consented to by the EP and it subsequently entered fully into force on the 1st of August 2020.[32]

As the following discussion will show, the role of Parliaments goes however further than consenting or approving ratification only. The European Parliament and domestic Parliaments have used their role to further attention for global sustainable development in the negotiation and conclusion of FTAs.

2.1. European Parliament

2.1.1. Consent

The requirement of the EP's consent to conclude an FTA can be seen as 'the ultimate formal instrument' that is available to the EP. The threat of a negative vote can place pressure on the Council and the Commission to allow the EP to have an impact on the content of these international agreements.33 Moreover, the need to obtain the approval of the EP has led the Council and the Commission to consider the EP's positive vote as a precondition for provisional application of an FTA.34 Seeing the EP's consent as a precondition for provisional application is an institutional practice given the fact that Article 218(5) TFEU does not establish a role for the EP in the decision to provisionally apply an agreement. As provisional application is used to alleviate the inconvenience of long ratification processes of mixed agreements, this is a considerable additional power for the EP.35

The EP has two principal ways to express its view before it gives its consent to an FTA: it can pose parliamentary questions and adopt resolutions.[36] The inclusion of provi-

31 See https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/canada/eu-canada-agreement_en.

32 See https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/vietnam/eu-vietnam-agreement_en.

33 Katharina Meissner, 'Democratizing EU External Relations: The European Parliament's Informal Role in SWIFT, ACTA, and TTIP' (2016) 21 European Foreign Affairs Review 269, 286; Kolja Raube, Meltem Müftüler-Bac and Jan Wouters (eds), Parliamentary Cooperation and Diplomacy in EU External Relations: An Essential Companion (Edward Elgar Publishing 2019) 474.

34 Christine Kaddous, 'The Transformation of the EU's CCP' in Piet Eeckhout and Manuel López Escudero (eds), The European Union's External Action in Times of Crisis (Hart Publishing 2016) 447.

35 Joni Heliskoski, 'Provisional Application of EU Free Trade Agreements' in Michael Hahn and Guillaume Van der Loo, Law and Practice of the Common Commercial Policy: The First 10 Years after the Treaty of Lisbon (Brill | Nijhoff 2021) 612 <https://brill.com/view/title/54375> accessed 18 December 2020.

36 Rules 136-139 and 143 Rules of Procedure of the European Parliament (2019-2024).

sions on sustainable development, environmental and labour protection standards has been pushed for by the EP by these means.[37] In June 2011, the EP for example adopted a Resolution on EU-Canada trade relations calling upon the Commission to be ambitious as regards sustainable development in its negotiations with Canada. More specifically, it should safeguard a high level of obligations in the fields of labour and environment.[38] This is in line with the EP's Resolution reacting to the Trade for All Communication of the Commission. The latter Resolution addresses, among others, the issue of regulatory cooperation between the EU and its trading partners: it should 'not [compromise] the technical procedures linked to fundamental standards and regulations, preserving European standards on health, safety, consumer, labour, social and environmental legislation' and should 'under no circumstances [undermine] or [delay] the democratically legitimised decision-making procedures of any trading partner'.[39]

In a similar vein, the EP adopted a Resolution on trade relations with Vietnam demanding that the FTA would include a binding and enforceable sustainable development chapter and involvement of independent civil society organisations in its framework.[40] The then Commissioner for Trade, Cecilia Malmström, was also questioned in the EP about Vietnam's debatable human and labour rights record. The debate in the EP pushed the Commissioner to engage with the concerns in this regard and to confirm the ambitiousness of the FTA's Trade and Sustainable Development chapter.[41] Thirty-two Members of the EP also sent a letter to the Commissioner and to the then High Representative Federica Mogherini. The Members urged them to, inter alia, require Vietnam to recognise independent labour unions before asking the EP's consent to the FTA.[42] Vietnam eventually

37 Ricardo Passos, 'The External Powers of the European Parliament' in Eeckhout and López Escudero (n 34) 100–104.

38 European Parliament, 'Resolution of the European Parliament on EU-Canada trade relations (P7_TA(2011)0257–B7-0344/2011– 2011/2623(RSP))' (8 June 2011).

39 European Parliament, 'Resolution of the European Parliament on a new forward-looking and innovative future strategy for trade and investment (P8_TA(2016)0299–A8-0220/2016–2015/2105(INI))' (5 July 2016).

40 European Parliament, 'Resolution of the European Parliament on the state of play of the EU-Vietnam Free Trade Agreement (P7_TA(2014)0458–B7-0367/2014–2013/2989(RSP))' (17 April 2014).

41 Bernd Lange, Marietje Schaake, on behalf of the Committee on International Trade, 'Parliamentary Question for oral answer to the Commission' (30 September 2015) O-000116/2015 <https://www.europarl.europa.eu/doceo/document/O-8-2015-000116_EN.html?redirect>; Answer given by Cecilia Malmström on behalf of the Commission in the Debate of 23 November 2015: <https://www.europarl.europa.eu/doceo/document/CRE-8-2015-11-23-ITM-012_EN.html?redirect>.

42 '32 MEPs send a joint letter to Mrs Mogherini and Commissioner Malmström to ask for more Human Rights progress in Vietnam' (Ramon Tremosa, 17 September 2019) <http://tremosa.cat/noticies/32-meps-send-joint-letter-mrs-mogherini-and-commissioner-malmstrom-ask-more-human-rights-progress-vietnam> accessed 27 May 2021.

adopted a roadmap for ratification of the two final core Conventions of the International Labour Organization (ILO) that it was not yet a party to.[43] The fact that this roadmap was negotiated with Vietnam by Members of the EP illustrates its crucial role in pushing for labour protection and sustainable development through trade.[44]

Finally, in relation to the agreement with the Mercosur countries, the EP reiterated the importance of including respect for environmental and social standards in all trade agreements between the EU and third countries.[45] In addition, it held more recently 'that the EU-Mercosur agreement cannot be ratified as it stands' due to concerns related to sustainable development, labour rights and environmental protection, and the implementation of the Paris climate agreement.[46] Mindful of the EP's consent authority, the negotiators continue their discussions on the sustainable development aspects of the agreement.[47]

At the time of the conclusion of an FTA, the agreement will be discussed in the EP's Committees. Concretely, for CETA for instance, the International Trade (INTA) Committee of the EP was the responsible committee while the Foreign Affairs (AFET) Committee, the Employment and Social Affairs (EMPL) Committee and, lastly, the Environment, Public Health and Food Safety (ENVI) Committee gave an opinion.[48] The EMPL Committee advised against consent to CETA as 'the privileged status accorded to investors with the [Investment Court System] stands in sharp contrast to the consultations

43 Explanatory Statement to Draft Resolution of the European Parliament on the draft Council decision on the conclusion of the Free Trade Agreement between the European Union and the Socialist Republic of Viet Nam (06050/2019 – C9-0023/2019 – 2018/0356(NLE)) of 23 January 2020; Russel Martin, 'Trade and Investment Agreements with Vietnam' (2020) PE 646.158 At a Glance - European Parliamentary Research Service 1.

44 Kristoffer Marslev and Cornelia Staritz, 'Towards a Stronger EU Approach on the Trade-Labor Nexus? The EU-Vietnam Free Trade Agreement, Social Struggles and Labor Reforms in Vietnam' (2022) Review of International Political Economy 1, 14.

45 133.European Parliament, 'Resolution of the European Parliament on trade negotiations between the EU and Mercosur (P7_TA(2013)0030– RC-B7-0008/2013– 2012/2924(RSP))' (17 January 2013), 7.

46 129.European Parliament, 'Resolution of the European Parliament on the implementation of the common commercial policy – annual report 2018 (2019/2197(INI)) (7 October 2020), 36.

47 Directorate-General for Trade, 'Meeting of the European Union-Mercosur Chief Negotiators: Joint Communiqué of the European Union and Mercosur' (8 March 2023) <https://policy.trade.ec.europa.eu/news/meeting-european-union-mercosur-chief-negotiators-2023-03-08_en> accessed 12 March 2023.

48 EP Legislative Observatory, 'EU/Canada Comprehensive Economic and Trade Agreement (CETA) - 2016/0205(NLE)' <https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2016/0205(NLE)&l=en> accessed 14 May 2020.

mechanism, envisaged for protecting labour interests and rights'.[49] The ENVI Committee did not advise against CETA's conclusion, however, its Rapporteur did express serious concerns as regards, inter alia, the precautionary principle, the regulatory cooperation foreseen and the established dispute settlement system during the plenary debate.[50]

In the context of the EU-Vietnam FTA, the Committee on Development (DEVE), the Committee on Fisheries (PECH) and the AFET Committee all recommended the INTA Committee to give its consent to the FTA. Nonetheless, all these Committees stressed the importance of monitoring Vietnam's sustainable development commitments. The AFET Committee also stressed the need to agree with the Commission on a timeline for taking measures to consider the, inter alia, sustainability concerns.[51] The INTA Committee itself considered that 'the EU will have more leverage to pressure Vietnam on human rights and environmental issues' when concluding the FTA.[52] The European Parliament hence accepted Vietnam's commitments, such as the roadmap for ratification of ILO Conventions, as sufficient and it did not require ex ante ratification to give its consent.[53]

As mentioned before, civil society actors equally raised these issues. The EP's resolutions and questions on the one hand, and the EP's Committees' work as well as their opinions on the other hand, can hence serve as a channel of information for the public and am-

49 Opinion of the Committee on Employment and Social Affairs for the Committee on International Trade on the draft Council decision on the conclusion of the Comprehensive Economic and Trade Agreement (CETA) Between Canada, of the one part, and the European Union and its Member States, of the other part (10975/2016 – C8-0438/2016 – 2016/0205(NLE)) of 8 December 2016; Ebert (n 22) 297.

50 Debate in the European Parliament on 'EU-Canada Comprehensive Economic and Trade Agreement - Conclusion of the EU-Canada CETA - EU-Canada Strategic Partnership Agreement' of 15 February 2017, <https://www.europarl.europa.eu/doceo/document/CRE-8-2017-02-15-ITM-004_EN.html>.

51 Opinion of the Committee on Development for the Committee on International Trade on the draft Council decision on the conclusion of the Free Trade Agreement between the European Union and the Socialist Republic of Viet Nam (06050/2019 – C9-0023/2019 – 2018/0356(NLE)) of 3 December 2019; Opinion of the Committee on Fisheries for the Committee on International Trade on the draft Council decision on the conclusion of the Free Trade Agreement between the European Union and the Socialist Republic of Viet Nam (06050/2019 – C9-0023/2019 – 2018/0356(NLE)) of 3 December 2019; Opinion of the Committee on Foreign Affairs for the Committee on International Trade on the draft Council decision on the conclusion of the Free Trade Agreement between the European Union and the Socialist Republic of Viet Nam (06050/2019 – C9-0023/2019 – 2018/0356(NLE)) of 5 December 2019.

52 Explanatory Statement to the Recommendation of the Committee on International Trade on the draft Council decision on the conclusion of the Free Trade Agreement between the European Union and the Socialist Republic of Viet Nam (06050/2019 – C9-0023/2019 – 2018/0356(NLE)) of 23 January 2020.

53 Areg Navasartian, 'EU-Vietnam Free Trade Agreement: Insights on the Substantial and Procedural Guarantees for Labour Protection in Vietnam' (2020) 5 European Papers - A Journal on Law and Integration 561, 565.

plify the voices of civil society.[54] Members of the EP are also contacted by civil society actors and they can directly support these actors.[55] In relation to the EU-Vietnam FTA for instance, Members of the EP actively participated alongside civil society organisations in a Roundtable with the Commission on Trade, Sustainable Development and Human Rights in EU-Vietnam Relations.[56] Similarly, the EP can contact the negotiating partner directly.[57] Again in relation to the EU-Vietnam FTA, the EP proved to be an important dialogue partner on sustainable development. High level delegations from Vietnam met with EP representatives, the EP's INTA Committee and its ASEAN delegation went on frequent missions, and the EP met with Vietnam's National Assembly.[58]

2.1.2. Right to be informed

The second main role of the EP is its right to be informed and reported to by the Commission at all stages of the negotiations of an FTA in accordance with Articles 207(3) and 218(10) TFEU. This right implies that all forms of information should be communicated to the EP and all relevant documents should be forwarded to it.[59] In relation to CETA, former Commissioner Malmström for instance addressed the EP stressing the Commission's intention 'to open a broad and inclusive debate on sustainable development provisions' in new generation FTAs and to also involve Members of the EP therein.[60]

The EP's right to be informed has also been specified in the interinstitutional agreement concluded between the EP and the Commission in 2010: the EP has 'to be able to express its point of view' and the Commission has 'to take Parliament's views as far as possible

54 Passos in Eeckhout and Escudero (n 37) 100–104.

55 Navasartian (n 53).

56 European Commission, 'Summary Paper - Trade, Sustainable Development and Human Rights in EU-Vietnam Relations Roundtable with EU stakeholders' Brussels (12 May 2015); <http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153624.pdf>.

57 Meissner (n 33) 286–287.

58 European Commission Staff Working Document, 'Human Rights and Sustainable Development in the EU-Vietnam Relations with specific regard to the EU-Vietnam Free Trade Agreement', SWD (2016) 21 final 6.

59 Markus Krajewski, 'New Functions and New Powers for the European Parliament: Assessing the Changes of the Common Commercial Policy from the Perspective of Democratic Legitimacy' in Marc Bungenberg and Christoph Herrmann, Common Commercial Policy after Lisbon: Special Issue (Springer 2013) 72 <http://ebookcentral.proquest.com/lib/eui/detail.action?docID=1082791> accessed 30 January 2020.

60 Speech. Cecilia Malmström on behalf of the Commission, 'Answer in the Debate of 23 November 2015' <https://www.europarl.europa.eu/doceo/document/CRE-8-2015-11-23-ITM-012_EN.html?redirect>.

into account'.[61] The EP can for instance respond to the Commission's recommendations for the negotiation of FTAs and its INTA Committee is in constant dialogue with the Commission.[62] To monitor highly politicised trade negotiations, the EP also sets up *in camera* monitoring groups to organise this dialogue with the Commission.[63] As Márton states it, these practices all serve 'to channel public concerns through the EP'.[64]

A significant piece of documentation to inform the EP of in this context, is the Commission's Sustainability Impact Assessment (SIA) for major trade negotiations. Such an assessment gives the Commission an 'in-depth analysis of the potential economic, social, human rights, and environmental impacts of ongoing trade negotiations'.[65] Conducting a SIA can be regarded as a procedural obligation for the Commission and its content should be taken into account during negotiations.[66] Be that as it may, the SIAs relating to CETA, the EU-Vietnam FTA, and the EU-Mercosur agreement have in practice not played a great role of influence on negotiations. As regards CETA, the Commission's position paper on the concerned SIA was only published in 2017 while the end of the negotiations of this agreement was in 2014.[67] For the EU-Vietnam FTA, the Commission failed to carry out a specific human rights impact assessment. The Commission argued that this was not needed as a SIA had already been carried out for a proposed EU-ASEAN FTA, which included Vietnam. Nonetheless, the European Ombudsman qualified this as a case of

61 Point 24 of the Framework Agreement on relations between the European Parliament and the European Commission OJ L 304, 20.11.2010, p. 47 as referred in Wolfgang Weiss, 'Executive–Legislative Balance in External Action' in Fromage and Herranz-Surrallés (n 25) 212.

62 Ibid.

63 Katharina Meissner and Guri Rosén, 'Exploring Interaction between National Parliaments and the European Parliament in EU Trade Policy' in Fromage and Herranz-Surrallés (n 25) 202–203. For a list of the current Monitoring Groups: https://www.europarl.europa.eu/cmsdata/247127/new%209th%20Leg.%20Standing%20and%20Shadow%20Standing%20Rapp.pdf.

64 Péter Márton, 'How the Debates on Trade Policy Helped Rebalance the Executive-Legislative Relationship in Favour of the European Parliament' in Fromage and Herranz-Surrallés (n 25) 170.

65 For an overview: <https://ec.europa.eu/trade/policy/policy-making/analysis/policy-evaluation/sustainability-impact-assessments/#:~:text=The%20Sustainability%20Impact%20Assessment%20(%20SIA,impacts%20of%20ongoing%20trade%20negotiations>.

66 Peter Van Elsuwege, 'The Nexus between the Common Commercial Policy and Human Rights - Implications of the Lisbon Treaty' in Hahn and Van der Loo (n 35) 421.

67 The end of the CETA negotiations was announced on 26 September 2014 - European Commission, CETA – Summary of the final negotiating results, available at https://trade.ec.europa.eu/doclib/docs/2014/december/tradoc_152982.pdf; European Commission services' position paper on the trade sustainability impact assessment of a Comprehensive Economic & Trade Agreement between the EU and Canada (4 April 2017) <https://trade.ec.europa.eu/doclib/docs/2017/april/tradoc_155471.pdf>.

maladministration.[68] The Ombudsman came to the same conclusion of maladministration in relation to the EU-Mercosur negotiations: in the case of this agreement, the SIA was only completed after the end of the negotiations.[69]

Civil society actors contacted the Ombudsman with these two complaints. In future occasions, it is also imaginable that Members of the EP would address the Ombudsman on this topic as Article 228(1) TFEU provides that the Ombudsman can conduct inquiries based on complaints submitted through them. Moreover, informing the EP on the basis of Article 218(10) TFEU is an essential procedural requirement. If the EP is not immediately and fully informed, it cannot exercise its democratic scrutiny and annulment of an act by the CJEU would be possible in accordance with Article 263 TFEU and its time limit. It could indeed be argued that a lack of timely informing the EP of a SIA, impedes on the validity of a decision to conclude the concerned agreement.[70] The EP cannot be expected to give its consent to an FTA if it cannot verify that the findings of a SIA have been taken into account in its negotiation.

2.1.3. Request for an Opinion of the CJEU

Finally, in accordance with Article 218(11) TFEU, the EP can demand a CJEU Opinion on the compatibility of an international agreement with EU law. Since a negative opinion on behalf of the CJEU blocks the entry into force of such an agreement, addressing the CJEU can be seen as an impactful tool for the EP. If the EP would fear a negative impact of an envisaged agreement on environmental and labour protection, and sustainable development, it could indeed ask such a CJEU Opinion. Under the TFEU, the EU commits to pursuing a high level of environmental protection for its citizens.[71] In addition, Articles 31 and 37 of the Charter stipulate the right to fair and just working conditions and to environmental protection. As regards the international stage, the Treaty on European Union (TEU) determines that the EU shall help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natu-

68 European Ombudsman, Decision in case 1409/2014/MHZ on the European Commission's failure to carry out a prior human rights impact assessment of the EU-Vietnam free trade agreement <https://www.ombudsman.europa.eu/en/decision/en/64308>.

69 European Ombudsman, Decision in case 1026/2020/MAS concerning the failure by the European Commission to finalise an updated 'sustainability impact assessment' before concluding the EU-Mercosur trade negotiations, https: <//www.ombudsman.europa.eu/en/decision/en/139418>.

70This was suggested by Professor Peter Van Elsuwege during an event at the European University Institute, Florence (25 May 2021) on the basis of Judgment of 24 June 2014, EU-Mauritius Agreement, C-658/11, EU:C:2014:2025, paragraphs 75-81.

71 Article 191(2) TFEU.

ral resources with the purpose of sustainable development.[72]

In relation to CETA, there was no majority among the EP's Members to refer the agreement to the CJEU.[73] The Walloon Parliament did however exercise political pressure on its national executives to request an Opinion of the CJEU on CETA pursuant to Article 218(11) TFEU.[74] The impact of the latter initiative cannot be underestimated as will be explained below. This request enabled the CJEU to establish the conditions an ISDS regime should fulfil in order to be compatible with EU law in Opinion 1/17.

2.2. Domestic Parliaments

In the case of mixed FTAs such as CETA, approval of ratification by the Member States' domestic Parliaments is required. For CETA in particular, several domestic Parliaments have voiced clear sustainability concerns. The Belgian Government, first, struggled to receive the needed mandate from the Walloon Parliament to sign CETA. The mandate was eventually granted conditional upon the request for a CJEU Opinion on CETA's compatibility with EU law, Opinion 1/17, and the addition to the agreement of a Joint Interpretative Instrument between Canada and the EU and its Member States (Instrument).[75] Given that this Instrument is intended to clarify the right to regulate stipulated in Article 8.9.1 CETA, it stresses that 'CETA preserves the ability of the European Union and its Member States and Canada to adopt and apply their own laws and regulations that regulate economic activity in the public interest'.[76]

Moreover, the Instrument clarifies in various parts of the text that standards and regulations related to food safety, product safety, consumer protection, health, environment or labour protection will not be lowered by CETA.[77] It remains to be seen if and how the Instrument will actually influence the agreement's implementation in these fields. In

72 Article 21(2)(f) TFEU.

73 Davor Jančić, 'EU-Canada relations and CETA: a tale of legislative trade diplomacy' in Raube, Müftüler-Bac and Wouters (n 33) 475.

74 Bosse-Platière and Rapoport (n 11) 18–19.

75 'Déclaration Du Royaume de Belgique Relative Aux Conditions de Pleins Pouvoirs Par l'Etat Fédéral et Les Entités Fédérées Pour La Signature Du CETA' <https://ds.static.rtbf.be/article/pdf/declaration-be-fr-nl-271016-9h00-clean-watermark-1477566706.pdf> accessed 18 December 2020.

76 Title 2 'Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States' (14 January 2017) OJ L 11, as referred to by Guillaume Van der Loo, 'Opinion 1/17: Legitimising the EU's Investment Court System but Raising the Bar for Compliance with EU Law' in Hahn and Van der Loo (n 35) 109.

77 Ibid. Preamble, Title 4, Title 7, Title 8, Title 9, Title 10.

any case, in Opinion 1/17, the CJEU refers repeatedly to its text and the CJEU uses the Instrument as a part of its reasoning to conclude that the ISDS regime provided in CETA will not (and should not) have the power 'to call into question the level of protection of public interest determined by the Union following a democratic process'.[78] Crucially, the Instrument does not only concern CETA's investment aspects, it also provides for an early review of the agreement's provisions on trade and sustainable development to ensure their effective enforceability.[79] The pressure of the Walloon Parliament therefore forced the EU to stress its commitment to global sustainable development once again.

Similar concerns regarding CETA were voiced, second, in the Netherlands. Several Dutch Members of Parliament claimed that CETA cannot protect labour and environmental standards while the ISDS regime provides strong rights for corporations to seek legal action against governments in relation to measures in these fields.[80] One of the options discussed to mitigate these concerns was to ensure a strong role for NGOs in CETA's advisory groups for the implementation of the agreement.[81] Since the discrepancy between the rights of corporations and the rights of NGOs was also of concern in other Member States such as Germany, the Commission introduced the Single Entry Point (SEP).[82] NGOs can address this SEP to complain in case of violations of provisions on sustainable development. The mechanism is general for all FTAs, but it also convinced the Dutch Parliament to approve CETA in particular.[83]

Whilst CETA is now ratified in the Netherlands and Germany, the end of the ratification process is not yet in sight.[84] As mentioned before, in Ireland, a member of Parliament

78 Opinion 1/17, 156 as referred to by Guillaume in Hahn and Van der Loo (n 35) 109–110.

79 Title 10 Joint Interpretative Instrument.

80 Khan (n 24); 'Il n'y a plus d'obstacle juridique au CETA' (n 24).

81 Niels Markus, 'Misschien is er toch nog hoop voor het Ceta-verdrag' Trouw (13 May 2020) <https://www.trouw.nl/gs-ba5483d6> accessed 13 May 2021.

82 A team within the European Commission's trade department, under the leadership of the Chief Trade Enforcement Officer. It is the first point of contact for all EU stakeholders who are facing potential trade barriers in third countries or who find non-compliance with sustainability rules related to Trade and Sustainable Development or the Generalised Scheme of Preferences. See: https://trade.ec.europa.eu/access-to-markets/en/content/single-entry-point-0.

83 Nikos Lavranos, 'Dutch Senate Approves CETA Ratification' Borderlex (12 July 2022) <https://borderlex.net/2022/07/12/dutch-senate-approves-ceta-ratification/> accessed 16 July 2022.

84 Jonathan Packroff, 'German Parliament Ratifies CETA, Urges Other Countries to Follow Suit' www.euractiv.com (2 December 2022) <https://www.euractiv.com/section/politics/news/german-parliament-ratifies-ceta-urges-other-countries-to-follow-suit/> accessed 13 March 2023.

brought CETA before the Irish Supreme Court over concerns on environmental standards. The Irish Supreme Court held that CETA can only be ratified if either domestic law is adapted or a referendum is organised.[85] In sum, sustainability is a clear priority for (Members of) domestic Parliaments in their assessment of CETA ratification.

The Walloon Parliament has also made clear that it is very concerned about the sustainable development aspects of the EU-Vietnam FTA and the EU-Mercosur agreement.[86] This Parliament again shares these concerns with numerous civil society organisations.[87] As regards the negotiation and conclusion of the EU-Vietnam FTA, the Walloon Parliament can however not play a role anymore: this agreement has been concluded as an EU-only agreement that entered into force in August 2020. By contrast, the connected Investment Protection Agreement (IPA) with Vietnam will have to be ratified by all domestic Parliaments. Considering that a majority of the French-speaking Belgian Members of the EP voted against the EU-Vietnam FTA in the EP, it can be assumed that this IPA ratification in the Walloon Parliament will not be a walk in the park either.[88] The same goes for the agreement with the Mercosur countries which is still envisaged as a mixed agreement.[89]

85 Robert Francis, 'Irish Supreme Court Ruling Says CETA Ratification Requires Referendum' Borderlex (11 November 2022) <https://borderlex.net/2022/11/11/irish-supreme-court-ruling-says-ceta-ratification-requires-referendum/> accessed 5 January 2023; 'Ireland's Top Court Rejects Canada-EU Trade Deal as Unconstitutional' (n 24).

86 'Une majorité d'eurodéputés francophones belges contre les accords UE-Vietnam' RTBF Info (12 February 2020) <https://www.rtbf.be/info/belgique/detail_une-majorite-d-eurodeputes-francophones-belges-contre-les-accords-ue-vietnam?id=10431080> accessed 13 May 2021; 'Accord UE-Mercosur, le nouveau combat wallon: "C'est non, nous sommes totalement opposés à ce traité"' (n 24); 'L'accord EU-Mercosur: nouvelle source de tensions politiques entre les régions?' RTBF Info (20 January 2020) <https://www.rtbf.be/info/belgique/detail_l-accord-eu-mercosur-nouvelle-source-de-tensions-politiques-entre-les-regions?id=10411850> accessed 26 May 2021.

87 Human Rights Watch, 'NGOs Urge European Parliament to Postpone Consent to EU-Vietnam Trade Deals' Human Rights Watch (4 February 2020) <https://www.hrw.org/news/2020/02/04/ngos-urge-european-parliament-postpone-consent-eu-vietnam-trade-deals> accessed 5 February 2020; 'La pression monte dans la société civile: 450 ONG appellent à l'abandon de l'accord UE-Mercosur' RTBF Info (15 March 2021) <https://www.rtbf.be/info/monde/detail_la-pression-monte-dans-la-societe-civile-450-ong-appellent-a-l-abandon-de-l-accord-ue-mercosur?id=10720100> accessed 26 May 2021.

88 For an overview: <https://www.europarl.europa.eu/legislative-train/theme-a-balanced-and-progressive-trade-policy-to-harness-globalisation/file-eu-vietnam-fta#:~:text=The%20FTA%20and%20IPA%20were,and%20investment%20agreements%20with%20Singapore.&text=The%20two%20texts%20were%20signed,Hanoi%20on%2030%20June%202019>; 'Une majorité d'eurodéputés francophones belges contre les accords UE-Vietnam' (n 86).

89 For an overview: <https://www.europarl.europa.eu/legislative-train/theme-a-balanced-and-progressive-trade-policy-to-harness-globalisation/file-eu-mercosur-association-agreement>.

As the Irish example makes clear, Members of domestic Parliaments can also launch legal proceedings before their own domestic courts to inquire about the compatibility of an FTA with their respective constitutions. French Members of Parliament also presented CETA to the French *Conseil constitutionnel* (the French Constitutional Court) bringing up concerns in relation to the precautionary principle. The French Constitutional Court however decided that the provisions it could assess – those coming under shared or national competences – were compatible with the French Constitution.[90] In Germany, the left-wing parliamentary group *Die Linke* ('The Left') launched proceedings against CETA before the *Bundesverfassungsgericht* (the German Constitutional Court). They feared downward pressure or environmental, consumer and worker protection due to the ISDS system and weak enforceability mechanisms provided for in the sustainability chapters.[91] In March this year, the German Constitutional Court however declared CETA compatible with the German Constitution.[92] These legal proceedings illustrate again that domestic Parliaments are willing to stand up to push for balancing trade with global sustainable development.

2.3. Common action

Different mechanisms for interparliamentary cooperation exist. For instance, twice a year, the Conference of Parliamentary Committees for Union Affairs of Parliaments of the EU (COSAC) gathers, and Joint Committee Meetings are organised.[93]

Indeed, the EP can interact directly with domestic Parliaments.[94] With respect to CETA's ratification for instance, the EP's INTA Committee engaged in a direct discussion with Members of seven domestic Parliaments since the EP sensed that these Parliaments 'do

90 Conseil constitutionnel, 31 July 2017, 2017–749 DC Accord économique et commercial global entre le Canada, d'une part, et l'Union européenne et ses États membres, d'autre part ECLI:FR:CC:2017:2017.749.DC as discussed in Bosse-Platière and Rapoport (n 70) 17–18.

91 Benedikt Riedl, 'European Integration with Responsibility in the CETA Case' European Law Blog (6 May 2021) <https://europeanlawblog.eu/2021/05/06/european-integration-with-responsibility-in-the-ceta-case/> accessed 13 May 2021.

92 'German Constitutional Court Rejects Complaints Challenging Provisional Application of CETA' EU Law Live (16 March 2022) <https://eulawlive.com/german-constitutional-court-rejects-complaints-challenging-provisional-application-of-ceta/> accessed 21 March 2022; 'Bundesverfassungsgericht - Press - Constitutional Complaints and Organstreit Application Directed against the Provisional Application of the EU-Canada Comprehensive Economic and Trade Agreement (CETA) Are Unsuccessful' <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2022/bvg22-022.html> accessed 23 April 2022.

93 For an overview: Thomas Christiansen and Afke Groen, 'Inter-parliamentary cooperation in the European Union: towards institutionalization?' in Raube, Müftüler-Bac and Wouters (n 33) 34–35.

94 Title II, Protocol (No 1) TFEU on the role of National Parliaments in the European Union.

not intend to become bystanders in major EU trade policy issues, neither politically nor legally'.[95] Contacts between the EP's INTA Committee and domestic Parliaments' committees of economic affairs could facilitate the building of mutual trust, solve specific problems and help identify potential barriers to ratification in an early stage.[96] Domestic

Parliaments from their side attempted to gain more information from Members of the EP on FTA negotiations.[97]

Fasone and Romaniello consider that this close cooperation between domestic Parliaments and the EP could be explained by 'the increased awareness of and the public attention on the content of EU trade agreements like CETA'.[98] These authors however question whether this will become a fixed practice for the conclusion of trade agreements more generally. The negotiations of FTAs with Singapore and Vietnam have for example not led to the same levels of parliamentary scrutiny.[99]

The COSAC report of June 2019 in any case shows that the EP and domestic Parliaments share sustainability concerns in relation to FTAs. A large majority of Parliaments considered the defence and promotion of human rights, social standards and environmental standards as crucial when negotiating new trade agreements.[100]

2.4. Summary

The European Parliaments' tools to further global sustainable development in the negotiation and conclusion of the EU's most recent Free Trade Agreements

95 European Parliament, 'Mid-Term Report 2016 - Relations between the European Parliament and National Parliaments' (2017) 8-9 and 27 <http://www.epgencms.europarl.europa.eu/cmsdata/upload/832c136e-45fa-4efd-9a84-9332a02422ad/Mid-term_Annual_Report_2016_Relations_with_national_Parliaments_web.pdf> accessed 14 May 2020. See also: Jančić (n 73) 475.

96 David Kleimann and Gesa Kübek, 'The Signing, Provisional Application, and Conclusion of Trade and Investment Agreements in the EU. The Case of CETA and Opinion 2/15' (2016) SSRN Electronic Journal 45 <https://www.ssrn.com/abstract=2869873> accessed 29 January 2020.

97 Cristina Fasone and Maria Romaniello, 'A Temporary Recalibration of Executive-Legislative Relations on EU Trade Agreements' in Fromage and Herranz-Surrallés (n 25) 192–193.

98 Ibid. 193.

99 Ibid. 193.

100 COSAC, '31 st Bi-annual Report - Developments in European Union Procedures and Practices Relevant to Parliamentary Scrutiny', June 2019, Bucharest, available at https://ipexl.secure.europarl.europa.eu/IPEXL-WEB/conference/getconference.do?id=082dbcc5677baaf301677f58eea00469.

Table 1: Own overview of the European Parliaments' tools to further global sustainable development in the negotiation of the EU's most recent Free Trade Agreements.

EUROPEAN PARLIAMENT	DOMESTIC PARLIAMENTS
Consent authority: • Resolutions • Parliamentary questions • Committee work • Amplifying voices of civil society actors • Direct contacts with the negotiating partner	Approval of ratification of mixed FTAs Monitoring of national executives in the Council for EU-only FTAs
Right to be informed: • Providing views in the Plenary, Committee and monitoring groups • Significance of SIAs	Amplifying voices of civil society actors
(Ombudsman and Opinion of the CJEU)	Opinion of the CJEU (through national executive) and domestic legal proceedings
Shared concern	

Source: author's elaboration

3. EUROPEAN PARLIAMENTS FURTHERING GLOBAL SUSTAINABLE DEVELOPMENT IN THE IMPLEMENTATION OF THE EU'S MOST RECENT FREE TRADE AGREEMENTS

The EU's most recent FTAs establish their own institutional mechanisms for their implementation. Concretely, the FTAs with Canada, Vietnam and the Mercosur countries provide a system of a Joint/Trade Committee and supporting specialised Committees. For instance, CETA sets out its general administrative and institutional provisions in chapter 26. A CETA Joint Committee comprising representatives of the EU and Canada and supported by several specialised committees has been set up. The relevant specialised committee in relation to sustainable development is the Committee on Trade and Sustainable Development responsible for overseeing the implementation of the chapters on Trade and Sustainable Development, Trade and Labour and Trade and Environment.[101] The specialised committee for regulatory cooperation in these fields is the Regulatory Cooperation Forum.[102]

Apart from these committees, CETA also establishes a Civil Society Forum (CSF) to enhance the dialogue on the agreement's sustainable development aspects.[103] In addition to the CSF, the Trade and Sustainable Development Committee is advised by domestic advisory groups (DAGs) that also participate in the CSF. These DAGs consist of employers', workers' and other civil society representatives.[104] The agreements with Vietnam and the Mercosur countries also establish a Committee on Trade and Sustainable Development and civil society involvement.[105] The latter agreements do however not provide for regulatory cooperation with the EU.

Specific provisions on parliamentary oversight are not included in FTAs' institutional constellations.[106] Therefore, the general provision of Article 218 TFEU should again be applied. Admittedly, in the implementation phase, Article 218(10) TFEU only foresees

101 Article 22.4.1 CETA.

102 Article 21.6 CETA.

103 Article 22.5 CETA.

104 Articles 22.5.1, 23.8 and 24.13 CETA.

105 Article 13.15 EU-Vietnam FTA; Article 14 of the chapter on Trade and Sustainable Development of the provisional text EU-Mercosur association agreement.

106 Although with Vietnam for instance, the EP organises Interparliamentary Meetings (see, for instance, <https://www.europarl.europa.eu/delegations/en/5th-eu-vietnam-interparliamentary-meetin/product-details/20221212DPU34745>).

the EP's continued right to be immediately and fully informed. It is the Council, on a proposal of the Commission, that establishes the positions to be adopted on the EU's behalf in bodies set up by an international agreement in accordance with Article 218(9) TFEU. A role for domestic Parliaments is neither provided. These Parliaments only have the possibility to monitor their national executives in the Council during the paragraph 9 procedure.

Yet, the lack of formal parliamentary involvement cannot and should not completely prevent Parliaments from continuing their pressure for global sustainable development commitments. The EP's INTA Committee has for instance taken up the task to monitor whether commitments made during the negotiation phase are actually respected when an agreement enters into force.[107] In the light of the EU's green deal diplomacy, this is essential for 'setting a credible example'.[108]

3.1. European Parliament

In accordance with its 'Trade Policy Review', the Commission intends to cooperate with the EP to ensure the effective enforcement of sustainable development commitments embedded in FTAs.[109] One might wonder how the EP is supposed to fulfil this role if it only has the right to be informed in accordance with Article 218(10) TFEU. Repasi however argues that:

The obligation to provide information without delay constitutes the absolute minimum of Parliamentary involvement that the Treaties require from the Commission, but it does not preclude to provide for stronger parliamentary oversight rights by means of secondary law or interinstitutional agreements, provided such rights do not restrict the rights of other institutions in terms of institutional balance.[110]

107 Laura Puccio and Roderick Harte, 'The European Parliament's Role in Monitoring the Implementation of EU Trade Policy' in Olivier Costa (ed), The European Parliament in Times of EU Crisis (Springer International Publishing 2019) 388 and 406 <http://link.springer.com/10.1007/978-3-319-97391-3_18> accessed 1 July 2021.

108 European Commission, 'The European Green Deal' Official Journal of the European Union COM (2019) 640 final, 20.

109 European Commission, 'Trade Policy Review' 19-20. See also: European Commission, 'Trade for All' 10 and 17.

110 René Repasi, 'Options for a Stronger Parliamentary Involvement in the Implementation of the Trade and Cooperation Agreement with the UK', Policy Paper commissioned by the German Bundestag parliamentary group Bündnis 90/Die Grünen (Alliance 90/The Greens) and the Greens/EFA group in the European Parliament, <https://www.annacavazzini.eu/wp-content/uploads/Options-for-a-Stronger-Parliamentary-Involvement-in-the-Implementation-of-the-TCA.pdf, 10>.

Indeed, several forms of EP involvement can be thought of. Firstly, Article 218(10) TFEU should not just imply that the EP passively receives information. Rather, Mendes argues that the EP's right to information should allow it to participate by exercising political control and by enabling it 'to understand the policy implications of the decisions that it then incorporates into EU legislative acts'.[111] This is in line with the interinstitutional agreement concluded between the EP and the Commission in 2010 which states that the EP should be able to express its views and that the Commission should take these views into account.[112]

Global sustainable development has remained a focus of the EP's monitoring of trade policy. To be more precise, Puccio and Harte consider that 'foreign standards, in particular in the area of sustainable development, play an important role in the EP's monitoring of FTA […] implementation'.[113] The EP uses different concrete monitoring mechanisms in this regard that are described by the authors.[114] For instance, the monitoring groups that were set up to follow-up with trade negotiations have been maintained for agreements that have entered into force and these groups report to the full INTA Committee on their activities. Moreover, the EP still subjects the Commission to written or oral questions and continues its contacts with civil society actors. Puccio and Harte also mention inter parliamentary delegations, missions, ad-hoc delegations, resolutions and the expertise of the EP's in-house research units. Evidently, all of these activities required a considerable extent of capacity-building within the EP's INTA Committee. The administrators in its Secretariat have for instance quadrupled.[115]

Secondly, the Commission claims to have actively facilitated the EP's participation by use of different mechanisms: contacts with the aforementioned monitoring groups, agenda points of the INTA Committee, technical debriefings, and individual contacts.[116] In

111 Joana Mendes, 'The External Administrative Layer of EU Law-Making: International Decisions in EU Law and the Case of CETA' (2017) Vol. 2 No 2, European Papers; pp 489-517 <https://www.europeanpapers.eu/en/e-journal/external_administrative_layer_of_eu_law_making>.

112 Point 24 of the Framework Agreement on relations between the European Parliament and the European Commission OJ L 304, 20.11.2010, p. 47 as referred to by Wolfgang Weiss in Fromage and Herranz-Surrallés (n 61) 212.

113 Puccio and Harte (n 107) 407.

114 Ibid. (n 107).

115 Evelyn Coremans and Katharina Meissner, 'Putting Power into Practice: Administrative and Political Capacity Building in the European Parliament's Committee for International Trade' (2018) 96 Public Administration 561, 572.

116 European Commission, 'Implementation of Free Trade Agreements 1 January 2018 - 31 December 2018' (Report) COM (2019) 455 final, 26.

the field of trade and sustainable development, these Commission initiatives led to the adoption of a 15-point action plan to improve implementation and enforcement of the chapters on Trade and Sustainable Development in February 2018.[117] In this action plan, the Commission committed itself to continue inviting the EP to participate in its Trade and Sustainable Development Expert meetings with the Member State's representatives. Moreover, it would further discuss with the EP 'what other channels would be most suited for deepening information flows (e.g. through existing country-focused monitoring groups or ad hoc meetings)'.[118] A review of this action plan was launched in 2021 and finalised in June 2022.[119]

The EP, and in particular the S&D and Green political groups, advocated very actively on this so-called Trade and Sustainable Development Review (TSD Review).[120] More generally, in their Report and Resolution on 'the trade-related aspects and implications of COVID-19', the Members of the EP set out their view on the future of trade agreements and sustainability. Taking the concerns of civil society seriously, the EP vouched for considering sanctionable sustainability provisions and a re- enforced role for these civil society actors.[121] In its eventual TSD Review, the Commission introduced sanctions as a measure of last resort and it extended the mandate for the DAGs to all FTA chapters instead of the sustainability chapters only.[122] The recent FTA with New Zealand already incorporates the new approach on sustainable development provisions in trade.[123]

117 Commission services, 'Non-Paper: Feedback and Way Forward on Improving the Implementation and Enforcement of Trade and Sustainable Development Chapters in EU Free Trade Agreements (2018).

118 Ibid 4.

119 'Analysis: "Trade and Sustainability" Chapters and the Stalling of the EU's FTA Agenda' Borderlex (9 December 2021) <https://borderlex.net/2021/12/09/analysis-trade-and-sustainability-chapters-and-the-stalling-of-the-eus-fta-agenda/> accessed 9 December 2021.

120 See, for instance: 'Putting workers and environmental rights at the core of our trade policy - consistent S&D advocacy gets results' (available at http://pr.euractiv.com/pr/putting-workers-and-environmental-rights-core-our-trade-policy-consistent-sd-advocacy-gets) and 'Position Paper of The Green MEPs of the International Trade Committee on the Review of the 15-Point Action Plan <https://www.greens-efa.eu/files/assets/docs/20220428_inta_green_position_paper_on_tsd_def.pdf>.

121 European Parliament, 'Resolution of the European Parliament on the trade-related aspects and implications of COVID-19 (P9_TA(2021)0328– A9-0190/2021– 2020/2117(INI))' (7 July 2021), 33 and 39.

122 European Commission, 'The power of trade partnerships: together for green and just economic growth' (Communication) COM (2022) 409 final 10 and 11.

123 Robert Francis, 'ANALYSIS – EU-New Zealand FTA: Sustainable Development Novelties' Borderlex (12 July 2022) <https://borderlex.net/2022/07/12/analysis-eu-new-zealand-fta-sustainable-development-novelties/> accessed 16 July 2022.

Thirdly, the EP itself used its consent authority as leverage to gain more procedural rights in the implementation of FTAs. In relation to the Trade and Cooperation Agreement (TCA) with the UK, the EP demanded an inter-institutional agreement with the Commission and the Council on its involvement in the implementation bodies of FTAs. Its approval of the TCA was thus dependent on such inter-institutional engagements. As Van der Loo and Chamon put it:

> Just as the Parliament won the right in comitology to be fully informed of those committees' dealings after a decade-long struggle, the TCA may prove to be the starting gun in the next battle for closer involvement in the work of bodies set up under international agreements. Like the Commission, the Council should come round to the idea that a closer, more structural involvement of the Parliament in the implementation of agreements like the TCA is necessary from a democratic perspective.[124]

The impact of this EP action remains unclear for now. The EP's consent to the TCA was accompanied by a Resolution stating that the EP 'requests the consolidation of these commitments into an Interinstitutional Agreement to be negotiated at the earliest opportunity'. One of these commitments is 'to take utmost account of the views of Parliament regarding the implementation of the Agreement by both Parties, including regarding possible breaches of the Agreement or imbalances in the level playing field and should it not follow the view of Parliament, to explain its reasons'.[125] This commitment might prove to be important in relation to the sustainable development aspects of the TCA.

It is however difficult to predict how the negotiations for this new interinstitutional agreement will play out and whether these commitments will only be made in relation to the TCA or in relation to the implementation of FTAs or international agreements more

124 Guillaume Van der Loo and Merijn Chamon, 'The European Parliament Flexes Its Muscles on the EU–UK Trade Deal' European Policy Centre (5 March 2021) <https://epc.eu/en/Publications/The-European-Parliament-flexes-its-muscles-on-the-EUUK-trade-deal-3c43bc> accessed 5 March 2021.

125 European Parliament, 'Resolution of the European Parliament on the outcome of EU-UK negotiations (P9_TA(2021)0141– B9-0225/2021– 2021/2658(RSP)) of 28 April 2021 (…) (P9_TA(2021)014- A9-0128/2021-05022/2021 – C9 0086/2021 – 2020/0382(NLE))' (28 April 2021), 9 accompanying its consent - European Parliament legislative resolution of 28 April 2021 on the draft Council decision on the conclusion, on behalf of the Union, of the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, and of the Agreement between the European Union and the United Kingdom of Great Britain and Northern Ireland concerning security procedures for exchanging and protecting classified information (P9_TA(2021)014-A9-0128/2021-05022/2021 – C9-0086/2021 – 2020/0382(NLE)) of 28 April 2021.

generally. On the one hand, the Commission showed its readiness to involve the EP. It stated that it would take due account of the views of the EP when examining possible breaches of the TCA or imbalances in the level playing field. Moreover, the EP would be allowed to appoint one member of the selection panel for panellists examining disputes regarding trade and sustainable development. Nevertheless, the Commission stressed the exceptional character of the TCA and the fact that it does not constitute a precedent for other agreements.[126] The Council seems less inclined to expand the EP's role. The Council Decision on the conclusion of the TCA only mentions that the EP 'shall be put in a position to exercise fully its institutional prerogatives throughout the process in accordance with the Treaties'.[127] In any case, considering the salience surrounding the EU-Mercosur agreement, it could be imagined that the EP asserts its role in a similar way.

Finally, Repasi suggests that a permanent representative of the EP could be assigned to FTAs' implementing bodies for meetings of these bodies with stakeholders. This possibility is explicitly foreseen in the text of the TCA but could also be very useful in the framework of the Trade and Sustainable Development and Regulatory Cooperation Committees of other FTAs.[128] The presence of such a permanent representative would assure that the EP can more easily follow up with stakeholder consultations and that it can amplify the voices of civil society actors in the implementation of FTAs as it did in the roundtable on the EU–Vietnam FTA negotiations.

3.2 Domestic Parliaments

In line with Article 218(9) TFEU, domestic Parliaments merely have the possibility to monitor their executives in the Council when these executives adopt the EU's positions for the decisions in FTA implementing bodies. In this respect, differences in domestic constitutional law will determine to what extent their views should be taken into account by their respective national executives.[129] Of course, domestic Parliaments also remain competent to adopt the necessary implementing legislation for FTAs.[130]

126 European Commission, 'Commission statement on the role of the European Parliament in the implementation of the EU-UK Trade and Cooperation Agreement' <https://www.politico.eu/wp-content/uploads/2021/04/27/20210422-Statement-to-EP-renumbered.pdf>.

127 Article 2(3) of the Council decision on the conclusion, on behalf of the Union, of the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, and of the Agreement between the European Union and the United Kingdom of Great Britain and Northern Ireland concerning security procedures for exchanging and protecting classified information, 5022/3/21 REV 3, 28 April 2021.

128 Repasi R, 'Options for a Stronger Parliamentary Involvement in the Implementation of the Trade and Cooperation Agreement with the UK'13.

129 Ibid 14.

130 Ibid 1.

In the field of sustainable development, the Netherlands and France jointly put forward a non-paper in May 2020. The two countries suggested improving enforcement of Trade and Sustainable Development chapters in FTAs by linking tariff reductions to effective implementation of the provisions of these chapters.[131] Bronckers and Gruni doubt the usefulness of this proposal. For instance, after (most) tariffs have been eliminated, non-compliance cannot be countered anymore and suspensions of reductions might damage innocent bystanders.[132] Be that as it may, the fact that the initiative came from the Dutch government, might have had to do with the backlash against trade deals in the Dutch Parliament.[133] The initiative was indeed welcomed by some Members of this Parliament.[134]

In October 2021, the Netherlands, supported by the delegations of Belgium and Luxembourg, also requested an agenda item on the TSD Review for the Trade Council of November 2021.[135] The request stated that '[t]he Netherlands, Belgium and Luxembourg are committed to contributing to the review of the EU's approach to Trade and Sustainable Development provisions'. Moreover, the Trade Council would provide Member States 'with an opportunity to share preliminary impressions and ideas based on their stakeholder consultations'.[136] Shortly after, the Netherlands published a position paper reiterating the proposal to link Trade and Sustainable Development commitments to tariff reductions and adding proposals to reinforce civil society involvement by DAGs.[137] As has been explained before, the ideas of sanctions and stronger civil society involvement have indeed been taken on board by the Commission.

131 'Non-paper from the Netherlands and France on trade, social economic effects and sustainable development', 14 May 2020 <https://www.rijksoverheid.nl/documenten/publicaties/2020/05/14/non-paper-from-the-netherlands-and-france-on-trade-social-economic-effects-and-sustainable-development> accessed 26 May 2021.

132 Marco Bronckers and Giovanni Gruni, 'Retooling the Sustainability Standards in EU Free Trade Agreements' (2021) 24 Journal of International Economic Law 1, 25.

133 Victor Mallet and Jim Brunsden, 'France and Netherlands Call for Tougher EU Trade Conditions' (Financial Times, 4 May 2020) <https://www.ft.com/content/e14f082c-42e1-4bd8-ad68-54714b995dff> accessed 26 May 2021.

134 Markus (n 81).

135 General Secretariat of the Council to Delegations, 'Review of Trade and Sustainable Development provisions in trade agreements - Request by the Netherlands delegation' (13410/21 WTO 249) - 29 October 2021 and connected position paper of the Netherlands (<https://www.rijksoverheid.nl/documenten/publicaties/2021/12/03/bijlage-1-netherlands-input-for-the-review-of-the-15-point-action-plan-on-trade-and-sustainable-development)>; 'Analysis: "Trade and Sustainability" Chapters and the Stalling of the EU's FTA Agenda' (n 119).

136 General Secretariat of the Council to Delegations, 'Review of Trade and Sustainable Development provisions in trade agreements - Request by the Netherlands delegation' 3.

137 <https://www.rijksoverheid.nl/documenten/publicaties/2021/12/03/bijlage-1-netherlands-input-for-the-review-of-the-15-point-action-plan-on-trade-and-sustainable-development>.

Domestic Parliaments can thus make their executives aware of sensitivities and concerns. Their political pressure can lead to concrete proposals or at least draw attention to these issues again in the public debate. In addition, the activities of the Dutch government show that it responded to civil society concerns which in turn facilitated CETA's ratification in the Dutch Parliament.[138]

3.3. Common action

As has been pointed out in relation to the negotiation phase, the EP and domestic Parliaments share sustainability concerns in relation to FTAs. It is therefore important for these Parliaments to continuously follow up with the Commission's implementing activities and each other's initiatives. In October 2020, the EP's INTA Committee for instance engaged in an exchange of views on the aforementioned non-paper of France and the Netherlands with the respective ministers.[139] The Commission also realised that implementation and enforcement of trade and sustainable development chapters is of great importance to the European Parliaments. In an opening statement to COSAC in 2021, Commissioner for Trade Dombrovskis said: 'Many parliaments have made it clear that this is your expectation too, and that of your citizens'.[140]

3.4. Summary

The European Parliaments' tools to further global sustainable development in the implementation of the EU's most recent Free Trade Agreements

138 'Analysis: "Trade and Sustainability" Chapters and the Stalling of the EU's FTA Agenda' (n 119).

139 Jana Titievskaia, 'Sustainability Provisions in EU Free Trade Agreements Review of the European Commission Action Plan' (2021) PE 698.799 Briefing – European Parliamentary Research Service 12, 11.

140 COSAC, 'Opening statement by EVP Dombrovskis at the Conference of Parliamentary Committees for EU Affairs of the national parliaments of the EU' (7 April 2021) <https://ec.europa.eu/commission/commissioners/2019-2024/dombrovskis/announcements/cosac-opening-statement-evp-dombrovskis-conference-parliamentary-committees-eu-affairs-national_en>.

Table 2: Own overview of the European Parliaments' tools to further global sustainable development in the implementation of the EU's most recent Free Trade Agreements.

<table>
<tr><th>EUROPEAN PARLIAMENT</th><th>DOMESTIC PARLIAMENTS</th></tr>
<tr><td>Not just receiving information passively:
• Providing views in the Plenary, Committee and monitoring groups
• Parliamentary questions
• Resolutions
• Expertise by EP's in-house research units</td><td rowspan="3">Monitoring of national executives:
• In the Council
• To push for new initiatives</td></tr>
<tr><td>Contacts with:
• Civil society actors
• Trade partners: their respective Parliaments, missions, ad-hoc delegations...</td></tr>
<tr><td>Commission initiatives and own initiatives for more involvement by inter-institutional engagements</td></tr>
<tr><td colspan="2">Shared concern</td></tr>
</table>

Source: author's elaboration

4. CONCLUDING REMARKS

Potential of European Parliaments for furthering global sustainable development and the international Just Transition in the context of EU trade policy?

To assess the role of European Parliaments, the general political context of the EU's trade policy has to be taken into account. The EP has proven to be generally supportive of the Commission and Council's main policy orientations and pursuit of 'fair trade'. It is however not yet seen as a sufficiently legitimising actor which points at the importance of interaction with domestic Parliaments.[141] These domestic Parliaments can in turn be (partly) driven by self-interested domestic goals.[142] Be that as it may, the above analysis of the role of these European Parliaments shows that they did play a considerable role as to the visibility of the issues in this field.[143]

In the context of the negotiation of the EU's most recent FTAs, European Parliaments have clearly shown their potential for furthering global sustainable development and the international Just Transition. They have pushed negotiators to be ambitious in this regard and ensured the presence of extensive provisions on sustainable development in FTAs. Under pressure of these Parliaments, the main criticism of these provisions – their lack of enforceability – has been addressed by the Commission in the TSD Review.[144]

This is of course related to the implementation of FTAs by cooperation in Trade and Sustainable Development and Regulatory Cooperation Committees. The preparatory work for and discussions in these Committees offer the EP the opportunity to continue its push for concrete engagements in terms of sustainable development and to monitor whether promises have been kept. Domestic Parliaments on the other hand should reach out to their executives taking the most important decisions in this regard in the Council. In accordance with the Commission's most recent Trade Policy Review, Parliaments can in this way ensure that the EU takes up its responsibility and supports third countries

141 Andrej Matić, 'The Role of the European Parliament in the Shaping of the Common Commercial Policy' in Hahn and Van der Loo (n 35) 578, 583 and 585.

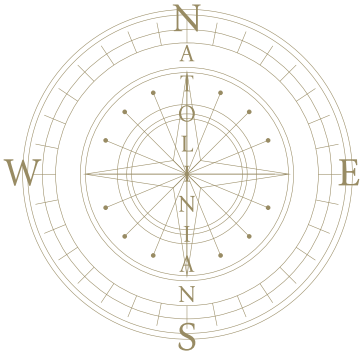
142 Jan Wouters and Kolja Raube, 'Rebels with a cause? Parliaments and EU trade policy after the Treaty of Lisbon' in Juan Vara and Soledad Rodríguez Sánchez-Tabernero (eds), The Democratisation of EU International Relations through EU Law (Routledge, Taylor & Francis Group 2019) 195.

143 Matić (n 141) 585.

144 Ebert (n 22); Bronckers and Gruni (n 132).

in the international Just Transition whilst improving its own environmental and social standards in line with the European Green Deal.

In sum, parliamentary involvement in the negotiation and implementation of FTAs can be considered crucial for furthering global sustainable development in their context. In addition to ensuring the democratic legitimacy of these agreements, European Parliaments' actions have had a considerable influence on the content of these agreements and these Parliaments have the means to contribute to the effectiveness of the provided cooperative provisions on sustainable development. They provide a channel of information for the public, amplify the voices of civil society actors, and the politicisation of FTAs force the EU to consistently stress and follow up on its commitment to global sustainable development. Green deal diplomacy can only function if the EU indeed sets an incredible example and we need European Parliaments as internal actors pushing for this.



CHAPTER 6

Comfortably Numb? The Implementation of Sustainability Commitments in the EU-China CAI

BY PAOLO MAZZOTTI

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Hello? (Hello? Hello? Hello?)
Is there anybody in there?
Just nod if you can hear me

Pink Floyd, 'Comfortably Numb' ('The Wall', 1979)

1. INTRODUCTION[1]

In the political guidelines submitted in 2019 to the European Parliament with a view to her confirmation as President of the European Commission, Ursula von der Leyen undertook the renowned commitment to a European Green Deal capable of stepping up the EU's efforts in tackling the climate challenge while stressing the importance of achieving 'a just transition for all'.[2] In the year which saw civil society across the globe uniting under the aegis of the Global Climate Strikes, this was a much-awaited signal. It showed that the urgency of acting against environmental degradation by revisiting patterns of production, trade, and consumption was acknowledged even at those very same highest political levels which the Fridays for Future movement aimed at engaging. When, a few months later, the European Green Deal was actually published, as a Communication, by the new Commission,[3] many a circle lauded the courage shown by the EU in placing environmental policy at the forefront of its political action. This appeared, in fact, to stand in sharp contrast to what was perceived as an insufficient engagement of the international community as a whole with the ambitious visions of the Paris Agreement[4] and the 2030 Agenda for Sustainable Development with its Sustainable Development Goals (SDGs).[5]

1 The author is grateful to all participants in the conference, 'A Green Deal for the Globe: European Union External Action and the International Just Transition' for providing their contributions to the author's reflection on the issues presented. He also thanks Prof. Suranjali Tandon for the feedback and kind assistance provided in her capacity as editor of the conference's proceedings. The author wishes to further express his gratitude to Dr. Gianmatteo Sabatino for the useful comments made on an earlier version of the manuscript. Responsibility for any mistakes or omissions remains entirely attributable to the author. While the paper was initially written in May 2021, it incorporates subsequent developments which took place, to the author's best knowledge, up to April 2023.

2 European Commission, 'A Union That Strives for More: My Agenda for Europe – Political Guidelines for the Next European Commission 2019-2024 (Political Guidelines), COM (2019).

3 European Commission, 'The European Green Deal' (Communication) COM (2019) 640 final.

4 United Nations Framework Convention on Climate Change, 'Decision on the Adoption of the Paris Agreement' (29 January 2016) FCCC/CP/2015/10/Add.1.

5 United Nations General Assembly, 'Transforming Our World: The 2030 Agenda for Sustainable Development' (25 September 2015) UN Doc A/RES/70/1.

From a substantive point of view, the European Green Deal unfolds into three main parts.[6] First, the bulk of the Communication addresses a number of novel, transformative policies which the Commission proposes to implement, with a view to stimulating the EU's transition towards a green economy.[7] Second, this is complemented by several proposals aiming at mainstreaming sustainability in all EU policies, integrating environmental concerns horizontally into existing arrangements.[8] Third, and most important for present purposes, a number of commitments are made concerning the role of 'the EU as a global leader'.[9] Acknowledging that '[t]he global challenges of climate change and environmental degradation require a global response',[10] the Green Deal outlines a roadmap for the EU's external action. The Commission's overarching purpose is to have the EU's international partners mirroring its own efforts to create a virtuous circle of partnerships and best practices for environmental sustainability. In this context, the Commission posited, *inter alia*, that '[t]rade policy can support the EU's ecological transition', since '[i]t serves as a platform to engage with trading partners on climate and environmental action'.[11] Reflecting a widely held assumption that the EU's impressive share in global markets endows it with a robust bargaining power *vis-à-vis* trading partners, the Commission essentially undertook to upscale the use of trade, broadly understood, as a policy leverage to influence the behaviour of said partners. Ultimately, this is assumed to work as the most efficient tool to push forward the agenda of the European Green Deal at a global level.

What is intriguing in this strategy is that it cannot, as of now, be regarded as a matter of pure policy; rather, it reflects most faithfully the EU's primary law. In fact, the European

6 To which, for the sake of completeness, one should add the introductory part, outlining the conceptual and policy framework of the Communication (European Commission (n 3) 2-3), and a concluding paragraph addressing the governance arrangements necessary for an effective implementation of the strategy (Ibid 22-24).

7 Ibid 4-15.

8 Ibid 15-19.

9 Ibid 20-22.

10 Ibid 20.

11 Ibid 21.

Court of Justice (ECJ) acknowledged in its landmark Opinion 2/15[12] that, as a result of a number of changes to the legal framework governing the Common Commercial Policy (CCP) brought about by the Lisbon Treaty,[13] 'the objective of sustainable development (…) forms an integral part of the common commercial policy'.[14] This provided constitutional legitimisation for the EU's systematic practice, ever since the 2011 EU-South Korea Free Trade Agreement (FTA),[15] to include 'Trade and Sustainable Development Chapters' (TSD Chapters) in the FTAs concluded in the last decade at the bilateral level, in the face

12 ECJ, Opinion 2/15 – The Free Trade Agreement with Singapore (ECLI:EU:C:2017:376). Literature on the Opinion is abundant, given its multi-layered significance to EU constitutional law. A detailed, yet concise account of the Opinion can be found in Christine Kaddous, 'Cour de justice, ass. Plénière, 16 mai 2017, Avis 2/15, ECLI:EU:C:2017/376' in Fabrice Picod (ed), Jurisprudence de la CJUE 2017: Décisions et commentaires (Bruylant 2018) 686-695. For more extensive commentary, see Marise Cremona, 'Shaping EU Trade Policy post-Lisbon: Opinion 2/15 of 16 May 2017' (2018) 14 European Constitutional Law Review 231. Whereas the Opinion, as will be detailed infra, is of interest here mainly on account of its acknowledgment that sustainable development fully forms part of the Common Commercial Policy (CCP), the Opinion addresses more broadly the general issue of the apportionment of competence between the EU and the Member States (MS) in relation to a number of provisions which form part and parcel of the EU's contemporary treaties in the field of international economic law. This is the case, remarkably, as regards investor-State dispute settlement (ISDS) mechanisms, as well as standards of protection relative to foreign direct investment (FDI), on the one hand, and portfolio investment, on the other hand (see n 18 below). For a comment underlining, in particular, the implications of the Opinion's findings concerning sustainable development, see Giovanni Gruni, 'Towards a Sustainable Trade Law? The Commercial Policy of the European Union after Opinion 2/15 CJEU' (2018) 13 Global Trade and Customs Journal 4; for focus mainly on the other aspects of the allocation of competence, see Dylan Geraets, 'Changes in EU Trade Policy after Opinion 2/15' (2018) 13 Global Trade and Customs Journal 13. The salience and complexity of the issues addressed in the case are made evident by the fact that Advocate General (AG) Sharpston reached, in her Opinion, conclusions different from those of the ECJ on a number of points: see Opinion 2/15 – The Free Trade Agreement with Singapore, Opinion of Advocate General Sharpston (ECLI:EU:C:2016:992). For commentary on the AG's Opinion, also usefully situating the points dealt with in the case within the longer history of the ECJ's jurisprudence on the CCP, see David Kleimann, 'Reading Opinion 2/15: Standards of Analysis, the Court's Discretion, and the Legal View of the Advocate General'(2017) EUI Working Paper RSCAS 2017/23 <https://cadmus.eui.eu/bitstream/handle/1814/46104/RSCAS_2017_23REVISED.pdf?sequence=4&isAllowed=y> accessed 18 April 2023.

13 Mainly, the requirement stipulated by the last sentence of Art. 207(1) TFEU, that '[t]he common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action', as laid down in Art. 21 TEU: see Opinion 2/15 (n 12), paras. 141-145. Against this background, Opinion 2/15 underlines the importance, in particular, of Art. 21(2)(f) TEU, under which the EU's external action should aim at 'help[ing] develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development'. For an early overview of the innovations in the CCP's legal framework brought about by the Lisbon Treaty, see Peter-Christian Müller-Graff, 'The Common Commercial Policy Enhanced by the Reform Treaty of Lisbon?' in Alan Dashwood and Marc Maresceau (eds), Law and Practice of EU External Relations: Salient Features of a Changing Landscape (Cambridge University Press 2008) (in particular, concerning the interpenetration of the CCP with broader objectives of the EU's external action, 192-197).

14 Opinion 2/15 (n 12), para. 147.

15 Free trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part [2011] OJ L127/1, of which see Chapter 13. Note, however, that steps in this direction had already been taken, though in a different shape which was not replicated in later practice, in the Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part [2008] OJ L/289/I/3 (see, in particular, Chapters 4 and 5 of Title III of Part II).

of the stalemate reached by the Doha round of negotiations in the World Trade Organisation (WTO).[16] TSD Chapters do, in fact, insert a number of commitments concerning environmental and labour standards in the economic bargain reached by the EU with its trading partners, aiming at ensuring, at a minimum, 'that trade between them takes place in compliance with the obligations that stem from the international agreements concerning social protection of workers and environmental protection to which they are party'.[17] More generally, TSD Chapters strive for advancements in trade liberalisation to be coupled with progress in environmental and labour standards of protection, consistent with the current thinking on sustainable development as based on the three 'interdependent and mutually reinforcing pillars' of 'economic development, social development, and environmental protection'.[18] Whereas more details on TSD Chapters will be given in Section 6.2.1 below, it is important, for the time being, to underline that the integration of environmental concerns into the CCP envisaged by the European Green Deal is an effort which is explicitly tasked upon the EU as a matter of EU primary law.

It is against this background that the recently published draft of the EU-China Comprehensive Agreement on Investment (CAI), agreement in principle on which was reached in December 2020 must be situated.[19] Following a quasi-decennial negotiation process, the two economic superpowers agreed to reciprocal concessions in the field of investment, emphatically heralded on the EU's side as 'rebalancing economic relations with China'.[20] In fact, the core of the CAI comprises commitments concerning market access and the issue of creating a level playing field, e.g., as regards disciplines placed upon the use of subsidies, State-owned enterprises, and regulatory processes. This was one of the EU's firm demands which took a stance that Chinese investors in the EU enjoyed a number of

16 As outlined in European Commission, 'Global Europe: Competing in the World', COM (2006) 567 final, 8-10.

17 Opinion 2/15 (n 12), para. 152.

18 World Summit on Sustainable Development, 'Johannesburg Declaration on Sustainable Development' (4 September 2002) UN Doc. A/CONF.199/20, para 5.

19 The text of the agreement in principle can be consulted at <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2237> accessed 18 April 2023. Provisions will be referenced pursuant to the numbering available at the time of writing, that is, May 2021. Note that the CAI is based upon one of the significant innovations brought about by the Lisbon Treaty in the CCP's legal framework, namely the inclusion in the scope thereof of 'foreign direct investment'. Likewise, it should be noted that one of the important clarifications given by Opinion 2/15 is that this was a deliberate choice meant to exclude portfolio investment: see Opinion 2/15 (n 12), paras. 78-110 and 225-256. In fact, this is reflected in the CAI's definitional provisions: see CAI, Section I, Art. 2 (e.g. the definitions of 'enterprise', 'establishment', 'investor of a Party', and 'operation').

20 See the statement from President von der Leyen available at <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2233> accessed 18 April 2023.

significant advantages on such points when compared with EU investors in China.[21] On the other hand, the contracting parties agreed to negotiate separately a more traditional agreement on substantive standards of protection for investors (such as protection against expropriation and fair and equitable treatment), which may raise politically and institutionally sensitive questions on the EU's side.[22] Significantly, however, the CAI as agreed this far also contains a *Section on Investment and sustainable development* (ISD Section).[23] In the words of Trade Commissioner Valdis Dombrovskis, such Section is meant to 'anchor the EU's] values-based trade agenda' within the relationship with China.[24] Considering that, save for the highly peculiar post-Brexit EU-UK FTA,[25] the EU-China CAI comes as the first bargain struck by the EU in the economic field after the adoption of the European Green Deal, analysing it from the perspective of sustainable development arrangements can provide a most useful insight into whether and how that agenda determines a shift in the EU's external economic governance policy-making. Whereas, at the time of writing,

21 For analysis of this question, see F. Godement, 'Wins and Losses in the EU-China Investment Agreement (CAI)'(2021) Institut Montaigne Policy Paper <https://www.institutmontaigne.org/en/publications/wins-and-losses-eu-china-investment-agreement-cai> accessed 18 April 2023.

22 See CAI, Section VI, Sub-Section 2, Art. 3. Note, however, that the concerns referred to do relate, to a large extent, to traditional ISDS mechanisms (i.e., investor-State arbitration). These are reportedly politically contested, owing to fears that they would lead to a 'regulatory chill', as was shown by the public debate held, for instance, concerning the investment chapters in the agreements between the EU, on the one hand, and Canada (see n 29) and the US, on the other hand. The institutional complexity referred to above would arise because Opinion 2/15 clarified that those mechanisms, insofar as they '[remove] disputes from the jurisdiction of the Member States' (Opinion 2/15 (n 12), para. 292), fall outside the EU's exclusive competence to conduct a CCP, and rather pertain to a competence shared between the EU and the Member States. This requires (or, at least, enables, if any such -likely- determination is made at the political level: see Cremona (n 12) 250-252) 'mixed' ratification by both the EU and all the Member States. Investor-State arbitration has, however, been abandoned by the EU, in favour of a two-tiered permanent 'investment court' system, ever since European Commission, 'Trade For All: Towards a More Responsible Trade and Investment Policy', COM(2015) 497 final, of which 21-22. This was practised in the EU's most recent international investment agreements (see, for instance, Section B.4 of Chapter 3 of the EU-Vietnam Investment Protection Agreement, finalised but not yet ratified – available online, in relevant part, at <https://circabc.europa.eu/rest/download/43b73335-2c40-48d1-9149-b6d6c5930378?ticket=> accessed 18 April 2023) and explicitly endorsed in ECJ, Opinion 1/17 – EU-Canada CET Agreement (ECLI:EU:C:2019:341). On such latter Opinion see Catharine Titi, 'Opinion 1/17 and the Future of Investment Dispute Settlement: Implications for the Design of a Multilateral Investment Court' in Lisa Sachs, Lise Johnson and Jesse Coleman (eds), Yearbook on International Investment Law & Policy 2019 (Oxford University Press 2021). It is therefore likely that the eventual agreement on substantive standards of investment protection between the EU and China will also stick to the investment court system, so that controversy around it might be significantly downscaled.

23 CAI, Section IV.

24 See the statement in the source available in n20.

25 Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part [2021] OJ L149/10. In this case, the FTA contains arrangement of a way more complex nature, meant to accompany the transition from the regime of deep integration reached prior to Brexit to the post-withdrawal reality.

the process of finalisation of the CAI is facing significant distress,[26] engaging in such exercise might provide useful insights into the future of the CCP and of the EU's efforts in advancing environmental (and labour) protection worldwide more generally.

In order to do so, the present paper proceeds as follows. Section 2 outlines TSD chapters in general, also introducing the reader to the fierce debate on the effectiveness of the enforcement mechanism by which they are typically assisted (Section 2.1). It then compares TSD chapters with the CAI's ISD Section, finding that the latter is modelled after the former, with little or no variation, also as regards enforcement mechanisms (Section 2.2). Taking note of the widespread acknowledgement that such mechanisms are unsatisfactory to meaningfully deliver on substantive sustainability commitments, the present paper undertakes to assess how the CAI could be streamlined, before its finalisation to contain a more effective implementation machinery. This chapter thus explores the potential for some recent proposals advanced in the context of TSD chapters in FTAs to be applied to the CAI's ISD Section. Hence, Section 3 addresses the idea of 'staged implementation' of economic concessions, conditional upon compliance by the trading partner with sustainability commitments, espoused by the French and Dutch governments in 2020. Section 4 analyses the idea, also endorsed by the European Green Deal, to qualify respect of the

26 Trade Commissioner Dombrovskis, in fact, is reported to have stated that the EU will 'suspend' efforts towards ratification of the CAI, in the face of the restrictive measures put in place by China against prominent EU policy-makers, as a reaction against the EU's sanctions on Chinese officials relative to the situation in Xinjiang and Hong Kong: see Deutsche Welle, 'EU-China Investment Deal Put on Ice'(4 May 2021) <https://www.dw.com/en/eu-china-investment-deal-put-on-ice-over-sanctions/a-57427703> accessed 18 April 2023. Also see, however, Finbarr Bermingham, 'EU Denies It Has Suspended Efforts to Ratify China Investment Deal' South China Morning Post (5 May 2021) <https://www.scmp.com/news/china/diplomacy/article/3132267/eu-denies-it-has-suspended-efforts-ratify-china-investment> accessed 18 April 2023. The European Parliament itself has taken an express stance on this, passing a Resolution on 20th May 2021 formally demanding negotiations with China to be halted: see European Parliament, 'European Parliament resolution of 20 May 2021 on Chinese countersanctions on EU entities and MEPs and MPs' (2021/2644(RSP)), in particular para 10. Considering that the consent of the European Parliament will be needed for the CAI to be ratified on the EU's side (see Art. 218(6)(a) TFEU, read in conjunction with Art. 207(2) TFEU), this effectively radically questions the possibility for the CAI to actually enter into force. This is all the more so, in light of the reported concerns by the US on the CAI, and of the attempts at rapprochement with the EU made by the current US administration, which may make the EU more sensitive to US strategic interests in turn: see Stuart Lau, 'EU Slams China's 'Authoritarian Shift' and Broken Economic Promises' Politico (25 April 2021) <https://www.politico.eu/article/eu-china-biden-economy-climate-europe/> accessed 18 April 2023. After this paper was finalised, further negotiations and ratification efforts did indeed disappear from the radar of the Parties' political and diplomatic agendas for several months. When talks to this end were meant to be resumed, in Spring 2022, meetings between the EU and China appeared to make little progress on the matter, in light of the further tensions between the Parties' sparked by China's ambiguous stance towards Russia's invasion of Ukraine in February 2022: see CGTN, 'China-EU Summit: Ratification of Comprehensive Agreement on Investment Stalled amid Political Tensions' CGTN (1 April 2022) <https://news.cgtn.com/news/2022-04-01/VHJhbnNjcmlwdDYoMDkz/index.html> accessed 18 April 2023.

Paris Agreement as an 'essential element' of the EU's FTAs. This is done by assessing the legal implications of such choice, identified in the possibility to invoke failure to comply with that provision for purposes of termination of the CAI under Art. 60 of the Vienna Convention on the Law of Treaties (VCLT).[27] Section 5 briefly concludes.

2. TSD CHAPTERS IN THE EU'S FTAS AND THE CAI'S ISD SECTION.

2.1. TSD Chapters in the EU's FTAs.

As stated in Section 6.1, TSD Chapters feature prominently in the FTAs concluded by the EU from 2011 onwards. After being successfully introduced in the 2011 EU-South Korea FTA,[28] the model was then replicated in, *inter alia*, the EU-Canada Comprehensive Economic and Trade Agreement (CETA, provisionally entered into force in 2017),[29] the 2018 EU-Japan Economic Partnership Agreement (EPA),[30] the 2019 EU-Singapore FTA,[31] and the 2020 EU-Vietnam FTA.[32] TSD Chapters are also envisaged to find their way into the EU's FTAs with Mexico and Mercosur, pursuant to the respective agreements in principle.[33] TSD Chapters are the flagship initiative by which the Commission abides by its policy commitment to pursuing 'a trade and investment policy based on values',[34] as

27 Vienna Convention on the Law of Treaties, [1969] 1155 UNTS 331.

28 See (n 15)

29 Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its member States, of the other part [2017] OJ L11/23, of which see Chapter 22.

30 Agreement between the European Union and Japan for an Economic Partnership [2018] OJ L330/3, of which see Chapter 16.

31 Free trade Agreement between the European Union and the Republic of Singapore [2019] OJ L294/3, of which see Chapter 12.

32 Free Trade Agreement between the European Union and the Socialist Republic of Viet Nam [2020] OJ L186/3, of which see Chapter 13. As regards the claim, made in the text surrounding n24 above, on the CAI as the first EU's post-Green Deal international economic law instrument, note that the EU-Vietnam FTA entered into force and was accordingly published in the EU's Official Journal in July 2020 (hence, after the adoption of the Green Deal), but the negotiations were finalised, and the text actually signed, in June 2019 (hence, before the Green Deal was published): see <https://ec.europa.eu/trade/policy/countries-and-regions/countries/vietnam/>.

33 See the agreement in principle relative to the EU-Mexico FTA, Chapter 27 on 'Trade and Sustainable Development' (available online at <https://circabc.europa.eu/rest/download/ec8b7432-1b1a-422a-86c5-7b9a-b158694a?ticket=>), as well as the agreement in principle relative to the EU-Mercosur FTA, at the (currently still unnumbered) Chapter on 'Trade and sustainable development' (available online at <https://circabc.europa.eu/rest/download/638541 54-7f3f-45d6-bfe6-53e330818fd0?ticket=> accessed 18 April 2023). For a further example of a TSD Chapter already in force, see Trade Agreement between the European Union and its Member States, of the one part, and Columbia and Peru, of the other part [2012] OJ L 354/3, at Title IX.

34 European Commission (n 22) 14-20. See, however, already European Commission (n 16) 9.

well as by the legal obligations placed thereupon by the CCP's primary law framework (as interpreted in Opinion 2/15). They embed principles concerning the advancement of labour rights and the protection of the environment into treaty instruments primarily meant to attain economic liberalisation, ensuring that the latter does not work to the detriment of the former and, rather, strives to create synergies therewith.

Specifically, this is pursued by a common template unfolding into four regulatory models, which outline the substantive framework of TSD Chapters.[35] At one level, the contracting Parties undertake to effectively implement the multilateral instruments on environmental and labour standards to which they are Parties. So, for instance, Art. 13.4(3) of the EU-South Korea FTA provides:

> The Parties*, in accordance with the obligations deriving from membership of the ILO and the ILO Declarationon Fundamental Principles and Rights at Workand its Follow-up* (…) commit to respecting, promoting and realising, 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 labour; (c) the effective abolition of child labour, 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* (…).[36]

35 This work follows to a large extent (see, however, n 53 below and surrounding text) the categorisation proposed in Gracia Marín Durán, 'Sustainable Development Chapters in EU Free Trade Agreements: Emerging Compliance Issues' (2020) 57 Common Market Law Review 1031, 1034-1040. A similar framework is also deployed in Marco Bronckers and Giovanni Gruni, 'Retooling the Sustainability Standards in EU Free Trade Agreements' (2021) 24 Journal of International Economic Law 25, 26-33, which, however, presents some more nuances in accounting for specific sub-categories. The leading study, to which much in those analyses is informed, is Lorand Bartels, 'Human Rights and Sustainable Development Obligations in EU Free Trade Agreements' (2013) 40 Legal Issues of Economic Integration 297 305-311. Note, however, that other, sectoral provisions which neither those studies, nor the present work focus upon, are also generally included in TSD Chapters. These include, typically, obligations relative to the sustainable management of timber and fishery resources (see, for instance, Arts. 12.7 and 12.8 of the EU-Singapore FTA (n 31)). Further, reference is made increasingly often to aspirational commitments to encouraging 'trade and investment favouring sustainable development', as well as to the role to be played by corporate social responsibility: see, for instance, Art. 16.5 of the EU-Japan EPA (n 30).

36 Emphasis added. Note that the structure of the provision reflects the ILO's legal tenet that the principles enshrined in the ILO's Constitution and reaffirmed in the 1998 Declaration on Fundamental Principles and Rights at Work are binding on ILO Member States by mere virtue of their membership in the Organisation, i.e. irrespective of ratification of the relevant Conventions. Such Conventions place additional and more detailed obligations upon ILO Member States, conditional however upon ratification thereof. See, for an overview of the issue, Jean-Michel Servais, International Labour Law (6th edn, Kluwers Law International 2020) 50, 83-85. There not being a comparable principle in the international environmental law domain, Art. 13.5(2) of the same FTA is more straightforward: 'The Parties reaffirm their commitments to the effective implementation in their laws and practices of the multilateral environmental agreements to which they are party'.

Authors have at times questioned the significance of such provisions.[37] However, an important consequence of the inclusion of these 'minimum-level clauses'[38] is that multilateral commitments are made enforceable in the context of the bilateral relationship between the FTA's contracting Parties, pursuant to the FTA's dispute settlement mechanism (DSM, on which see shortly below).[39] Since a comparably well-developed DSM would most often not be available as per the arrangements reached in the corresponding multilateral forum, the FTA can thus become a valuable instrument to effectively enforce the communal values enshrined in those multilateral environmental and labour instruments. This was made evident in the landmark EU-South Korea arbitral award, handed down in January 2021.[40] The EU had long been contesting, among other things, a number of aspects of Korean legislation which strongly limited freedom of association in Korean industrial relations. This was the case, for instance, with provisions which excluded the self-employed, those dismissed, and the unemployed from the notion of 'worker' for purposes of the right to join a trade union. Instigated by lobbying coming from a number of civil society actors, the EU eventually decided, in December 2018, to initiate proceedings pursuant to the FTA's DSM.[41] In the award, the arbitral panel engaged at length with the meaning of the commitment, recalled above, to 'respecting, promoting and realising the principles concerning fundamental rights in accordance with the obligations deriving from membership of the ILO and the ILO Declaration on Fundamental Principles and Rights at Work'.[42] It eventually reached the conclusion that: 'The EU-Korea 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 Chapter 13 of the [EU-South Korea FTA]*'.[43]

On such basis, the panel found Korean law to fall short of compliance with ILO obligations and, hence, with the FTA's TSD Chapter.[44]This is the first example ever of a TSD

37 See Bartels (n 35) 308-309.

38 As they were labelled in Marín Durán (n 35) 1036.

39 Ibid 1038.

40 Panel of Experts Proceeding Constituted under Article 13.15 of the EU-Korea Free Trade Agreement, Report of the Panel (20th January 2021) (hereinafter: 'EU-South Korea arbitral award') <https://circabc.europa.eu/rest/download/d4276b0f-4ba5-4aac-b86a-d8f65157c38e?ticket=> accessed 18 April 2023.

41 Ibid paras 1-5.

42 Ibid paras 100-141.

43 Ibid para 107. Emphasis added.

44 Ibid paras 142-258.

Chapter in an EU FTA being litigated,[45] and hence provides, from the perspective of the effectiveness of TSD Chapters with which the present paper itself is concerned, a most interesting case study as to what the follow-up to the panel's findings will be.

Second, TSD Chapters incorporate so-called 'non-regression clauses'.[46] For instance, pursuant to Art. 16.2(2) of the EU-Japan EPA:

> The Parties shall not waive or otherwise derogate from [the respective environmental or labour laws and regulations] or fail to effectively enforce them through a sustained or recurring course of action or inaction in a manner affecting trade or investment between the Parties.

The rationale for such provisions is to prevent a race to the bottom in regulatory standards. Since environmental and labour regulations have high compliance costs for businesses, there is a risk that producers would employ the volatility of capital enabled by globalisation to relocate their activities to countries where those regulations are less demanding or are enforced less strictly. This could encourage the State of provenance to lower its standards (in terms of regulation or enforcement, as the case may be) to prevent the flight, to which a competitor State might react lowering its own standards in turn to keep on being attractive, and so forth. Non-regression clauses aim at preventing such dynamic from taking place, and hence place a way more significant constraint upon the contracting Parties' regulatory autonomy than minimum-level clauses. Here, no pre-existing multilateral regulatory benchmark can be used to assess the concerned States' legal system: rather, it is the domestic level of protection of one State's own choosing which cannot regress, at least as regards its practical enforcement, 'in a manner affecting trade or investment'.[47] The importance of such latter qualifier is clearly evidenced by the

45 Note that, even outside the EU's practice, the only other known case of litigation of labour commitments in the context of an FTA is Arbitral Panel Established pursuant to Chapter Twenty of the Dominican Republic-Central America-United States FTA, Report of the Panel (14 June 2017) <http://www.sice.oas.org/tpd/usa_cafta/Dispute_Settlement/final_panel_report_guatemala_Art_16_2_1_a_e.pdf> accessed 18 April 2023 (hereinafter: US-Guatemala Arbitral Award), on which see below.

46 Marín Durán (n 35) 1038-1040.

47 Some FTAs also contain a more ambitious commitment, which is however less likely to have a significant impact because of the aspirational tone of the provision, aiming at constraining the level of protection chosen as such, i.e. irrespective of enforcement issues. For instance, under Art. 13.3(1) of the EU-Vietnam FTA (n 32): 'The Parties stress that weakening the levels of protection in environmental or labour areas is detrimental to the objectives of [the FTA's TSD Chapter] and that it is inappropriate to encourage trade and investment by weakening the levels of protection afforded in domestic environmental or labour law'. A remarkable exception in this regard is provided by the uncommonly assertive language of Art. 16.2(2) of the EU-Japan EPA (n 30), under which '[t]he Parties shall not encourage trade or investment by relaxing or lowering the level of protection provided by their respective environmental or labour laws and regulations' (emphasis added).

renowned US-Guatemala litigation (2017). Here, the US was unable to substantiate the claim that trade between the contracting Parties had been affected by Guatemala's alleged shortcomings in enforcing its labour laws (e.g. by failing to secure compliance with court orders on the reinstatement of workers dismissed in reprisal for union activities). Whereas the Panel found some evidence that such lack of enforcement had indeed taken place, the impossibility to show that this had affected the trade relationship between the Parties prevented it from finding that Guatemala's conduct was prohibited under the US-Guatemala FTA's non-regression clause.[48] Some EU FTAs seem to lessen the impact of the qualifier. This is done by stipulating that a mere *intention* to affect trade or investment is sufficient to render the regression illegal, without requiring the establishment of an actual impact on economic activities.[49] The fact remains, however, that such provisions place heavy evidentiary burdens on Parties trying to invoke them – arguably, the political price to pay for having constraints placed upon States irrespective of multilateral instruments, but still a steep one.[50]

Third, TSD Chapters encompass 'high-levels clauses'.[51] Under Art. 12.2 of the EU-Singapore FTA:

> The Parties shall continue to improve [their own environmental and labour protection laws and policies], and shall strive towards providing and encouraging high levels of environmental and labour protection.

48 *US-Guatemala arbitral award* (n 45), paras. 153-197 and 446-507.

49 See, for instance, Art. 13.3(3) of the EU-Vietnam FTA (n 32): 'A Party shall not, through a sustained or recurring course of action or inaction, fail to effectively enforce its environmental and labour laws, as an encouragement for trade and investment' (emphasis added). For elaboration on the difference between provisions requiring that trade be 'affected', and those making reference to mere 'encouragement' or similar wording, see Bronckers and Gruni (n 35) 30-32.

50 There is a line of thought which infers from the disappointing outcome of the US-Guatemala litigation that litigation as such is unfit for the purpose of enforcing TSD Chapters: see, for instance, Kathleen Claussen, 'Reimagining Trade-Plus Compliance: The Labor Story' (2020) 23 Journal of International Economic Law 25 33-39, as well as Katerina Hradilová and Ondrej Svoboda, 'Sustainable Development Chapters in the EU Free Trade Agreements: Searching for Effectiveness' (2018) 52 Journal of World Trade 1019 1036-1037. This seems to go too far. The failure of the US claim in the Guatemala case was primarily due to questions of a substantive nature: it was the demanding legal standard enshrined in the wording of the non-regression clause which determined the US' difficulties in providing the requisite evidence, which in turn determined the dissatisfactory decision of the Panel. Had the substantive obligation been crafted in a different way, e.g. being tied to a breach of ILO standards rather than to an impact on inter-State trade relationships, the Panel might well have established that Guatemala had breached its FTA with the US, and this could have possibly led to higher pressure on Guatemala to improve its labour law enforcement record. In other words, it seems inapposite to infer conclusions on litigation as a means of enforcement in general from the failure of a claim brought under a particular kind of provisions, which stands out in the whole range of TSD provisions as the most demanding one.

51 Marín Durán (n 35) 1038.

The practical significance of such provisions is often doubted.[52] In fact, it is not immediately evident under which circumstances a case for a breach thereof can be made, although it has been forcefully pointed out that, for instance, an overt, sudden, and significant lowering of domestic standards might be censored under such clauses – it being, indeed, difficult to view such a move as a good faith effort towards compliance with such aspirational commitments.[53] The point is however picked up again in Section 3 which attempts to identify another possible way for high-levels clauses to be of relevance.

Finally, somewhere in between minimum-level clauses and high-levels clauses stand provisions encouraging the ratification of multilateral instruments in the labour field, where the ILO's centralised institutional setting provides a relatively uncontroversial benchmark for assessing in which direction national labour standards should develop.[54] Like the former, they aim at securing as high a level of compliance as possible with pre-existing standards agreed at the multilateral level; like the latter, however, they are predominantly aspirational in tone. For instance, under Art. 13.4(3) of the EU-Vietnam FTA:

> Each Party shall: (a) make continued and sustained efforts towards ratifying, to the extent it has not yet done so, the fundamental ILO conventions [and] (b) consider the ratification of other conventions that are classified as up to date by the ILO, taking into account its domestic circumstances (…).

The significance of these provisions, as well as the limitations placed on the operation thereof, is also apparent from the EU-South Korea case. Out of the (then) eight conventions qualified by the ILO as 'fundamental',[55] South Korea had only ratified four, with

52 Ibid; Bronckers and Gruni (n 35) 33.

53 See Bartels (n 35) 307-308.

54 By contrast, and arguably as a consequence of the more fragmented nature of international environmental law and its governance, no corresponding provisions can be found as regards the environmental prong of TSD Chapters. Marín Durán (n 35) does not consider such set of provisions. Bronckers and Gruni (n 35), at 26-27, group them along with minimum-level clauses (of which the authors also separately identify a sub-group of commitments concerning principles, irrespective of any particular convention, such as the ILO principles referred to in n 36) under the heading of 'obligations based on existing international standards'.

55 In fact, until 2022, the fundamental conventions were only 8, namely: the Forced Labour Convention (No. 29) of 1930 (including its 2014 Protocol); the Freedom of Association and Protection of the Right to Organise Convention (No. 87) of 1948; the Right to Organise and Collective Bargaining Convention (No. 98) of 1949; the Equal Remuneration Convention (No. 100) of 1951; the Abolition of Forced Labour Convention (No. 105) of 1958; the Discrimination (Employment and Occupation) Convention (No. 111) of 1958; the Minimum Age Convention (No. 138) of 1973; and the Worst Forms of Child Labour Convention (No. 182) of 1999. In 2022, two more instruments were qualified as 'fundamental' due to the lessons learned throughout the Covid pandemic: these are the Occupational Safety and Health Convention (No. 155) of 1981 and the Promotional Framework for occupational Safety and Health Convention (No. 187) of 2006. See <https://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm> accessed 18 April 2023.

no ratifications between 2011 (the date of provisional entry into force of the EU-South Korea FTA) and 2018 (the date when the EU triggered the FTA's DSM).[56] The EU alleged that this amounted to a breach of the relevant provision in the EU-South Korea FTA.[57] After acknowledging that the latter entailed, in principle, an enforceable obligation, the Panel maintained that 'the standard against which the Parties are to be measured is higher than undertaking merely minimal steps or none at all, and lower than a requirement to explore and mobilise all measures available at all times'.[58] Underlining, in particular, that 'Korea ha[d] not committed to a specific timeframe for the ratification of the four outstanding ILO Conventions',[59] the Panel satisfied itself, for purposes of finding compliance with the ratification commitment, of the fact that an analysis of domestic politics showed that 'Korea ha[d] certainly made efforts towards ratification since at least 2017',[60] despite the fact that such efforts were 'less-than-optimal'.[61] The 'best endeavours' nature of such obligations[62] makes them, at the same time, very significant and hard to enforce in the concrete. They have the potential to raise substantive standards of protection (as opposed to 'conservative' non-regression clauses) in a concrete and measurable manner (contrary to vague high-levels clauses). Yet, to the extent that they lack definite deadlines for ratification to be accomplished, in those cases where there is no (almost-)complete stalemate in domestic political processes, which would be censorable, it will be hard for the claimant to make a case that (unsatisfactory) progress in ratification falls short of the FTA's standards.

56 EU-South Korea arbitral award (n 40), para. 260. These were conventions Nos. 100, 111, 138, and 182. Note that, at the time of writing, and subsequent to the arbitral award, South Korea has ratified three more conventions (Nos. 29, 87, and 98, all ratified on 20th April 2021), with only Convention No. 105 now standing out (Conventions Nos. 155 and 187, which were only declared fundamental in 2022, had already been ratified by South Korea in 2008): see the ILO's South Korea database at <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:103123> accessed 18 April 2023. Albeit that the claim based on the ratification commitment provision was unsuccessful (see below), and that the ratification process actually began prior to the filing of the complaint (see n 59 below and surrounding text), this might perhaps be viewed as a successful outcome of the litigation (broadly understood, to encompass also the prior intergovernmental dialogue), detailed research upon which would be most interesting. As regards the peculiar case of ratification of Convention No. 105, see EU-South Korea arbitral award (n 40), paras 289-290.

57 Art. 13.4(3) EU-South Korea FTA (n 15): 'The Parties will make continued and sustained efforts towards ratifying the fundamental ILO Conventions, as well as the other Conventions that are classified as 'up-to-date' by the ILO'.

58 EU-South Korea arbitral award (n 40) para 277.

59 Ibid para 291.

60 Ibid para 286.

61 Ibid paras 291-292.

62 Ibid para 277.

Besides the substantive obligations analysed thus far, TSD Chapters set up a number of institutional mechanisms meant to oversee the process of implementation thereof.[63] Typically, this entails the creation of a threefold structure. At one level, a 'Trade and Sustainable Development Committee' (TSD Committee) is established, comprising officials from the governments of the contracting Parties.[64] TSD Committees are to provide the basic forum for engagement between the Parties on matters related to TSD Chapters, in a process of dialogue and mutual learning and oversight. Second, 'Domestic Advisory Groups' (DAGs) are created.[65] Each Party thereby commits to setting up a platform, at the domestic level, for having its own civil society involved in the process of implementation of TSD Chapters. Such platform is to be operationalised by means of both mandatory meetings between the DAG and governmental officials, and the enabling of DAGs to gather and issue recommendations by their own initiative. Civil society is then expected to proactively engage with FTAs, hence contributing to reducing the political tension registered, for instance, in the EU relative to the ratification of CETA; as well as to channelling non-trade concerns into economic governance through a dedicated mechanism.[66] Third, joint arrangements between the Parties, sometimes named 'Civil Society Forums' (CSFs), are envisaged.[67] These are transnational mechanisms enabling meetings between the Parties' respective DAGs, with a view to exchanging views on the process of implementation of TSD Chapters. A virtuous result expected of CSFs is the creation of cross-border solidarity ties, as was indeed the case, for instance, with the backing provided by EU trade unions to the Korean counterparts in lobbying for the European Commission to bring a complaint against South Korea.[68]

63 For a complete analysis of this aspect of TSD Chapters, see Denise Prévost and Alexovičová I, 'Mind the Compliance Gap: Managing Trustworthy Partnerships for Sustainable Development in the European Union's Free Trade Agreements' (2019) 6 International Journal of Public Law and Policy 236. and Iveta Alexovičová, 'Mind the Compliance Gap: Managing Trustworthy Partnerships for Sustainable Development in the European Union's Free Trade Agreements' (2019) 6 International Journal of Public Law and Policy 236, 244-251. Institutional mechanisms proper are complemented by ancillary provisions meant to ensure the effective working thereof, as well as to create an institutional environment conducive to the adoption of best practices at the domestic level: see, for instance, Arts. 13.11 (mandating for environmental and labour regulations to 'take into account' scientific evidence and international standards), 13.12 (restating transparency obligations laid down in the FTA in general in the specific TSD domain), 13.13 (mandating for the Parties to carry out a sustainability impact assessment in respect of the process of implementation of the FTA), and 13.14 (laying down a comprehensive and detailed obligation to cooperate between Parties in TSD activities) of the EU-Vietnam FTA (n 32).

64 See, for instance, Arts. 13.15.2, 13.15.3, and 17.2 of the EU-Vietnam FTA (n 32).

65 See, for instance, Art. 16.15 of the EU-Japan EPA (n 30).

66 For an analysis of the 'insider-outsider dilemma' thereby faced by civil society actors, and of the 'co-optation' risk implicit in involving into FTA processes those voices which are expected to drive contestation of global neoliberalism as enshrined into them, see Jan Orbie et al., 'Promoting Sustainable Development or Legitimising Free Trade? Civil Society Mechanisms in EU Trade Agreements' (2016) 1 Third World Thematics 526.

67 See, also for the name of CSF, Art. 13.13 of the EU-South Korea FTA (n 15).

68 See n 40 and surrounding text.

The importance of institutional provisions in TSD Chapters can be fully appraised if one considers the DSM which is applicable for the enforcement of such Chapters. FTAs typically adopt a litigation procedure modelled after the WTO's Dispute Settlement Understanding (DSU).[69] Under such model, a government complaining that the counterpart is in breach of the FTA's obligations can request consultations with the latter, with a view to reaching a mutually satisfactory solution; if this cannot be accomplished, the establishment of an arbitral Panel can be requested; if the Panel rules in favour of the complaining Party, and controversy later arises as to whether the defeated Party remedied the breach so identified, further proceedings can be initiated, whereby the complaining Party can be authorised by the Panel to suspend obligations arising under the FTA (adopting so-called 'sanctions') to push for compliance.[70] When the complaint involves a provision included in a TSD Chapter, however, sanctions cannot be adopted: the report of the arbitral Panel is, rather, understood as a mere 'recommendation' for the defeated Party to restore legality under the FTA, and the winning Party is not entitled to adopt any retaliatory measures, nor indeed to bring any further claim, if non-compliance continues despite the Panel's findings. This has been described as a 'promotional model',[71] whereby the EU renounces sanctions, assuming that resorting to dialogue and cooperation is more effective than confrontation in promoting advancements in the implementation of TSD Chapters. From this angle, the institutional mechanisms laid down in those Chapters are expected to generate the needed political pressure upon the defeated Party

69 A detailed account of the DSU manifestly falls outside the scope of this paper. Reference can be made, to this end, to the authoritative picture provided by Peter Van den Bossche and Werner Zdouc, The Law and Policy of the World Trade Organization: Text, Cases and Materials (4thedn, Cambridge University Press 2017) 164-304.

70 See, for instance, Chapter 14 of the EU-Singapore FTA (n 31).

71 See International Labour Organisation, 'Social Dimensions of Free Trade Agreements' [2013] (Revised edition 2015) (ILO Studies on Growth with Equity 2015) <http://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_228965.pdf> accessed 18 April 2023. Note however that, subsequent to the finalisation of the present paper's first draft, the EU Commission revised its approach in a policy paper circulated on 22 June 2022 (European Commission, 'The Power of Trade Partnerships: Together for Green and Just Economic Growth', COM(2022) 409 final). Under such revised stance, the Commission proposes to include sanctions, 'as a matter of last resort, in instances of serious violations of core TSD commitments, namely the ILO fundamental principles and rights at work, and of the Paris Agreement on Climate Change' (n 3). Shortly thereafter, the new approach has been implemented in an agreement in principle on an FTA with New Zealand reached on 30 June 2022: see Art. X.16.2 of the FTA's Dispute Settlement Chapter <https://circabc.europa.eu/rest/download/af42c268-16d2-4a56-a8ab-6d548e0052a3?ticket=> accessed 18 April 2023. For early analysis of the FTA, see Carlotta Ceretelli, 'EU – New Zealand FTA: Towards a New Approach in the Enforcement of Trade and Sustainable Development Obligations' EJIL: Talk!, (28 September 2022) <https://www.ejiltalk.org/eu-new-zealand-fta-towards-a-new-approach-in-the-enforcement-of-trade-and-sustainable-development-obligations/> accessed 18 April 2023. Interestingly, however, the subsequent Agreement in Principle on the 'Trade and Investment Pillar' of the EU-Chile Advanced Framework Agreement (de facto, an FTA fully modelled after the EU's other FTAs), reached on 9th December 2022, went entirely back to the promotional approach (i.e., totally excluding sanctions from the purview of disputes concerning the TSD Chapter): see Art. 26.20 of the TSD Chapter, <https://circabc.europa.eu/rest/download/0ce300c3-3791-4ef8-87f7-50b8e4243745?> accessed 18 April 2023.

for it to bring itself in conformity with TSD Chapters, as interpreted in the arbitral award. The promotional model has been the subject of fierce criticisms. Critics point out, *inter alia*, that without sanctions there is no sufficient incentive for the defeated Party to comply with the award, and that operational shortcomings affect the working in practice of civil society mechanisms, preventing them from exercising the political pressure upon which the promotional model is premised.[72] Despite difficulties in collecting rigorously the empirical evidence necessary to formulate a conclusive assessment,[73] what all discussants seem to agree upon is that the *status quo* is unsatisfactory from the perspective of enabling TSD Chapters to be effectively enforced. In response to the harsh debate held on this point, the Commission opened a public consultation with stakeholders through a non-paper published in 2017,[74] by which it took note of the sub-optimal state of the existing regime and indicated two possible alternatives for reform of the enforcement of TSD Chapters: either streamlining the extant promotional model or introducing a DSM encompassing the possibility of sanctions. One year later, after collecting different views on the topic, the Commission published another non-paper.[75] In its 2018 document, the Commission stated that no consensus could be found on the introduction of sanctions, to the effect that a number of arrangements meant to increase the efficiency of the promotional model would be the way forward.[76] These include enhancing the capacity of DAGs and CSFs, to step up their monitoring role,[77] as well as resorting to a 'more asser-

72 On the need for sanctions see, for instance, Bronckers and Gruni (n 35) 37-50. As regards the shortcomings in the practical functioning of civil society mechanisms, see the literature surveyed in Orbie et al. (n 66) 528-529. Also see Prévost and Alexovičová (n 63) 251-255.

73 See Jonas Aissi, Rafael Peelsa and Daniel Samaan, 'Evaluating the Effectiveness of Labour Provisions in Trade Agreements: An Analytical and Methodological Framework' (2018) 157 International Labour Review 671.

74 European Commission, 'Non-paper of the Commission Services – Trade and Sustainable Development (TSD) Chapters in the EU Free Trade Agreements (FTAs)' (2017). The document, which at the time of the present paper's first draft was available at <https://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155686.pdf> accessed 18 April 2023, appears to have been subsequently removed – presumably, in connection with the Commission's policy shift in 2022 (n 70). The present author was unable to locate the document elsewhere on the internet.

75 European Commission, 'Non-paper of the Commission Services – Feedback and Way Forward on Improving the Implementation and Enforcement of Trade and Sustainable Development Chapters in EU Free Trade Agreements' (2018). The document, which at the time of the present paper's first draft was available at <https://trade.ec.europa.eu/doclib/docs/2018/february/tradoc_156618.pdf>, appears to have been subsequently removed – presumably, in connection with the Commission's policy shift in 2022 (n 70). However, unlike the 2017 one (see n 73 above), this non-paper has remained unofficially available online at the following link: <https://www.politico.eu/wp-content/uploads/2018/02/TSD-Non-Paper.pdf> accessed 18 April 2023.

76 For a critical analysis of the 2018 non-paper, see James Harrison et al., 'Labour Standards Provisions in EU Free Trade Agreements: Reflections on the European Commission's Reform Agenda' (2019) 18 World Trade Review 635.

77 European Commission (n 75) 5-6.

tive enforcement' of TSD Chapters, making more frequent use of DSMs and increasing political pressure for compliance thereafter.[78] Crucially, such latter commitment is also reiterated in the European Green Deal,[79] which hence implicitly acknowledges the inadequacy of the promotional model, at least as practised this far, to make trade work 'in the service of sustainable development'.[80] Yet, it is deplorable that the debate this far has largely focussed on a narrow dichotomy between the option of adopting sanctions and that of streamlining the promotional model. As has forcefully been pointed out in the literature, such juxtaposition is largely artificial, and obfuscates the existence of alternatives which should rather be considered.[81] Moreover, there is a growing consensus that the EU should not adopt a 'one-size-fits-all' approach; rather, it should pursue a flexible attitude, modelling TSD Chapters, including their procedural and enforcement provisions, after the peculiar circumstances prevailing in each partner country.[82] This is in itself an invitation to experiment with innovative solutions, getting out of the limiting quarrel concerning sanctions. This is not to say that sanctions should not be feature in the DSM for TSD Chapters – rather, it is most arguable that they should at least be available in the abstract, since many arguments advanced to oppose them seem to be misconceived.[83] Without renouncing sanctions as a measure of last resort, the EU should arguably think of alternative paths to follow.[84] This exercise is picked up again in Sections 3 and 4 below in relation to the EU-China CAI, which the following sub-Section aims at sketching out as an offspring of the promotional model prevailing in the EU's TSD Chapters.

78 Ibid 7-8.

79 European Commission (n 3) 21.

80 I borrow this evocative image from Olivier De Schutter, Trade in the Service of Sustainable Development: Linking Trade to Labour Rights and Environmental Standards (Hart Publishing 2015).

81 Harrison et al. (n 76) 647-654. One such alternative which has been argued with particular rigour is the proposal to introduce a private complaint procedure, enabling the private enforcement of TSD commitments: see Marco Bronckers and Giovanni Gruni, 'Taking the Enforcement of Labour Standards in the EU's Free Trade Agreements Seriously' (2019) 56 Common Market Law Review 1591, 1598-1609.

82 See European Commission (n 75) 7, as well as European Commission (n 3) 20. In the literature, see James Harrison et al., 'Governing Labour Standards through Free Trade Agreements: Limits of the European Union's Trade and Sustainable Development Chapters' (2019) 57 Journal of Common Market Studies 260, 270-272.

83 Space precludes here an extensive analysis of this point. The present author has critically addressed elsewhere the debate surrounding sanctions in the context of TSD Chapters in the EU's FTAs: see Paolo Mazzotti, 'Stepping Up the Enforcement of Trade and Sustainable Development Chapters in the European Union's Free Trade Agreements: Reconsidering the Debate on Sanctions'(European Law Institute's Young Lawyers Award 2021 Winning Paper) <https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/YLA_Award/Submission_ELI_Young_Lawyers_Award_Paolo_Mazzotti_2021.pdf> accessed 18 April 2023.

84 See, in a similar perspective, Bronckers and Gruni (n 81) 1618.

2.2. The CAI's ISD Section.

Reading through the CAI's ISD Section, one easily discovers a striking continuity with the tradition of TSD Chapters. As regards substantive provisions, minimum-level clauses lay down the foundations of the CAI's vision on sustainable development. Under the terms of Art. 4 of Sub-Section 2, 'Investment and Environment':

> Each Party is committed to effectively implement the multilateral environmental agreements to which it is a party.

Further, Art. 6 of the same Sub-Section more particularly contains an obligation to:

> [E]ffectively implement the UNFCCC and the Paris Agreement adopted thereunder, including its commitments with regard to its Nationally Determined Contributions.

The commitment is, moreover, replicated in respect of the social component of sustainable development in Art. 4 of Sub-Section 3, 'Investment and Labour'.[85]

Further, non-regression clauses also figure in the ISD Section, and allow the CAI to have a say also on purely domestic practices. The CAI adopts the milder version of the impact on investment qualifier sketched out above, proscribing regression when it takes place as a mere 'encouragement' to investment, without also requiring an actual impact thereupon to be shown. Pursuant to Art. 2(2) of Sub-Section 2:

> A Party shall not waive or derogate from, or offer to waive or derogate from, its environmental laws as an encouragement for the establishment, acquisition or retention of an investment or an investor in its territory, whereas, under the terms of Art. 2(3),

85 '1. Each Party, in accordance with its obligations assumed as a member of the International Labor Organization ('ILO'), and its commitments under the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, shall respect, promote and realize, in good faith and in accordance with the ILO Constitution, the principles concerning the fundamental rights which are the subject of the fundamental ILO Conventions. 2. Each Party is, in accordance with the commitments of the members of the ILO and the 2019 ILO Centenary Declaration for the Future of Work, committed to effectively implement the ILO Conventions it has ratified […]'. For ease of reference, in the following, only provisions relating with the environment will be included in the main text, whereas labour commitments will be quoted by means of a footnote. Except as otherwise indicated, all provisions quoted in this Section come from the CAI's ISD Section, so that only the Sub-Section and the article's numbering will be referenced.

> A Party shall not, through a sustained or recurring course of action or inaction, fail to effectively enforce its environmental laws, as an encouragement for investment.[86]

An aspirational call for domestic regulations to be streamlined is also envisaged, since high-levels clauses also find their way into the CAI. Art. 2(1) of Sub-Section 2 provides that:

> Each Party shall strive to ensure that its laws and policies provide for and encourage high levels of environmental protection and shall strive to continue to improve those laws and policies and their underlying levels of protection.[87]

Finally, a provision encouraging the ratification of ILO Conventions is also laid down. From the EU's perspective, this is a much appreciable accomplishment, given the poor record on the part of China as to acceptance of ILO law. Art. 4 of Sub-Section 3 provides that:

> Each Party is, in accordance with the commitments of the members of the ILO and the 2019 ILO Centenary Declaration for the Future of Work, committed to (…) work towards the ratification of the ILO fundamental Conventions. (…) The Parties will also consider the ratification of the other Conventions that are classified as 'up to date' by the ILO.[88]

86 On the labour standards side, pursuant to Art. 2(3) of Sub-Section 3, '[a] Party shall not waive or derogate from, or offer to waive or derogate from, its labour laws as an encouragement for the establishment, acquisition, expansion or retention of an investment or an investor in its territory'. Art. 2(4) then provides that: 'A Party shall not, through a sustained or recurring course of action or inaction, fail to effectively enforce its labour laws, as an encouragement for investment'. Note, moreover, that the CAI also includes the further, principled statement, of the kind referred to in n 46 above, that '[t]he Parties recognise that it is inappropriate to encourage investment by weakening or reducing the levels of protection afforded in domestic environmental [or labour] laws': see Sub-Section 2, Art. 2(2) (as regards the environment), as well as Sub-Section 3, Art. 2(2) (as regards labour standards).

87 This is mirrored in the labour field by Art. 2(1) of Sub-Section 3: 'Each Party shall strive to ensure that its laws and policies provide for and encourage high levels of labour protection and shall strive to continue to improve those laws and policies and their underlying levels of protection'.

88 Out of 190 ILO Conventions, China had at the time of the CAI's publication only ratified 26, 4 of which were 'fundamental' conventions (Nos. 100, 111, 138, and 182: n 54), so that 4 others out of the total of 8 (now 11: n 54) stood out (although China had already ratified in 2007 Convention No. 155, which was qualified as fundamental in 2022: n 54); 2 were 'governance' conventions (of which there exist, in the ILO acquis, 4); and the remaining ratifications concerned sectoral 'technical' conventions, of a somehow lesser importance (although it should be pointed out that this count included Convention No. 155 up to its 'upgrading' to fundamental status in 2022). Further, the latest ratification dated back to 2015, and the second latest back to 2007, so that for almost 15 years China made only marginal progress in committing to internationally agreed labour standards. In a very positive development following the writing of this paper's first draft, however, China ratified on 12 August 2022 two more fundamental conventions in the field of forced labour, that is to say the Forced Labour Convention (No. 29) and the Abolition of Forced Labour Convention (No. 105). See the country's profile on the ILO's website, at <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11110:0::NO::P11110_COUNTRY_ID:103404> accessed 18 April 2023.

A number of interesting complementary provisions, which however do not fall within the scope of this paper, are further laid down. Such provisions are also aligned with prior TSD practice.[89] Overall, it can be safely posited that, as regards substantive obligations, the CAI's ISD Section is fully in line with the last decade's EU's FTA practice. This is arguably good news. The EU's TSD Chapters are, in fact, largely acknowledged to be rather ambitious in depth and scope. They combine commitments on international standards with more demanding obligations on domestic levels of protection, in such a way as to provide an advanced platform for real progress in environmental and social sustainability. What is disappointing is the fact that the CAI's ISD Section is also in line with prior TSD practice as regards the other aspects – the institutional and the procedural. To be fair, the ISD Section's institutional design does even take one step back when compared with earlier TSD Chapters. Whereas an intergovernmental Working Group on Sustainable Development is set up 'to facilitate and monitor the implementation of the Sustainable Development Section',[90] no civil society mechanisms are envisaged – that is, no DAGs are established, and this implies that neither CSFs are. China undoubtedly has a complex situation as far as civil and political rights are concerned,[91] and it is hardly conceivable, for a government which tightly controls civil society actors domestically, to allow them to play a role on the international scene. Further, the EU's self-professed strong interest in reaching an agreement somehow diminished its bargaining power.[92] However, the foreclosure of the investment relationship with China to scrutiny from civil society can only be seen as a disappointment from the perspective of the trade and investment policy based on values which the EU claims to be pursuing. This is not only from the point of view of the democratisation of international economic governance which civil society mechanisms aim at bringing about. The overall effectiveness of the ISD Section risks being hampered by such failure, to the extent that pressure from civil society is assumed by the EU to be a key factor in bringing about compliance with arbitral awards handed down in the context of the promotional model.

89 (n 34) and (n 62). In the CAI, these include commitments to promoting corporate social responsibility (Sub-Section 1, Art. 2) and to carrying out assessments of the impact on sustainability of the CAI's implementation (Sub-Section 1, Art. 4). Further, an undertaking is made to facilitate and encourage 'investment favouring green growth' (Sub-Section 2, Art. 5) and 'investment favouring decent work' (Sub-Section 3, Art. 5), and soft obligations on 'dialogue and cooperation on investment-related environment [and labour] issues' are laid down (Sub-Section 2, Art. 3, and Sub-Section 3, Art. 3).

90 See Section VI, Sub-Section 1, Art. 4. This corresponds with traditional TSD Committees: see n 63.

91 See, for instance, the influential Human Rights Watch, 'World Report 2021 – China: Events 2020' (2021) <https://www.hrw.org/world-report/2021/country-chapters/china-and-tibet> and, more recently, Human Rights Watch, 'World Report 2022 – China: Events 2021' (2022)<https://www.hrw.org/world-report/2022/country-chapters/china-and-tibet> (both accessed 18 April 2023).

92 See n19 and surrounding text.

In fact, coming to the procedural side, the ISD Section's DSM is, in turn, fully in line with the well-established TSD promotional practice. Provisions of the CAI other than those included in the ISD Section can be litigated under a WTO-looking intergovernmental procedure, which can end up with the panel authorising the winning Party to impose sanctions against the recalcitrant one.[93] The ISD Section, by contrast, includes a Sub-Section on the Mechanism to Address Differences, which explicitly lays down at the outset that 'Section X (State to State Dispute Settlement) does not apply to this Section',[94] and goes on to outline the standard TSD litigation procedure: the complaining government can enter into consultations with the counterpart,[95] with the possibility to request the establishment of an arbitral panel if no satisfactory solution is reached.[96] The Panel is then to issue a report setting out 'the findings of facts, the applicability of the relevant provisions and the basic rationale behind any findings and recommendations', pursuant to which '[t]he Parties shall consult within 30 days (…) and discuss measures to address the matter, based on the report';[97] no possibility is given to request the panel to authorise sanctions, if any disagreement arises as to whether the report has been complied with.

The continuity thus established with the TSD tradition is complete. Besides discarding the views of the proponents of sanctions, which was unsurprising and is legitimate, the Commission, more problematically, appears not to have followed up on the relevant commitments taken in the 2018 non-paper. Civil society mechanisms have disappeared, instead of being enhanced.[98] Time will tell whether the political undertaking on more assertive enforcement, reiterated in the European Green Deal, will have a better fate.[99] For the time being, however, what the negotiations led to is an ISD Section which, in terms of normative design, does not distinguish itself from TSD Chapters in the EU's FTAs in any respect other than the (regressive) marginalisation of civil society, despite the almost unanimous consensus that those Chapters are in need for some overhaul to secure better implementation.

However, at the time of writing, the CAI is a mere agreement in principle: it has not been

93 See CAI, Section V (in particular, Art. 16 thereof).

94 Sub-Section 4, Art. 1(1).

95 Sub-Section 4, Art. 1.

96 Sub-Section 4, Art. 3.

97 Sub-Section 4, Art. 4.

98 See (n 76) and surrounding text.

99 See (n 77) and surrounding text.

signed yet, let alone ratified. This means that there is still room for manoeuvre to have different and more effective implementation formulas included in the agreement, provided enough political will can be mobilised to this end. The remainder of this Chapter thus reviews some proposals recently advanced in the context of the debate on TSD Chapters in FTAs (which, quite surprisingly, have not been considered at all in the CAI process), and explores their potential when applied to the CAI.

3. STAGED IMPLEMENTATION: TOWARDS SUSTAINABLE DEVELOPMENT CONDITIONALITY?

In April 2020, the Dutch and French governments jointly issued a 'non-paper on trade, social economic effects and sustainable development'.[100] This document advanced a number of proposals meant to enhance the synergy between the EU's trade liberalisation agenda and the promotion of environmental and labour standards. The issuing governments expressed dissatisfaction, in particular, with the limited implementation of TSD Chapters in practice – an issue with which France had already shown to be uncomfortable in the past, advocating the cause of sanctions.[101] The first paragraph of the non-paper, titled 'Stronger sustainability chapters', does indeed put forward the two governments' vision on how the process of translation into practice of TSD commitments might be stepped up. Besides recalling the European Green Deal's commitment to a more assertive enforcement, which is in essence a matter of pure political will to avail oneself of available legal mechanisms, the non-paper submits an important and innovative view concerning those Chapters' legal design itself. According to France and the Netherlands:

> [T]he EU could *incentivize* effective implementation *by rewarding* partner countries that live up to TSD commitments. Parties should introduce, where relevant, *staged implementation* of tariff reduction *linked to the effective implementation of TSD provisions* and clarify what conditions countries are expected to meet for these reductions, *including the possibility of withdrawal* of those specific tariff lines in the event of a breach of those provisions.[102]

100 Dutch Government and French Government, 'Non-paper from the Netherlands and France on Trade, Social Economic Effects and Sustainable Development' (2020) <https://nl.ambafrance.org/Non-paper-from-the-Netherlands-and-France-on-trade-social-economic-effects-and> accessed 18 April 2023.

101 See French Government, 'Mise en œuvre du CETA: Le plan d'action du gouvernement' (2017) <https://www.gouvernement.fr/sites/default/files/document/document/2017/10/plan_action_ceta_du_gouvernement.pdf> accessed 18 April 2023.

102 Dutch Government and French Government (n 100), para 1. Emphasis added.

Whilst quickly dismissed in the literature,[103] the idea most certainly deserves further scrutiny. What the Dutch and French governments are proposing to adopt is, in effect, a form of *positive conditionality*, which can be defined making implementation of a concession contingent on prior compliance by the counterpart with its own obligations. In fact, full implementation of the FTA's trade concessions would be conditional upon implementation by the trading partner of the sustainability commitments enshrined in TSD Chapters. This would entail acting at two important levels. In the first place, it would have significant symbolic implications, amounting to a tangible application of the principle of equal footing of the economic, environmental, and social components of sustainable development,[104] since it would assert the impossibility to detach advancements in the economic pillar from parallel progress in the environmental and social ones. On the other hand, and more relevant to the present purposes, it would obviously have the practical effect of incentivising the Contracting Parties to abide by their sustainability commitments. By linking the accrual of commercial benefits to the bearing of the costs stemming from compliance with environmental and labour standards, it would provide a reason to engage in such latter effort which, being rooted in a rational choice perspective, goes beyond the possibly mild pressure ordinarily placed upon policy-makers to enhance their sustainability profile. Such pressure is, in fact, often thought to be rooted in political processes which are value-laden, and do not structure themselves in term of crude cost-benefit analysis. As a consequence, so the argument goes, bureaucratic and diplomatic élites trained in the prevailing realist tradition would risk being unlikely to prove receptive to such needs, if no practical interest provided them with a concrete reason to engage with them.

In EU law, conditionality has been much studied in connection with the enlargement of the EU. This was particularly the case with the 2004–2007 'eastward' enlargement rounds, where conditionality was most extensively practised.[105] In this domain, conditionality has proved to be a generally effective policy tool in terms of achieving legal-technical reforms in the acceding countries (mainly as regards the reception into domestic legal systems of the *acquis communautaire*), albeit its effectiveness has been radically questioned in respect of pursued objectives of a more political nature, such as the consolidation of

103 Bronckers and Gruni (n 35) 49.

104 See (n 17) and surrounding text.

105 See the leading study in Dimitry Kochenov, *EU Enlargement and the Failure of Conditionality: Pre-accession Conditionality in the Fields of Democracy and the Rule of Law* (Kluwer Law International 2008). See, in particular, 65-82, for a detailed analysis of the legal framework governing enlargement conditionality (to be read along with 62-64, positing the famous argument that enlargement law is, to a large extent, governed by unwritten customary rules). On a more historical and political note, also see Heather Grabbe, *The EU's Transformative Power: Europeanization through Conditionality in Central and Eastern Europe* (Palgrave Macmillan 2005) 7-22.

democracy and the rule of law.[106] However, enlargement conditionality is arguably a *sui generis* case. This is both because it is regulated in a largely peculiar manner, reflecting the high political stakes involved, and because the EU's bargaining power is, here, maximised by the exceptional attractiveness for candidate States of the accession prospect, to which the latter cannot oppose any real counterbalance.[107] An example of conditionality more in line with the questions dealt with by the Dutch-French proposal, which can thus draw inspiration therefrom, can however be found in the EU's Generalised System of Preferences (GSP).[108] The GSP is a trade tool by which the EU unilaterally grants tariff preferences to imports from developing countries, to foster their economic development by providing a number of goods with preferential market access. In order to comply with WTO law,[109] the EU laid down a number of fairly detailed conditions for GSP preferences to be applicable. Such conditions identify three different 'programmes'. At one level, a 'general' scheme is established, which provides for trade preferences to developing countries not having been classified by the World Bank (WB) as 'high-income' or 'upper-middle income' for three consecutive years, and which do not already benefit

106 This was the influential view advanced in Kochenov (n 105). A condensed version of the arguments put forward in such latter work can be found in Dimitry Kochenov, 'Overestimating Conditionality' in Inge Govaere and others (eds), *The European Union in the World: Essays in Honour of Marc Maresceau* (Brill Publishing 2014).

107 Kochenov (n 105) 52-53. Also see Grabbe (n 105) 1-2.

108 As established, for the 2012-2023 period (see Art. 43), by Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a Scheme of Generalised Tariff Preferences and repealing Council Regulation (EC) No 732/2008 [2012] OJ L303/1. For good accounts thereof, see De Schutter (n 80) 110-123, and Thomas Lebzelter and Axel Marx, 'Is EU GSP+ Fostering Good Governance? Results from a New GSP+ Compliance Index' (2020) 54 Journal of World Trade 1, 2-7.

109 Preferential tariff rates are an obvious derogation from the basic Most-Favoured Nation (MFN) obligation enshrined in Art. I of the General Agreement on Tariffs and Trade (GATT). They have, however, been authorised by the GATT State Parties, in specific connection with GSP programmes beneficial to developing countries: first, on a temporary basis, in GATT Parties, 'Generalized System of Preferences' (25 June 1971), BISD 18S/24; later, permanently, and in the version eventually incorporated in WTO law, through the so-called 'Enabling Clause' (GATT Parties, 'Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries', 28 November 1979, L/4903). Those GATT decisions, however, place a number of conditions upon GSP programmes (or, at least, they do so in the understanding of the Appellate Body (AB)), which have been fleshed out in the important case of WTO Appellate Body, European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries (2004) (WT/DS246/AB/R), to the findings of which the current EU's GSP Regulation is still informed. The most important condition, from a substantive point of view, is the requirement that any system of trade preferences be 'generalised', 'non-reciprocal', and, most crucially, 'non-discriminatory'. For an analysis of the facts of the case and of the Appellate Body's reasoning and findings, see Lorand Bartels, 'The Appellate Body Report in "European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries" and Its Implications for Conditionality in GSP Programmes' in Thomas Cottier, Joost Pauwelyn, and Elisabeth Bürgi (eds), Human Rights and International Trade (Oxford University Press 2005).

from an arrangement granting preferential access to the EU's market (typically, an FTA).[110] Second, the so-called 'GSP+' is set up. Under such programme, countries already benefitting from the general scheme and qualifying as 'vulnerable'[111] can apply to receive further tariff preferences, subject to a number of requirements (on which see below) relating, in essence, to the ratification and effective implementation of multilateral instruments on environmental protection, labour standards, human rights, and good governance.[112] Last, the so-called 'everything-but-arms' (EBA) arrangement enables least-developed countries (LDCs) to enjoy duty-free access to the EU's market on all products – except, intuitively, for arms and ammunition.[113] Whereas it is only the GSP+ which is subject to a form of positive conditionality, a generalised form of negative conditionality applies in respect of all arrangements. In this context, negative conditionality can be understood as the legal technique whereby implementation of a concession is immediate but can be subsequently revoked if the counterpart breaches its own obligations. In fact, all GSP preferences can be temporarily suspended if a country puts in place a number of particularly grave conducts, including 'a serious and systematic violation of principles' of the human and labour rights instruments upon which the GSP+ arrangement is premised (not, however, the environ-

110 Regulation 978/2012 (n 108), Art. 4. See Art. 7 for the preferences thereby granted.

111 Such condition prevails when 'a lack of diversification and insufficient integration within the international trading system' affects the applicant country's economy: Regulation 978/2012 (n 108), Art. 9(1)(b). More precise, quantitative criteria are listed in Annex VII to the Regulation, along with rules concerning the statistical data to be used for the purposes of establishing vulnerability.

112 Regulation 978/2012 (n 108), Art. 9. The list of relevant conventions can be found in Annex VIII to the Regulation. These include the ILO's fundamental conventions (see n 54) and the main multilateral instruments in the environmental domain, as well as a number of UN-backed human rights instruments (e.g. the 1966 Covenants, or the Conventions against torture and genocide) and treaties promoting good governance (that is, the UNODC-administered instruments adopted to combat drug trafficking and the Convention against Corruption). See Art. 12 for the preferences thereby granted.

113 Regulation 978/2012 (n 108), Art. 17. See Art. 18 for the technical arrangements meant to secure that arms do not benefit from the scheme.

mental and good governance ones).[114]

It is, however, the GSP+ which is mainly of interest here, to the extent that it can provide a template for the proposal envisaged in the 2020 non-paper by the Netherlands and France. In fact, the positive conditionality underlying this regime entails a detailed procedural scheme, meant to ensure that the conditions for GSP+ preferences are complied with. Contrary to the general GSP arrangement, which, being based on the mere status of the countries concerned pursuant to WB classifications, is administered in a completely unilateral way by the Commission,[115] access to the GSP+ is based upon an application to this end by the country interested in benefitting from the scheme. The application is directed to the Commission, which subsequently notifies it to the Council and the European Parliament and assesses whether the conditions for access to the GSP+ are fulfilled.[116]

114 Regulation 978/2012 (n 108), Art. 19. Note that a further basis for temporary suspension of all three schemes, which however has a considerably lesser practical and conceptual significance, is laid down in Art. 21. This provision is meant to safeguard good cooperative practices between the EU and the beneficiary country, with a view to the smooth implementation of the GSP. At the time of writing, resort to Art. 19 (and the corresponding provisions in earlier GSP Regulations) has been made thrice: once in 1997, relative to the use of forced labour in Myanmar (see Council Regulation (EC) No 552/97 of 24 March 1997 temporarily withdrawing access to generalized tariff preferences from the Union of Myanmar [1997] OJ L85/8); once in 2007, in respect of the worrying state of workers' freedom of association and the right to collective bargain in Belarus (see Council Regulation (EC) No 1933/2006 of 21 December 2006 temporarily withdrawing access to the generalised tariff preferences from the Republic of Belarus [2006] OJ L405/35); last, and just recently, in 2020, regarding the deterioration of the human rights situation in Cambodia (see Commission Delegated Regulation (EU) 2020/550 of 12 February 2020 amending Annexes II and IV to Regulation (EU) No 978/2012 of the European Parliament and of the Council as regards the temporary withdrawal of the arrangements referred to in Article 1(2) of Regulation (EU) No 978/2012 in respect of certain products originating in the Kingdom of Cambodia [2020] OJ L127/1). The case of Cambodia is particularly interesting, because for the first time the EU withdrew EBA preferences, and for the first time the suspension was only partial, i.e. it only affected certain products. For an overview of the cases of Myanmar and Belarus, as well as of other instances where withdrawal of GSP preferences was demanded by civil society and/or considered by the Commission (without, however, being effected), see Ionel Zamfir, 'Human Rights in EU Trade Policy: Unilateral Measures' (European Parliamentary Research Service's Briefing PE 621.905 2018) <https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/621905/EPRS_BRI(2018)621905_EN.pdf> accessed 18 April 2023, as well as Clara Portela and Jan Orbie, 'Sanctions under the EU Generalised System of Preferences and Foreign Policy: Coherence by Accident?' (2014) 20 Contemporary Politics 63, 67-70. However, in the way less legalised framework governing the EU's GSP prior to the AB's 2004 ruling (see n 109), GSP preferences were also withdrawn for Yugoslavia in 1991, as an attempt on the part of the (then) European Communities to help de-escalating political tension in the early stage of the Yugoslav Wars: see Council Regulation (EEC) No 3302/91 of 11 November 1991 withdrawing Yugoslavia from the lists of beneficiaries of the Community generalized tariff preferences scheme for 1991 [1991] OJ L315/46.

115 See Regulation 978/2012 (n 108), Art. 5. Note that, in any event, '[t]he Commission shall notify the GSP beneficiary country concerned of any changes in its status under the scheme' (Art. 5(4)). As recalled in the text surrounding n 109, this can be due either to a change in the WB classification of a former beneficiary country, or to the entry by the latter into an arrangement granting preferential access to the EU market.

116 Regulation 978/2012 (n 108), Art. 10.

Besides the requirements that the candidate country already benefit from the general scheme and qualify as 'vulnerable', these can be divided into three groups:

- The country concerned must have ratified all the relevant Conventions, while the most recently available conclusions of the monitoring bodies established thereunder must not have identified 'a serious failure to effectively implement' them, and the country must give a binding undertaking to maintain ratification and effective implementation *pro futuro*;[117]

- The applicant country must not have formulated reservations which would render nugatory those ratifications;[118] and

- It must have committed to a collaborative attitude concerning the monitoring on the effective implementation of the Conventions.[119]

If all conditions are fulfilled, the country can benefit from the GSP+. Once admitted to the scheme, however, the country will also be subject to a further scheme-specific negative conditionality, which adds to the general one referred to above. Thus, if any of the conditions for inclusion in the list of GSP+ beneficiaries are no longer fulfilled after admission, GSP+ preferences can be withdrawn, and the beneficiary country can slide back to the general scheme's preferences. In fact, the Commission is continuously to 'keep under review the status of ratification of the relevant [C]onventions' and to 'monitor their effective implementation, as well as cooperation with the relevant monitoring bodies'.[120] Based on such continuous assessment, the Commission is, inter alia, to produce a periodical report to the Council and the Parliament.[121] If, 'either on the basis of the conclusions on the report (…) or on the basis of the evidence available, the Commission has a rea-

117 Regulation 978/2012 (n 108), Art. 9(1), letters (b) and (d).

118 Regulation 978/2012 (n 108), Art. 9(1)(c). More precisely, any reservations must not be prohibited by the relevant instrument; must not have been determined to be incompatible with the object and purpose thereof pursuant to a process established to that end in that instrument itself; and must not have been subject to an objection to the same end, preventing the entry into force of the treaty as between the reserving State and the objectors, by the EU and/or a qualified majority of its Member States, pursuant to Art. 20 VCLT.

119 Regulation 978/2012 (n 108), Art. 9(1), letters (e) and (f). More precisely, any reporting requirements under the relevant Convention must have been accepted without reservation; 'a binding undertaking to accept regular monitoring and review of [the country's] implementation record in accordance with the provisions of the relevant [C]onventions' must have been given; and so 'a binding undertaking to participate in and cooperate with' the EU's Commission-led monitoring procedure which will be referred to below.

120 Regulation 978/2012 (n 108), Art. 13(1).

121 Regulation 978/2012 (n 108), Art. 14.

sonable doubt' that the GSP+ conditions are no longer complied with,[122] a procedure is to be opened, possibly leading to temporary withdrawal of GSP+ preferences. This is done by publishing a notice on the EU's Official Journal, specifying a period not longer than six months within which the country concerned can submit 'observations'.[123] After the expiry of such period, the Commission must decide within not more than three months whether to withdraw GSP+ preferences or not.[124] It is important to notice that, at all stages of the application of negative conditionality, the Commission is to take into account the conclusions of the monitoring bodies established under the relevant Conventions, where present.[125] On the one hand, some doubts have been raised as to the extent to which this is reflected in actual GSP practice.[126] On the other hand, this is an extremely important feature of the GSP Regulation, aiming at providing the Commission's decisions with a legitimacy which they would lack, if any determination on compliance with international standards were to be made at a purely unilateral (and, hence, potentially politicised)

122 Regulation 978/2012 (n 108), Art. 15(3).

123 Regulation 978/2012 (n 108), Art. 15(4).

124 Regulation 978/2012 (n 108), Art. 15(7). This far, GSP+ preferences have only been withdrawn once, in 2010. Sri Lanka slid back to general GSP rates based on its failure to comply with a number of the UN human rights instruments included in Annex VIII in its repression of the Tamil Tigers separatist movements (see Implementing Regulation (EU) No 143/2010 of the Council of 15 February 2010 temporarily withdrawing the special incentive arrangement for sustainable development and good governance provided for under Regulation (EC) No 732/2008 with respect to the Democratic Socialist Republic of Sri Lanka [2010] OJ L45/1). See the sources quoted in n113 for further detail.

125 This is envisaged in respect of the general monitoring activity (Regulation 978/2012 (n 108), Art. 13(1)), when drafting the report to the Council and the European Parliament (Arts. 14(2) and 14(3)), and during the carrying out of the withdrawal procedure (Art. 15(6)). Note, moreover, that the general procedure under Art. 19, available to withdraw preferences under all three arrangements, is strictly modelled after the GSP+ one under Art. 15: accordingly, under Art. 19(6), the conclusions of the relevant monitoring bodies are also to be 'sought as appropriate' when the general withdrawal procedure is resorted to. Further, the condition that the most recent available conclusions of the relevant monitoring bodies do not establish 'a serious failure to effectively implement' the multilateral instruments concerned (see text surrounding n 116) entails that those conclusions play a pivotal role also as regards the earlier stage of positive conditionality (although the practical operation of the provision is not uncontroversial: see n 132 below)

126 See Jan Orbie and Lisa Tortell, 'The New GSP+ Beneficiaries: Ticking the Box or Truly Consistent with ILO Findings?' (2009) 14 European Foreign Affairs Review 663. Orbie and Tortell's criticism relates, however, to the withdrawal of preferences based on failures to comply with ILO-backed labour standards. On the other hand, withdrawals of preferences for Cambodia (also addressed in n 113) and Sri Lanka (see n 123) were primarily based on human rights concerns, rather than on ILO law, but still drew, in particular in the case of Cambodia (see, for instance, Regulation 2020/550 (n 114), 'whereas' nos. (25), (52), and (56)), on the findings of international organisations, remarkably the OHCHR.

level.[127] However, the Commission must also 'seek' and 'assess' any relevant information, irrespective of its source, at least when applying negative conditionality:[128] this includes information coming from civil society actors, which further adds an interesting human rights advocacy layer to the operation of the GSP.[129]

It is hereby submitted that a GSP+-like system can be used to operationalise the Dutch-French proposal. DG Trade is by now long accustomed to the GSP's procedures, which have been streamlined over the years in an incremental improvement process. An expertise has thus been built up at the Commission, which can be drawn upon with a view to implementing positive conditionality in the TSD domain – and, from the angle chosen here, in respect of the CAI's ISD Section. In fact, just like the GSP+, that Section includes commitments based on international standards which lend themselves well to a form of *ex ante* monitoring, conditioning the implementation of the economic provisions of the CAI on the taking of action by the counterpart in the environmental and/or labour

127 Note, however, that, as a matter of practice, the GSP appears to be administered in a way which is fully in line with the EU's broader geopolitical considerations: see Portela and Orbie (n 114). For theoretical elaboration on the point, see Andrea Ott and Guillaume Van der Loo, 'The Nexus between the CCP and the CFSP: Achieving Foreign Policy Goals through Trade Restrictions and Market Access' in Steven Blockmans and Panos Koutrakos (eds), *Research Handbook on the EU's Common Foreign and Security Policy* (Edward Elgar Publishing 2018) 244-248. For elaboration on the problem of legitimacy of unilateral action in the field of sanctions in general (note that, in fact, the withdrawal of GSP preferences is a sanction in all respects, as acknowledged by De Schutter (n 80), at 104), see Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press 1995) 106-108.

128 This is explicitly stated in Regulation 978/2012 (n 108), Art. 14, concerning the drafting of the report to be submitted to the Council and the European Parliament, and in Art. 15(6), in respect of the withdrawal procedure, so that it should be regarded as implicit also under Art. 13, concerning continuous assessment of the state of ratification and implementation of the relevant international instruments. As regards positive conditionality, on the other hand, Art. 10(3) seems to mandate for the Commission's assessment, that the conditions to be admitted to the GSP+ are fulfilled, to be carried out based on the information submitted by the applicant country only. This is indeed logical, if one considers that, from the angle of effective compliance, the only factor to be taken into account at this stage are the most recent available conclusions of the relevant monitoring bodies, rather than implementation per se (see text surrounding n 116).

129 In the case of Sri Lanka, the Commission appears indeed to have paid attention, particularly in respect of the decision to initiate the withdrawal procedure, to reports coming from NGOs: see Regulation 143/2010 (n 124), 'whereas' no. (3).

domain.[130] To start with, minimum-levels clauses[131] easily fit within a GSP+-like exercise. Since the Parties thereby commit to effective implementation of environmental and labour multilateral instruments, a mechanism could be established, which would require a good record under the respective monitoring systems in respect of implementation,[132] before investment concessions can actually be implemented. This need not necessarily replicate the GSP+ requirement which specifies that the analysis be based on 'the most recent' report, since this has now been shown to be potentially conducive to distortions.[133] Nor would staged implementation need to include the high negative threshold that the monitoring reports not identify a 'serious failure', which, in turn, seems to have played a role in granting GSP+ preferences to problematic countries, defeating the purpose of positive conditionality.[134] Taking stock of the awareness now available of those shortcomings, a requirement to holistically assess the implementation record emerging from the relevant monitoring bodies' findings, also anticipating at such early stage the role to be

130 By contrast, the non-regression clauses referred to in (n 85) and surrounding text, which are exclusively based on national regulatory standards, do not seem to be able to benefit from a positive conditionality scheme: by definition, they place a negative obligation upon the Contracting Parties, which is complied with by not lowering standards of protection as an encouragement to investment. This is a continuous obligation, which can be breached at a given point of time, but which cannot be considered to have been 'complied with' in a particular moment, unless the Contracting Parties decide to lay down a deadline upon the expiry of which, if no regression has taken place, they satisfy themselves that the observation period has been long enough to proceed to implementation of the CAI's economic provisions under the do ut des logic underlying staged implementation. This obviously entails significant moral hazard risks: China or the EU would then be clearly incentivised to only pay lip service to the obligation, refraining from encouraging investment through derogations from applicable standards until the deadline is met, if they were not to suffer any negative consequences in the event of derogation the day after. Such risks could only be averted by a robust ex post negative conditionality mechanism, capable of quickly reacting to such an abuse by sanctioning the delinquent Party (in essence, reinstating the non-preferential regime). As explained shortly below, however, in the particular context of the CAI this appears to be particularly hard to achieve, in light of the primarily regulatory nature of the concessions thereby entailed.

131 See n 84 and surrounding text.

132 In the vein of Art. 9(1)(b) of Regulation 978/2012 (n 108): see n 116 and surrounding text.

133 See Jeffrey Vogt, 'A Little Less Conversation: The EU and the (Non) Application of Labour Conditionality in the Generalized System of Preferences (GSP)' (2015) 31 International Journal of Comparative Labour Law and Industrial Relations 285. Vogt underlines, in particular at 298-301, that this requirement enabled Guatemala to keep on benefitting from the GSP+, despite condemnation of its poor labour rights record on the part of the ILO. This was because the concern expressed by the ILO reached in the 2011 monitoring report the level deemed necessary by the Commission for a GSP+ application to be rejected; when, however, Guatemala filed its application to be included in the renewed GSP+ scheme in 2013, the criterion forced the Commission to take into account that year's monitoring report, where ILO condemnation was milder, owing to a commitment by Guatemala's government which led the employers' component in the ILO's monitoring system to block the attempt by the workers' component to have the concern reiterated in the 2013 report.

134 See Vogt (n 133), as well as Orbie and Tortell (n 126).

played by the submissions of civil society,[135] might be envisaged as a precondition for the CAI's liberalisation commitments to be implemented. On a different note, it should be noted that positive conditionality could also be extended to high-levels clauses[136] and to commitments concerning ratification of ILO Conventions.[137] Though aspirational in tone, such provisions are legally binding in their entirety. The EU-South Korea litigation has laid down a convincing standard to assess compliance with the latter, which could reasonably be assumed to be useful also for the operationalisation of the former. Whilst not being required 'to explore and mobilise all measures available at all times', contracting Parties are not allowed to take 'merely minimal steps or none at all' towards ratification of the instruments they committed to ratifying[138] (or, it is here suggested in the context of high-levels clauses, towards raising domestic levels of protection). Parties would then need to be in a position to show, through reference to their domestic political processes, that they took at least incremental steps towards ratifying ILO instruments or raising standards of protection.[139] From the EU's perspective, China could therefore be required to demonstrate serious commitments in this respect, in particular as regards ratification of the outstanding ILO fundamental Conventions,[140] before requiring compliance with liberalisation commitments on the EU's side.[141]

135 See (n 128). For a contribution pointing to yet another source of information which could be deployed in assessing compliance with positive conditionality (strictly speaking, in the GSP context: but nothing seems to prevent consideration of the idea also for the purposes of the Dutch-French proposal), see Axel Marx, 'Integrating Voluntary Sustainability Standards in Trade Policy: The Case of the European Union's GSP Scheme' (2018) 10 Sustainability 1.

136 See (n 87) and surrounding text.

137 See text surrounding (n 88).

138 See (n 58) and surrounding text.

139 See (n 60) and surrounding text.

140 See (n 88) and surrounding text. Note that, if it were possible to revise the substantive crafting of the CAI, the inclusion of obligations to work towards ratification of carefully identified Conventions in the environmental domain might also be desirable, e.g. as regards instruments concerning the sustainable management of fisheries. Indeed, China's fishing policies are often deemed to be unsustainable, primarily on account of the overfishing allowed by the extensive subsidies programmes (mainly, fuel subsidies) run by the Chinese government to the benefit of its fishing fleet. For an overview of the problem, see Tabitha Mallory, 'Fisheries Subsidies in China: Quantitative and Qualitative Assessment of Policy Coherence and Effectiveness' (2016) 68 Marine Policy 74. This could particularly be the case in respect of the WTO Agreement on Fisheries Subsidies, negotiated after the first draft of the present paper was written: see 'Agreement on Fisheries Subsidies – Ministerial Decision of 17 June 2022' (WT/MIN(22)/33 – WT/L/1144).

141 Note that this would provide the Commission with a properly legal tool to abide by a policy commitment which the Commission itself acknowledged to be of the outmost importance, namely the 'encouragement of early ratification' of core labour and environmental standards through the deployment of the trade leverage when negotiating FTAs: see European Commission (n 75) 8-9. Evidence of those commitments might be provided, for instance, by showing that high-level dialogue was opened with the ILO with a view to ratification (as regards commitments to ratifying ILO instruments), or that legislative processes were started at the domestic level to raise standards of protection (as regards high-levels clauses).

However, when transposing the Dutch-French proposal (submitted having FTAs in mind) into the CAI domain, one has to take note of two interrelated (and fundamental) differences between FTAs and the CAI itself. First, the notion of staged implementation involves complex questions of distribution of competences between the EU and the Member States (MS). In fact, whereas the CCP is a matter of EU exclusive competence, it cannot be used, through the *escamotage* of the need to implement it, as a Trojan horse to affect the distribution of competence in other policy areas.[142] In the original proposal, those questions were indeed rather straightforward: the Netherlands and France envisaged conditional reduction of tariffs – a key component of the customs union, which traditionally forms the hard core of the EU's exclusive competences.[143] Accordingly, it would be the Commission to be called upon to implement, if need be, the tariff preferences negotiated with the trading partners, which would make applying positive conditionality quite simple. By contrast, the economic commitments in the CAI would raise much more complex issues of competence. To start with, the core concessions made are those concerning investment liberalisation. These include obligations concerning market access, national treatment (NT), and most-favoured nation (MFN) treatment, subject to a number of reservations on 'non-conforming measures' included in an Annex to the CAI.[144] These are mainly negative obligations, which would typically enjoy direct effect in the EU's legal order and might accordingly be viewed as not needing any act of implementation proper: Chinese investors would be able to directly challenge before the courts of the EU and its MS any existing measure incompatible with those provisions (e.g. unjustifiably

142 See Art. 207(6) TFEU: 'The exercise of the competences conferred by this Article in the field of the common commercial policy shall not affect the delimitation of competences between the Union and the Member States, and shall not lead to harmonisation of legislative or regulatory provisions of the Member States in so far as the Treaties exclude such harmonisation'. The point had already been explicitly made by the ECJ in Case 104/81 – Hauptzollamt Mainz v. Kupferberg&Cie (ECLI:EU:C:1982:137), at para 12: 'The measures needed to implement the provisions of an agreement concluded by the Community are to be adopted, according to the state of Community law for the time being in the areas affected by the provisions of the agreement, either by the Community institutions or by the Member States. That is particularly true of agreements such as those concerning free trade where the obligations entered into extend to many areas of a very diverse nature'. On this issue, see Piet Eeckhout, EU External Relations Law (2nd edn, Oxford University Press 2011) 327-328. Critically underlining the point in respect of the implementation by the EU of TSD Chapters, see Marín Durán (n 35), 1049-1054.

143 See Arts. 3(1)(a) and 31 TFEU, as well as Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff [1987] OJ L256/1.

144 CAI, Section II, in particular Arts. 2, 4, and 5. The EU's schedule of commitments and reservations can be found at <https://circabc.europa.eu/rest/download/12955cac-f6ce-4110-a585-592f37833da4?ticket=> accessed 18 April 2023.

discriminating against them or restricting access to the European market).[145] In line with recent EU FTA practice,[146] however, the CAI explicitly excludes the direct effect of its provisions.[147] Such core obligations would therefore unequivocally be in need for positive implementation by means of regulatory acts; and such regulatory acts could then be included in the staged implementation scheme, making their adoption or entry into force conditional on appropriate findings of compliance by China with its ISD commitments.

Still, whereas legal bases seem to be available for the EU to regulate in respect of market access, and NT and MFN obligations insofar as they concern establishment of investments,[148] NT and MFN provisions also protect 'the operation' of an investment. They thus place non-discrimination constraints on the exercise of general regulatory authority, which would only fall within the EU's competence to the extent that it regards exercises thereof falling within the scope of the EU's functionally attributed powers. In a number of instances, it would, accordingly, be the MS to be called upon to adopt such positive implementation measures. A number of further economic concessions made by the CAI

145 In fact, negative obligations typically qualify under the ECJ's main test for a provision contained in an international treaty signed by the EU to enjoy direct effect in the EU legal order, namely that the obligation therein contained be 'clear, precise, and unconditional'. For detailed reference to the case law on direct effect, see Eeckhout, (n 142) 331-355. Note, however, that economic liberalisation through the private enforcement of directly effective negative obligations has proved to imply significant information and transaction costs, potentially undermining its effectiveness, even in a highly integrated (and less politically sensitive) context such as the EU's internal market: see Jacques Pelkmans, 'Mutual Recognition in Goods. On Promises and Disillusions' (2007) 14 Journal of European Public Policy 699, 709-711. Accordingly, even if those obligations in the CAI enjoyed direct effect (that which they do not, as explained shortly below), positive implementation by means of regulatory acts repealing laws incompatible with the CAI's commitments would still be desirable, from the perspective of offering credible incentives for China to effectively implement its sustainability commitments.

146 See Aliki Semertzi, 'The Preclusion of Direct Effect in the Recently Concluded EU Free Trade Agreements' (2014) 51 Common Market Law Review 1125. The author explains the trend through reference to the increasing degree of incorporation of WTO law into the EU's FTAs. This would, if FTAs were allowed to enjoy direct effect within the EU's legal order, jeopardise the well-established ECJ case law denying direct effect to WTO law (on which see Eeckhout (n 142) 343-350), allowing the latter to enjoy de facto direct effect through the 'backdoor' of corresponding FTA obligations. Note that, however, such account does not hold as far as the CAI is concerned, since, dealing with investment, such latter agreement sharply diverges in scope from WTO law (which, as is well known, contains only very limited provisions on investment in the Agreement on Trade-Related Investment Measures (TRIMs Agreement) and the General Agreement on Trade in Services (GATS)).

147 See CAI, Section VI, Sub-Section 2, Art. 14: 'Nothing in this Agreement shall be construed as conferring rights or imposing obligations that may be directly invoked before the Parties' courts or tribunals'.

148 See Arts. 64(2) and 207(2) TFEU. Based on the latter, see for instance the so-called FDI screening Regulation (Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union [2019] OJ L79I/1), which establishes a framework of cooperation between MS in the phase of FDI screening which, though mainly procedural, however asserts a considerable EU power in respect of admission of investments into the EU.

will, indeed, most surely need to be implemented at the MS level, notably as regards the liberalisation of business travels.[149] Overall, the only CAI investment-related provision which appears to fall neatly within the scope of EU competence for implementation purposes is the obligation to allow investors from the counterpart to be involved in the activities of the respective standardisation bodies.[150] If this is the case, staged implementation should arguably resort to different techniques than legislation at the EU level, for it to be actually appealing to China as a reason to effectively commit to implementation of ISD obligations.[151] The most viable solution would then apparently be to condition upon the effective implementation of the ISD Section by China, to be ascertained by the GSP+-like means pointed out above, the entry into force, at the level of international law, of the primary obligations contained in the CAI's economic sections themselves. By so doing, it would not be the minute implementation activity which would become staged, as the

149 CAI, Section II, Art. 6 bis. This will require, for instance, the establishment of appropriate procedures to apply for authorisations to stay in the territory concerned for the periods envisaged in para 5 of the provision.

150 CAI, Section III, Sub-Section 2, Art. 7. Indeed, ever since the 1980s, the EU increasingly resorts to the so-called 'New Approach' to rulemaking, by which public regulatory acts only lay down minimum requirements (typically, concerning health and safety in the field of products), and leave it to technical standards set by private law bodies, chiefly composed of representatives from industry, to lay down detailed rules. These, through a number of arrangements, de facto acquire force of law. The cross-sectoral act laying down the general regulatory framework for the 'New Approach' is Regulation (EU) No 1025/2012 of the European Parliament and of the Council of 25 October 2012 on European standardisation, amending Council Directive 89/686/EEC and 93/15/EEC and Directives 94/9/EC, 94/25/EC, 95/16/EC, 97/23/EC, 98/34/EC, 2004/22/EC, 2007/23/EC, 2009/23/EC and 2009/105/EC of the European Parliament and of the Council and repealing Council Decision 87/95/EEC and Decision No 1673/2006/EC of the European Parliament and of the Council [2012] OJ L316/12. Note, however, that, strictly speaking, Regulation 1025/2012 does not lay down rules on the composition of recognised standardising bodies, which, as stated above, are bodies of a purely private nature, so that alternative measures to implement the provision would have to be envisaged (e.g. acting at the level of eligibility for access to the EU's financial support, laid down in Annex III to Regulation 1025/2012). Regulation 1025/2012 is an act based on Art. 114 TFEU: it is therefore part of the regulation of the internal market as a matter of shared competence, to the effect that, the EU having exercised its competence, MS are now prevented from regulating the matter in turn (see Arts. 2(2) and 4(2)(a) TFEU), and implementation could then only be carried out at the supranational level. For a concise introduction to the 'New Approach', see Paul Craig and Gráinnede Búrca, EU Law: Text, Cases, and Materials (6th edn, Oxford University Press 2015) 620-627. For elaboration on the increasing significance of standards as de facto legally binding provisions, see Harm Schapel, 'The New Approach to the New Approach: The Juridification of Harmonized Standards in EU Law' (2013) 20 Maastricht Journal of European and Comparative Law 521, and Annalisa Volpato, 'The Harmonized Standards before the ECJ: James Elliot Construction' (2017) 54 Common Market Law Review 591.

151 Combining regulatory action at the EU level with leaving it upon the MS to sparsely adopt the necessary implementing measures in the areas of their competence, only subject to the requirement of sincere cooperation pursuant to Art. 4(3) TEU, would indeed not seem to be a credible solution for China to accept positive conditionality. It would not offer any formal guarantees (save for the time-consuming and obviously inadequate infringement action which the Commission could bring against recalcitrant MS) that, once China complies with its ISD obligations, the economic concessions contained in the CAI will be smoothly implemented in the whole of the EU, because this would hinge upon the vagrancies of each MS' domestic political processes.

Netherlands and France assume, but rather the entry into force of the EU's liberalisation obligations at the level of international law in the first place. The basic idea of positive conditionality could thus be retained, while more easily accommodating the complex apportionment of regulatory competences between the EU and the MS.

The second point which should be considered is that the Dutch-French proposal, like the GSP+, envisages a form of negative conditionality applying once positive conditionality is satisfied. In fact, the mechanism proposed by the Netherlands and France enables the withdrawal of the tariff preferences granted through staged implementation if, after those preferential tariffs enter into force, the trading partner falls short of compliance with the relevant TSD provisions. Again, as shown by the GSP, this is relatively straightforward as far as tariffs are concerned: non-preferential tariffs can be easily reinstated by means of quick implementing or delegated acts of the Commission, be levied on all imports effected since the moment of the entry into force of the reinstatement, and cease being applied by customs authorities once the preferential regime revives. By contrast, regulatory concessions such as those contained in the CAI do more hardly lend themselves to such a kind of stop-and-go implementation, since they are meant to regulate the investment environment on the long term – not to mention the further competence difficulties implied by the decentralised mode of implementation which will most likely be needed in the CAI's case, as outlined above. The problem is picked up again in the next Section, dealing with another policy proposal recently put forward, which deals precisely with the appropriate response to violations of sustainability commitments in the context of the EU's commercial treaties.

4. RESPECT OF THE PARIS AGREEMENT AS AN 'ESSENTIAL ELEMENT' OF THE CAI?

Moving one step back to the European Green Deal, if one considers the paragraph thereof devoted to trade policy, they will find only one, real innovation in terms of substantive normative design. According to the European Green Deal, '[t]he Commission will propose to make the respect of the Paris [A]greement *an essential element* for all future comprehensive trade agreements',[152] and the commitment has been restated at the policy level ever since.[153] It is thus quite surprising that no mention of such a clause is to be

152 European Commission (n 3) 21. Emphasis added.

153 See, most importantly, the Communication replacing and updating the 'Trade for All' strategy (n 22): see European Commission, 'Trade Policy Review – An Open, Sustainable and Assertive Trade Policy' COM(2021) 66 final 12. The Dutch-French proposal also makes explicit reference thereto: see Dutch Government and French Government (n 100) 2.

found in the CAI, the negotiation process of which has, indeed, received a significant speed-up precisely after the Green Deal was adopted.[154] Be it as it may, the Commission does not clearly spell out in the Green Deal what the precise arrangements to achieve such outcome would be, nor which precise consequences should be attached thereto. The proposal does, however, quite explicitly draw upon the important precedent of human rights clauses in the EU's trade and development cooperation agreements concluded in the 1990s, to which attention should therefore be turned.

In fact, following two decades of incremental progress,[155] the Commission published in 1995 a Communication, soon endorsed by the Council,[156] meant to lay down a standard for all future cooperation treaties concluded by the EU with third countries. The Communication's objective was to ensure that the EU's relations with those countries aim at respecting and promoting human rights worldwide.[157] All the EU's cooperation treaties were from then on to include a clause so worded:

> Respect for the democratic principles and human rights established by [the Helsinki Final Act and the Charter of Paris for a New Europe] [as well as the principles of market economy] [as defined at the Bonn CSCE conference] inspires the domestic and external policies of the [EU] and of [third country] and *constitute an essential element of this agreement*.[158]

154 See the retrospective timeline of the negotiations published by the Commission at <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2115> accessed 18 April 2023.

155 An excellent account of the historical path leading to the emergence of the model which will be outlined below can be found in Lorand Bartels, *Human Rights Conditionality in the EU's International Agreements* (Oxford University Press 2005) 7-31.

156 See Conclusions of the 29 May 1995 Council's meeting, referenced in *Bulletin of the European Union* 5/1995, point 1.2.3 (<http://aei.pitt.edu/83937/1/BUL376.pdf> accessed 18 April 2023).

157 European Commission, 'Communication on the Inclusion of Respect for Democratic Principles and Human Rights in Agreements Between the Community and Third Countries', COM (95) 216 final. For scholarly analysis of the model envisaged in the Communication, see Der-Chin Horng, 'The Human Rights Cause in the European Union's External Trade and Development Agreements' (2003) 5 European Law Journal 677, 678-682. At more length, see Bartels (n 155) 81-127.

158 European Commission (n 157) 15 (emphasis added). The words between square brackets in the original, to point out that their content would be amenable to change depending on the particular circumstances of negotiation with each partner country. Note, indeed, that, as a matter of practice, the pool of international instruments used to sketch out into more detail the concepts of 'democratic principles', 'human rights', and 'market economy' for purposes of the clause was more composite (as was, in fact, the very same choice to include a reference to a market economy): see Bartels (n 155) 88-93.

The importance of such 'essential elements clause' lay in its interaction with the 'non-execution clause' also envisaged in the Communication. Under such provision, in the so-called 'Bulgarian' version which eventually prevailed in practice:[159]

> If either Party considers that the other Party has failed to fulfil an obligation under this Agreement, it may take *appropriate measures*. Before so doing, *except in cases of special urgency*, it shall supply the Association Council with all relevant information (…).[160]

Interpretive statements which the Communication recommended to annex to the agreements clarified, on the one hand, that 'cases of special urgency' were to cover instances where the essential element clause was breached,[161] and that 'appropriate measures' should be understood as 'measures taken in accordance with international law'.[162] In practice, this meant that, when the EU was satisfied that the essential elements clause had been breached, it could react unilaterally by, *inter alia*, suspending or terminating the operation of the treaty, pursuant to the grounds envisaged to this end in customary international law as reflected in the VCLT.[163] This was acknowledged by the ECJ in the land-

159 So named after the cooperation agreement with Bulgaria, where it was first used in the 1990s' wave of agreements which prompted the Communication. Since the Communication drew on earlier practice, indeed, reference was also made to a so-called 'Baltic' wording of the clause (so named after the agreements with the Baltic countries where it was introduced), which more straightforwardly read: '[T]he parties reserve the right to suspend this Agreement in whole or in part with immediate effect if a serious breach of its essential provisions occurs'. See European Commission (n 157) 15.

160 Ibid (emphasis added). The Association Council was a bilateral intergovernmental forum established by the agreements containing the clauses addressed here, so that the meaning of the clause was, in essence, that any action taken by a Party in response to an alleged breach by the counterpart outside of the 'cases of special urgency' could only be taken after political dialogue had proved unfruitful in settling the dispute.

161 Ibid 16.

162 Ibid.

163 Note, in fact, that the VCLT as such only regulates treaties concluded between States only, although it is commonly accepted that most of its provisions codify customary law. The relevant provisions are also replicated in the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, done at Vienna on 21 March 1986 (A/CONF.129/15), to which the EU could, in the abstract, be a Party. The EU has not, however, ratified it, nor has the Convention actually entered into force as between the 44 current Parties, due to the failure to reach the requisite number of ratifications (35 States: of the 44 Parties referred to, only 32 are States, and 12 are international organisations). For ease of reference, the provisions which will be referred to below will be quoted in their VCLT shape, albeit that, technically speaking, the EU could resort thereto only as a matter of customary international law. For other instances of what the Commission understood to be 'measures taken in accordance with international law', see European Commission (n 157) 17.

mark case of *Portugal v. Council*, where an essential elements clause was first interpreted.[164] In fact, although the question then generated some controversy,[165] the main significance of including an essential elements clause in an international agreement seems to be that

164 ECJ, Case C-268/94 – *Portugal v. Council* (ECLI:EU:C:1996:461), reading, at para 27: 'A provision such as [the essential elements clause of the cooperation agreement with India] may be, amongst other things, an important factor for the exercise of the right to have a development cooperation agreement suspended or terminated where the non-member country has violated human rights'. For a detailed account of the case, see Eeckhout (n 142) 130-136.

165 This was because, strictly speaking, Art. 60(3)(b) VCLT requires 'the violation of a provision *essential to the accomplishment of the object or purpose* of the treaty' (emphasis added), which is to be determined objectively, by considering the agreement as a whole. Under this line of reasoning, essential elements clauses might not necessarily qualify as essential to the accomplishment of the agreement's object or purpose. In fact, an analysis of most EU agreements featuring them would indeed show that they are rather understood as a premise thereof, which however remains external to the object and purpose proper: see Bartels (n 155) 83-106. This argument is predicated to be confirmed by *Portugal v. Council* (n 164) itself: indeed, in the excerpt quoted above, the ECJ referred to the grounds for suspension and/or termination of treaties in a quite generic manner, without specifically mentioning Art. 60(3)(b) VCLT. This is in contrast to the view taken by the AG in Case C-268/94 – *Portugal v. Council*, Opinion of Advocate General La Pergola (ECLI:EU:C:1996:207), para 28, footnote 33, which specifically mentioned that provision, so that the different path followed by the ECJ's reasoning sounds much like an implicit disavowal. In Bartels' account, the violation of an essential elements clause would rather justify resort to Art. 60(3)(a) VCLT, allowing a treaty to be suspended or terminated when the counterpart puts in place 'a repudiation of the treaty not sanctioned by the [VCLT]'. It might be interesting to notice, in fact, that when the EU suspended the operation of a treaty based on general international law, it never claimed to exercise the right under Art. 60(3)(b) VCLT (neither, however, under Art. 60(3)(a) VCLT). In the most relevant case, that of Yugoslavia (see 91/586/ECSC, EEC: Decision of the Council and the Representatives of the Governments of the Member States, meeting within the Council of 11 November 1991 suspending the application of the Agreements between the European Community, its Member States and the Socialist Federal Republic of Yugoslavia [1991] OJ L315/47), the EU claimed to be resorting to Art. 62 VCLT's *rebus sic stantibus* clause (see Decision 91/586, third 'Whereas'); and this reasoning was upheld by the ECJ in Case C-162/96 – *Racke v. Hauptzollamt Mainz* (ECLI:EU:C:1998:293), paras 53-57. In the more recent case of Syria, Art. 62 VCLT still seems to be the chosen legal basis for suspension, but is mentioned only implicitly (see 2011/523/EU: Council Decision of 2 September 2011 partially suspending the application of the Cooperation Agreement between the European Economic Community and the Syrian Arab Republic [2011] OJ L228/18, 'Whereas' no. (9)). While intriguing, the point is, however, arguably relevant from a merely theoretical point of view. Moreover, and most importantly, Bartels' argument could hardly be made in the case of the CAI, since it cannot be denied that sustainable development forms, in all respects, integral part of the CAI's object and purpose. Section IV, Sub-Section I, Art. 1 explicitly states that the Parties 'reaffirm their commitment to promote the development of investment in such a way as to contribute to the objective of sustainable development, for the welfare of present and future generations, and to ensure that this objective is integrated and reflected in their investment relationship', and 'recognize that economic development, social development and environmental protection are interdependent and mutually reinforcing dimensions of sustainable development'. For further confirmation, also see the CAI's Preamble and Section I, Art. 1(2). Accordingly, the following assumes that the main legal effect of an essential elements clause devoted to the Paris Agreement in the CAI would be that of enabling resort to Art. 60(3)(b) VCLT in the face of a breach thereof, irrespective of the debate held at the time of human rights-based essential elements clauses.

of enabling resort to Art. 60(3)(b) VCLT,[166] under the terms of which:

> 1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part. (…)
>
> U73. A material breach of a treaty, for the purposes of this article, consists in: (…)
>
> (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.[167]

The purpose of Art. 60 VCLT is that of safeguarding the balance between the rights and obligations of the parties to a treaty, relieving an innocent party from the obligation to comply whilst being harmed by non-compliance of the counterpart.[168] At the same time, it aims at safeguarding the stability of treaty regimes, by subjecting to demanding con-

166 That Art. 60(3)(b) VCLT reflects customary law, so that the EU can resort thereto (see n162), is essentially undisputed: see, also referring to the pertinent case law of the International Court of Justice (ICJ), Thomas Giegerich, 'Article 60 – Termination or Suspension of a Treaty as a Consequence of Its Breach' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2012) 1048. On a partially doubtful note, however, see Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Brill Publishing 2008) 749-750.

167 Note that, however, Art. 60 VCLT is a default rule, which is in principle applicable irrespective of any treaty provision to this end: an essential elements clause would therefore have a primarily clarificatory value. On the other hand, Art. 60(4) VCLT, stating that Art. 60 VCLT is 'without prejudice to any provision in the treaty applicable in the event of a breach', is generally interpreted as meaning that application of the VCLT's/customary general rule is actually *precluded* when a treaty-based *lex specialis* exhaustively regulates responses to a treaty breach, including through the establishment of a DSM: see Giegerich (n 166) 1041-1042, as well as Christian Tams, 'Treaty Breaches and Responses' in Christian Tams, Antonios Tzanakopoulos and Andreas Zimmermann (eds), *Research Handbook on the Law of Treaties* (Edward Elgar Publishing 2014) 496. Accordingly, an essential elements clause featured in a treaty also including as elaborate a DSM as the CAI's might also be significant in clarifying that, by envisaging a DSM, the Parties are not waiving their *lex generalis*rights under Art. 60(3)(b) VCLT. Such a pre-empting effect of treaty provisions *qua lex specialis*does not, however, seem to be compelled by the VCLT's language, and the contrary view was, in fact, taken by the ECJ in Opinion 2/15 (n 12), para. 161. Critically on this passage of the Opinion, on the other hand, see Marín Durán (n 35) 1046-1047.

168 See Giegerich (n 166) 1022-1024.

ditions the exercise of a right of suspension/termination which is unilateral in essence.[169] This is further accomplished by the application of some procedural requirements laid down in Arts. 65-67 VCLT, aiming in essence at preventing the invocation of a material breach from producing immediate effects. However, it is more ambiguous whether those provisions, contrary to the substantive conditions enshrined in Art. 60 VCLT, codify customary law.[170] In fact, according to the ECJ, they do not, so that, in legal relationships not regulated by the VCLT (such as, indeed, those involving the EU), it would be enough for the interested Party to notify to the counterpart its intention to avail itself of the right to suspend/terminate the treaty for the suspension/termination to be legally effective.[171]

Incorporating a provision into the CAI, to the effect that respect for the Paris Agreement would be explicitly qualified as an essential element thereof, would thus enable the EU to unilaterally suspend or terminate the CAI itself if China fell short of compliance with its commitments under that milestone environmental treaty.[172] This would, inter alia, imply relieving the EU, temporarily (in the case of suspension) or permanently (in the event of termination), from its obligations to grant Chinese investors market access, NT, MFN treatment, and membership in European standardisation bodies, as referred to above.[173] To more fully assess the practical implications of the point, however, it is useful to separately consider the possibility of suspension, on the one hand, and that of termination, on the other hand. In the former case, it is indeed hard to figure out how suspension could be easily implemented in practice. As recalled in the previous Section, the CAI's concessions are mainly meant to provide guarantees on the overall regulatory environment in the long term (with the possible exception of obligations on admission of investments

169 Ibid. On the tension with legal stability implicit in the VCLT's options for unilateral action, see Sotirios-Ioannis Lekkas and Antonios Tzanakopoulos, 'Pacta Sunt Servanda versus Flexibility in the Suspension and Termination of Treaties' in Tams, Tzanakopoulos and Zimmerman (eds) (n 167), 316-326.

170 See Giegerich (n 166) 1048; Villiger (n 166) 813-814.

171 See *Racke v. Hauptzollamt Mainz* (n 165), paras. 58-59.

172 For the internal procedure under which the decision to suspend the agreement should be taken as a matter of EU constitutional law, see Art. 218(9) TFEU (on which see Eeckhout (n 142) 209).

173 See Arts. 70 and 72 VCLT. Note, however, that, under the terms of Art. 60(1) VCLT, whereas termination can only regard the whole of the treaty, suspension can affect it 'in whole or in part': see Villiger (n 166) 740-741. Art. 70(1)(b) VCLT, on its part, clarifies that termination 'does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination' (emphasis added). There is no clarity, however, as to the extent to which those provisions also safeguard the legal situation of individuals, such as the investors who would benefit in the concrete from execution of the CAI, who are not parties to the treaty: see Stephan Wittich, 'Article 70 – Consequences of the Termination of a Treaty' in Dörr and Schmalenbach (eds) (n 166) 1206-1208. Villiger does indeed firmly maintain that 'rights and obligations of individuals and of third States not parties to the treaty are not covered': see Villiger (n 166) 873.

and those on temporary stay for business purposes).[174] It is, indeed, hardly conceivable that, for example, the NT obligation be suspended temporarily (but the same also goes for other obligations such as those concerning MFN treatment and the transparency of regulatory processes). This would imply that the EU or the MS, as the case may be, could establish differential treatment in, say, administrative requirements for Chinese investors when compared with European investors for a given period, save for passing a new bill restoring non-discrimination once application of the CAI would be resumed. Whereas this would be impractical and time-consuming even on its own terms, the complexity of engaging in such a regulatory policy is further exacerbated by the allocation of competences between the EU and the MS surveyed in the previous Section. On the other hand, termination of the CAI would be more straightforward: the permanent release of the EU from those regulatory constraints would justify a departure from the standards of protection afforded in compliance with the treaty which, at least from a practical point of view, would be unproblematic, because the changes so effected could legitimately remain perpetually in force. Termination of a treaty is, however, a most radical response to a breach, which would be justified in extreme cases only. In fact, by its very nature, termination is only available once in the whole lifecycle of a treaty. Can this be said to be an appropriate means for the enforcement of the ISD Section?

It is submitted that the answer is in the affirmative, chiefly owing to the particular nature of the Paris Agreement.[175] The core substantive obligations thereby assumed are those concerning 'nationally determined contributions' (NDCs):[176] countries are to unilaterally state goals concerning climate change mitigation which they intend to achieve, with a view to implementing the principle of common but differentiated responsibilities and respective capabilities and coordinating global efforts in combating climate change. NDCs are to be updated at least every five years,[177] and are subject to a requirement of progressive upscaling, as well as to an aspirational undertaking that they 'reflect the highest possible

174 See (n 147) and (n 148) and surrounding text. Indeed, such obligations are eventually implemented by means of decisions in concrete cases which are of an administrative nature akin to those by regarding tariffs, so that, just like the latter (see n142 and surrounding text), they can be temporarily suspended more smoothly: for instance, all applications for admission of an investment filed by Chinese investors during the period of suspension of the CAI might be refused, with no prejudice for a revival of the liberalisation regime (i.e., for resuming the practice of admitting such applications as a matter of legal obligation) upon cessation of the suspension itself.

175 For an overview of the Paris Agreement, see Jorge E. Viñuales and Pierre-Marie Dupuy, *International Environmental Law* (2nd edn, Cambridge University Press 2018) 184-197. At more length, see Daniel Bodansky, Jutta Brunnée and Lavanya Rajamani, *International Climate Change Law* (Oxford University Press 2017) 209-250.

176 See Paris Agreement (n 4), Art. 3.

177 Ibid., Art. 4(9).

ambition' at all times.[178] The legal value of the pledges contained in the NDCs as such is, on the other hand, highly contested, but a number of plausible views have been submitted to the effect that they might be legally binding.[179] Be that as it may, a widely accepted baseline seems to be that there exists at least an obligation of conduct to make one's best efforts to effectively implement those commitments.[180] Addressing such a crucial and debated question manifestly falls outside the scope of this work, which proceeds on the assumption that NDCs do indeed place such an obligation of conduct upon the Parties submitting them.[181]As a consequence, falling short of reasonable efforts with a view to achieving them might be qualified as a 'breach' of the Paris Agreement, relevant to Art. 60(3)(b) VCLT when applied to the CAI, in light of the proposed essential elements clause. The pivotal aspect which might operationalise that clause is the fact that most NDCs are laid down along with a date set for the accomplishment of their pledges. In its first NDC submission, for instance, China has undertaken a number of ambitious commitments to be achieved by 2030.[182] If by that date it were possible to determine that China's efforts were negligently insufficient to achieve its NDCs, the EU could invoke Art. 60(3)(b) VCLT to terminate the CAI. Possibly, the EU could reach such an outcome

178 Ibid, Art. 4(3).

179 That is, they might be directly binding as unilateral acts, or indirectly binding, as elements to be taken into account, pursuant to the VCLT rules on treaty interpretation, when interpreting the United Nations Framework Convention on Climate Change 1992 (1771 UNTS 107) (UNFCCC), in the context of which the Paris Agreement was adopted. See Viñuales and Dupuy (n 175) 190-191.

180 Based on Art. 4.2 of the Paris Agreement (n 4), under which 'Parties *shall* pursue domestic mitigation measures, *with the aim of achieving* the objectives of [their NDCs]' (emphasis added). See Bodansky, Brunnée, and Rajamani (n 175) 231-232.

181 From this perspective, it is indeed remarkable that the CAI envisages, in Section IV, Sub-Section 2, Art.6(a) (see text surrounding n 84), that 'each party shall (…) effectively implement the UNFCCC and the Paris Agreement adopted thereunder, *including its commitments with regard to its Nationally Determined Contributions*' (emphasis added). The provision's language might even go so far as to be interpreted as crafting achievement of the NDCs, in the context of the CAI's obligation mirroring them thereby created, as an obligation of result.

182 For instance, 'to achieve the peaking of carbon dioxide emissions around 2030 and making best efforts to peak early' (a crucial component of the Paris Agreement's overall vision: see Art. 4(1)); 'to lower carbon dioxide emissions per unit of GDP by 60% to 65% from the 2005 level'; and 'to increase the share of non-fossil fuels in primary energy consumption to around 20%'. China's first NDC is available at <https://unfccc.int/sites/default/files/NDC/2022-06/China%27s%20First%20NDC%20Submission.pdf> accessed 18 April 2023; for the goals mentioned here, see 5. In late October 2021, after the first draft of this paper had been completed, China has further expanded on its commitments in an update to its first NDC: see (in unofficial English translation) <https://unfccc.int/sites/default/files/NDC/2022-06/China%E2%80%99s%20Achievements%2C%20New%20Goals%20and%20New%20Measures%20for%20Nationally%20Determined%20Contributions.pdf> accessed 18 April 2023. Of high significance is the commitment to achieving carbon neutrality before 2060: see 2. For a 'user-friendly' summary of China's NDCs, also monitoring action taken to comply with the commitments thereby taken, see <https://climateactiontracker.org/countries/china/> accessed 18 April 2023.

in light of the findings of the monitoring and enforcement systems in-built in the Paris Agreement, so as to shelter the decision from any suspect of strategically-oriented unilateralism.[183] Under such circumstances, the termination's radicality could indeed be significantly put in perspective: it would sanction the failure, on the part of the CAI, in achieving, in the long run of (almost) a decade of implementation, its stated objective of fostering the interpenetration of economic and environmental progress. Considering how crucial the international community's efforts in mitigating climate change are, putting an economic agreement to an end would well be justified if it were proved wrong in its optimistic assumptions upon expiry of the deadline set not only by China, but also by the UN as a whole through the SDGs, to impress change in global economic relations

and beyond. The CAI could then be replaced by a more ambitious investment agreement, going harder on the environmental side.

From this perspective, and perhaps counterintuitively, the 'extreme' option of terminating the CAI might be more appropriate than sticking to less assertive solutions to enforce its ISD Section. Indeed, and closing the circle, the finding on the practical difficulties which suspension would meet in the CAI's particular case also enables us to answer the question asked at the end of the preceding Section. Save for the limited instances identified above,[184] applying negative conditionality to keep on providing incentives for China to comply with ISD commitments after positive conditionality is exhausted is arguably impractical. In fact, as a matter of practice, this would be the same as suspending part of the CAI under Art. 60 VCLT. This is problematic. A 'stick' complementing positive conditionality's 'carrot' could still be available as regards the environmental component if the

183 See (n 127) and surrounding text. The Paris Agreement does, indeed, envisage a number of tools meant to facilitate monitoring of action taken by the parties in achieving the Agreement's objectives. Pursuant to Art. 13, each Party is to periodically submit reports on action taken at the national level (see Art. 13(7)), which is to undergo technical review by a panel of independent experts (see Arts. 13(11) and 13(12)). Moreover, a permanent 'Committee to facilitate implementation and promote compliance' was established in 2018, pursuant to Art. 15(2), which is also to oversee action taken by the Parties in pursuing the Agreement's objectives. The Committee's findings and recommendations may be also relied upon in independently assessing (here) China's environmental performance (see UNFCCC, Conference of the Parties serving as the meeting of the Parties to the Paris Agreement, Decision 20/CMA.1). Finally, Art. 24 enables resort to pacific means of settlement of disputes concerning the Agreement's interpretation or application, possibly including submission of a dispute to the ICJ; again, at least where those means are of a judicial or quasi-judicial nature, the finding of a breach would be assisted by sufficient guarantees for it to be taken as a basis for a termination decision. For an overview of the institutional devices to monitor the implementation of the Paris Agreement, see Bodansky, Brunnée, and Rajamani (n 175) 242-246.

184 See (n 174) and surrounding text.

Art. 60 VCLT-based termination were ensured through the essential elements clause,[185] but the machinery for ensuring compliance with labour commitments would thereby suffer from a significant *vulnus*. This would still reiterate, in essence, the unsatisfactory *status quo* of TSD Chapters, and of the ISD Section at present – there would be no sanction at all connected with non-compliance in regard to labour standards. Further research is arguably needed in order to develop creative solutions to the problem.[186] Including an essential elements clause in the CAI referencing the Paris Agreement seems, however, a solution already at hand, thanks to the high-level commitment taken by the Commission, and political efforts to this end can therefore be made already in the short term.

5. CONCLUDING REMARKS

The EU-China CAI is an extremely important treaty for investment liberalisation worldwide. Especially upon being complemented by the parallel treaty on substantive standards of protection for investors currently under negotiation, it will lay down a legal framework governing and promoting investment flows between two of the hugest markets in the world, mobilising possibly unprecedented flows of capital. Given its importance, it is most disappointing that its ISD Section is fully in line, substantively as well as institutionally and procedurally, with TSD Chapters in the EU's FTAs – a model which, on the implementation side, is almost ubiquitously deemed to be unsatisfactory, and which the Commission itself has committed to reforming. This is, perhaps, understandable if one accepts the premise espoused by the EU in the public narrative surrounding the negotiations. If, in fact, Chinese investors in the EU have indeed benefitted already from a remarkable degree of openness whereas European investors in China confront a number of barriers which the economic concessions of the CAI aimed at overcoming, it may be hypothesised that the EU was not in a position to make more far-reaching demands on the sustainable development side.[187] Whether this political narrative corresponds with

185 Albeit that the Paris Agreement, while most certainly of the utmost importance, is only one amongst the environmental treaties ratified by China, which are therefore subject to the ISD Section's minimum-levels obligation, and would also need a negative conditionality mechanism capable of providing incentives towards their implementation upon fulfilment of positive conditionality (see n84 and surrounding text). On the other hand, since it concerns ends (climate change mitigation and adaptation) and not means, it is cross-sectoral in nature, so that it might be regarded as sufficiently comprehensive for the purpose of making available a sanction connected with non-compliance with environmental obligations.

186 See, for instance, Bronckers and Gruni (n 81) 1616-1618, proposing to adopt financial penalties and/or smart sanctions against individuals or undertakings involved in egregious violations of labour and/or environmental standards, to be authorised pursuant to the regular DSM envisaged in FTAs (as outlined inSection 6.2.1 above). Contra: Marín Durán (n 35) 1060-1061.

187 See (n 20) and surrounding text.

economic and legal realities would require more detailed knowledge and empirical research which does not appear to have been carried out yet, and the present paper accordingly remains agnostic on the issue. In any event, accepting such a line of reasoning would problematically imply accepting the higher importance of economic liberalisation over environmental and social protection, contrary to the current thinking on sustainable development.[188]

Be it as it may, considering that the CAI might have been the first occasion for the Commission to abide by the European Green Deal's commitment to step up the synergy between environmental and trade policies, one cannot but be dismayed. It is particularly striking that the Paris Agreement was not expressly qualified as an essential element of the CAI, given the high degree of political investment made by the Commission in this respect.[189] It is, however, the overall failure to consider any form of change in the implementation machinery of sustainability commitments, of which the Dutch-French positive conditionality proposal is just one example, which gives the impression that the Commission preferred resting on its low-profile (and hence more easily acceptable to China) prior practice, failing to grasp the significance of stepping up the level of engagement if the international community is to achieve a just transition to a greener economy. Borrowing an evocative image from a well-known musical masterpiece (cited in the epigraph to this chapter),[190] it can therefore be said that, in the face of ubiquitous criticism of the existing TSD promotional model, the EU has decided to stay 'comfortably numb'. It preferred to quietly reiterate the earlier and uncontroversial TSD practice, over having to face the political contestation which could have surrounded the firmer and more demanding negotiation stance to which, however, the EU itself had repeatedly committed.

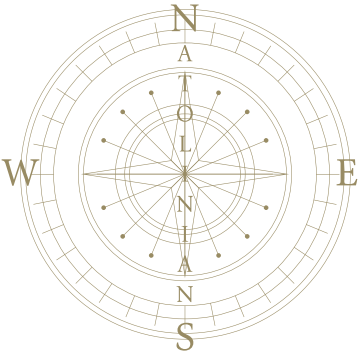
Such position can, however, still be reversed. The CAI has not even been signed, and the geopolitical tension surrounding its conclusion[191] can paradoxically turn out to provide a new window of opportunities, to the extent that it gives time for more extensive public debate on the CAI to take place. Indeed, mobilisation of social and political forces can lead ISD concerns to be taken more seriously in the CAI's final version - a contribution to a veritable 'trade and investment policy based on values', much needed in the defining years of mankind's fight against climate change.

188 See (n 18) and surrounding text.

189 See (n 153) and surrounding text.

190 In the conviction that, within certain limits, this can summarise with uniquely evocative force the scholarly point made in the present paper: see Alex B. Long, '[Insert Song Lyrics Here]: The Uses and Misuses of Popular Music Lyrics in Legal Writing' (2007) 64 Washington and Lee Law Review 531, particularly at 555 ff.

191 See (n 25).



CHAPTER 7

Just Transition in EU External Action: Conceptualizing EU Efforts to Promote Just Transition to a Global Low-carbon Future

BY RONAN MCLAUGHLIN

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Ronan is now based in Glasgow, Scotland, where he works as a Policy Adviser in the Scottish Government's Trade Policy Division. While now professionally focused on international trade policy, Ronan maintains an interest in just transition and wider energy/environmental issues, something which he was recently able to explore further through a short-secondment at the Vienna-based Energy Community in early 2023.

1. INTRODUCTION

In March of 2021, Europe reached a key milestone in efforts to phase-out polluting and carbon intensive coal from its energy systems, with half of the continents 324 coal-fuelled power plants having closed or announced a retirement date before 2030.[1] This is a trend also mirrored beyond Europe. In the USA, it has now been over 10 years since coal was the primary fuel for electricity generation,[2] while in China, the world largest coal user, consumption has plateaued over the last several years, remaining below a peak reached in 2013.[3]

Developments such as the decline of the coal industry are among a number of trends driven by decarbonisation efforts that are leading to concerns about potentially negative social and economic effects on certain regions, workers, and communities,[4] There is growing recognition that increasingly widespread objectives to achieve net-zero carbon economies by the middle of this century will have major implications on jobs, skills, employment prospects and income distribution.[5] Given this, there has therefore also been a corresponding growth in interest in how the low carbon transition can be implemented in a fair and politically smooth way[6] and a recognition that neglecting such considerations could lead to a backlash which slows or even reverses this essential transformation.[7] On this, just transition has become an increasingly important and recognised concept.

1 Kira Taylor, 'Europe halfway towards closing all coal power plants by 2030' (2021) Euractiv (23 March 2021) <https://www.euractiv.com/section/climate-environment/news/europe-halfway-towards-closing-all-coal-power-plants-by-2030/> accessed on 18 April 2021.

2 David Cherney, 'Coal's Unstoppable Decline Means Carbon Emissions From Electricity Will Keep Dropping For Years To Come' (2021) Forbes <https://www.forbes.com/sites/davidcherney/2021/01/13/coal-producers-affirm-us-carbon-emissions-from-electricity-will-keep-declining/?sh=3f97701b2ba1>.

3 International Energy Agency, 'Coal 2020: Analysis and forecast to 2025' (December 2020) <https://www.iea.org/reports/coal-2020/demand>, accessed on 17 April 2021.

4 Ajay Gambhir, Fergus Green, Peter Pearson, 'Towards a just and equitable low-carbon energy transition' (2018) 26 Grantham Institute Briefing Paper.

5 Béla Galgóczi, 'Just transition on the ground: Challenges and opportunities for social dialogue' (2020) 26 (4) European Journal of Industrial Relations 367.

6 Fergus Green and Ajay Gambhir, 'Transitional assistance policies for just, equitable and smooth low-carbon transitions: who, what and how?' (2020) 20 (8) Climate Policy 902.

7 Gambhir, Green, Pearson (n 4).

Although contested,[8] the concept of just transition has grown greatly in use and popularity in recent years and is now promoted by an increasingly wide range of actors.[9] With roots in North American labour movements of the 1970s,[10] it can be said that just transition has today been recognised as an international norm, embodied in the work of the United Nations and other international organisations.[11] While the numerous competing understandings and definitions of just transition will be explored later in this paper, the consideration of the concept advanced by Anabella Rosemberg provides a useful starting point for this analysis:

> The concept of just transition – as a strategy aimed at protecting those whose jobs, incomes and livelihoods are at risk as consequence of climate policies, or more broadly as the world pursues more sustainable pathways – presents the advantage of engaging with those workers and communities most affected, giving them an active role in rethinking their future.[12]

Just transition can therefore be broadly considered as a range of policies aimed at protecting workers, communities and regions facing socio-economic challenges as a result of the low carbon transition and seeking to promote their inclusion in transition planning efforts.

In the last few years, the EU has become increasingly conscient of these developments, the need to advance the low carbon transition and to mitigate the social and economic consequences for citizens, regions and industries. Just transition was recently prominently endorsed and institutionalised by the European Commission through its flagship European Green Deal (EGD), which established a Just Transition Mechanism designed to assist sectors and regions currently dependent on carbon-intensive industries.[13] The growth in just transition as a policy priority within Europe, is mirrored to some extent by the EU's action on this internationally. The European Union is a key advocate of

8 Edouard Morena, Dunja Krause, Dimitris Stevis, 'Introduction: The genealogy and contemporary politics of just transitions' in Edouard Morena, Dunja Krause, Dimitris Stevis, Just Transitions: Social Justice in the Shift Towards a Low-Carbon Environment (Pluto Press 2020) 5.

9 Ibid. 4.

10 Ibid. 9.

11 Gambhir, Green, Pearson (n 4).

12 Anabella Rosemberg, 'Policy Analysis Brief: Strengthening Just Transition Policies in International Climate Governance' (2017) 1 The Stanley Foundation.

13 Claudia Strambo, 'Just Transition and the geopolitics of decarbonisation in the EU' (2020) 3 Stockholm Environment Institute.

and party to the 2015 Paris Agreement,[14] which contains reference to just transition in its preamble.[15] Furthermore, the European Commission and many EU Member States have also endorsed the 2018 Just Transition Declaration[16] and the European Commission has recently begun to roll out the Initiative for Coal Regions in Transition in the Western Balkans and Ukraine.[17]

Corresponding to the growth of the concept and its move towards the centre of policy debates, academic interest in just transition has also grown from the early 2000s.[18] Given the new salience of the topic in EU policy, there has also been increased attention as to how just transition is being operationalised within the EU. However, while much of this attention has been focused on the internal dimensions of such policies, just transition in the EU's external energy, environmental and climate policy is less well-researched. This paper seeks to address this gap, by asking how and why does the EU engage externally on this issue, and what version of just transition is advanced when it does so?

In doing so, this paper builds on a wealth of literature and academic studies including those by Dimitris Stevis,[19] Romain Felli,[20] Béla Galgóczi,[21] Anabella Rosemberg.[22] Building on these works, this paper contributes by conceptualising just transition within EU policy making, mapping this onto the broader debate on the variations of the concept, and then exploring EU international action in this policy area.

14 United Nations Framework Convention on Climate Change, 'Decision on the Adoption of the Paris Agreement' (29 January 2016) FCCC/CP/2015/10/Add.1.

15 Ibid.

16 United Nations Framework Convention on Climate Change, 'Solidarity and Just Transition Silesia Declaration.' COP24 Katowice (2018) <https://cop24.gov.pl/presidency/initiatives/just-transition-declaration/> accessed 10 April 2021.

17 European Commission, 'Initiative for coal regions in transition in the Western Balkans and Ukraine' (21 April 2021) <https://ec.europa.eu/energy/topics/oil-gas-and-coal/coal-regions-in-the-western-balkans-and-ukraine/initiative-coal-regions-transition-western-balkans-and-ukraine_en#:~:text=The%20Initiative%20for%20coal%20regions,that%20this%20transition%20is%20just> accessed on 25 April 2021.

18 Morena, Krause, Stevis (n 8) 6.

19 Dimitris Stevis and Romain Felli, 'Global labour unions and just transition to a green economy' (2015) 15 (1) International Environmental Agreements: Politics, Law and Economics 29.

20 Romain Felli, 'An alternative socio-ecological strategy? International trade unions' engagement with climate change'(2014) 21 (2) Review of International Political Economy 372.

21 Galgóczi (n 5) 370.

22 Rosemberg (n 12).

To do so, a wealth of secondary literature has been studied, including from above mentioned authors and others. Interviews with policy makers, officials and experts were also a fundamental part of this research, including several with key individuals working in this area in the European Commission and those working at the frontline of the case studies examined here. Finally, a comprehensive analysis of EU policy documents, strategies and legislation related to just transition was also undertaken.

The paper provides an initial overview of the history of just transition and an examination of contemporary interpretations of the term, before considering its growth within the EU and then positing a conclusion as to the dominant conceptualization of the concept in EU policy making today. Section 2 will subsequently consider the international dimension through examining two case studies:

a. the negotiation and signing of the 2018 Solidarity and Just Transition Silesia Declaration, and

b. the initiative for coal regions in transition in the Western Balkans and Ukraine.

The paper endeavours to explore and illuminate Just Transition in contemporary EU policy-making, and external action in particular. It will thereby offer an early analysis into an emerging area which can be expected to grow in importance in coming years.

2. JUST TRANSITION AND THE EUROPEAN UNION

While the history of just transition stretches back over fifty years,[23] its appearance in global[24] and EU level policy debates is far more recent.[25] In order to understand just transition in EU policy making it is necessary to first briefly trace the origins, development and contemporary interpretations of the term, before relating this to the iterations of just transition in the internal policy and activity of the European Union today. This will then serve as a basis for subsequent analysis of external dimensions of this question, explored later in the paper.

23 Morena, Krause, Stevis (n 8) 9.

24 Béla Galgóczi, Just Transition towards environmentally sustainable economies and societies for all (International Labour Organisation 2018).

25 Ioanna Theodosiou and Nikos Mantzaris, *Just Transition: History, Development and Challenges in Greece and Europe* (The Green Tank 2020).

2.1. The growth of just transition

Trade Unions in North America are most often credited with the first development of what would eventually become known as just transition. In particular, Tony Mazzocchi, an American trade unionist, is generally considered to be the father of the idea.[26] Tony Mazzocchi accepted the need to phase out certain jobs and industries, given their impact on people and the environment,[27] but argued against the jobs versus environment discourse, believing that an environmentally friendly economy also had the potential to support productive employment.[28] Accordingly, he called for the creation of a *Superfund for Workers* to support and provide training for those workers whose jobs had become obsolete due to environmental regulation.[29] From here, just transition ideas began to spread through organised labour in the USA and around the world[30] and the growing integration of labour and environmental concerns was particularly notable among trade unions in Spain, the UK and Australia throughout the mid-1990s and early 2000s.[31]

Around this period, just transition also began to appear in global-level policy debates, initially still within the sphere of organised labour including on the agenda of the International Trade Union Confederation,[32] but then more broadly in forums such as the UNFCCC Conference of the Parties (COP) discussions[33] and in reports by the United Nations Environment Programme (UNEP).[34] Over the past ten years, just transition has since moved to the heart of global debates on how to address climate change and manage the transition to low carbon economies. As well as this growing global recognition and attention paid to just transition, the concept is also increasingly embedded in regional, national and sub-national level governance, with actors such as the EU, Spain and Colorado having developed initiatives in this area.[35] Finally, a number of recent events and movements have also brought the issues associated with just transition to the forefront

26 Morena, Krause, Stevis (n 8) 9.

27 Ibid. 10.

28 Stevis, Felli (n 19) 32.

29 Galgóczi (n 5).

30 Dimitris Stevis and Romain Felli, 'Planetary just transition? How inclusive and how just?' (2020) 6 Earth System Governance 2.

31 Morena, Krause, Stevis (n 8) 14.

32 Ibid.

33 Galgóczi (n 24).

34 Morena, Krause, Stevis (n 8) 16.

35 Ibid.

of public consciousness. This is notably true of the *gilets jaunes* protests in France, which highlighted how green policies can be met with public resistance when they fail to be inclusive and are seen as unfair.[36] It is therefore clear that over the last fifty years just transition has grown to become a globally relevant concern driving responses to the climate crisis at all levels of policy making.

2.2. A contested concept

Despite this growing acceptance and recognition of just transition, it is important to reiterate that the term remains contested, with numerous different foci and competing definitions. In order to discuss these differing considerations, and to explore the diversity of understandings of the term, it is useful to begin with an examination of the ILO's "Guidelines for a just transition towards environmentally sustainable economies and societies for all", which have been described as a "definitive model for just transition",[37] though this is of course contested. Following this, a consideration of a broad range of perspectives which can broadly be described as critical will then be undertaken, allowing for a spectrum of just transition definitions to be presented onto which the version ascribed to by the EU can then be mapped.

Published in 2015, the ILO guidelines set out to provide "non-binding practical orientation to Governments and social partners".[38] Setting out six key guidelines the document highlights the centrality of social consensus and dialogue on the transition pathway,[39] as well as consideration of gender dimensions, the need for coherence across policy areas, the priority of the creation of more decent jobs and the importance of international cooperation,[40] Commenting on the guidelines, Senior Researcher Béla Galgóczi states "The ILO Guidelines highlight the importance of securing the livelihoods of those who might be negatively affected by the green transition and also stress the need for societies to be inclusive, provide opportunities for decent work for all, reduce inequalities and effectively eliminate poverty".[41] Moreover, Samantha Smith, Director of the Just Transition Centre

36 Laima Eicke et al., 'Countering the risk of an uneven low-carbon energy transition'(2019) 8 IASS Policy Brief 8.

37 Samantha Smith, 'Just Transition: A report for the OECD' (Just Transition Centre 2017) 3; International Labor Organization, 'Guidelines for a Just Transition Towards Environmentally Sustainable Economies and Societies for all.' (2015)

38 Galgóczi (n 5) 3.

39 Ibid. 5.

40 Ibid. 6.

41 Ibid. 3.

has described the ILO's vision as "a systemic and whole of economy approach to sustainability",[42] It can therefore be said that broadly speaking the ILO guidelines outline a vision of just transition which is conceived of as a broad and inclusive process, tailored to local circumstances, and seeks to address associated societal aims such as the elimination of poverty and the provision of more decent jobs.

While the ILO guidelines provide an important framework that has been endorsed by many, they have also been criticised by numerous authors, with some positing far more radical and transformational visions of just transition. In their 2020 article, Irina Velicu and Stefania Barca advance a criticism of the ILO guidelines founded on their failure to conceptualise what "just" and "justice" signify.[43] The authors claim the guidelines offer a "much more restricted version of the sustainable development discourse",[44] focused only on securing jobs in new low-carbon economies, in which considerations of what *just* in just transition means is limited to workers inclusion in negotiations on this transition process.[45] They see that this narrow conceptualisation of justice "inevitably reproduces workers as subjects of inequality".[46] This can be broadly associated to what Dimitris Stevis and Romain Felli term the "social ecological approach" to just transition,[47] in their typology of three varieties of just transition. This approach calls for the "democratisation of social and economic relations"[48] and a "reorganisation of the relations between state, capital and labour"[49] in order to redress imbalances of power in society and ensure production is redesigned to meet human and planetary needs, rather than those of profit.[50] Two other varieties of just transition are also advanced by the authors which are considered to be more prominent in public debate and more widely accepted.[51] The "shared solution approach", focuses on dialogue and mutual understanding in just transition, as

42 Smith (n 37).

43 Irina Velicu and Stefania Barca, 'The Just Transition and its work of inequality' (2020) 16 (1) Sustainability: Science, Practice and Policy, 266.

44 Ibid.

45 Ibid.

46 Ibid. 267.

47 Stevis, Felli (n 19) 38.

48 Ibid.

49 Ibid. 39.

50 Ibid. 38.

51 Ibid.

a way to improve the green credentials of the economy in a socially acceptable way,[52] while the "differentiated responsibility approach", focuses more on the defence of the "losers" of the transition, emphasising the responsibility of the state and capital to support them.[53]

The contested nature of the just transition concept is therefore clear. Given these various interpretations, it is now pertinent to analyse the growth of just transition in EU policy-making and to consider how the version ascribed to by the bloc falls in relation to the diverse visions presented here.

2.3. Just transition in the European Union

While just transition is a novel concept in Europe, transitions themselves are not. Among the most notable, and in many cases painful, past transitions to happen in Europe were those related to economic restructuring and deindustrialisation in the 1970s and 1980s.[54] Conscient of the challenges of past transitions and of the increasing unprofitably of environmentally damaging industries such as mining around Europe, calls for the establishment of a just transition policy at EU-level began to gain traction in the European Parliament around 2015.[55] These calls were led by Members of the European Parliament (MEPs) from eastern Member States in particular, who saw just transition largely from a social and economic point of view, as a way to protect jobs in regions which had few economic opportunities beyond coal.[56] In 2015, in the context of the revision of the EU's Emissions Trading Scheme (ETS) Directive, a proposal was launched to allow Member States to use revenue from the scheme to support just transition in coal mining areas.[57] While the specific proposal linked to the ETS was ultimately unsuccessful, a compromise was reached with the inclusion of just transition projects in the newly established Modernization Fund,[58] a dedicated funding programme supporting ten lower-income member states.[59] This constituted an important milestone as the first time EU funds were granted for the express purpose of just transition in coal regions.[60]

52 Ibid.

53 Ibid. 37.

54 Sanjeev Kumar, Arianna Americo and Charlotte Billingham, *The New Social Contract: A Just Transition* (Foundation for European Progressive Studies 2016) 13.

55 Interview with European Commission Official 1, online, 27 January 2021.

56 Ibid.

57 Theodosiou and Mantzaris (n 25).

58 Ibid.

59 European Commission, 'Modernisation Fund' <https://ec.europa.eu/clima/policies/budget/modernisation-fund_en> accessed on 28 April 2021.

60 Theodosiou and Mantzaris (n 25).

2017 subsequently saw the establishment of a dedicated just transition policy initiative in the form of the Initiative for Coal Regions in Transition, designed to help address the social impact of the low-carbon transition and promote knowledge sharing and the exchange of best practice.[61] In 2019 a dedicated secretariat was established for the initiative, with responsibilities including the facilitation of regular meetings between the regional representatives, the development of toolkits to assist regional actors in accessing EU support and other resources and the provision of tailored technical assistance in areas such as just transition strategy development, project identification and development support.[62] In responding to requests for assistance submitted by eligible regions, the secretariat will also often visit the region concerned to engage with local and community actors, including civil society organisations, in order to include their perspectives in the technical assistance workplan under development.[63] The Initiative for Coal Regions in Transition is therefore based largely on the provision of technical support, resources and the sharing of experience and best practice across Europe. It is also directed at a regional level with a focus on engagement with a range of actors at the local level.

Just transition, and climate and environmental policies at EU-level generally, took a major step forward with the new European Commission and its flagship European Green Deal unveiled in December 2019,[64] with certain key figures in the College of Commissioners, including Frans Timmermans and Maroš Šefčovič considered to have been particularly important in pushing the just transition agenda.[65] The EGD sets out a vision for addressing the climate and environmental crisis, referred to as "this generation's defining task", and outlines a strategy for achieving a fair and prosperous EU economy with net-zero greenhouse gas emissions by 2050.[66] Through the EGD, a Just Transition Mechanism is proposed which seeks to provide support for those regions and sectors most affected by the transition and ensures the move towards low-carbon economies is fair and inclusive.[67] Specifically, the mechanism has three pillars. The first is a Just Transition Fund to be established within the framework of EU cohesion policy to finance the necessary invest-

61 European Commission, 'Coal regions in transition' (24 March 2021) <https://ec.europa.eu/energy/topics/oil-gas-and-coal/EU-coal-regions/coal-regions-transition_en> accessed 4 April 2021.

62 Interview with Senior Adviser to the European Commission, online, 23 February 2021.

63 Ibid.

64 European Commission, 'The European Green Deal' (Communication) COM (2019) 640 final.

65 Interview with Senior Policy Adviser at a Brussels-based think tank, online, 12 April 2021.

66 Ibid. 2.

67 Ibid. 16.

ments to support transition in the most affected regions.[68] The two additional pillars are an InvestEU just transition scheme and a public sector loan facility with the European Investment Bank, designed to support a wider range of investments, including those outside specific just transition territories[69] and to mobilise and facilitate private investment.[70] At present, the three pillars of the Just Transition Mechanism continue to work their way through the EU's legislative process, although the Just Transition Fund is closest to being formally adopted, with final approval from the Council and the European Parliament expected by summer 2021.[71]

To provide further detail on the Just Transition Mechanism, the proposal for the Fund will now be examined in greater depth. Following inter-institutional negotiations, the final resources dedicated to the Just Transition Fund were revised down to €17.5 billion, with €7.5 billion allocated under the Multiannual Financial Framework and €10 billion under Next Generation EU.[72] The stated aim of the Fund is to support the "people, economies, and environment of territories facing serious socio-economic challenges deriving from the transition process towards the Union's 2030 targets for energy and climate".[73] The Fund is specifically directed at level three territories,[74] the smallest geographical classification used for the framing of EU regional policies.[75] and to access the funds Member States are required to prepare just transition plans in coordination with local authorities in the territory concerned.[76] Activities which the Fund can be used to support are also outlined in the proposal, including investments in small and medium-sized enterprises, research and innovation activities, clean energy technologies and infrastructure, sustainable transport, training of workers and the inclusion of job seekers.[77] Finally, there is also

68 European Commission, 'Proposal for a Regulation of the European Parliament and of the Council Establishing the Just Transition Fund' (Communication) COM (2020) 22 final.

69 Ibid. 4

70 Interview with European Commission official 1 (n 55).

71 Agnieszka Widuto and Pernilla Jourde, 'Just Transition Fund' (2021) 12 European Parliamentary Research Service.

72 Ibid. 2.

73 Council of the European Union, 'Just Transition Fund (JTF) Regulation - Confirmation of the final compromise text with a view to agreement' COM (2020) 22 final 13.

74 Ibid. 21.

75 Eurostat, 'NUTS - Nomenclature of Territorial Units For Statistics, Background' <https://ec.europa.eu/eurostat/web/nuts/background> accessed 23 May 2023.

76 Widuto and Jourde (n 71).

77 Ibid. 17.

a mechanism linking access to the Fund to Member State's overall climate targets, whereby funding can be restricted by 50% to any Member State which has not committed to the EU-wide target of climate-neutrality by 2050.[78] It is therefore clear that the Just Transition Fund is designed to provide financing for a range of activities to compensate specific territories for disruptive socio-economic consequences of climate and environmental policies. It also clearly seeks to ensure the inclusion of local actors by requiring Member State authorities to cooperate with them on the development of just transition plans and seeks to incentivise Member States to adopt ambitious climate policies, restricting their access to funding if they do not.

Over the last five to ten years, just transition policies have become increasingly prominent and institutionalised at EU-level. The European Green Deal and the Just Transition Mechanism clearly mark an important turning point however, demonstrating an unprecedented level of ambition and commitment to the low carbon transition and to fairness and inclusion in that transition. Having described developments in this area, and some key elements of the new Just Transition Mechanism, it is now critical to analyse this in greater depth, and to consider the parameters and objectives of the vision of just transition being advanced by the EU.

2.4. Conceptualising just transition in internal EU policies

Having outlined the key elements of EU just transition policies to date, it is possible to identify four key elements in the EU's approach, which will now be explored further here.

A first key theme in the EU's approach can therefore be identified as the instrumentalization of just transition as a mechanism to facilitate climate and environmental policies and to minimise popular resistance to the upcoming low-carbon transition. This stems from a recognition that while the overall impact of the transition to climate neutrality will be positive, with the EGD described as a "growth strategy",[79] there will be specific citizens, regions and industries for whom the process will be challenging and have potentially negative socio-economic impacts,[80] and as such it is necessary to develop compensatory policies in order to secure the support of these specific constituents.[81] Moreover, there is a clear sense that while carbon-intensive industries such

78 Ibid. 16.

79 European Commission 'The European Green Deal' (Communication) (n 64).

80 Interview with European Commission official 2, online, 18 February 2021.

81 Interview with European Commission official 1 (n 55).

as coal mining are becoming increasingly unprofitable and are in inevitable decline as a result of market forces, policies at EU-level such as the ETS are hastening this decline and the consequent socio-economic impacts.[82] It is therefore incumbent upon the EU to develop solutions to the challenges its policy has helped to create.[83] Related to this, just transition can be considered in the context of the broader ideals of European integration, and in particular in relation to European solidarity.[84] Given the benefits of the low-carbon transition to Europe at a macro-level, negative local-level impacts can be considered in terms of a sacrifice for the broader collective good.[85] In a spirit of solidarity there is therefore a sense of obligation to support these regions for whom the transition will be particularly challenging.[86] Finally, it has also been noted that many of the regions potentially eligible for just transition support express a high degree of Euroscepticism and criticism of the impact of previous EU policies.[87] This presents an additional incentive to ensure appropriate consideration of the socio-economic impact of a flagship EU policy such as the European Green Deal and to develop mechanisms to alleviate those impacts and potential associated public resistance. Just transition in the EU is therefore related to notions of fairness, and solidarity with parts of the continent likely to lose out as a result of an inevitable social and economic evolution but is also related to a sober political calculation regarding the need to ensure popular acquiescence in contexts with high levels of scepticism towards the European Union.

A second common element in EU just transition policy concerns the focus on concentrated and territorially targeted support and the prioritisation of engagement with local stakeholders. This is reflected in the European Green Deal which states the transition "must put people first" and ensure "active public participation",[88] and the proposal for the establishment for the Just Transition Fund which emphasises that "in order to ensure the effectiveness of the Just Transition Fund, the support provided needs to be concentrated".[89] The importance of public engagement is practically exemplified through the community engagement work of the secretariat for the Initiative for Coal Regions in

82 Interview with Senior Adviser to the European Commission (n 62).

83 Ibid.

84 Interview with European Commission official 1 (n 55).

85 Ibid.

86 Ibid.

87 Interview with European Commission official 3, online, 8 February 2021.

88 European Commission, 'The European Green Deal' (Communication) (n 64).

89 European Commission, 'Proposal for a Regulation of the European Parliament (n 68).

Transition,[90] and in the obligation under the Just Transition Fund for transition plans to be developed in coordination with local authorities.[91] Seeking to explain this approach, Claudia Strambo posits that this distinct territorial focus and the prioritisation of engagement with local actors provides a mechanism to overcome political obstacles to advancing decarbonisation, in that, to some extent, it allows for the bypassing of the national level at which some member states remain resistant to change.[92] Though this approach can also be explained as a way to maintain the distinctiveness of just transition policies and ensure that resources allocated through them are used for their specific intended purpose.[93] It can therefore be said that among the potential mechanisms to operationalise just transition, the European Commission has opted for a targeted territorial approach,[94] in which engagement with local stakeholders is at its heart.

An emphasis on retraining, skills and education, as well as investments to promote economic diversification can be considered a third common theme in the EU's approach to just transition. This is evident in the EGD which calls for "re-skilling programmes" and "jobs in new economic sectors",[95] and in the proposal for the Just Transition Fund, which advocates for "the economic diversification of the territories most affected by the climate transition and the reskilling and active inclusion of their workers and job seekers".[96] This can be seen to respond to a particularly acute skills challenge, in which the long-term dominance of a single carbon-intensive industry in a region alongside other trends such as digitalisation has the potential to make a lack of relevant skills a significant barrier to accessing new socio-economic opportunities in the post-transition world.[97] Just transition policies are therefore intended to provide citizens and workers with the skills and training needed to adapt and integrate into the new low-carbon economy.[98] Correspondingly, the EU's approach to just transition also seeks to encourage economic dynamism in the regions concerned, and the creation of new jobs in those localities to

90 Interview with Senior Adviser to the European Commission (n 62).

91 Just Transition Fund (n 73).

92 Strambo (n 13).

93 Interview with European Commission official 1 (n 55).

94 Interview with European Commission official 2 (n 80).

95 European Commission, 'The European Green Deal' (n 64) 16.

96 European Commission, 'Proposal for a Regulation of the European Parliament (n 68) 2.

97 Interview with European Commission official 4, online, 12 February 2021.

98 Sebastiano Sabato and Boris Fronteddu, 'A socially just transition though the European Green Deal? (2020) 1 European Trade Union Institute 40.

replace those lost through the phase-out of carbon intensive industries.[99] The importance placed on the continuing availability of sources of employment in the regions supported through just transition policies is particularly important to emphasise, as a way to avoid the kinds of regional depopulation which resulted from previously poorly managed transitions in Europe.[100] These priorities are evidenced in the proposal for the Just Transition Fund, in which the kind of initiatives which can be supported under the scheme include "productive investments in SMEs, including microenterprises and start-ups, leading to economic diversification", and "upskilling and reskilling of workers and jobseekers".[101] Despite the ambition to promote economic diversification and encourage skills development to meet the needs of post-transition economies, it can nonetheless be said that EU just transition policies remain limited in their scope, in that there are limited references to broader issues of social inclusion such an inequality.[102] While gender equality and the importance of recognising the circumstances of vulnerable groups is mentioned briefly in the proposal for the Just Transition Fund,[103] issues of equality and social inclusion are left largely unaddressed in the EGD and documents related to the Initiative for Coal Regions in Transition, though this may become a growing feature of EU just transition policy in the future.[104]

A final element in the EU approach to just transition policy can be identified as a recognition of the importance of transition planning, and of the potential negative implications of failing to plan. It can be said that there has been a recognition amongst both EU policy makers,[105] and local and regional actors[106] that the transition will not be inclusive by default and of the need to plan early for the future given that transitions can take decades to implement.[107] In practical terms, this focus on detailed transition planning is evidenced in the Initiative for Coal Regions in Transition, given the role of the secretariat in supporting transition plan development and in the importance placed on the sharing of transition plans and models of economic diversification through the

99 Interview with European Commission official 1 (n 55).

100 Ibid.

101 European Commission, 'Proposal for a Regulation of the European Parliament (n 68).

102 Sabato and Fronteddu (n 98).

103 European Commission, 'Proposal for a Regulation of the European Parliament (n 68) 9.

104 Interview with European Commission official 1 (n 55).

105 Interview with European Commission official 5, online, 12 February 2021.

106 Interview with European Commission official 2 (n 80).

107 Interview with Senior Policy Adviser at a Brussels-based think tank (n 65).

initiative.[108] It is also central in the proposal for the Just Transition Fund, with Member States required to develop just transition plans with local authorities in order to access funding.[109]

Inside the EU, just transition can therefore be considered a policy initiative designed to facilitate the transition to a low-carbon future by securing public buy in and supporting those with the potential to be negatively affected by that transition, particularly given the EU's role as an institutional leader on climate and environmental policies and high levels of Euroscepticism in many of the regions concerned. Policies in this area are also designed to be highly concentrated in geographical terms, to be inclusive through engagement with local stakeholders and ensure their ownership of the process. This regional focus also facilitates the transition process, allowing a bypassing of national-level authorities to some extent, important in cases where Member States remain resistant to fully embrace the low-carbon transition. EU just transition policies also focus on skills, retraining and economic diversification, seeking to ensure the ongoing economic dynamism of the regions concerned, but do not go beyond this, failing to consider broader questions of equality and social justice. A final element concerns an emphasis on transition planning and a recognition of the need to map out the road to transition in concrete terms. Broadly just transition policies advanced by the EU are therefore designed to facilitate an inclusive and managed transition to an economically dynamic low carbon future in specific regions currently dependent on carbon intensive industries which require phasing out to support global climate and environmental objectives.

3. JUST TRANSITION IN EU EXTERNAL ACTION: CASE STUDIES FROM BILATERAL AND MULTILATERAL CONTEXTS

To explore just transition in the EU's external action, this chapter will examine two case studies, reflecting bilateral and multilateral contexts respectively. Section 5 will then draw conclusions from the cases examined and posit some common themes regarding the EU's external action on just transition.

3.1. EU bilateral engagement on just transition: The Initiative for Coal Regions in Transition in the Western Balkans and Ukraine

Supporting neighbouring states in their decarbonisation efforts, including through a just transition, is a key priority of the EU's external environmental policy, emphasised in the

108 Interview with Senior Adviser to the European Commission (n 62).

109 European Commission, 'Proposal for a Regulation of the European Parliament (n 68) 21.

EGD.[110] and in the Council Conclusions of 25 January 2021, which underline that "The EU will support the ambitions and efforts of countries in the Southern Neighbourhood, Western Balkans and the Eastern Partnership in tackling environmental, climate and energy challenges".[111] This was also laid out more specifically in the European Commission's Economic and Investment Plan for the Western Balkans which outlines EU support for the post-COVID-19 economic recovery in the region, including through a "green and digital transition".[112]

The Initiative for Coal Regions in Transition in the Western Balkans and Ukraine was launched in December 2020, with the intention of supporting the countries concerned to undertake a just transition away from coal and towards carbon-neutrality.[113] Support through the programme is directed towards regions in six countries and is managed by the European Commission in collaboration with international partners including the European Investment Bank, the College of Europe in Natolin and the World Bank,[114] whose participation is considered particularly important in that it brings a non-European perspective to the programme.[115] While open to any region with significant coal use and production in the six countries concerned,[116] the initiative is currently engaged with 17 regional partners.[117] The programme mirrors the Initiative for Coal Regions in Transition, a similar programme currently running inside the EU and seeks to build on the opportunities of bringing together regional stakeholders from the EU, the Western Balkans and Ukraine, to share experiences and best practice, to find synergies in their activities and to

110 European Commission, 'The European Green Deal' (n 64) 20.

111 Council of the European Union, 'Council Conclusions on Climate and Energy Diplomacy – Delivering on the external dimensions of the European Green Deal' (Outcome of Proceedings) (2021) 11

112 European Commission, 'An Economic and Investment Plan for the Western Balkans' (Communication) (2020) COM/2020/641 final.

113 European Commission, 'Initiative for Coal Regions in Transition in the Western Balkans and Ukraine' (n 17).

114 Ibid.

115 Interview with European Commission official 3 (n 87).

116 European Commission, 'Initiative for Coal Regions in Transition in the Western Balkans and Ukraine' (n 17).

117 European Commission, 'Commission launches the secretariat of a new initiative for coal regions in transition in the Western Balkans and Ukraine' (15 February 2021) <https://ec.europa.eu/info/news/commission-launches-secretariat-new-initiative-coal-regions-transition-western-balkans-and-ukraine-2021-feb-15_en> accessed 29 April 2021.

facilitate cooperation between them.[118] A secretariat was established in February 2021 to support the implementation of the initiative[119] and the roll out of the five elements that make up the programme.[120] The first element is the delivery of training and learning resources, undertaken principally by the College of Europe in Natolin, in the form of courses on transition planning, social policy and the provision of relevant reports, data and academic literature.[121] Other elements include the organisation of regular platform meetings between the participants, and a twinning component which sets up pairings between peers in the EU and the Western Balkans and Ukraine, and also across the non-EU regions.[122] Two final elements are the provision of technical assistance and advisory services, and financial assistance, provided by the World Bank and the European Bank for Reconstruction and Development.[123]

In terms of objectives, building on and making the most of the experience of others is a key aim of the initiative.[124] It is hoped that the programme will act as a forum for the exchange of experience and knowledge between and among EU and non-EU regions, allowing others to use the lessons of previous transitions.[125] There is also an ambition to support the regions concerned in accessing financing, thereby ensuring regional authorities have the means necessary to implement transition plans fully.[126] Finally, ensuring the transition process is inclusive and locally led is also a key objective, evidenced by the broad range of stakeholders which many elements of the initiative are open to, including local community representatives, NGOs, businesses, and regional authorities.[127] This is in recognition of the broader economic, social and cultural significance that industries such as coal mining can have, both for those directly involved and others in the region.[128] It can also help to ensure the just transition process is understood and accepted and provides

118 Interview with Member of a collaborating partner of the Initiative for Coal Regions in Transition in the Western Balkans and Ukraine, online, 9 April 2021.

119 European Commission, 'Commission launches the secretariat' (n 117)

120 Interview with Member of a collaborating partner of the Initiative (n 118).

121 Ibid.

122 Ibid.

123 Ibid.

124 Ibid.

125 European Commission, 'Commission launches the secretariat of a new initiative for coal (n 117).

126 Interview with Member of a collaborating partner of the Initiative (n 118).

127 Ibid.

128 Ibid.

opportunities for a broad range of input into that process.[129] Ultimately, the ambition is to facilitate transition away from coal in the Western Balkans and Ukraine by providing assistance to do so and thereby expedite progress towards decarbonisation.[130]

The Initiative for Coal Regions in Transition in the Western Balkans and Ukraine is therefore an important concrete example of EU international engagement on just transition. While at very early stage, there is an expectation that this programme may continue to grow or that similar initiatives may develop, including beyond the EU's neighbourhood.[131]

3.2. EU multilateral engagement on just transition: The Solidarity and Just Transition Silesia Declaration

While discussion in the UNFCCC, a long-standing and near-universal global forum for efforts to prevent dangerous human interference with climate systems.[132] previously dealt only marginally with social and economic concerns, this began to change from 2008, with references made to employment issues in the 2009 COP15 negotiating text.[133] The Paris Agreement negotiated at COP21 in 2015 and the Solidarity and Just Transition Silesia Declaration signed at COP24 in 2018, can now be seen as part of a new phase of global climate negotiations in which broader social issues, including the need for just transition, are seen as essential to multilateral debate.[134]

Taking place in December 2018 in the Polish city of Katowice, COP24 welcomed over 20,000 international delegates principally to discuss the Paris Agreement "operating manual" and achieve consensus on issues such as mechanisms for reporting of emissions and contributions to climate finance programmes.[135] However, the event was also billed by many as a "Just Transition COP", particularly given its symbolic location in the heart of

129 Ibid.

130 Ibid.

131 Ibid.

132 United Nations Framework Convention on Climate Change, 'What is the United Nations Framework Convention on Climate Change?' <https://unfccc.int/process-and-meetings/what-is-the-united-nations-framework-convention-on-climate-change> accessed 23 May 2023.

133 Rosemberg (n 12).

134 Ibid.

135 Simon Evans and Jocelyn Timperley, 'COP24: Key outcomes agreed at the UN climate talks in Katowice', (2018) *Carbon Brief* (16 December 2018) < https://www.carbonbrief.org/cop24-key-outcomes-agreed-at-the-un-climate-talks-in-katowice/> accessed 23 May 2023.

one of the biggest coal mining regions in Europe.[136] This was a particular priority for the Polish Presidency organising the summit, who hoped to progress the international debate by building on the inclusion of just transition in the Paris agreement, to share Poland's experience of its ongoing transition and to focus the debate on the human impacts of decarbonisation.[137]

The Solidarity and Just Transition Silesia Declaration, signed by over 50 parties on the opening day of the conference, was an important achievement in this respect, raising the profile of just transition and placing it at the heart of global climate governance. As the COP Presidency, Poland began to negotiate and garner support for the declaration months prior to the official conference, adapting the text and their approach following discussions with international partners.[138] The EU was said to be a critical partner from an early stage in these negotiations, particularly given that it was around this time that just transition was gaining recognition as an important policy priority and initiatives at EU-level were beginning to be implemented.[139] The Presidency engaged in talks with a wide range of EU partners, including representatives of the Commission, the Council and other Member States, taking notes of their comments and making adjustments to the text as part of the normal negotiating process.[140]. Overall, the EU was considered to have been an important and constructive partner throughout, sharing the Presidency's view on the importance of including the social consequences of climate change in the COP forum.[141]

In terms of content, the Presidency was driven by the priorities of raising the global profile of just transition and of gaining widespread approval for the declaration, and as such stuck to a broad conception of the term rather dictating an uncompromising definition of just transition.[142] There was also however, a will to extend the idea beyond rich northern states and beyond the coal sector, to highlight the applicability of just transition to a broad range of contexts and to promote the integration of just transition into the fabric

136 Morena, Krause, Stevis (n 8).

137 Interview with a Senior Official of the COP24 Polish Presidency, online, 12 April 2021.

138 Ibid.

139 Ibid.

140 Ibid.

141 Ibid.

142 Ibid.

of the UNFCCC process.[143] As such the document itself recognises the opportunities of new low-carbon economies to provide decent jobs and affirms a recognition of the importance of just transition for the achievement of the Paris Agreement objectives.[144] The declaration also outlines an appreciation of the differential impacts of the transition, and the particular vulnerabilities of developing countries and specific economic sectors, cities and regions.[145] Finally, there is also a recognition of the importance of participation and social dialogue, of securing public buy-in[146] and a call for increased sharing of experience across international organisations and among all stakeholders concerned.[147]

It is therefore clear that the Solidarity and Just Transition Silesia Declaration represents an important milestone in the growth of just transition as an issue of global relevance and a key example of EU multilateral engagement on just transition. While taking a broad approach to what just transition means, the declaration nonetheless includes a number of important markers of the term, including a recognition of the differential impact of the low-carbon transition, a focus on inclusion, the provision of decent jobs and the value of sharing of experience. The EU played an important role in the negotiation of this text with the subsequent declaration signed by the European Commission and numerous member states. It is now pertinent to consider this declaration alongside the Initiative for Coal Regions in Transition in the Western Balkans and Ukraine, to identify any commonalities and possible conclusions regarding the EU's external action on just transition.

4. COMPARING EU BILATERAL AND MULTILATERAL ENGAGEMENT ON JUST TRANSITION

While the Solidarity and Just Transition Silesia Declaration and the Initiative for Coal Regions in Transition in the Western Balkans and Ukraine are clearly very different, with one being a broad declaratory statement, and the other a targeted policy instrument, they represent two of the most high-profile examples of EU international action on just transition. As such, it is pertinent to examine both together and to consider what commonalities can be drawn out.

143 Ibid.

144 United Nations Framework Convention on Climate Change, 'Solidarity and Just Transition Silesia (n 16) 1.

145 Ibid. 2.

146 Ibid.

147 Ibid. 3.

Regarding approaches to the definition of just transition, it can be said that generally both cases take a broad and non-prescriptive approach. In the case of the Initiative for Coal Regions in Transition in the Western Balkans and Ukraine this is evidently deliberate in that a key element of the programme focuses on supporting the regions concerned to develop their own transition roadmaps.[148] thereby remaining largely unspecified as to what that transition should entail. Regarding the Solidarity and Just Transition Silesia Declaration, it has been shown how the Polish Presidency took a deliberately broad approach to just transition in an effort to secure the widest possible support for the Declaration.[149] While in the bilateral case this approach can be seen as part of an effort which prioritises local ownership of the transition process and support for the development of local transition plans, in the multilateral case this reflects an effort to secure the broadest support possible.

While the importance of mutual learning and sharing of experience features in both cases, there is an evident greater focus on this in the Initiative for Coal Regions in Transition in the Western Balkans and Ukraine. In this programme, there is a prioritisation of the exchange of experience and knowledge, with three of the five elements of the initiative focused on this.[150] In contrast, this is referred to in only one subsection of the Solidarity and Silesia Just Transition Declaration, which states that the parties will "Highlight the importance of further work on the just transition of the workforce and the creation of decent work and quality jobs, including: Sharing experiences from Parties, relevant international organisations, observer organisations, as well as other stakeholders".[151] As such while both mention the importance of sharing knowledge and experience, this is referred to minimally in the Solidarity and Just Transition Silesia Declaration, while it is a fundamental element of the second case.

Finally, regarding the target constituents of each case and their approach to inclusion and participation in the just transition process, it can be said that while there are important differences in the scope of each, both underline the necessity of inclusive and representative processes. Clearly the Initiative for Coal Regions in Transition in the Western Balkans and Ukraine is highly targeted in its approach, given its focus on supporting regional actors in a small group of countries with their transition away from coal spe-

148 European Commission, Initiative for Coal Regions in Transition in the Western Balkans and Ukraine, (n 17).

149 Interview with a Senior official of the COP24 Polish Presidency (n 137).

150 Interview with Member of a collaborating partner of the Initiative (n 118).

151 United Nations Framework Convention on Climate Change, Solidarity and Just Transition Silesia (n 16) 3.

cifically.[152] In contrast, the Solidarity and Just Transition Silesia Declaration is far broader in scope, recognising the particular difficulties faced by developing countries,[153] highlighting the challenges of transition for regions, cities and economic sectors and referring to the transition to low-greenhouse gas emissions and climate resilient economies generally, rather than in reference to a particular industry.[154] Despite these differences in scope, both cases emphasise the importance of inclusion and participation in relation to their respective constituencies. In the Solidarity and Just Transition Silesia Declaration parties note "the importance of a participatory and representative process of social dialogue involving all social partners",[155] while the Initiative for Coal Regions in Transition in the Western Balkans and Ukraine demonstrates its commitment in this area through its openness the participation of a broad range of stakeholders.[156] As such, while the focus of these two cases is very different, there is an evident common focus on inclusion and broad participation.

Comparing and simultaneously analysing the Solidarity and Just Transition Silesia Declaration and the Initiative for Coal Regions in Transition in the Western Balkans and Ukraine therefore allows for the identification of some common features of the EU's external action on just transition. These can be identified as a broad and non-prescriptive approach to just transition, a recognition of the value of mutual learning and the sharing of experience and a focus on participatory and inclusive processes. Although it remains important to recognise variations in strength of commitment to these principles across the two cases and some key outstanding differences, such as the target constituents of each case.

5. CONCLUDING REMARKS

In conclusion, this paper has sought to examine just transition in the EU's external action and has done so in two parts. Firstly, through conceptualising just transition in EU internal policy, mapping the development of the term to become an issue of global concern, considering developments inside the EU in relation to this and identifying key features in the EU's approach to just transition today. External elements of this policy area were then addressed, focusing on two case studies and considering commonalities between them.

152 European Commission, Initiative for Coal Regions in Transition in the Western Balkans and Ukraine (n 17).

153 United Nations Framework Convention on Climate Change, 'Solidarity and Just Transition Silesia (n 16).

154 Ibid. 2.

155 Ibid.

156 Interview with a Member of a collaborating partner of the Initiative (n 118).

Following decades of development, just transition is now an internationally recognised although still contested policy issue, relevant at all levels of governance, from global to local. Over the past decade the EU has also begun to develop policy in this area and has most recently unveiled a sophisticated instrument in the form of the Just Transition Mechanism. While still at an early stage, EU internal just transition policies can be seen as an effort to facilitate EU-led decarbonisation policies and minimise popular resistance, while key elements of the approach can be identified as a focus on territorially targeted support, engagement with local stakeholders, an emphasis on retraining, skills and economic diversification and the need for transition forward-planning. While this approach can be seen as largely grounded in principles such as solidarity, inclusion and participation, there are also evident sober political considerations such as an ambition to counter Euroscepticism and bypass Member States who remain resistant to decarbonisation reforms. Furthermore, it is also important to note the absence of broader questions related to social inclusion, with limited reference to issues such as equality in just transition policy documents. Externally, an examination of the Solidarity and Just Transition Silesia Declaration and the Initiative for Coal Regions in Transition in the Western Balkans and Ukraine highlighted a non-prescriptive approach to the definition of just transition, an emphasis on mutual learning and sharing of best practice and, in common with features of internal policies, a recognition of the importance of inclusion and participation of local constituents.

Given the early stage of many EU internal and external just transition policies this article was unable to offer an analysis as to the effectiveness of these efforts. This presents a fruitful area of future research. Furthermore, beyond the EU, the extent to which other key global players, such as the United States and China also promote just transition issues in international fora and their interaction with the EU in this regard, will be another interesting area to consider.

EU international engagement on just transition can be expected to grow further in coming years. This was a view expressed by numerous European Commission officials and frontline practitioners interviewed for this paper, who point to the need to advance transition in other parts of the world and in other carbon-intensive industries beyond coal.[157], and highlight the potential for existing just transition policies to be expanded further.[158] This is also an ambition which has been expressed officially at EU-level, particularly in

157 Interview with European Commission official 3 (n 87).

158 Interview with Member of a collaborating partner of the Initiative (n 118).

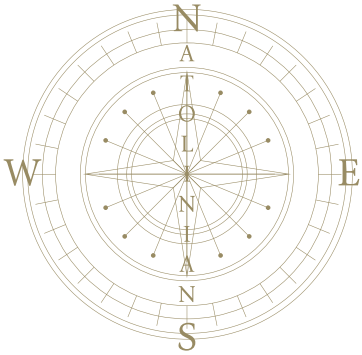
the Council Conclusions on Climate and Energy Diplomacy published in January 2021.[159] Furthermore, just transition can also be expected grow given its value as an objective in itself, as a way to protect individuals and communities facing social and economic hardship as a result of decarbonisation, but also as an effective way to counter fears or narratives which threaten to frustrate efforts to address the climate crisis[160]. Just transition offers a way out of the jobs versus environment or economy versus environment discourse that is so often instrumentalised by political leaders around the world to justify their failure to act in the face of impending climate breakdown. As the need to take action becomes ever more urgent, it can therefore be expected that the EU and others will seek to promote just transition to a greater extent.

While just transition is critical inside Europe, with hundreds of thousands of coal miners and strongholds of carbon-intensive industry, the scale of the transition required in global industrial manufacturing and coal production heartlands, largely located in Asia, is on another level. Given climate neutrality targets announced by China and others in the region[161], it is clear that coal phase out and the transformation of carbon intensive industry will become a reality in these areas in coming decades. Ensuring it does not lead to political turmoil and widespread socio-economic devastation will require forward planning and just transition policies. Here, the EU has a critical future role to play as a globally recognised climate and environmental actor and champion of multilateralism. The Union should therefore act to ensure just transition continues to be integrated into its external action, both through specific external policy instruments and through agenda-setting in key global governance fora such as the UNFCCC. In doing so, the Union can both work to accelerate decarbonisation and can act to avoid the potentially devastating consequences of poorly managed transitions which could threaten Europe's economic prosperity and social stability. Collaboration on just transition can therefore be expected to grow as an important feature of global environmental, climate and energy governance and represents a key area in which effective international engagement will be critical for the EU in coming decades.

159 Council of the European Union 'Council Conclusions on Climate and Energy Diplomacy (n 111) 7.

160 Interview with European Commission official 3 (n 87).

161 Climate Home News, 'Which countries have a net zero carbon goal?' (14 June 2019) <https://www.climatechangenews.com/2019/06/14/countries-net-zero-climate-goal/> accessed 29 April 2021.



CHAPTER 8

Informalisation of the European Environmental External Action

BY FRANCESCA LEUCCI & BY FRANCESCO SPERA

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1. INTRODUCTION

The European Union (EU) makes use of a variety of legal instruments in conducting its external relations with third countries and international organisations. Together with international agreements concluded on the basis of Article 218 TFEU, the Union also adopts a wide variety of bilateral soft law instruments. Carrying different labels[1] and employed by all EU institutions responsible for EU External Relations,[2] those soft bilateral tools are normally adopted between the Union and third states and international organisations in several policy areas. An important element that characterises them, and, at the same time, differentiates them from international agreements, is their 'non-binding nature' for the Parties that adopt them. From this characteristic, most of the literature in international law has derived the term 'soft'[3] and it has defined soft international instruments broadly as 'any written international instrument, other than a treaty, containing principles, norms, standards, or other statements of expected behaviour'.[4]

Despite the fact that international agreements still continue to be the key legal tool to regulate the EU's external action with third countries and international organisations, it has been observed that the 'recourse to non-binding instruments in governing the relations of the EU with the rest of the world is increasingly common and compared to binding international agreements, at least two times more bilateral soft law tools are agreed between EU actors and international organisations or third countries'.[5] In particular, EU institutions have increasingly resorted to international soft law instruments in politically

1 Such as Memorandum of Understandings, Joint Communications, Joint Letters, Arrangements, and Codes of conduct etc.

2 Council of the European Union, the High Representative of the Union for Foreign Affairs and Security Policy, the European Union External Action (EEAS) and some EU Agencies (Europol, Eurojust, Frontex).

3 Fabien Terpan, 'Soft Law in the European Union the Changing Nature of EU Law' (2015) 21. 1 European Law Journal 68–96; Gregory Shaffer and Mark Pollack, 'Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance' (2010) Minnesota Law Review; Ramses Wessel and Joris Larik, *EU External Relations Law: Text, Cases and Materials* (2nd ed Oxford Hart Publishing 2020); Ramses Wessel, 'Normative Transformations in EU External Relations: The Phenomenon of " Soft " International Agreements' (2021) 1 West European Politics; Oana Stefan et al., 'EU Soft Law in the EU Legal Order: A Literature Review' SoLaR Working Paper (2019) 9-13.

4 This definition is adopted generally for the purpose of the research. The term will be discussed in greater detail below in paragraph 2 and Chapter 2 Dinah Shelton, 'Soft Law', in David Armstrong (ed.) *Routledge Handbook of International Law* (Oxon Routledge 2009), 68-80

5 Wessel and Larik, *EU External Relations Law…* (n 3). See also Andrea Ott in Wessel, 'Normative Transformations in EU (n 3); Paul Cardwell, *EU External Relations Law and Policy in the Post-Lisbon Era* (TMC Asser Press 2014) <https://doi.org/10.1007/978-90-6704-823-1>; Linda Senden, 'Soft Law and Its Implications for Institutional Balance in the EC' (2005) 1 Utrecht Law Review 79 <https://doi.org/10.18352/ulr.9>.

sensitive and technically complex areas, especially in the framework of the migration, security, and environmental crisis.[6] Most of the EU External Relations doctrine generally classified them in two main groups, namely political commitments and administrative arrangements.[7] Following the common practice of States and international organisations, the use of soft law seems to be motivated by various reasons. Generally, scholars tend to highlight that this practice is justified by the need to increase the effectiveness of external action, to allow greater smoothness in negotiation and conclusion of an instrument, or to enhance the margin of discretion of the signatories in the fulfilment of commitments.[8] In addition to that, non- binding agreements may be more suitable to the political sensitivity of the subject of the agreement or to its changing nature. These reasons have been analysed and criticised, for instance, in important cases which are often mentioned in the EU law literature such as the Joint Way Forward (JWF) on migration issues between Afghanistan and the EU of 2016,[9] Memorandum of Understanding (MoU) between the European Community and the Swiss Federal Council on a contribution by the Swiss Confederation towards reducing economic and social disparities in the enlarged European Union,[10] or the well-known EU-Turkey Statement.[11]

6 The expansion of the use of soft law concerns other policy areas as well. See Jacopo Alberti, 'Challenging the Evolution of the EMU: The Justiciability of Soft Law Measures Enacted by the ECB against the Financial Crisis before the European Courts' (2018) 37 Yearbook of European Law 626; Menelaos Markakis and Paul Dermine, 'Bailouts, the Legal Status of Memoranda of Understanding, and the Scope of Application of the EU Charter: Florescu' (2018) 55 Common Market Law Review 643. See Marion Panizzon, 'The Global Migration Compact and the Limits of "Package Deals" for Migration Law and Policy' in Thomas Gammeltoft-Hansen et al., 'What is a Compact? Migrants' Rights and State Responsibilities Regarding the Design of the UN Global Compact for Safe, Orderly and Regular Migration' (2017) 1 RWI Working Paper) 21; Caterina Molinari, 'The EU and Its Perilous Journey through the Migration Crisis: Informalisation of the EU Return Policy and Rule of Law Concerns' (2019) 44(6) European Law Review and Caterina Molinari, 'EU Institutions in Denial: Non-Agreements, Non- Signatories, and (Non-)Effective Judicial Protection in the EU Return Policy' (2019) 02 Maastricht Faculty of Law Working Paper 3.

7 Wessel and Larik (n 3) 119. See also Caterine Molinari (n 6) and Paula Garcia Andrade, 'The Distribution of Powers Between EU Institutions for Conducting External Affairs through Non-Binding Instruments' (2016) 1.1 European Papers: A Journal on Law and Integration 115–125 <https://doi.org/10.15166/2499-8249/9>.

8 Garcia Andrade (n 7); Wessel (n 3).

9 European Commission, 'Afghanistan. Joint Way Forward on Migration Issues between Afghanistan and the EU 2.10.2016', 3, 2017, 369–73 <https://doi.org/10.3280/diri2016-003017>.

10 CJEU (2013). Decision C (2013) 6355 of the Commission on the signature of the Addendum to the Memorandum of Understanding on a Swiss financial contribution. Commission of the European Communities, Brussels, 20.10.2005, COM (2005) 468 final, 2005/0198 (CNS) <https://eur-lex.europa.eu/legal- content/EN/TXT/?uri=celex%3A52005PC0468>.

11 Ott (n 5) 568.

In this context, by taking into consideration the past practices, researchers and critics that these instruments have posed in certain fields such as migration, or environment, the current contribution assesses from a legal and economic perspective the pro and cons of displaying soft bilateral instruments by the European Union in its external environmental action and highlights the risks and opportunities of using soft bilateral legal instrument in EU Environmental external relations. As explained-above, they can pursue more than just one goal, since they serve to solve diplomatic, procedural and political issues at the same time.[12] Although the plethora of soft bilateral instruments is quite wasteful, this research focuses on a specific instrument adopted in 2016 between the EU and India: '2016 Joint Declaration by India and the European Union on an Indo-European Water Partnership'.[13]

Cooperation between the EU and India has increased significantly in recent years, and recently India is becoming a very important geopolitical partner with the Union. It represents the world's biggest democracy, and it represents a strategic actor in contrast with another Asiatic superpower, China. Especially the European Parliament stressed the strong political, economic, social and cultural links between India and the Union, with a potential to develop stronger and deeper bilateral relations in order to tackle climate changes and environmental crises.[14] The EU and India, among the world's largest emitters of greenhouse gases, share a common interest in fighting climate change and facilitating the transition to a sustainable economy. The interest of the European Parliament was confirmed by a Joint Statement issued the last 8 of May 2021 between the EU-India Leaders' that confirms several commitments and promises for further strengthening the ties between the two regional entities.[15]

From a legal point of view, this instrument might represent a potential challenge for the EU legal order, as it has been pointed out for other soft bilateral instruments by the European doctrine,[16] and, from an economic perspective, a risk of inefficiencies.

12 Wessel (n 3) 119.

13 Commission Decision on a Joint Declaration by India and the European Union on an Indo-European Water Partnership, Decision, C(2016)156, 11/03/2016, Directorate-General for Environment <https://ec.europa.eu/transparency/documents- register/detail?ref=C(2016)1561&lang=en>.

14 EU-India relations: Parliament calls for stronger ties between the world's two biggest democracies. Press Releases PLENARY SESSION AFET 29-04-2021 <https://www.europarl.europa.eu/news/en/press-room/20210422IPR02625/parliament-calls-for-stronger-ties-between-the-eu-and-india>.

15 Joint Statement EU-India Leaders' Meeting (8 May 2021) <https://www.consilium.europa.eu/media/49523/eu-india- leaders-meeting-joint-statement-080521.pdf>.

16 Andrea Ott, 'Informalization of EU Bilateral Instruments: Categorization, Contestation, and Challenges' 39 (1) (2020) Yearbook of European Law 583.

The outcome that might result is twofold. On the one hand, the study observes the potential impact on employment of these instruments as they are employed to combat climate change and environmental crisis. On the other hand, there can be legal and constitutional limits to employing these soft tools within the EU legal order. Hence, I confirm the concerns previously raised in literature.

Before delving into the analysis of the selected instrument, Sections 2 and 3 will provide an overview of scholarly explanations for why soft law is employed from both a legal and an economic perspective. Following the analysis of the soft tool, this chapter will draw conclusions. Moreover, given the limited scope of the present research, final suggestions for future research paths will be provided.

2. WHY SOFTENING THE EU EXTERNAL RELATIONS: A LEGAL PERSPECTIVE

All EU actors with external representation competences conclude international agreements. These actors are EU agencies (especially Europol, Frontex or EASA),[17] the EEAS, the High Representative, the Commission,[18] the Council and European Council. The reason for this large involvement is based on the treaty structure of the European Union and the competences allocations. The Union is a supranational organisation, whereby the competence division does not follow the logic of States. In consequence, the governmental and administrative tasks of representing the Union externally belong to more than one actor. Furthermore, and to make it even more complex, each policy field provides a different legal framework for the allocation of external action and competences. Thus, each organ derives its concrete mandate from the primary and secondary law that

17 Govin Permanand and Ellen Vos, 'Between Health and the Market: The Roles of the European Medicines Agency and European Food Safety Authority'(2008) 4 Maastricht Working Papers, Faculty of Law; Andrea Ott, Ellen Vos and Florin Coman-Kund, 'EU agencies and their international mandate: a new category of global actors?' (2013) 7 Cleer Working Papers.

18 Andrea Ott (n 16) argues that the 'Commission has, exceptionally, the power to conclude international agreements that escape the treaty-making procedure under primary law. The mandate for such Commission treaty-making derives more frequently from secondary EU law, for instance, Art. 8 of the IPA II Regulation (OJ 2014 L 77/11).'; Andrea Ott, 'The EU Commission's administrative agreements: "Delegated treaty-making" in between delegated and implementing rule-making', 200-232, in Eljalill Tauschinsky and Wolfgang Weiß (ed) *The legislative choice between delegated and implementing acts in EU law* (Edgar Elgar Publishing 2018).

regulates the policy area.[19] For the purpose of the analysis, external relations soft bilateral instruments account for international soft laws that both the EU and its Member States produce as well as internal soft law. The study is relevant because European law scholars have observed the existence of a nexus between the reasons and aims of international soft law and EU soft law exists. Many scholars in recent years stressed that those instruments have not been properly assessed in relation to the supranational character of EU law, that can be differentiated from international law.[20] Despite the fact that international soft law and internal EU soft law have been the object of many academic researchers in the last twenty years, it is noted that the legal effects of EU external relations soft law in the EU law are still underexplored.[21] For this reason, the chapter tries to address this gap, assessing one of these instruments from a legal perspective. However, the complexity that characterises external relation soft law, as an emerging, yet underdeveloped field of research, cannot be fully understood by a sole legal standpoint. Therefore, the economic analysis will also help the reader to understand and discover the international action of the EU from another perspective.

2.1. Why soft law is adopted (an emerging taxonomy of soft laws for the EU external relations)

As mentioned above, the literature presents many reasons for adopting soft law in EU external relations.

From a legal perspective, the use of non-legally binding instruments is considered as a basis for cooperation with third countries especially in the sensitive field such as migration, mostly for political reasons and to avoid democratic checks and long formal decision-making processes.[22] For instance, under its strategy inaugurated in 2005 and later changed in 2011 for the Global Approach to Migration and Mobility (GAMM), the

19 'The president of the European Council and the Council fulfil external representation tasks as laid out in Articles 15 (1) (6), 16 (1) and (6) TEU. Art.220 refers to Commission and the High Representative, the EEA according to the Council Decision of 26 July 2010, 2010 OJ L 201/30 (Art.2 and Art.5(6)) on High Representative), Frontex Regulation covering international relations in Regulation of 14 September 2016, 2016 OJ L 251/1 (Art.8, Art.14, 15, 52)' in Ott (n 16) 579.

20 Ott (n 16) 576, where it is mentioned that this has been reflected in several contributions on EU soft law in the Yearbook of European Law 2018, 457-649; see also Edoardo Chiti, 'EU and Global administrative organizations' in Edoardo Chiti and Bernardo G Mattarella (eds), *Global Administrative Law and EU Administrative Law* (Springer Publishing 2011) 13, also mentioned by the authors. See also Wessel (n 3).

21 Ott (n 16) 576.

22 See among all, Molinari (n 6); Sara Poli, 'Articles The Integration of Migration Concerns into EU External Policies: Instruments, Techniques and Legal Problems' (2020) 5.1 European Papers 71–94 <https://doi.org/10.15166/2499-8249/374>.

Union does not exclusively rely on legally binding readmission agreements to cooperate with third countries.[23] Soft bilateral instruments are considered to be an attractive instrument for third country governments and in the Commission view, the idea of informal arrangements, in the forms of Compacts, 'avoids the risk that concrete delivery is held up by technical negotiations for a fully-fledged formal agreement'.[24] Overall, partner countries therefore maintain a higher level of flexibility and control in the context of non-binding international accords.[25]

A good example often mentioned and contested by the EU External relation literature is the *2016* 'Joint Way Forward on Migration Issues between Afghanistan and the EU'.[26] In 2015, following the events of the Arab Spring and the Syrian War, Europe was facing a migration crisis resulting in the arrival of an unprecedented number of people across the Mediterranean Sea and the Balkans seeking asylum. In particular, one of the most represented nationalities among these asylum seekers was Afghan (20.9%).[27] A high number of them had little chance of recognition of asylum in the European Member States since it was more difficult for Afghan nationals to be granted for protection and thousands of people had to be sent back.[28] Due to the high number of immigrants, the demand for a united actions of member states by the media and public opinion, the Union could not conclude a formal EU readmission agreement with Afghanistan because the procedure according to the treaties for concluding an formal readmission agreement would have taken too long.[29] Moreover, the Afghan Parliament was strongly opposed to the con-

23 Poli (n 22) 76.

24 Communication COM (2016) 700 final of 18 October 2016 from the Commission to the European Parliament, the European Council and the Council, First Progress Report on the Partnership Framework with third countries under the European Agenda on Migration.

25 Peter Slominski and Florian Trauner, 'Reforming me softly how soft law has changed EU return policy since the migration crisis' (2020) 44 (1) West European Politics <https://doi.org/10.1080/01402382.2020.1745500 >; see also Jean-Pierre Cassarino, *Readmission Policy in the European Union. Study for the European Parliament* (Committee on Civil Liberties, Justice and Home Affairs, European Parliament 2010) 14–15. 51; Nils Coleman, *European Readmission Policy: Third Country Interests and Refugee Rights* (Martinus Nijhoff 2009) 209; Sergio Carrera Implementation of *EU Readmission Agreements: Identity Determination Dilemmas and the Blurring of Rights* (Springer International Publishing 2016).

26 European Commission, 'Joint Way Forward on Migration Issues between Afghanistan and the EU' (n 9).

27 Operational Data Portal of UNHCR, 'Monthly Arrivals by Nationality to Greece, Italy and Spain' Refugees/Migrants Emergency Response – Mediterranean. <https://data2.unhcr.org/en/situations/mediterranean?page=1&view=grid&Type%255B%255D=3&Search=%2523month ly%2523> accessed 14 May 2016.

28 At a time when security in Afghanistan was worsening, policy changes seemed to be a reaction to the migration situation of Member States rather than to the objective security situation in Afghanistan.

29 European Council on Refugees and Exiles, 'EU Migration Policy and Returns: Case Study on Afghanistan' 2017 1-37 <https://www.ecre.org/wp-content/uploads/2017/> and <https://www.ecre.org/wp-content/uploads/2017/11/Returns-Case- Study-on-Afghanistan.pdf>.

clusion of a readmission agreement for political reasons due to humanitarian concerns regarding their nationals.

As a consequence, in order to overcome the impasse in the negotiations, a need for a 'rapid, effective and manageable process for a smooth, dignified and orderly return',[30] led to the adoption of an informal/non-binding instrument circumventing ratification procedures on EU and Afghan side, and escaping the democratic control by the European and the national parliament. In this sense, another well-known example of a soft bilateral instrument circumventing the consent of a national parliament is the 'Memorandum of Understanding (MoU) between the European Union and the Swiss Federal Council on a contribution by the Swiss Confederation towards reducing economic and social disparities in the enlarged European Union'.[31]

The majority of research on the rationale and the characteristics of EU soft bilateral instruments has drawn a possible taxonomy of the practice of the European Union at the international level l. As mentioned above, although not figuring among legal instruments *ex* Article 288 TFEU, nonetheless it has been observed that they come in a vast variety of shapes and forms.[32] In EU External Relations and international law, typologies and rationale of employment of those instruments may differ for each policy area. Thus, it can be noted that both European and international law studies converge on classifying soft bilateral law based on the function assigned to them by their authors.[33] If the legality of hard law derives in particular from being placed by authorities legitimated for this after a pre-established procedure, in adherence to a formal or institutionalist conception of law, the legal character of soft law derives from its effectiveness, in adherence to a functionalistperspective or, better, exclusively functionalist.[34]

30 European Commission, 'Joint Way Forward on Migration Issues between Afghanistan and the EU' (n 9) Introduction.

31 CJEU (2013). Decision C (2013) 6355 of the Commission on the signature of the Addendum to the Memorandum of Understanding on a Swiss financial contribution. Commission of the European Communities, Brussels, 20.10.2005, COM (2005) 468 final, 2005/0198 (CNS) <https://eur-lex.europa.eu/legal- content/EN/TXT/?uri=celex%3A52005PC0468>.

32 Richard Baxter, 'International Law in Her Infinite Variety' (2020) 71 International and Comparative Law Quarterly 1980, 549; Stefan (n 3) 664.

33 Wessel and Larik (n 3) 119. See also Molinari (n 6) and Garcia Andrade (n 7). Olsson (n 33) 196 and Ott (16).

34 Fabien Terpan and Sabine Saurugger, 'Does Soft Law Trigger Differentiation and Disintegration?' (2022) European Papers 1229 <https://www.europeanpapers.eu/en/e-journal/does-soft-law-trigger-differentiation-and-disintegration>.

In this sense, the study embraces an international normative transformism approach[35] that has interpreted soft law in a dynamic perspective of the sources of international law whose functions are in common with EU External Relations soft bilateral instruments.[36] In consequence, these tools 'replace binding bilateral (or multilateral) agreements, and, in general, supplement, interpret and prepare existing or future (multi) or bilateral international treaties'.[37]

In conclusion, the examples assessed and chosen for their relevance in the EU practice and EU doctrine, show that soft governance and the use of soft law do not participate in the characterization of the European Union as a unique model of regional integration. On the contrary, they reflect a tendency of EU law to resemble more as state law. The authors believe that the evolution of certain EU policy fields (i.e.., Common Foreign and Security Policy) that heavily rely upon soft law tools, participate in what Terpan calls '*normalisation process*', meaning the '*transformation of the EU into a 'traditional' organization*.[38] Moreover, this transformation can be confirmed by the fact that the EU is embracing, according to Wessel, a global trend in which formal treaties make way for '*informal law*'.[39]

2.2. Why soft law should not be adopted (potential legal challenges)

Although it has been indicated that a 'turn to informality' should not *per se* have negative consequences for the legality of norms[40], most of the literature agrees that soft law should not be used to avoid the basic principles of EU law. Thus, the compliance with these EU constitutional principles provides a criterion to evaluate the legality of soft international instruments.[41] In this García Andrade also concluded that 'international soft law measures, as any other legal act, need to find, broadly speaking, a legal foundation in the Treaties in

35 Johanna Alkan Olsson and Iihami Alkan Olsson, 'The Normative Development of International Climate Change Regime: The Interplay between Hard and Soft Law' (Paper presented at Law and Society in the 21st Century 2007 Berlin) 197.

36 Ott (n 16)

37 Ibid.

38 Terpan (n 3) 68–96.

39 Joost Pauwelyn, Ramses Wessel and Jan Wouters 'When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking' (2014) 25 European Journal of International Law, 733–63 in Ramses Wessel (n 3) 73.

40 Ibid. 4.

41 See also the CJEU Decision C (2013) 6355, the Swiss MoU case where the Court thus underlined the importance of the principles of conferral and institutional balance even in the case of soft external arrangements. In fact – and this is essential for the point made by the present paper – the 'soft' nature of the agreement does not transform it being part of the overall EU external relation regime.

order to be correctly adopted'[42]. Most of the European law scholars are almost unanimous in recognizing that the use of these measures may run the risk of stepping outside the EU legal framework challenging the protection and the promotion of certain principles of EU constitutional and administrative law.[43] One of the most quoted authors in this field, Linda Senden, in 2004, argued that the Commission and the Council for employment soft law instead of legislation upsetting the 'horizontal division of powers – between the Community institutions – which in its turn can be seen as affecting the legitimacy of the European Community'.[44] Stating that an act 'is not intended to create legal rights or obligations under international law'[45] or is 'not intended to create legally binding rights and obligations",[46] regardless of its function, cannot in and of itself side-step values and principles of the EU legal order.

This is the reason at the basis of the current contribution. From a legal point of view, many EU scholars have raised criticisms and issues with regards to the use of soft law in external relations by the EU institution. The assessment of the Joint Declaration with India might help to shed light with regards to the legality of the adoption of soft law in another sensitive field, namely the environment.

3. WHY SOFTENING THE EU EXTERNAL RELATIONS: AN ECONOMIC PERSPECTIVE

The aim of this section is to shed light on the rationale for using soft law from an economic perspective. Scholars acknowledge that the law and economics has almost bypassed

42 Paula García Andrade, 'The Role of the European Parliament in the Adoption of Non-Legally Binding Agreements with Third Countries' in J. Santos Vara and S. R. Sanchez-Tabernero (eds.), The Democratization of EU International Relations Through EU Law (Routledge 2018) 120 in Ramses A Wessel (n 3).

43 See Wessel (n 3); Ramses Wessel and Joris Larik Meijers Committee, '1806 Note on the Use of Soft Law Instruments under EU Law, in Particular in the Area of Freedom, Security and Justice, and Its Impact on Fundamental Rights, Democracy and the Rule of Law' (9 April 2018) <https://www.commissie- meijers.nl/sites/all/files/cm1806_note_on_soft_law_instruments.pdf>; Terpan (n 3); Laurent Pech, 'The Rule of Law as a Guiding Principle of European Union's External Action' (2011) SSRN Electronic Journal <https://doi.org/10.2139/ssrn.1944865>; Senden (n 5); Kenneth Abbott and Duncan Snidal, 'Hard and Soft Law in International Governance' (2000) vol. 54 No 3 International Organization <https://doi.org/10.1162/002081800551280>.

44 Senden (n 5) 97.

45 European Commission, 'Joint Way Forward on Migration Issues between Afghanistan and the EU' (n 9) Introduction.

46 'Memorandum of Understanding on Cooperation' European External Action Service and League of Arab States General Secretariat, Miscellaneous 2015.

international law, with few exceptions.[47]. One of the possible reasons for that is the idea that its application in the international domain is not so useful as in the domestic one. Conversely, some scholars highlight how the economic analysis may help enhance the combination between doctrinal description and prescription effects of rational maximising behaviours under conditions of scarcity, it may shed a light on traditionally neglected questions. For instance, it can help conduct deeper inquiries into the role of international institutions as '*balancers*' ' and thus solve the institutional choice of which body should be better suited to adopt decisions that affect all international actors (*e.g.,* on the proper environmental standard). These kinds of questions require indeed an examination of relative institutional competencies and strategic interactions among various institutions. Moreover, applied to contexts other than traditional markets, economics does not only aim at wealth maximisation but it can also include the maximisation of multiple values at the same time.[48] In any case, it is important to bear in mind that the economic analysis of international law looks at states as key units.[49] While states pursue their individual goals, they inevitably create externalities that affect other states, creating a gap between what is optimal for an individual state and what is globally efficient. The goal of international cooperation and international cooperation is thus to close this gap.

Formally binding agreements among states are surely the main tool by which states address externalities created by their actions because they help maximise the value of agreements.[50] The use of soft law from an economic perspective seems to be therefore inefficient. However, Guzman and Meyer[51] pinpointed three complementary reasons that can explain the choice of what has been called a 'middle ground approach to commitment'.[52]

First, States resort to soft law as a coordinating device when binding agreements are not needed, meaning that they use it to resolve coordination games. In fact, relationships between countries can be described either as a pure coordination game or as more

47 Jeffrey Dunoff and Joel Trachtman, 'Economic Analysis of International Law' (1999) 24 Yale Journal of International Law <https://digitalcommons.law.yale.edu/yjil/vol24/iss1/2>.

48 Ibid. 4.

49 Andrew Guzman and Alan Sykes, 'Economics of International Law' in Francesco Parisi (ed.), The Oxford Handbook of Law and Economics Volume 3 Public Law and Legal Institutions (Oxford University Press 2017).

50 By and large, States try to maximise the value of their agreements through optimal enforcement mechanisms. Since violations in international law are very frequent, States seek to increase the power of enforcement whenever possible, by resorting to hard law more than soft law (ibid, 7).

51 Andrew Guzman and Timothy Meyer, 'International Soft Law' (2010) 2 (1) The Journal of Legal Analysis <https://ssrn.com/abstract=1353444>.

52 Ibid. 188.

complex variations with some tension between the parties to agreements. Soft law is traditionally employed when there is some degree of certainty that States' incentives will remain constant in the future. In this case, the expected levels of compliance would be the same across various forms of agreements, including formal legal obligations and informal norms. Therefore, if all is equal from a compliance perspective, then informal norms may be preferred for many reasons. First of all, they can be adopted by lower rank officials without undergoing long and complex bureaucratic processes of binding agreements. From this point of view, soft law allows to save public money when small efforts to coordinate behaviours are needed. These efforts are normally limited to information sharing among national enforcement authorities.[53] Seemingly, when soft law is used as a coordinating device it does not raise interesting issues as to its compliance. For this reason, scholars have been investigating more the other reasons why States use soft law.

The second reason soft law is used in international law is because its violation entails less costs compared to hard law (loss avoidance theory). In fact, when States enter into agreements, they will consider both their gains and their losses, *i.e.* the costs they will bear if they violate their terms. From this point of view, it is quite intuitive that soft law is preferred every time that marginal costs of sanctions (from hard law) are expected to be higher than marginal benefits (avoided costs of violations). However, the consequences of violations in international law differ from domestic law regimes[54] and they basically refer to 'the three Rs of compliance: reputation, retaliation and reciprocity'.[55]. It is reciprocity in particular that is the pillar of many bilateral agreements, and cooperation is achieved exactly because the States prefer mutual compliance rather than mutual defection. If enforcement is not needed, then soft law is clearly to be preferred, since there is no need for a costly promise by hard law. However, the strength of reciprocity is limited by several factors. First of all, reciprocity does not protect against a future change of interests between the parties which may make the threat of reciprocal defection ineffective. Secondly, reciprocity may fail when compliance is hardly credible for reasons unrelated to the treaty.[56] Thirdly, the threat of ceasing compliance as a response to the violation of another party may not work in the case, for instance, of large multilateral environmental agree-

53 Ibid. Guzman specially highlights that in the area of international competition policy where regulators are incentivized to cooperate, and the main goal of soft law agreements is to improve their communication.

54 In domestic contract law regimes, the cost of violation is traditionally represented by a money transfer imposed by courts that does not have an impact on the total welfare of the State since what is lost by one party is gained by another.

55 Guzman and Meyer (n 51) 193.

56 See on this point the example of the International Covenant on Civil and Political Rights (ICCPR), Guzman and Meyer (n 51) 194.

ments. Based on these cases, it can be argued that reciprocity cannot be regarded as the main reason why soft law should be preferred to hard law. The second R of compliance (reputation) might provide a better explanation. In international law, failure to comply also makes future promises less credible towards any States and not only the parties to the violated agreement.[57] Therefore, although treaties are considered to be the most effective instruments of cooperation,[58] if the expected costs of their violation (including the reputational loss) are higher than the sum of expected reputational and direct losses, then soft law will be adopted rather than hard law. In the end, all relies on the trade-off between the expected benefits of compliance from the treaty and the expected penalty in case of its violation. In order to simplify the distinction between hard and soft law from an economic perspective, Guzman and Meyer distinguish three main cases: when compliance is expected whether the agreement is binding or not, when compliance is only expected if the agreement is binding, when violation is expected even if a formal treaty is adopted. Arguably, soft law is more convenient in the first case, and, in the other two cases, it depends on the trade-off between expected gains from cooperation and costs.

The third reason why States choose soft law is that it provides enough flexibility to change the law in response to changed circumstances (delegation theory).[59]. In fact, non-binding agreements lower penalties associated with violations, they avoid the exercise of a veto over potential amendments, and on the other hand, they induce unilateral innovations of their terms. From this point of view, the choice between soft and hard law relies on the trade-off between transaction costs involved in the Pareto-improving amendment of international agreements (*e.g.,* unanimity consensus).[60] and the expected costs involved in welfare-enhancing unilateral deviations from nonbinding agreements. Under the delegation theory, States will opt for soft law every time that the expected benefits from unilateral changes exceed the expected costs.[61] This is likely to occur in three cases: 1) when it is uncertain whether actual rules will remain optimal in the future; 2) when it is uncertain whether the states will be able to renegotiate the rules under changed circumstances in the future; 3) when one or a small group of states has the power to change what is expected to be a compliant behaviour. The first case re-

57 For more literature on this point, see Guzman and Meyer (n 51) 195.

58 Charles Lipson, 'Why are some international agreements informal?' (1991) 45 (4) International Organization 508.

59 Guzman and Meyer (n 51) 197.

60 However, soft law does not always lower transaction costs. For instance, multilateral soft law agreements operating by unanimity raise similar issues to binding agreements. But soft law makes violations more likely to occur and, thus, it encourages informal processes of amendments spurred by more frequent violations (Guzman and Meyer (n 51) 198.

61 Ibid. 199.

fers to states' uncertainty about future conditions in the world. The second case refers to the fact that unilateral changes might be superior compared to explicit renegotiations. The third case relates to the need of preserving cooperation also in face of future pressures to change.[62] In conclusion, no single theory can explain the use of soft law in international commitments. Coordination, loss avoidance and delegation offer three different rationales for preferring soft law over hard law and they all refer to the expected inefficiency of binding agreements which are necessarily case-specific. Section 4 will thus investigate one selected case of soft-law and explain whether its adoption can be regarded as legally and economically reasonable.

4. THE 2016 JOINT DECLARATION BY INDIA AND THE EUROPEAN UNION ON AN INDO-EUROPEAN WATER PARTNERSHIP

The instrument falls in what the emerging EU External Relations doctrine has defined as political commitments according to its label.[63] In this category, non-binding instruments that are generally found are MoU,[64] and Statements[65] which are normally concluded by the Union with a third country or international organisation. This is an important point since, as stated above, the EU doctrine is unanimous to conclude that these instruments have some practical or legal effects, committing somehow the European Union, its states and its institutions.[66] This is particularly true for the EU return policy, with the notable Joint Way Forward with Afghanistan, the EU-Turkey Statement, or the Compact with Jordan.[67]

62 For more details and examples on these cases, see Guzman and Meyer (n 51) 200-201.

63 Ott (n 16), 582.

64 Ott (n 16), 582 'MoUs are concluded that enable the macro-financial assistance provided to Eastern Partnership and ENP countries: Commission implementing decision approving the MoU between the European Union and Georgia related to macro- financial assistance to Georgia, C (2018)4154/F1. The legal status of the 2011 cooperation MoU between the European Commission and the World Organization for Animal Health (OIE) concerning their general relations is, however, not clear, OJ 2011 C 241/1.'

65 Joint Declaration on the Central African Forest Initiative by the Central African partner countries (such as Congo, Cameroon) and by the European Union as well as other countries or organizations (including the Federal Republic of Germany, the Kingdom of Norway, the Republic of France), Commission Decision of 4 December 2015, on the signing of the Joint Declaration, C (2015)8742/F1.

66 Ott, (n 16), 591; see also Wessel (n 3) 79; Molinari (n 6) 15; Poli (n 22) 74.

67 The Compact with Jordan is detailed in the Annex of Decision 1/2016 of the EU-Jordan association Council of 19 December 2016 agreeing on EU-Jordan Partnership Priorities <https://eur-lex.europa.eu/legal- content/EN/TXT/PDF/?uri=CELEX:22016D2388&from=EN>.

In accordance with the Treaty law, ex Article 218 (paras 5 and 6), international agreements are adopted by a Council Decision, by complying with the principle of conferral.[68] However, soft bilateral instruments usually do not fall into any formal obligation. Moreover, the European doctrine criticises the lack of transparency given that several soft bilateral instruments adopted by EU Institutions are not public, especially in the field of the CFSP/CSDP. By looking at the EU Commission Register,[69] it seems that only one out of six documents are open access, whereas the others are only available upon request, or are not published at all.

Despite a certain inconsistency in the terminology and the pre-Lisbon difficulty to understand the legal nature of the instruments, a post-Lisbon practice inaugurated by the Commission at least gives the possibility for the reader to trace whether the Parties (or the Commission on behalf of the European Union) intended to confer a legal binding nature to it or not. Considering that international law doctrine generally maintains that the form of an instrument is not a significant criterion for determining its legal nature,[70] agreements may constitute treaties 'regardless of their form and designation'.[71] Similarly, it is a consolidated view of the European Court of Justice that the form of soft bilateral law is 'irrelevant'.[72] In fact, since its *ERTA* doctrine, the Court held the principle that the intention of the parties in the European legal order became a fundamental element and the EU principles are applied.[73]

In light of the above, it can be implied that the Joint Declaration is a soft law instrument that reflects this practice of the Commission, by stating that 'is not intended to create any legal or financial obligations under domestic or international law in respect of either side'.

Concerning the aim, as already mentioned, the instruments contain political commitments

68 Council Rules of Procedure. Council Decision of 1 December 2009 adopting the Council's Rules of Procedure, 2009 OJ L 325/35– 61.

69 The key words in the research that have been used are: "Joint Declaration" and DG ENVI and DG Climate Action.

70 Wessel (n 3).

71 Wessel (n 3).

72 CJEU (2004). Case C-233/02, France v. Commission, 23 March 2004, ECLI:EU:C:2004:173.

73 See also Case C-325/91 (concerning a Commission communication), France v Commission, para. 26 (concerning Commission guidelines), see also: Case C-114/12 Commission v Council (Broadcasting Organizations), ECLI:EU:C:2014:2151, paras 39; Case C-425/13 Commission v Council (Australian ETS), ECLI:EU:C:2015:483, paras 26–28.

that are confirmed by certain elements. The Joint Declaration talks of 'EU's substantive commitment', together with the Annex to the document, laid the foundations for the Partnership that has been lately created and Joint Working Groups. The Partnership has been characterised by its own organisation based on Forums and the Joint Working Groups by meetings on a regular basis. Commitments and actions undertaken according to this tool have been reported and assessed.[74] Furthermore, important intergovernmental commitments were confirmed by the Action Document for India – EU Water Partnership - Phase II, of the Annex 4 of the Commission Implementing Decision on the 2020 Annual Action programme for the Partnership Instrument:

> The interest and intention of the GoI (Government of India) to work with the EU on water and river basin management issues was confirmed through the Joint Declaration on Water signed by the Republic of India and the EU in March 2016. The parties committed to work towards the establishment of the India-EU Water Partnership, bringing together representatives of relevant stakeholders, including interested EU Member States and Indian States, European and Indian institutions, businesses, and civil society.[75]

Based on the above, it seems that this soft tool falls within the category of preparing and committing Contracting Parties to adopt later binding arrangements being categorised as political commitments that, according to the most recent EU External Relations research on political commitments, might raise certain legal issues.[76] Among them, the India-EU Water Partnership (IEWP) and a 'MoU on the India-EU Water Partnership', signed in October 2016 between the Indian Minister of Water resources, River Development and Ganga Rejuvenation and the EU Environment Commissioner.[77] These actions enabled to conclude several IEWP activities that, after July 2017, have been co-financed by the European Union and the German Federal Ministry of Economic Cooperation and Development (BMZ).

74 See the India-EU Water Partnership website <https://www.iewp.eu/>.

75 Joint Declaration between the EU (European Union) and the Government of India on India-EU Water Partnership (IEWP) <https://ec.europa.eu/fpi/sites/fpi/files/ann4_india-eu_water_partnership_-_phase_ii.pd>.

76 See above with regards to migration soft bilateral instruments the studies of Ott (n 16) and Wessels (n 3).

77 'India-EU Water Partnership' <https://www.iewp.eu/about> accessed 23 May 2023>.

5. LEGAL ANALYSIS OF THE JOINT DECLARATION

As with similar Joint Declarations.[78] the instrument at issue contains the mandate on what the act is based, namely Article 17 TEU.[79] However, there is an open inter-institutional and academic debate on the use of Article 17 TEU, since it only refers to a general representation to external representation without indicating any peculiar instruments to be used.[80] From this point of view, according to the Vademecum released by the Commission,[81] this mandate is precise enough for adopting political commitments if the content of the soft law tool is in line with existing EU policies. In other words, the conclusion of political commitments cannot differ too much from the conclusion of international agreements. The Commission (or, in the case of CFSP, the MoU's High Representative) will negotiate and sign the document, where the actual conclusion is in the hands of the Council. Thus, the transformation may affect the norm, but not always the procedure.[82] Conversely, the Council stressed that Article 16 TFEU shall provide a more precise mandate to conclude political commitments on behalf of the EU since Article 17 is too general and only refers to a Union's representation. From the Council's point of view, Article 16 provides more power and any actions within External Relations require an approval by the Council.[83]

In this context, the Court of Luxembourg has set certain thresholds when it comes to adopting external soft law by European institutions. They can only act within their competences assigned to them by the Treaties (horizontal conferral of powers) and they have to engage in mutual sincere cooperation.[84]

78 See for instance Commission decision of 15 June 2015 on the Joint declaration establishing a Mobility Partnership between Belarus and the EU and its participating Member States, C (2015)3955 final; Commission Decision of 25 June 2015 on the signature of an MoU between the EU and China on reinforcing the EU-China IP dialogue mechanism, 2015) 4269 final.

79 Wessel (n 3) 77; Thomas Verellen, 'On Conferral, Institutional Balance and Non-Binding International Agreements: The Swiss MoU Case'(2016) vol 1 No 3 European Papers, 225–233.

80 Ott (n 16) 587; Wessel (n 3) 78.

81 European Commission, *Vademecum on External action of the European Union*, SEC (2011) 881, 53.

82 Wessel (n 3).

83 'Contribution of the legal service, 15809/12, Brussels 6 November 2012, 5; contribution of the legal service, 5707/13, Brussels, 1 February 2013. Only exceptionally and only concerning Mobility Partnerships, the Commission will also refer to Art. 79 TFEU; see Joint Declaration establishing a Mobility Partnership between Jordan and the EU and its participating Member States, C (2014) 3664 final' in Ott (n 16).

84 Christophe Hillion, 'Conferral, cooperation and balance in the institutional framework of EU external action', in M Cremona (ed), *Structural Principles in EU External Relations Law* (Oxford Hart Publishing, 2018) 117–74, 142.

Overall, the Court requires a specific mandate to the Commission in order to act on behalf of the Union. In alternative, the Commission should seek the Council's prior approval for its action. With regard to the soft tool at issue, the paragraph 7 of the Commission Decision with which the Joint Declaration has been adopted states that the Council has been informed. According to the established but limited case law, the Court did not find any breach of institutional balance by the Commission because the Council approved the negotiation of soft law, and it was informed.[85] However, in the Joint Declaration there is no evidence that proves the Council's prior approval of the negotiation. The only sentence: '*the Council has been informed*' is not helpful to understand the nature of the institutional cooperation between the Council and the Commission. In this sense, the Commission's reference to Article 17 TEU might be problematic since it is argued that this EU co-funded structure – the IEWP - seems to resemble the Partnership Instrument, a hard law instrument, whose legal basis relies on the Regulation (EU) No 234/2014 of the European Parliament and of the Council of 11 March 2014 establishing a Partnership Instrument as legal binding tool for cooperation with third countries. Some elements might suggest this possibility.

Firstly, on the one hand, the 2014 Regulation is also mentioned at the basis of the Action Document.[86] On the other hand, in the Joint Declaration there is no mention of the 2014 Regulation. Despite the fact that there is no reference to the 2014 Regulation in the official website where the Joint Declaration and the IEWP are published, the IEWP, for its content, objective and aims, is nevertheless part of the EU-India Strategic Partnership among whose commitments it is possible to find a 'scale up cooperation on water management'.[87]

Secondly, in the Preamble of the Joint Declaration that created the IEWP, the words 'mutually beneficial cooperation' or 'reciprocity' are clearly a reference to the Article 1 of the 2014 Regulation: 'Subject matter and objectives', when it is stated that 'this Regulation establishes a Partnership Instrument for cooperation with third countries to advance and promote Union and mutual interests'. Policy dialogues and action plans for promoting cooperation between the Union and a third country are also mentioned in the Joint Declaration and in Article 1 of the 2014 Regulation. Both instruments promote the possibility to provide 'business opportunities' for European companies. For this reason, it seems odd that the IEWP has not been based under the clear legal framework of 2014 Regulation.

85 Case C-233/02 France v Commission, ECLI:EU:C:2004:173, paras 40–41.

86 See above, reference 76.

87 Factsheet, 'EU-India Strategic Partnership' (Brussels, 8 May 2021) <https://ec.europa.eu/commission/presscorner/detail/en/FS_21_2353>.

Moreover, since the 2014 Regulation empowers the Commission, in accordance with Article 290 TFEU, to adopt delegated acts 'in respect of the priorities defined in the Annex', it is not clear whether the Joint Declaration is in line with the 'action plans and similar bilateral instruments' envisaged in the 2014 Regulation for supporting the implementation of Partnership and Cooperation Agreements.[88] Hence, it raises doubts whether the Commission might have the competence, within its delegated power, to adopt such political commitment at the basis of the creation of a Partnership Instrument. It seems indeed that the nature of bilateral alliance differs from country to country.[89]

In conclusion, the interpretation above suggests that the Commission used its delegated power to adopt a Joint Declaration, namely a 'political commitment', on behalf of the whole Union. The Joint Declaration, as a soft tool, represents the legal basis for the India-EU Water Partnership, which is a proper and well-structured Partnership Instrument as per the content and aim defined by the 2014 Regulation. The IEWP has then promoted and aimed at proposing important environmental goals for India, the EU and in particular some EU member states that seemed to be more involved than others. Although it is uncertain whether prior approval has been given by the Council, in this case, the reference to Article 17 TEU for the adoption of the Joint Declaration might constitute a breach of institutional balance and the principle of conferral by the Commission because it does not qualify as such a specific power with regards to the policy field and the commitments involved, following the *MoU Switzerland case*.[90]

A counterargument to that may be that the Commission overused its power while being sure that it was playing within an exclusive competence of the Union, namely Oceans and Fisheries since the document was signed by Karmenu Vella.[91] This possibility might shield the Commission from any European constitutional principle's breaches. If it is argued that the Joint Declaration does not replace an international agreement, it falls within an exclusive European competence, then it is possible that it prepares or implements other soft or hard instruments as shown above, allowing the necessary flexibility for Member States to reinforce the parallel informal arrangements into which the Member States separately engage.[92]

88 Annex of Regulation (EU) No 234/2014 of the European Parliament and of the Council of 11 March 2014 establishing a Partnership Instrument for cooperation with third countries.

89 EU Strategic Partnerships with third countries, EU Strategic Partnerships with third countries (etiasvisa.com)

90 Case C-660/13 Council v Commission (MoU Switzerland), ECLI:EU:C:2016:616.

91 EU Whoiswho <https://op.europa.eu/en/web/who-is-who/person/-/person/CRF_90139562>.

92 Jean-Pierre Cassarino and Mariagiulia Giuffré, 'Finding its place in Africa: Why has the EU opted for flexible arrangements on readmission?' in Ott (n 16) 594.

It is therefore possible that the Joint Declaration, as a non-binding instrument, has been a better tool for escaping concerns that were raised in relation with the 2014 Regulation. In its Statement attached to the 2014 Regulation, the European Parliament noted that in the Partnership Instrument Framework there is no explicit reference to the possibility of suspending assistance in cases where a beneficiary country fails to observe the basic principles enunciated in the respective instrument and notably principles of democracy, rule of law and the respect for human rights. Side-lining the role of the European Parliament seems also be the practice of soft bilateral tools according to the majority of the EU doctrine.[93] Relevant precedents of stepping outside the democratic check of the European Parliament are the Joint Way Forward with Afghanistan and the EU-Turkey Statement. The ECJ in *Tanzania and Mauritius* cases held that at least an information right for the European Parliament ensures that the Parliament is in a position to exercise democratic control over the European Union's external action and, more specifically, to verify that the choice of the legal basis for a decision on the conclusion of an agreement was made with due regard to the powers of the Parliament'. The ECJ also finally argued that this right contributes to ensuring the 'coherence and consistency' of EU external relations.[94] EU scholars have been stressing that these arguments shall be applied also when soft bilateral laws are adopted, in analogy with the information right laid down in Article 218 TFEU especially when a soft law replaces or constitutes the basis of an international agreement.[95]

The legal mandate and how far a soft bilateral tool might infringe EU law is evaluated by looking at its function and aim. From the analysis, it can be argued that the Joint Declaration is the legal basis of an Instrument that, deviating from the 2014 Regulation, seems to resemble in its aim and objective a Strategic Partnership Instrument. Perhaps stricter conditions should have been applied for the conclusion of the creation of the IEWP, i.e., the participatory right of the EP, formal requirements for publications and clarifications about its adoption, and a possibility for suspension of funding in case of third parties' breaches of the European values.

93 Ott (n 16) 591; Wessel (n 3) 83; Ricardo Passos, 'The External Powers of the European Parliament' in Piet Eeckhout and Manuel Lopez-Escudero (eds) *The European Union's External Action in Times of Crisis*. (Oxford: Hart Publishing 2016) 85–128; Verellen (n 79). 'On Conferral, Institutional Balance and Non-Binding International Agreements: The Swiss MoU Case', European Papers, 1:3, European Forum, Insight of 10 October, 1225–33.

94 Case C-263/14 Parliament v Council (Tanzania) 2016 ECLI:EU:C:2016:435 (para. 42).

95 Ott (n 16) p. 592; and see also Francis Snyder, 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques' (1993) Vol. 56, No. 1 The Modern Law Review 19; K Wellens and G Borchardt, 'Soft Law in EC Law' (1989) ELR 267–321; Linda Senden, *Soft Law in European Community Law* (Hart Publishing 2004); Terpan (n 3) 68–96.

The consequence of this complex and confused lack of a proper mandate or legal basis might create inter institutional conflict from an EU law perspective even in International Courts, as it was the ITLOS case, when the Council challenged a written statement by the European Commission on behalf of the Union before the International Tribunal for the Law of the Sea.[96] Moreover, the lack of legal certainty and inconsistency in the EU External Action might weaken the Union credibility toward third-states or international actors to assume obligations and to pursue its agreed goals in fighting climate change and promote European values abroad according to Art. 21 TEU.

It is therefore interesting to see whether the instrument can be justified from an efficiency perspective.

6. ECONOMIC ANALYSIS OF THE JOINT DECLARATION

From an economic perspective, the first factor to take into account is the distinction between multilateral and bilateral agreements. For instance, international environmental agreements proved to be often successful when adopted between two parties. Guzman cites the arrangement between the United States and Canada on the reduction of acid rain, as a particular example of that.[97] The success of the instrument seemed to rely on the fact that the commitment was both reciprocal and bilateral. In fact, both parties could benefit from reduced pollution by their own action and the action of the other. In other words, the threat of reciprocal non-compliance induced reciprocal cooperation. To put it simpler, bilateral agreements in the field of the environment seem to work better than multilateral instruments because they avoid freeriding issues, hence ensuring self-enforcement.

Regarding multilateral agreements, the probability of their success is quite low. For example, the *Montreal Protocol on Substances that Deplete the Ozone Layer* represents a successful case. Scholars argued that the occurrence of several factors (industrial interests, public interests in reducing health issues and side-payment mechanisms to assist developing countries) may have led to such a high degree of compliance.[98] However, many other arrangements, such as the Kyoto Protocol and other climate-related agreements argue against this evidence. Among the possible reasons for that, researchers cited: the scientific

96 C-73/14, Council v Commission (ITLOS), ECLI:EU:C:2015:663.

97 Guzman and Sykes (n 49).

98 Susan Solomon, Joseph Alcamo and A.R. Ravishankara, 'Unfinished Business after Five Decades of Ozone-Layer Science and Policy' (2020) 11 Nature Communications 4272 <https://doi.org/10.1038/s41467-020-18052-0>.

uncertainty about future scenarios, benefits that some countries would gain from climate change, very high costs of emissions abatement,[99] especially for the largest polluters.[100] In the area of fisheries protection, the chance of success of multilateral agreements are even lower. Although overfishing is a well-known problem given the common-pool natural resources at stake, freeriding and enforcement issues undermine the chance of success of any multilateral agreements. Freeriding means that the States would better remain outside cooperative regimes. Enforcement issues are related to the fact that the costs of compliance are extremely high and there is no effective mechanism to measure compliance.[101]

Based on the above, the Joint Declaration between India and the EU, as a form of bilateral agreements, is apt to ensure reciprocity and self-enforcement, which is also one of the first reasons why soft law may be preferred over hard law instruments. In fact, under the loss avoidance theory, if there is some degree of certainty that States' incentives remain constant in the future, then informal norms turn out to be more beneficial. In other words, if the expected levels of compliance would be the same across various forms of agreements, including formal legal obligations and informal norms, soft laws are preferred. There is no need to waste money over more expensive procedures if it can be highly expected that the parties will respect the terms of the agreement in any case. With special regard to the Joint Declaration on water management, two main factors may contribute to the probability of compliance: the lack of expertise of Indian authorities in the field of water management and the need of the EU to project itself as a leader in the space of environment within its external relations. Indeed, infringing the agreement's terms would determine a severe drop in the credibility of the EU vis-à-vis all its current and future partners. Also, it would undermine its credibility for the achievement of the Green Deal's objectives.

Additional economic arguments in favour of soft law can be derived from the expected costs of hard laws. They mainly refer to the consequences of future violations (either the probability of violation or the magnitude of expected harm). In this case, reputational losses from violating both soft law and hard law seem to be equal. For this reason, there is no point in bearing the extra-costs of adopting hard laws, given that self-enforcement and compliance can be achieved in any case.

99 Measures to reduce greenhouse gas emissions mainly include financing substitutes for fossil fuels and the production of renewable energies which are clearly expensive.

100 Guzman and Sykes (n 49).

101 Ibid.

Secondly, uncertainties about the future may sharpen the lack of stability of the agreements, hence making renegotiations of the terms unavoidable (delegation theory). In order to avoid longer and expensive negotiations, soft law instruments may be therefore better placed. Uncertainties in the future may also come from the impossibility to predict how the world will look in the next decades. It is indeed hard to determine today whether natural resources are going to be severely depleted notwithstanding the policies on sustainability put in place around the world. Emission reductions have been already postponed from 2020 to 2030 raising the risks of climate change and related costs in the long term.[102] Considering that water security is strictly connected to climate risks[103] and many factors play a role in raising these risks, it can be easily understood how easily negotiable instruments would ensure a sufficient degree of flexibility and lower the expected costs of violating or modifying traditional hard law agreements.

Lastly, considering that the Joint Declaration belongs to the category of political commitments with a preparatory purpose for future agreements, it can be also argued that the instrument is used as a coordinating devices and non-binding agreements are not needed. They would only determine a waste of public money.

In conclusion, under all scholarly interpretations of rationales for employing soft laws (coordination, loss avoidance and delegation), the objectives of the Joint Declaration between EU and India may be achievable through soft laws rather than hard laws at lower costs. The informal form seems to ensure the same degree of reciprocity and compliance, while leaving room for future adjustments according to changed circumstances. Formal instruments would instead make the whole process of enforcement and renegotiation much more expensive.

7. CONCLUDING REMARKS

The aim of this chapter was to provide a novel perspective over the tools employed by the EU in order to achieve its objectives in the EU external environmental relations.The use of soft law between the Union and third states (or international organisations) seems quite frequent in several policy areas, including the environment. Notwithstanding this

102 Michel Elzen, Detlef Vuuren and Jasper Vliet, 'Postponing emission reductions from 2020 to 2030 increases climate risks and long-term costs' (2010) 99 Climatic Change 313-320 <https://doi.org/10.1007/s10584-010-9798-5>.

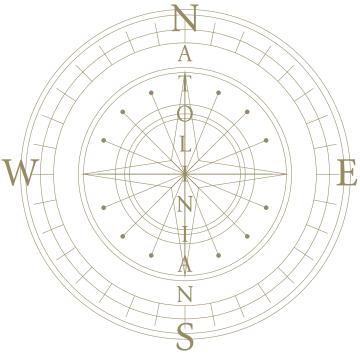
103 ANNEX 4 Of the Commission Implementing Decision on the 2020 Annual Action programme for the Partnership Instrument. Manmade pressures led farmers, households and industry to rely more on groundwater rather than surface waters in rivers and lakes. The unregulated use of groundwater in turn determined its overuse and raised the need to plan and manage water on a river basin and multi-sectoral basis.

fact, legal and economic challenges together have not received enough attention in the literature of international law. Motivated by the need of closing this research gap, this paper tried to compare legal and economic implications underlying the adoption of non-binding instruments in the EU external relations. After a preliminary examination of the use of soft law from a theoretical perspective (objectives and taxonomy), the chapter offers a list of reasons why soft law should not be used in order to comply with the EU principles and, above all, the horizontal division of powers.

This research focuses on a specific instrument adopted in 2016: the *Joint Declaration by India and the European Union on an Indo- European Water Partnership*. The non-binding nature of this instrument raises several legal challenges that the article clearly illustrated. In particular, issues have been highlighted regarding the principles of democracy, rule of law and the respect for human rights. Moreover, financial commitments as a consequence of soft laws are more likely to occur (and they already occurred), hence making it even more important to ensure that democratic rules are rigorously followed.

Conversely, economic arguments seem to argue in favour of the use of informal procedures since they clearly reduce present and future costs involved in the implementation and enforcement of soft law instruments. One of the main reasons why soft law is economically justified is indeed the high probability of compliance and reciprocity that render binding agreements useless. Surely, the role of the EU as an environmental leader in the world lays the foundations for its strong credibility vis-à-vis its external partners. Using hard laws would ultimately create a weaker incentive with subsequent critical challenges to the EU legal order.

Given the sensitivity of the selected domain (environment and climate change), the authors believe that this area represents a crucial path for future research. In particular, constitutional and legal challenges need to be explored in more detail with respect to all publicly available soft law tools. On the other hand, the legal analysis needs to be complemented by the economic one for three main reasons. First, economic analysis helps understand the real motivation underlying procedural and contradictory choices. Secondly, economics helps identify inconsistencies between the law and the efficiency, with further implications for legal analysis. Thirdly, economics complements the legal literature regarding how the law should be changed in order to meet present needs and, at the same time, ensuring the respect of the rule of law. In fact, a mismatch between law and economics in the EU external action would ultimately sharpen the risk of lacking credibility towards present and future partners.



CHAPTER 9

The European Union as an Effective Actor in Climate Change Negotiations in the International Maritime Organisation

BY INA MISKULIN

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1. INTRODUCTION

The issue of climate change is high on the political agenda of the European Union (EU) and globally. Consequently, ramping up the EU external action in the field of climate diplomacy in order to make the EU a global leader in the field has been declared as the EU's priority on many occasions.[1]

The role of the EU climate leadership on international climate governance has been a topic of an ongoing debate, especially since 2009 when the Lisbon Treaty brought about a change in the internal power structure, arguably with an effect on the EU action in climate issues.[2] Therefore, the academic community has been particularly active in dissecting the EU role in the climate negotiations through analysing its actions at international level and, to a lesser extent, effectiveness in the realms of Conference of the Parties (COP) climate change negotiations.[3]

Nevertheless, despite the large scholarly interest in the area of climate change, the EU position in the discussions in the International Maritime Organisation (IMO), a specialised agency of the United Nations responsible for regulating shipping established in 1948 and an important element of the global climate change policy, has been largely overlooked. Given the importance of international shipping for global trade and its impact on the environment, one would assume that the EU action in that forum would inspire more academic debate.

As regards global climate change governance, the discussions taking place in the IMO's Maritime Environment Protection Committee (MEPC) are an important piece in the international efforts for the climate change mitigation puzzle. This was confirmed many times by, among others, the Council of the EU and EU Commission, the latest example

1 European Council, 'Conclusions on COVID-19 and climate change' <https://www.consilium.europa.eu/media/46341/1516-10-20-euco-conclusions-en.pdf> accessed 19 May 2023.

2 Bram de Botselier, 'The European Union's Performance in Multilateral Environmental Agreements: Was the Lisbon Treaty a Game Changer?' (2017) 11 EU Diplomacy Papers, <http://doi.org/doi:10.13140/RG.2.2.19997.87529>; Tom Delreux, 'EU actorness, cohesiveness and effectiveness in environmental affairs' (2014) 21 Journal of European Public Policy <http://doi.org/doi: 10.1080/13501763.2014.912250>.

3 Carolina Pavese and Diarmuid Torney, 'The contribution of the European Union to global climate change governance: explaining the conditions for EU actorness' (2012) 55 Revista Brasileira de Política Internacional, <https://doi.org/10.1590/S0034-73292012000300008> ; Lisanne Groen et al., 'The EU as a Global Leader? The Copenhagen and Cancun UN Climate Change Negotiations' (2012) 8 (2) Journal of Contemporary European Research; Charlotte Bretherton, John Vogler, 'Towards an EU Policy for Sustainable Global Development?' in Stefan Gänzle et al., 'The European Union and Global Development: An 'Enlightened Superpower' in the Making?' (Palgrave Macmillan 2012).

being the EU Strategy for Sustainable and Smart Mobility published on the 9th of December 2020. It states that '[t]he EU must continue working closely with all international organisations, such as […] the International Maritime Organisation (IMO), on concrete measures aimed at reaching science-based global emission reduction goals consistent with the Paris Agreement'.[4] In particular, the importance of the EU focus on this forum is rather significant for the following reasons:

1. The global share of greenhouse gas (GHG) emissions from shipping amounts to 2.1%, and it is projected to increase if no reduction measures are put in place.[5]

2. The Paris agreement does not cover shipping *per se*, and the Kyoto Protocol mandates the IMO to deal with climate change mitigation and regularly report to UNFCCC.[6]

3. Global shipping lines are vital for global trade and the economy, carrying a large percentage of global trade.[7]

Given that the IMO actions towards reducing the carbon footprint of the shipping sector are pertinent in the overall discussion on the international efforts towards climate neutrality, it is essential to study the effectiveness of the EU action in the IMO. This should be especially done in view of anticipating the future developments in the IMO given critical climate-related challenges ahead and the EU's high environmental ambition.[8]

4 European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Sustainable and Smart Mobility Strategy – putting European transport on track for the future' COM (2020) 789 final <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2020:789:FIN>.

5 International Maritime Organisation, 'Fourth IMO GHG Study' (2022) <https://wwwcdn.imo.org/localresources/en/OurWork/Environment/Documents/Fourth%20IMO%20GHG%20Study%202020%20-%20Full%20report%20and%20annexes.pdf>.

6 European Parliament, 'International Climate Negotiations, Issues at stake in view of the COP 25 UN Climate Change Conference in Madrid' (2019) Study Requested by the ENVI Committee, <https://www.europarl.europa.eu/RegData/etudes/STUD/2019/642344/IPOL_STU(2019)642344_EN.pdf>.

7 International Chamber of Shipping, 'Shipping and world trade: driving prosperity' (2020) <https://www.ics-shipping.org https://www.ics-shipping.org/shipping-fact/shipping-and-world-trade-driving-prosperity/>; United Nations Conference on Trade and Development, Review of Maritime Transport 2015 (UNCTAD 2015).

8 Adina Vălean, 'A speech delievered by the Commissioner Valean ahead of the MEPC 75' (2019) European Commission <https://ec.europa.eu/commission/commissioners/2019-2024/valean/announcements/addressing-shipping-emission-international-maritime-organization_en>; Kitack Lim, 'Speech delivered by the Secretary General for the occasion of the MEPC 75' (2020) International Maritime Organisation, <https://www.imo.org/en/MediaCentre/SecretaryGeneral/Pages/MEPC-75-opening.aspx>.

To illustrate the technical nature of the topic in question, it is worth noting that the GHG emission reduction discussions in the IMO currently revolve around short-term measures combining technical and operational approaches aimed at reducing the carbon intensity of ships in line with the Paris Agreement. This research will attempt to bridge a gap in the academic literature by reflecting on the EU position in the MEPC being a politically important and rather technical forum discussing climate change issues.

The proposed research seeks to examine the effectiveness of the EU action in the IMO. Specifically, it focuses on the area of climate change negotiations in the context of its Maritime Environment Protection Committee. In order to reflect the elements and the extent of the EU effectiveness in that field, the paper will focus on two case studies – the negotiations for MEPC 72 (2018) and MEPC 75 (2020) – where the overall outcome in terms of environmental ambition was quite different.

In particular, a critical milestone happened in 2018 with adopting the Initial IMO Strategy on the reduction of GHG emission from ships (MEPC 72). Although it is considered a success for its Parties, the EU has arguably been an essential driver behind this revolutionary deal.[9] However, the Strategy is just the beginning. To make pledges a reality, the IMO needs to adopt effective short-term measures to live up to the political promise to reduce the total annual GHG emissions by at least 50% by 2050 compared to 2008, while, at the same time, pursuing efforts towards phasing them out entirely. To this end, the recently held MEPC 75 (2020) was supposed to implement the Initial Strategy and make a concrete step towards reaching the GHG reduction levels compatible with the Paris Agreement target but instead has resulted in adopting the level of ambition far lower than the one the EU wished to see.[10]

Therefore, the research seeks to answer the question whether the EU is an effective actor in the IMO in the area of climate change negotiations and to analyse and interpret the impact of the internal policies and the external context on the EU's power to shape global politics. More specifically, it aims at explaining EU's effectiveness as an actor in the IMO through identifying the link between its internal policies and the outcome of the MEPC 72 and MEPC 75 negotiations while reflecting on the external elements that come into play. The aim of focusing on the two competing yet similar cases is to identify and ex-

9 Judith van Leeuwen, Klaus Kern, 'The External Dimension of European Union Marine Governance: Institutional Interplay between the EU and the International Maritime Organization. Global Environmental Politics' (2013) 13 (1) WIMEK- Environmental Policy.

10 European Commission, (n 8).

plain the dependent variable's elements – the effectiveness of the EU action on those two instances characterised by different outcomes. By identifying the variable leading to the change in goal attainment, the research will attempt to shed light on the fragile nature of the EU's effectiveness. What is seemingly different in the two cases is the overall change in external opportunity structure linked due to, among other factors, the COVID-19 pandemic and a significant change in the EU internal policies characterised by increased climate ambition.

2. LITERATURE REVIEW AND THE CONCEPTUAL FRAMEWORK

Since the phenomenon explored is a complex one and the field is under-researched, it is important to devise a clear structure that will allow for the separation of individual components of the two cases in question to analyse and understand it better. In order to do that, the work previously done by scholars on defining and operationalising the notion of effectiveness should be revisited to draw inspiration from it and apply it to this research by splitting the main question into the sub-questions that will feed directly into it. Also, the academic literature dealing with the notion of effectiveness will serve as an inspiration for the hypothesis that will guide the research and offer a framework for determining the causality between the various elements of the effectiveness puzzle.

Consequently, to understand the notion of effectiveness, it is important to briefly touch upon the underlying concept of actor's presence since a minimal level of it is a prerequisite for the EU to act, and in that regard, actorness precedes effectiveness.[11] The actorness is roughly explained as 'the capacity to behave actively and deliberately in relation to other actors in the international system',[12] and it has been used for decades to explain the unusual 'creature' the EU (or the EC before that) is. Therefore, in an attempt to encapsulate the effect of internal EU processes on its external representation, the EU has been defined as a *sui generis* international actor. In that regard, Jupille and Caporaso[13] identify different elements of actorness – recognition, authority, autonomy and cohesion. However, as

11 Carmen Gebhard, 'The Problem of Coherence in the European Union's International Relations' in Christopher Hill et al. (eds), *International Relations and the European Union* (Oxford University Press 2017) <http://doi.org/doi: 10.1093/hepl/9780198737322.003.0006>; Chad Damro et al., *The EU's Evolving External Engagement – Towards New Sectoral Diplomacies* (Routledge 2018).

12 Gunnar Sjöstedt, *The External Role of the European Community* (Westmead UK: Saxon House 1977).

13 Jospeh Jupille, James Caporaso, 'States, Agencies and Rules: The European Union in Global Environmental Politics' in Carolyn Rhodes (ed), *The European Union in the World Community* (Boulder CO 1998).

Niemann and Bretherton[14] state, although scholars started to explore the connections between actorness and effectiveness, their relationship is quite under-researched. However, effectiveness as a relative concept is defined as the result of EU actorness shaped by the external opportunity structure influencing the EU actions[15] or, in other words, as the EU's ability to reach its objectives by influencing other actors.[16] In particular, the notion has been frequently operationalised through assessing the effect of the EU's diplomatic efforts and its internal policies on the goal attainment variable while taking due account to the external context applicable to a specific case.

Although the literature on EU effectiveness encompasses a vast number of policy areas in which the Union acts, this research aims to position itself at the intersection of the EU effectiveness scholarship and the areas of climate change and maritime global governance. In other words, by focusing on the EU's effectiveness in the GHG emission reduction negotiations in the IMO, the research aims to fill in the identified gap in the literature that mostly focuses on the EU effectiveness in the UNFCCC fora.

Starting from the analysis of the EU's effectiveness in the international climate change negotiations, Pavese and Torney,[17] by examining the EU's position in the UNFCCC, caution against approaching the EU as a state actor when analysing its effectiveness. They argue that given the character of the EU as a collection of nation-states with their diverging interests, its contribution to global climate change governance has been substantial. In that regard, da Conceicao-Heldt and Meunier,[18] on the various examples of international negotiations, including in the area of environment, found that the international context in which the EU operates is an important variable impacting the EU's ability to 'translate internal cohesiveness into external effectiveness'. The way they operationalise cohesiveness relates to the degree to which the EU manages to find a common output despite the diverging views. This is quite relevant in the areas of the EU shared competence (Article 4 TFEU), such as environment and transport, where the Member States retain their ability

14 Arne Niemann and Charlotte Bretherton, 'EU external policy at the crossroads: The challenge of actorness and effectiveness' (2013) 27 (3) International Relations <http://doi.org/doi:10.1177/0047117813497306>.

15 Lisanne Groen and Arne Niemann, 'The European Union at the Copenhagen climate negotiations: A case of contested EU actorness and effectiveness' (2013) 27 (3) International Relations <http://doi.org/doi: 27. 308-324. 10.1177/0047117813497302>.

16 Niemann and Bretherton (n 14).

17 Pavese and Torney (n 3).

18 Eugenia da Conceição-Heldt and Sophie Meunier, 'Speaking with a single voice: internal cohesiveness and external effectiveness of the EU in global governance' (2014) 21 Journal of European Public Policy <http://doi.org/doi: 10.1080/13501763.2014.913219>.

to act. Regarding the external constellation of powers, they find that the relationship of the EU's relative position to that of the status quo and that of the bargaining positions of other actors influences the EU's goal attainment. In that regard, reformist positions will be usually followed by low effectiveness, which in the context of the EU growing climate ambition could often be the case. Similarly, Oberthur and Groen[19] based on two different international negotiations – Nagoya protocol (2014) and COP 15 (2009) and through analysis of three elements - EU's policy objectives, EU engagement in the negotiations and goal achievement, found moderate to very reformist positions to be a major impediment for the EU's goal attainment despite the level of its engagement.

Linked to the reformist negotiating position of the EU in the global power constellation, Bäckstrand and Elgström[20] find that the EU's lack of influence on the 2009 Copenhagen climate negotiations could be explained by its declining market power due to the small and decreasing share of GHG emissions in the EU which made its rather ambitious position not relatable. On the contrary, according to Damro,[21] the negotiating power of the EU can be enhanced by its internal regulation that increases the credibility of its reformist goals. Another view on the elements leading to high effectiveness in international environmental negotiations is offered by Delreux,[22] who assesses the EU's goal attainment linking it with its starting position as demonstrated in the internal negotiating mandate or Council Conclusions before the negotiations. He consequently finds a high level of effectiveness of the EU action in environmental negotiations in general while pointing out that the EU often adjusts its expectations before the international negotiations resulting in a high level of similarity between the EU's starting position and the final agreement. Similarly, Oberthur and Groen,[23] find goal achievement of the EU in the Paris Agreement negotiations high not least because the EU lowered its expectations compared to those for the 2009 and 2011 COP. They analyse the international structure, the diplomatic performance of the EU and the circumstances linked to the French being hosts of the COP. Furthermore, they assert that its internal policies helped the EU's negotiation position while the traditional internal division was kept at bay by the coordinated position when

19 Sebastian Oberthür and Lisanne Groen, 'Explaining goal achievement in international negotiations: the EU and the Paris Agreement on climate change' (2018) 25 Journal of European Public Policy <http://doi.org/doi: 10.1080/13501763.2017.1291708>.

20 Karin Bäckstrand and Ole Elgström, 'The EU's role in climate change negotiations: from leader to "leadiator"' (2013) 20 Journal of European Public Policy <http://doi.org/doi: 10.1080/13501763.2013.781781>.

21 Damro (n 11).

22 Delreux (n 2).

23 Oberthür and Groen (n 19).

it comes to climate ambition. When it comes to the external opportunity constellation, Parker, Karlsson[24] examine the EU's global climate leadership in the case of five consecutive UN climate summits from 2008–2012, focusing, among other, on the impact of the other diplomatic actors on the changes in the EU's leadership strength that changes from low to high. They propose that effective global climate governance is a coalition leadership of the EU, US, and China. A couple of years later, Parker, Karlsson,[25] researching the importance of the US leadership for adopting the Paris Agreement, found the leadership competition with the EU and China still present while assessing the role of the US to be crucial for the agreement.

When it comes to analysing the EU's position in the IMO, the results are significantly more modest than in the case of rather politicised COP negotiations. However, many authors show interest in the EU's action in this specialised UN agency regulating shipping. In particular, a rather comprehensive assessment of the EU international role through the prism of coherence can be found in Wouters, de Jong, Marx, De Man.[26] However, the study commissioned by the European Commission deals, to a significant extent, with the EU competence, participation and its status in the IMO in order to demonstrate the need for the EU to be externally represented by European Commission in the IMO, but it does not assess how effective the EU actually is in this arena. Furthermore, van Leeuwen and Kern[27] frame their discussion around the various ways of the institutional interplay between the IMO and the EU and find the EU's structural leadership to be an important factor leading to synergies between the EU initiated initiatives and those of the IMO. However, the research was done before the GHG issues became such a prominent topic globally, and it does not cover the policy interplay in the climate change area. Zooming into the cohesiveness in the EU and the coordination process that ensures it, Gulbrandsen examines how the EU overcomes the issue of diverging interest between the Member States and the European Commission in the IMO realm. The author concludes that although the Member States prefer the sectoral regulation to occur within the IMO arena, the EU legislative work combined with the inter-institutional coordination has

24 Charles Parker and Christer Karlsson, 'The European Union as a global climate leader: confronting aspiration with evidence' (2016) 17 (1) International Environmental Agreements <http://doi.org/doi:10.1007/s10784-016-9327-8>.

25 Charles Parker and Christer Karlsson, 'The UN climate change negotiations and the role of the United States: assessing American leadership from Copenhagen to Paris' (2018) 27 Environmental Politics <http://doi.org/doi:10.1080/09644016.2018.1442388>.

26 Jan Wouters et al., *Study for the Assessment of the EU's Role in International Maritime Organisations. Final Report* (Leuven Centre for Global Governance Studies – Europahuis 2009).

27 van Leeuwen, Kern (n 9).

restricted Member States freedom of action in the IMO. As a result, the conclusion is that the mismatch of the Member States interest is quite successfully managed through the EU coordination process. However, the research does not touch upon the effectiveness of the EU in the IMO, nor it focuses on GHG reduction from ships.

Expanding further on the EU coordination process for the IMO, Heims finds that strong EU maritime administrations (at that time an EU country - UK and Germany) contest it as it decreases their room for manoeuvre in that international body.[28] Given that the Member States' positions for various areas that the IMO regulates diverge, the fact that the article does not focus on climate change issues could be problematic in drawing unambiguous conclusions.[29] Finally, Kissack[30] paints a rather gloomy picture of the EU's role in influencing the international regulatory regime examining the EU's role in negotiating the International Labour Organisation's Maritime Labour Convention (MLC). He argues that the EU's role in this global norm-setting process was not as pronounced as the literature on international regulation regimes concludes. The assessment of this role is conducted through four explanatory variables: internal EU coordination, cohesion, the ILO negotiating environment and the character of the norms negotiated. What he found to be a major impediment to the EU's effectiveness is the lack of cohesiveness stemming from the diverging views of some of the EU states which advocate for lower labour standards and others, notably the Northern Member States, which oppose this.

As shown above, in their analyses of the effectiveness of the EU's actions in different international fora, the authors consider the impact on the internal EU policies, its cohesiveness, and overall international relations dimension and the interplay between the parties. Furthermore, comprehensive coverage of the EU effectiveness in the international climate change negotiations is contrasted by a patchwork of perspectives from which the EU's position in relation to the IMO is analysed in the academic literature. In addition, although the EU coordination process contributing to its cohesiveness in the IMO negotiations has been a subject of scholar's interests, the EU's climate change governance in that institution has not been covered so far.

28 Eva Heims, 'Regulatory co-ordination in the EU: a cross-sector comparison' (2017) 24 Journal of European Public Policy <http://doi.org/10.1080/13501763.2016.1206141>.

29 Ibid.

30 Robert Kissack, '"Man Overboard!" Was EU influence on the Maritime Labour Convention lost at sea?' (2015) 22 Journal of European Public Policy <http://doi.org/10.1080/13501763.2015.1046899>.

However, there are important conclusions to be drawn from the relevant literature that feed into a hypothesis on what elements of the effectiveness puzzle had an impact on the less than ambitious outcome of the MEPC 75 as opposed to that of the MEPC 72. In particular, the assumption that emerges from the literature is that the high ambitions are often linked to low effectiveness combined with the impact the constellation of powers of other actors has on a particular case. Namely, in contrast to the MEPC 72 context the EU, before the MEPC 75, raised the environmental ambition through its Communication on the Green Deal and linked initiatives that could have led to the expectations – the outcome gap. Furthermore, the importance of the external elements such as interests of other actors and, in the MEPC 75 context, COVID-19 considerations presumably played a major part in diminishing the EU's negotiating power and in turn leading to difficulties translating its internal policies into external effectiveness.

3. THE ANALYSIS

3.1. Step 1: MEPC 72 and MEPC 75 goal attainment

In order to give a final appreciation of the EU's effectiveness in the IMO and the factors it depends on, it is necessary to examine whether the goal, as defined by the above-mentioned factors, was attained. However, it is important to note that assessing the goal achievement of the EU in these cases is no small feat. There are numerous challenges linked to it (such as broad objectives of EU internal policy that make assessment difficult, preferences of the other actors, level of ambition that makes the achievement of the goal more or less difficult and the temporal perspective goal achievement in the short, mid or long term).[31]

The MEPC 72 adopted the IMO Initial Strategy putting the global shipping sector on the path towards fulfilling the Paris Agreement ambitions. For the first time, the IMO Initial

31 Sebastian Oberthür, Knud Jørgensen, Jamal Shahin, 'Assessing The EU's Performance in International Institutions Conceptual framework and core findings' in Sebastian Oberthür, Knud Erik Jørgensen, Jamal Shahin (eds) *The performance of the EU in international institutions* (Routledge 2013).

Strategy[32] set the goal of reducing the total annual GHG emissions from international shipping, which should peak as soon as possible, by at least 50% by 2050 compared to 2008 levels while pursuing efforts towards phasing them completely. Despite diverging views on the ambition, the IMO Initial Strategy should strive for (some states pushing for 40% until 2060 and some, including the EU Member States for 70-100% until 2050), the deal was struck to 50% by 2050 with the support by all but two delegations.

Furthermore, to achieve the 2050 goal, the Strategy envisaged the implementation of short-term, mid-term and long-term measures. Regarding the period until 2023, the Strategy proposed candidate short-term measures to be agreed by the MEPC between 2018 and 2023.

Although, the EU Member States were ones to push for a 70-100% reduction target by 2050 in 2018 negotiations, given the fact that the agreed initial strategy identifies levels of ambition through different progressive GHG emission reduction goals (short, mid and long-term measures) for international shipping. As it gives a possibility of a market-based measure and alternative fuels as a candidate mid-term measure, it could be said that the EU and its Member States stayed on the agreed line as enshrined in the 2013 Strategy. In other words, they compromised the high reduction target in exchange for a clear and progressive implementation trajectory in a bridge-building exercise towards the more conservative IMO States.

Consequently, the possible short-term measures and their combination were discussed in the Committee and Intersessional GHG Working Group meetings ever since (European Parliament ENVI, 2020), resulting in an agreement adopted by the MEPC 75. Concretely, draft amendments to the International Convention for the Prevention of Pollution from Ships (MARPOL) Annex VI were approved, introducing the Energy Efficiency Existing Ship Index (EEXI), operational Carbon Intensity Indicator (CII), which includes a rating

32 International Maritime Organization, Resolution MEPC 304(72) Initial IMO Strategy on Reduction of GHG emissions from Ships (adopted on 13 April 2018). The Initial Strategy 2018 sets goals, and identifies candidate measures. Paragraph 1.4 of the Initial Strategy 2018 introduces its prospective revision in 2023, which is widely seen as the earliest date any form of relevant mandatory IMO regulation may emerge. Paragraph 1.5 draws a direct link to the Paris Agreement, though the latter does not include international shipping per se.

The goals set in the Initial Strategy 2018 appear in Paragraph 3 under 'levels of ambition'. These are summarised below:

– to review and aim to strengthen the EEDI requirements for ships, and

– to reduce CO_2 emissions on average across international shipping, by at least 40% by 2030, pursuing efforts towards 70% by 2050, compared to 2008; and to peak GHG emissions from international shipping a.s.a.p. and to reduce the total annual GHG emissions by at least 50% by 2050 compared to 2008.

scheme (A to E), and an enhanced Ship Energy Efficiency Management Plan (SEEMP) with mandatory content, approval and subsequent audits.[33]

However, much to the dislike of a certain number of environmentally ambitious States (mostly the EU Member States and SIDS), similarly progressive industry representatives[34], and expectedly so, the NGOs dealing with environmental matters[35], the outcome of the MEPC 75 arguably lacks ambition in the context of initial strategy and the Paris Agreement targets. In particular, the compromise lacks strong enforcement and sanctions to sufficiently penalise ships with a poor rating in the CII scheme. Furthermore, the deal struck lack elements that would incentivise fast-movers or a rapid uptake of energy-efficient ships and technologies.[36] Consequently, those identified shortcomings of the outcome of the MEPC 75 could hamper the achievement of the emission reduction in line with the Paris Agreement. In particular, the delegations of the Marshall Islands, Solomon Islands and Tuvalu, supported by WWF, CSC and Pacific Environment, called for refusal of adoption of the draft amendments that would fail to peak the emissions as soon as possible and achieve GHG emission reduction before 2023 as provided in the IMO Initial Strategy. Despite those issues, the EU Member States agreed to the adoption as the only other option available was no deal at all.

The European Commission, ahead of the MEPC 75 meeting, expressed its concerns regarding the missing elements of effective short-term measures such as incentives for ships to improve their performance through effective enforcement schemes, meaningful and comprehensive verification schemes and mechanisms to ensure a level playing field and to avoid early movers being penalised. However, in a speech given to the European Parliament's ENVI Committee ahead of the MEPC 75, Commissioner for Mobility and Transport said that the EU would support the compromise even though it does not correspond

33 International Maritime Organization, IMO Media Centre, 'IMO Secretary-General speaks out against regional emission trading system' (2017) <https://www.imo.org/en/MediaCentre/PressBriefings/Pages/3-SG-emissions.aspx>; Lloyds Register, IMO MEPC 75 Summary Report (Lloyds Register Briefing Note 2020) <https://safety4sea.com/wp-content/uploads/2020/11/Lloyds-Register-IMO-MEPC-75-Summary-Report-2020_11.pdf> accessed 27 November 2020.

34 Sea Europe, 'Maritime climate protection: IMO still on time, but off target' (2020) <https://www.seaeurope.eu/images/files/2020/press-releases/sea-europe-cesa-press-release-maritime-climate-protection-imo-still-on-time-but-off-target-november-2020.pdf>.

35 Transport & Environment, 'UN shipping body fails to implement its own greenhouse gas reduction plan' (2020) <https://www.transportenvironment.org/press/un shipping-body-fails-implement-its-own-greenhouse-gas-reduction-plan>.

36 Kuba Szymanski, 'IMO Marine Protection Committee 16 – 20 November' (2020) Intermanager <https://www.intermanager.org/2020/11/imo-marine-environment-protection-committee-16-20-november-2020/>.

to the level of ambition the EU was striving for. Commissioner Valean stated that in light of the COVID-19 pandemics, pushing for the ambitious agenda was difficult, and instead of postponing the decision until further notice, the EU preferred to adopt a lukewarm compromise that will then be boosted in the MEPC 76.[37]

Figure 1: Interim conclusions

Source: author's elaboration

From the analysis above, it can be generally said that the EU's goal attainment variable was on the high end of the spectrum in the case of MEPC 72 negotiations, while it significantly decreased for the MEPC 75 when the EU demonstrated a low level of goal attainment. Moreover,

1. The outcomes of the two negotiating rounds (MEPC 72 and MEPC 75) were rather different in their environmental ambition, with first putting international shipping on the path to achieve Paris agreement objectives and the other slowing down the pace of progress.

2. The outcome of the MEPC 72 for the EU meant a bridge-building exercise between lowering down the overall emission reduction target and gaining the progressive steps on the way to achieve the target.

3. The EU has a long-term perspective in mind while negotiating global GHG reduction measures in the IMO.

37 European Commission (n 8).

The EU, defending a reformist position in both cases, was not equally successful due to a number of factors possibly being linked to its internal policy and external considerations such as power constellation of other actors and COVID-19 considerations linked to virtual negotiations realignment of political priorities.

Following these conclusions, in the next chapter, the internal policies of the EU in the field of maritime transport and climate change will be discussed in the attempt to shed light on the most prominent factors leading to the above-explained difference in goal attainment variable.

3.2. Step 2: The quality of the EU's policy objectives

3.2.1. Global perspective for the EU shipping sector

The EU's policy objectives form a basis of its negotiating strategy by influencing its positioning in the international constellation of interests.[38] Hence, when discussing the effectiveness of the EU as an actor in the process of global climate change governance in the IMO, an important step is mapping the EU's internal policies in the field.

As international shipping is a global sector, the element of competitiveness is a crucial consideration for the EU's internal policymaking and an incentive for a stronger external outreach. In other words, on the one hand, the fear of competitive disadvantage as a result of more stringent regional environmental rules potentially limits the EU's ambitions in terms of implementing more ambitious measures for the shipping sector. On the other hand, it forces the EU to export its environmental agenda to the global sphere.[39] Therefore, while the competitiveness of the EU's fleet and the port sector could be seen as a limitation of the EU's policy on the greening of the maritime sector, it is also its driver. Therefore, it is precisely the delicate balance between the two sides of the same coin that is guiding the EU's policy in the GHG reduction in maritime transport, which makes this analysis even more layered and pertinent.

For the above-mentioned reasons, the EU has been traditionally keen on working towards adopting global measures not only because their overall effect on the environment is more substantial as opposed to that of merely regional ones but also because of competitiveness considerations related to the potential EU-only measures for the reduction of the GHG emissions from the shipping sector. The usual rhetoric of the EU policy

38 Oberthür and Groen (n 19).

39 Daniel Kelemen, 'Globalizing European Union environmental policy' (2010) Journal of European Public Policy, <http://doi.org/doi: 10.1080/13501761003662065>.

documents in the maritime transport field clearly states that the EU's priority is to find global solutions in the International Maritime Organisation. Similarly, the intention to extend the external outreach of the EU internal market rules has been mentioned on many occasions in the EU policy papers. In particular, the 2011 European Commission's White Paper for Transport sets out the EU's agenda aiming to 'extend internal market rules through work in international organisations... and to promote European safety, security, privacy and environmental standards worldwide. Reinforce the transport dialogue with main partners'.[40]

While framing the EU climate change policy context surrounding the MEPC 72 and MEPC 75 negotiating rounds, this chapter will examine the existence of EU policies in the specific area of GHG emission reduction from the shipping sector from 2013 leading to the MEPC 72 in 2018 and from 2018 to the end of 2020 when MEPC 75 took place.

3.2.2. The road towards the adoption of the 2018 Initial Strategy (IMO, 2018)

Following the European Maritime Transport Strategy[41] that opened the door for the concerted EU efforts on GHG emission reduction within the IMO, in 2013 the European Commission issued a Communication on Integrating Maritime Transport Emissions in the EU's Greenhouse Gas Reduction Policies[42] where, as a first step, it proposed a system for Monitoring, Reporting and Verification of Emissions (MRV). It is important to note that the EU was giving due regard to the issue of the GHG emission from the shipping sector also in years prior to that. However, the 2013 Communication is significant as it clearly sets the EU's position regarding the GHG emission reduction in international shipping, stating that the EU's aim is to come to a global solution and express a vision of the process leading to that. In particular, the European Commission's vision is outlined through a three-step process:

1. implementation a system for Monitoring, Reporting and Verification (MRV) of emissions,

40 European Commission, 'White Paper Roadmap to a Single European Transport Area – Towards a competitive and resource efficient transport system COM (2011) 0144 final <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52011DC0144>.

41 European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Strategic goals and recommendations for the EU's maritime transport policy until 2018' COM (2009) 8.

42 European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions -Integrating maritime transport emissions in the EU's greenhouse gas reduction policies' COM (2013) 0479 final.

2. definition of reduction targets for the maritime transport sector, and

3. application of a market-based measure (MBM).

Furthermore, the Communication states that a potential proposal for Monitoring, Reporting and Verification of Emissions will feed into the IMO discussions to serve as an example for a global scheme with a final goal of agreeing on a global market-based measure and operational efficiency standards of the international fleet. Finally, it goes on to explain the intention to, in the case the agreement on the IMO level is not reached, pursue the inclusion of maritime transport into an EU wide market-based measure.[43]

The adoption of the Regulation (EU) 2015/757 of the European Parliament and of the Council of 29 April 2015 on the monitoring, reporting and verification of carbon dioxide emissions from maritime transport (MRV Regulation[44]) in 2015 marked the achievement of the first step of the three-step process on the EU level. The Regulation was set to apply to ships above 5000 gross tonnages, regardless of their flag, calling at EU ports, as of 1st of January 2018.

Consequently, the EU's intention to export its internal rules came to its fruition when the IMO, on the 70th session of MEPC, established IMO Data Collection System[45] and, at least temporarily, postponed the more concrete discussions of the possible inclusion of the maritime sector to EU market-based measures. The IMO Data Collection System entered into force in March 2018 with the collection of fuel consumption data set to start on the 1st of January 2019.

Given the fact that the newly adopted global IMO Data Collection System had some divergences from the original MRV Regulation, pursuant to article 22 of the same Regulation, in 2019, the European Commission published an amended Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2015/757, in order to align the EU legislation with the international obligations of its Member States. However, the negotiations between the two co-legislators, the Council of the EU and the European Parliament are still ongoing. The significant stall in the

43 Ibid.

44 European Parliament, 'Regulation (EU) 2015/757 of the European Parliament and of the Council of the 29 of April 2015 on monitoring, reporting and verification of carbon dioxide emissions from maritime transport.'

45 International Maritime Organisation, 'Resolution MEPC.278(70) Amendments to MARPOL Annex VI (Data collection system for fuel oil consumption of ships)' (2017) <https://wwwcdn.imo.org/localresources/en/OurWork/Environment/Documents/278(70).pdf>.

process since the Council agreed on a mandate in October 2019[46] could be explained as the European Parliament's eagerness to wait for the Commission Communication on the Green Deal[47] and the linked proposals in order to decide whether to use the MRV Regulation revision as a platform for broadening the scope of the Regulation towards the inclusion of the maritime sector into EU Emission Trading Scheme (EU ETS). Finally, quite expectedly, the European Parliament's ENVI Committee in its final report proposed to include maritime shipping in the scope of the EU ETS Directive from 2022 as well as to form an Ocean Fund for financing the innovation for decarbonizing the maritime transport through the revenues from auctioning the ETS allowances.[48] However, it is yet to be seen how the final compromise between the legislators will look like, but the political push from the European Parliament towards increasing the EU's environmental ambition is evident.

Another piece of the EU policy puzzle, the Directive (EU) 2018/410 amending the Directive 2003/87/EC establishing the EU ETS in Recital 4[49], mandates the EU to review the progress achieved in the IMO towards an ambitious emission reduction objective and on accompanying measures to ensure that the sector duly contributes to the efforts needed to achieve the objectives agreed under the Paris Agreement. It also notes that the action from the IMO or the Union should start from 2023 including preparatory work on adoption and implementation of the Initial Strategy.

Concerning the second step identified in the 2013 Commission Communication defining the reduction targets for the maritime transport sector, the EU remained faithful to its mantra of resolving the climate change issues in maritime transport on the IMO level. In that regard, the Valetta Council Conclusions[50] reiterated the preference of the Member States to deal with the GHG emission reduction from the shipping sector on the international level. The Member States welcomed the progress made at the IMO with regards

46 Gregor Erbach, 'Monitoring, reporting and verification of CO_2 emissions from maritime transport' (2020) European Parliamentary Research Service, European Parliament.

47 European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions -The European Green Deal' (2019).

48 Erbach (n 46).

49 European Parliament, 'Directive (EU) 2018/410 of the European Parliament and of the Council of 14 March 2018 amending Directive 2003/87/EC to enhance cost-effective emission reductions and low-carbon investments'.

50 Council of the European Union, 'Council conclusions on Priorities for the EU's maritime transport policy until 2020: Competitiveness, Decarbonisation, Digitalisation to ensure global connectivity, an efficient internal market and a world-class maritime cluster' (2017) <https://data.consilium.europa.eu/doc/document/ST-9976-2017-INIT/en/pdf>.

to the adoption of the IMO Data Collection System and the adoption of a roadmap for the Initial IMO strategy on reduction of GHG emissions from ships. They also called for a proactive approach from the Member States and the Commission to work towards the adoption of the Strategy in 2018 to take into account the well below 2°C objective of the Paris Agreement.[51]

After the Initial Strategy[52] was adopted, the EU has continued to express the ambition when it comes to further progress on its implementation because the Initial Strategy as such does not have binding character and therefore necessitates a swift agreement on the short-term measures for achieving the agreed levels of ambition.

3.2.3. The road towards the implementation of the 2018 IMO Initial Strategy

Building up the momentum for the MEPC 75 and the expected implementation of the short-term measures as proposed by the 2018 Initial Strategy, in the Climate Diplomacy Conclusions[53] the EU Member States called on the IMO to implement its initial greenhouse gas emission strategy consistent with the temperature goals of the Paris Agreement.

Furthermore, the European Commission published the Communication on the European Green Deal in December 2019, raising the EU's environmental policy stakes and setting the objective of achieving climate neutrality by 2050. This long-term climate neutrality target, coupled with the newly set GHG emission reduction goal of 55% by 2030,[54] can be seen as significantly stepping up EU's environmental efforts. Although the GHG emission reduction targets for shipping are not specifically set, the EU transport sector, as a major polluter, is bound to participate in this economy-wide exercise. In particular, the EU Green Deal ambition for the transport sector is set to 90% emission reduction by 2050. To achieve that, the Communication acknowledges that the Commission 'will propose to extend European emissions trading to the maritime sector'.[55]

51 United Nations Framework Convention on Climate Change, 'Decision on the Adoption of the Paris Agreement' (29 January 2016) FCCC/CP/2015/10/Add.1.

52 International Maritime Organisation, 'Initial Strategy as submitted to Tanaloa Dialogue' (2018) <https://unfccc.int/sites/default/files/resource/250_IMO%20submission_Talanoa%20Dialogue_April%202018.pdf.>.

53 Council of the European Union, 'Council Conclusions on Climate Diplomacy' (2019).

54 European Council, 'EUCO Conclusions on COVID-19 and climate change' (2020) <https://www.consilium.europa.eu/en/press/press-releases/2020/10/16/european-council-conclusionsoncovid-19-and-climate-change-15-october-2020/>; Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law').

55 European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions -The European Green Deal', (2019).

The response of the international level to the announcement of the regional MBM was immediate,[56] with the IMO Secretary General, Kitack Lim repeating his views expressed in 2017 in a letter to former Presidents of the European Parliament, Commission and the European Council cautioning against extending the EU-ETS to include ships for the fear that such a regional measure would hamper further progress of the IMO in addressing GHG emissions from international shipping.[57]

A careful stance regarding the extension of the ETS to the shipping sector was expressed by the EU Shipping Ministers who in Opatija Council Conclusions[58] welcomed the Commission's Communication on the Green Deal, however stressing the importance of the global climate change mitigation measures and preservation of the level playing field. The Conclusions also noted:

> the importance of further work within the IMO on achieving 2050 emission reduction objective coupled with a vision for complete decarbonisation while supporting a timely and effective implementation of the Initial IMO Strategy on Reduction of GHG Emissions from Ships and its forthcoming review.[59]

Quite expectedly, the reaction of the European Community's Ship-owners Association (ECSA) with regards to the possible regional market-based measure was rather negative. Fearing the competitive disadvantage the EU flags could be faced with should such measures be adopted, as well as potential serious implications for progress in the IMO in the face of the EU implementing regional measures, ECSA repeatedly advocated for the continuation of the work started with the adoption of the 2018 Initial Strategy and its swift implementation.[60] This view is mirrored in the statement given by the European

56 Anastassios Adamopoulos, 'IMO warns against trouble and confusion for global decarbonisation efforts amid EU emissions push' Lloyds List (London, 19 December 2019) <https://lloydslist.maritimeintelligence.informa.com/LL1130337/IMO-warns-against-trouble-and-confusion-for-global-decarbonisation-efforts-amid-EU-emissions-push>.

57 International Maritime Organization, 'IMO Media Centre - IMO Secretary-General speaks out against regional emission trading system' (2017) <https://www.imo.org/en/MediaCentre/PressBriefings/Pages/3-SG-emissions.aspx>.

58 Council of the European Union, 'Council Conclusions on 'EU Waterborne Transport Sector – Future outlook: Towards a carbon-neutral, zero accidents, automated and competitive EU Waterborne Transport Sector' (2020)

59 Ibid., Point 1.3.

60 Edmund Hughes, *Implications of application of the EU Emissions Trading System (ETS) to international shipping, and potential benefits of alternative Market-Based Measures* (MBMs) (European Community Shipowners' Associations 2020) <https://safety4sea.com/wp-content/uploads/2020/09/ICS-Implications-of-application-of-the-ETS-to-international-shipping-and-potential-benefits-of-alternative-market-based-measures-2020_07.pdf>.

Shipyards and Maritime Equipment Association (SEA Europe) ahead of the MEPC 75, expressing the fear that the lack of international agreement will drive EU towards regional measures to the detriment of the shipping sector that urgently needs funds and a stable regulatory framework for the green transition.[61]

On the other hand, the European Parliament's ENVI Committee, in the context of the revision of the MRV Regulation, stated that after 20 years of unfulfilled promises by IMO to tackle shipping emissions, the EU action is necessary given the fact that 'several attempts to regulate the shipping sector were already made over the past years, none of which was successful. The momentum to include shipping in the ETS is now'.[62]

While in the previous decade, the inclusion of the maritime sector into EU ETS was a matter considered from the perspective of the competitiveness of the shipping sector, EU's climate change policy and negotiation tactics in the IMO, the current context is somewhat different. With the increasing political attention given to climate change combined with the economic crisis caused by the COVID-19 pandemics and the urgent need for financial resources that would drive the green revolution, the likelihood of the EU adopting regional measures is significantly higher.

3.2.4. Alternative fuels as the way forward in the mid and the long term

In addition to the discussion on the ETS for shipping as a negotiating tactic or a real possibility, another element of the greening of the EU's shipping sector, in the context of both the EU's 2050 climate neutrality and the 2018 IMO Initial Strategy goals, is linked to alternative fuels. In that regard, the IMO Initial Strategy's mid-term measures to be finalised and agreed by between 2023 and 2030 and long-term measures for finalisation beyond 2030 acknowledge the possible need for an effective uptake of alternative low-carbon and zero-carbon fuels.

In the EU, as already mentioned, since the EU GHG 2030 and 2050 emission reduction goals have recently changed, the low-carbon shift of the transport sector must accelerate

61 Sea Europe, 'Maritime climate protection: IMO still on time, but off target' (2020) <https://www.seaeurope.eu/images/files/2020/press-releases/sea-europe-cesa-press-release-maritime-climate-protection-imo-still-on-time-but-off-target-november-2020.pdf>.

62 European Parliament, 'Greenhouse gas emissions from shipping: waiting for concrete progress at IMO level' (2020) Briefing requested by the ENVI Committee <https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/652754/IPOL_BRI(2020)652754_EN.pdf>.

significantly in order to reach the EU Green Deal GHG emission reduction goals of 90% reduction in transport by 2050.[63]

In relation to the legislation already in place in the EU in the field of alternative fuels, the Renewable Energy Directive[64] establishes an overall policy for the production and promotion of energy from renewable sources in the EU. It required the EU to fulfil at least 20% of its total energy needs with renewables by 2020, with at least 10% of the Member States transport fuels coming from renewable sources by 2020. After its revision, the Directive 2018/2001/EU set a new binding renewable energy target for the EU for 2030 is at least 32%, with a clause for a possible upwards revision by 2023. The Directive was adopted as part of the '*Clean Energy for All Europeans Package*', aiming to keep the EU a global leader in renewables and help the EU meet its emissions reduction commitments under the Paris Agreement.

Another piece of legislation pertinent for the GHG emission reduction from the shipping sector is the 2014 Alternative Fuels Infrastructure Directive mandating the Member States to ensure that LNG is available at all of the EU Trans European Transport core network (TEN-T) ports for seagoing ships as from the end of 2025. From the data made available by the European Alternative Fuels Observatory,[65] it is quite evident that this coverage will hardly be reached in time. Furthermore, the European Green deal announced the *Fuel EU Maritime*[66] initiative that should enhance sustainable maritime fuels' deployment and which will presumably encourage further EU engagement in the IMO in the context of mid-term measures.

The same assumption presumably incentivised the IMO observer organisations (ICS, BIMCO, WSC, Intertanko, Intercargo, Interferry, CLIA and IPTA) to the right after the

63 European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – The European Green Deal' (2019)

64 European Parliament, 'Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC' (Text with EEA relevance).

65 European Commission, 'European Alternative Fuels Observatory' <https://www.eafo.eu/It> accessed 25 January 2021.

66 European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions -The European Green Deal' (2019).

publication of the EU Green Deal announce to the IMO a jointly funded project for a fund for financing R&D for technologies and fuels aimed at decarbonisation.[67]

In the context of significant investments in research and infrastructure that will be crucial to encourage and enable the uptake of those fuels, a strong competitiveness element is present. In particular, should the EU impose measures to encourage the development and uptake of alternative fuels that are not followed by the international community, there is a strong possibility of the EU operators being at a competitive disadvantage. Furthermore, the market base measure could be an important element helping to close the economic calculation gap between traditional and alternative fuels.[68] However, as already discussed, if imposed on a regional level, they could result in not only a competitive disadvantage for the EU shipping sector but also a negative impact on the IMO GHG discussions. Therefore, the EU's alternative fuels policy is quite pertinent in evaluating its relative position in the global climate change governance in the maritime sector.

This view is confirmed by the Green Deal Communication[69] and the Sustainable and Smart Mobility Strategy,[70] which both see alternative fuels as a way forward towards the environmental sustainability of the sector. Regarding the investments needed, the Strategy proposes a combination of carbon pricing policies and research and innovation through Horizon Europe partnerships while reminding that global actions remain critical for decarbonisation of the maritime sector. In particular, the latter document stresses the need to improve the energy efficiency of vessels and reduce emission through promoting ambitious standards for their design and operation, emphasising the need for the EU to continue working closely with the IMO on concrete GHG reduction measures consistent with the Paris Agreement.

67 International Maritime Organisation, 'Marine Environment Protection Committee 75th session Agenda item 7, Proposal to establish an International Maritime Research and Development Board (IMRB) Submitted by ICS, BIMCO, INTERTANKO, CLIA, INTERCARGO, IPTA, INTERFERRY and WSC' (2019) MEPC 75/INF.5.

68 Hughes (n 60).

69 European Commission (n 66).

70 European Commission (n 4).

Figure 2: Interim conclusions

Source: author's elaboration

From the analysis done on the existence and the nature of EU policy objectives in the field of the GHG emission reduction from ships, there are a few conclusions that could be drawn:

1. The negotiating position of the EU in the IMO is defined through its significant regulatory power that is composed of existing legislation and likelihood of future more stringent regional rules but also influenced by competitiveness considerations.

2. Competitiveness of the sector plays a major role in the EU's policy making process, and it is an important element to be considered in relation to the EU's regulatory and market power ambitions (pioneer of green technologies) as environmental measures in the short term could be harmful to the competitiveness of the EU's shipping sector unless taken on the IMO level.

3. The EU's climate change ambitions have increased ahead of MEPC 75, potentially making its negotiating position more reformist.

Following these conclusions, the next chapter evaluates the EU's negotiating position by having a detailed look into the EU's relative position in the MEPC 72 and MEPC 75 negotiation rounds and the tactics employed. Critical in that process is understanding the EU's starting point comprising its policies and other factors relative to the EU's engage-

ment in the IMO (such as the strength of the other actors in terms of the fleet, trade and the involvement of the EU Member States on the Committee meetings).

3.3. Step 3: External dimension and the EU's negotiating position

3.3.1. Mapping of powers and interest within the IMO member states

To get a clearer picture of the negotiating strength of the EU Member States in the IMO, it is essential to reflect on the various variables that influence it. As already mentioned, internal policies play a big part in how the EU approaches the IMO arena as they could limit or form the negotiating mandate and enhance the EU's credibility and regulatory power.[71] However, it is not only the EU political and legislative sphere that is important when considering its performance in the international climate negotiations. More specifically, the variables such as the EU's market power[72] and the relative power of other parties and their specific interests are vital elements to be taken into account. As Groen and Neimann[73] found, the low effectiveness of the EU in 2009 COP was partially due to the unfavourable international opportunity structure consisting of major global players having opposite positions to those of the EU. Similarly, Thomas,[74] when discussing the EU's effectiveness in international negotiations, states that besides the quality of EU's internal policies, an important factor to be taken into account is the external opportunity structure.

In that regard, the IMO consists of 174 members and three associate members, 63 intergovernmental organisations that have an observer status (including the European Commission) and 80 non-governmental organisations with consultative status (among which environmental NGOs and the industry representatives).[75] The latter information is rather interesting as it demonstrates the fact that industry and environmental views are represented in the discussions in the IMO and presumably aid in making the discussion more concrete rather than solely political.

Regarding the fleet and registry size, which could be seen as an important factor determining the strength of a certain IMO member state, although each party has one vote, the situation is as follows. According to the United Nations Conference on Trade and

71 Damro (n 11).

72 Bäckstrand and Elgström (n 20).

73 Groen and Niemann (n 15).

74 Daniel Thomas, 'Still Punching Below Its Weight? Coherence and Effectiveness in European Union Foreign Policy' (2012) 50 (3) Journal of Common Market Studies 457–474.

75 More information is available at the IMO website. Please see: <https://www.imo.org/en/OurWork/ERO/Pages/NGOsInConsultativeStatus.aspx>.

Development,[76] the top five ship-owners combined accounted for 52 % of world fleet tonnage. Greece is in first place with a market share of 18 %, followed by Japan and China, both having a share of 11%, Singapore 7 % and Hong Kong SAR 5 %. In that regard, half of the world's tonnage is owned by Asian companies, while the EU's market power is reflected in the fact that European companies own 41% of the world's total fleet servicing 90% of international EU trade. Northern America accounts for 6% of the global fleet, and Latin America, the Caribbean, Africa and Oceania combined share a maximum of 1%. Nevertheless, given that the flag registration does not need to match the vessel owner's nationality, the situation is slightly different, and the biggest flags are Panama, Liberia, the Marshall Islands, Hong Kong SAR and Singapore. As Hayer[77] reports, the size of the registered merchant fleet influences decision-making since the legislation is weighed against the burden put on those that will be the most impacted financially by the legislation. It is important to note that the biggest owners and registries are more reluctant to change the status quo except for the Marshall Islands due to its climate change vulnerability, one of the most vocal advocates of environmental solutions.[78]

3.3.2. Negotiating positions of the IMO players

Like the market power element, the size and the technical capabilities of the delegations influence negotiating strength of states, and in that regard, the smaller states do not have the same possibility to influence the decision-making process. They cannot follow all the working groups that run in parallel or have the same level of expertise and financial means as other, bigger delegations.[79] Within MEPC, Small Island Developing States (SIDS) that are under the biggest threat of the sea level rise are also limited in their capacity to represent their position on the need to act rapidly to reduce the contribution of shipping to climate change. Apart from the fact that some of those delegations have their voices heard by the force of the personality of their delegates,[80] a rather interesting fact to consider in the context of the EU's coalition-building strategy is the financial support given by the EU

76 United Nations, 'United Nations Conference on Trade and Development Review of Maritime Transport 2020' (2020) UNCTAD/RMT/2020 <https://unctad.org/system/files/official-document/rmt2020_en.pdf>.

77 Sarabjeet Hayer, *Decision-making processes of ICAO and IMO in respect of environmental regulations. Study for the ENVI Committee, Policy Department A: Economic and Scientific Policy* (European Parliament 2016) <https://www.europarl.europa.eu/RegData/etudes/STUD/2016/595332/IPOL_STU(2016)595332_EN.pdf>.

78 Anastassios Adamopoulos, 'Shipping has seven months to show decarbonisation progress' Lloyds List (London, 1 April 2021) <https://lloydslist.maritimeintelligence.informa.com/LL1136228/Shipping-has-seven-months-to-show-decarbonisation-progress>.

79 Philip Linné and Erik Svensson, 'Regulating Pollution from Ships' in Karin Andersson et al (eds), *Shipping and the Environment* (Heidelberg Springer 2017).

80 Hayer (n 77).

and its Member States to Pacific Island IMO delegations to participate in the IMO GHG discussions. In particular, some of the EU Member States offer financial assistance for Pacific Island delegations for attending the meetings.[81] Furthermore, when it comes to the SIDS and Least Developed States (LDS), the EU offered support trough *Capacity-Building for Climate Change Mitigation in the Maritime Shipping Industry* project (2015–2020) so as to address the possible negative impacts of GHG emission reduction measures of the IMO.

On the contrary, the well-represented countries include Japan, Norway, China, the US and the EU as a dominant force aided by its coordinated positions and some of its prominent maritime powers.[82] China's global profile is characterised mainly by the fact that the country is a host to 93% of the world's shipbuilding,[83] and it is the world's largest exporter. In that regard, it is a rather important element in the IMO's power constellation. China supported the IMO Initial Strategy adoption and is engaged in a negotiation on the short-term measures. However, China's proposal linked to the short-term measures lacked detail on enforcement[84] which is a major issue in the context of what the MEPC 75 decided and it pulled out of the common submission by Denmark, France and Germany on short-term measures due to COVID-19 considerations.[85] What is important to note is the recent carbon neutrality pledge by China that marks a shift in the country's environmental agenda that could potentially have a positive spillover effect on the IMO GHG discussions.

Another major maritime country, Japan, is traditionally one of the most active and biggest delegations in the MEPC meetings[86] characterised by a moderately conservative position when it comes to the GHG emission reduction combined with great technical knowledge and willingness to compromise. Even though Japan supported a 50% reduction by 2060 in the IMO Initial Strategy negotiation, it supported the final compromise

81 More information available at The Micronesian Centre for Sustainable Transport Website <https://www.mcst rmiusp.org/index.php/imo-ghg-emissions-reduction/imo-ghg-emissions-reduction-roadmap/pacific-islands-in-the-imo>.

82 Hayer (n 77).

83 United Nations (n 76).

84 Sam Chambers, 'China comes out in support of applying mandatory efficiency rules to all the world's existing ships' *Splash247* (9 April 2020) <https://splash247.com/china-comes-out-in-support-of-applying-mandatory-efficiency-rules-to-all-the-worlds-existing-ships/>.

85 International Maritime Organisation, 'Intersessional Meeting of the Working Group on Reduction of GHG Emissions from Ships, 7th session, Agenda item 2, Proposal for a mandatory operational goal-based short-term measure Submitted by Denmark, France and Germany' (2020) ISWG-GHG 7/2/9 7

86 Harilaos Psaraftis and Christos Kontovas, 'Influence and transparency at the IMO: the name of the game' (2020) 22 Maritime Economics & Logistics.

that was more ambitious, and it engages in the short-term measure discussions, which is also demonstrable by its submissions.[87]

Furthermore, a major global force, the USA, abstained from adopting the IMO Initial Strategy, which confirmed their lack of environmental ambition.[88] In the years following that, during the Trump administration, the US withdrew from the Paris Agreement, putting another nail in the coffin of their willingness to contribute to the global climate change efforts. However, with the new Biden administration, the winds are changing and judging by the recent statement by the US special presidential envoy for climate John Kerry, the US wants the International Maritime Organization to adopt a zero-emissions target and will work to help develop appropriate measures.[89]

In addition to that, the developing states, Brazil, India and Saudi Arabia are the ones to defend the common but differentiated responsibilities and respective capabilities principle in the IMO GHG discussions, which also found its way to the final text of the IMO Initial Strategy.[90] Nevertheless, Saudi Arabia did not approve the adoption of the IMO Initial Strategy,[91] which of course, impacted their willingness to contribute to its implementation in the context of the discussions held during the MEPC 75.

3.3.3. The EU cohesiveness in the IMO

Finally, when it comes to the EU maritime interest, the situation is rather complex as the trade-off guides it between environmental ambitions and competitiveness of the sector and a complex puzzle of diverging Member States national interest as well as EU competence considerations. Given that the topics of external representation, the EU's de facto and de jure actorness in the international organisations and the internal competence struggle are quite complex, for this research, they will not be delved into but rather taken at face value.

87 Safety4Sea, 'Initial IMO Strategy on GHG reduction: An overview' (23 August 2018) <https://safety4sea.com/initial-imo-strategy-on-ghg-reductions-an-overview/>.

88 Sean Healy, 'Greenhouse gas emissions from shipping: waiting for concrete progress at IMO level' (2020) <https://www.europarl.europa.eu/thinktank/en/document/IPOL_BRI(2020)652754>.

89 Jonathan Josephs, 'Climate change: Shipping industry calls for new global carbon tax' BBC News (London, 21 April 2020) <https://www.bbc.com/news/business-56835352> accessed 27 July 2020.

90 Psaraftis and Kontovas (n 86).

91 Healy (n 88).

When talking about the cohesiveness of the EU in the IMO (and international organisations in general), it can be explained as the ability of the EU to coordinate internally and represent externally a common position regardless of the possible diverging views of the Member States.[92] In the case of the IMO, the EU is managing to achieve cohesiveness despite the existing differences in characteristics and views between the Member States.[93] Southern Member States Greece, Malta and Cyprus hold a majority of the EU fleet, which could also imply a certain scepticism towards solutions that would be financially burdensome for the industry while the northern Member States are traditionally pushing more for the environmental agenda also due to the fact their maritime industry is the frontrunner of innovation.[94]

As transport matters are of shared competence (Article 4 TFEU), unless the EU laid down rules in a certain area, Member States retain competence over the field. However, given the ever-increasing interlinkages of the different EU policy areas and the diverging views of the Commission and the Council on the competence issue, especially when it comes to the environmental matters, the rule of thumb for the IMO MEPC coordination is to agree on the coordinated document proposed by the Commission unanimously. If the agreement is not possible, the Member States may speak freely in the IMO unless the matter falls under the EU exclusive competence, in which case the Member States and the Commission should remain silent. Furthermore, even when expressing its views on the matters of shared competence, the Member States interventions should not impact the EU legal acquis. Delreux[95] depicts quite vividly the institutional struggle for prevalence in the external representation in the areas covered with shared competence by the TFEU, which is present in the case of the IMO as well.

In the IMO, the EU Member States are the ones having the status of parties while the European Commission has a permanent observer status[96] which does not grant the power to vote on behalf of the EU, although it was implicitly acknowledged as an important actor in the IMO trough official letters of the IMO Secretary General to the EU Council,

92 Conceição-Heldt and Meunier (n 18).

93 Jan Wouters et al. (n 26).

94 Sam Morgan, 'MEPs set to navigate shipping into the EU's carbon market' *Euractiv* (6 July 2020) <https://www.euractiv.com/section/shipping/news/meps-set-to-navigate-shipping-into-the-eus-carbon-market/> accessed 27 July 2020.

95 Delreux (n 2).

96 Michael Roe, *Maritime Governance and Policy-Making* (Springer London 2013).

Commission and Parliament Presidents.[97] Furthermore, the size of the EU Member State delegations varies and while some can participate in the plenary and the working groups, as well as Sub-Committee meetings, some of them are significantly smaller or rarely attending the meetings.

Consequently, on the representation front, it is the Presidency of the Council of the EU that normally speaks first in the plenary following the coordinated position of the EU as agreed beforehand and when such position exists. Usually, other EU delegations present at the meeting intervene afterwards, restating the EU position.[98] It is important to note that the EU is externally represented by its Member States, but this should not present a problem for the EU to show unity and express its single position in the IMO. As former Trade Commissioner Lamy[99] states that the single position does not have to be expressed by a single mouth.

Finally, when it comes to the leadership in the IMO, the number of submissions is an important indicator of the activity and technical capability of a delegation.[100] Of course, submission of a proposal does not guarantee its adoption, but it does demonstrate willingness to lead the multilateral dialogue. It is worth noticing that the EU Member States are rather active in that arena and that submissions made by Germany, Denmark, the Netherlands, France, Sweden, Greece and Cyprus or by the current Presidency of the Council of the EU are a regular feature of the MEPC meetings.[101] The situation is not much different for the two cases discussed in this research, with the amount of the EU Member States submissions for the MEPC 75 and the Intersessional GHG meeting before it is impressive.[102]

97 Adamopoulos (n 56).

98 Jan Wouters et al. (n 26).

99 Pascal Lamy, 'Europe's Role in Global Governance: the Way Ahead', Speech in Humboldt University Berlin (Berlin 7 May 2002) <http://europa.eu/rapid/press-release_SPEECH-02-197_en.htm>. accessed 27 July 2002.

100 Yvonne Kleistra and Niels Willigen, 'Evaluating the Impact of EU Diplomacy: Pitfalls and Challenges' in Joachim Koops and Gjovalin Macaj (eds) *The European Union as a Diplomatic Actor. The European Union in International Affairs Series* (Palgrave Macmillan 2015) <https://doi.org/10.1057/9781137356857_4>.

101 Psaraftis and Kontovas (n 86).

102 The information gathered trough consulting official registry of the IMO meeting documents that are available for the public after the meetings.

This rather exciting choreography of the EU in the IMO allows the EU to express its views despite the technical limitations of certain Member States, legal issues linked to the Commission's membership status in the IMO and the internal division of competence.[103]

3.3.4. The impact of COVID-19 pandemic

Finally, it is important to mention the current context of COVID-19 pandemics, which could be seen as a major game-changer for the EU's effectiveness in the IMO.[104] Firstly, from the practical side, it is already difficult to push for the adoption of a reformist position such as the one of the EU in business-as-usual negotiations, and a virtual setting can only reduce the possibilities of convicting and lobbying the undecided delegations to accept a major shift in their positions. In that regard, China pulled out of France, Denmark and Germany's proposal for short-term measures due to COVID-19 related issues. In particular, the document states that the COVID-19 outbreak made it impossible to meet physically and challenging to meet and work online as well resulting in no agreement[105].

Secondly, amid the pandemic, climate change went down the scale of political priorities. On the EU level, COVID-19 crisis management was taking a large proportion of political space, especially in the first months of the pandemics. Similarly, on the international level, the planned COP 26 meeting was postponed due to the pandemic, which inevitably reduced the political pressure to act rapidly.[106] In that regard, it could be said that the relative positions of conservative states were more pronounced in this new constellation of global political priorities.

103 Jan Wouters et al. (n 26).

104 European Commission (n 8).

105 International Maritime Organisation, 'Intersessional Meeting of the Working Group on Reduction of GHG Emissions from Ships, 7th session, Agenda item 2, Proposal for a mandatory operational goal-based short-term measure Submitted by Denmark, France and Germany' (2020) ISWG-GHG 7/2/9 7.

106 UNFCCC, UN Climate Press Release, COP26 Postponed, 1st April 2020 <https://unfccc.int/news/cop26-postponed>.

Figure 3: Interim conclusions

Source: author's elaboration

Following the analysis of the external factors pertinent for determining EU's relative negotiating position in the IMO's MEPC negotiating rounds, the following conclusions can be drawn (in addition to its regulatory power, the EU's negotiating strength depends on several external factors):

1. The EU's negotiating position is relative to numerous external factors linked to the power constellation of other actors, its ability to speak with one voice, alliance building capabilities and COVID-19 considerations.

2. The EU's market power defined by the size of its fleet and the proportion of participation in the international trade and relative to that of other international actors.

3. The EU's ability to transmit a single message as a result of its internal coordination process.

4. The EU's alliance and coalition building engagement in the IMO as demonstrated by siding with the ambitious delegations advocating for 70- 100% reduction in the MEPC 72 and the financial support to the SIDS to participate in the MEPC discussions as well as capacity building financing for SIDS and LCD's.

5. COVID-19 considerations (practical and political).

4. CONCLUDING REMARKS

The above analysis point to a conclusion that the levels of effectiveness of the EU in MEPC 72 and MEPC 75 negotiations differ. Notably, the ability of the EU to translate its position to the final outcome of the negotiations was significantly lower in the case of MEPC 75 than it was for MEPC 72.

Reflecting on those outcomes of the analysis in light of the initial hypothesis that assumed a highly reformist position combined with the inopportune external context to be the causes of the EU's low effectiveness in the MEPC 75, the findings are not very surprising. However, there are many nuances and details that emerged during the analysis that are worth mentioning in order to give more pith to these findings.

Firstly, even if the adoption of the Initial GHG Strategy was an impressive success, there are a few elements that need to be taken into account when comparing the EU's effectiveness on MEPC 72 and MEPC 75. Namely, the MEPC 72 deal resulted from a long period of negotiations, and when looked at from the mid-term perspective, one could better appreciate the lengthy process and persistent effort that the EU put into achieving the deal. Furthermore, although an important milestone for the shipping sector to contribute to the Paris Agreement goals, the Initial Strategy is a political declaration and call for action, therefore not containing concrete and enforceable measures to achieve the desired outcome. Short-term measures should have a practical effect to decrease emissions, and the shipping sector would feel that. This explains the reluctance of the IMO parties to adopt the enforcement mechanism that would concretise the agreement consisting of CII and its rating scheme, EEXI and SEEMP.

Secondly, as expected, the COVID-19 pandemic could be seen as a major stumbling block for the EU's effectiveness in the MEPC 75. The difficulties of bridging the gap between the reformist and conservative positions in the virtual context are important factors to be taken into account. In particular, considering the fact that the burden on ambitious actors such as the EU is significantly higher in that regard. Furthermore, the sense of urgency to act on the climate change front was overshadowed by the global pandemic which made it to the top of the crisis management agenda in the EU and globally. Consequently, the moderate-conservative negotiating positions of other states, apart from those of the Pacific Islands delegations, gained more prevalence in this rearranged international priority structure. In other words, while the adoption of the IMO Initial Strategy happened in the context of the momentum created by the adoption of the Paris Agreement and the

severe public scrutiny linked to the presumed passiveness of the IMO, that incentive was lacking in the MEPC 75 case.

Thirdly, in the IMO MEPC discussions, there are two possible conclusions regarding the EU's effectiveness. On the one hand, following a rigid mathematical logic, one could conclude that the disparities between the ambitious goals the EU approached the MEPC 75 negotiations and the final outcome are substantial, which indicates a low level of effectiveness. To put this differently, when assuming the responsibility of being a global leader in the fight against climate change, the EU approached the negotiations with a highly reformist position resulting in a major gap between its mandate and the outcome. On the other hand, taking a more interpretive approach and learning from the MEPC 72 experience, the expectations – outcome gap could be seen as a result of the bargaining tactics of the EU. That is, the EU is prior and during the negotiations exerting pressure through its internal policies calling for higher climate ambition, announcing plans for regional market-based measures for shipping emissions and through its negotiation strategy of creating alliances with like-minded states. However, the EU is aware that the actual deal will need to be balanced out through bridge-building exercises with those on the moderate-conservative side of the spectrum. Following that logic, the gap between the unspoken ambition and goal attainment is significantly lower, especially considering the long-term perspective that the EU is aiming at.

Fourthly, although it could be seen as counterintuitive in light of the feeling of urgency linked to the effects of climate change, to have a more precise appreciation of the EU's effectiveness in the IMO climate change talks, the evaluation would benefit from having a longer to mid-term perspective. Limiting the EU's effectiveness analysis to the case of the MEPC 75, where the EU fell short when it comes to reaching a deal on enforceable short-term measures with an actual impact on GHG emission reduction, could be seen as short-sighted. In other words, what will be really important in the coming period is to negotiate mid-term measures that could take shape in market-based measures and alternative fuels policy mix, and it could be that the EU's creating the momentum for it through increasing its internal environmental ambitions and nurturing good working relations with the IMO states and the industry.

Fifthly, the international community's attitude towards environmental matters has been identified as a major stumbling block in the MEPC negotiations, notably MEPC 75. However, the situation is changing, not least as a result of the change in the USA's politics, and the upcoming period could be characterized by smoother negotiations and more ambitious outcomes.

However, the question that arises from this analysis is whether the EU's position as a global power is as strong as the EU wishes it to be. In particular, the fact that the COVID-19 pandemic and the unfavourable external power structure easily changes the dynamics of the negotiations to the detriment of the EU's bargaining power speak to the EU's ability to put its weight on the matters of global interest. In that regard, it would be worth expanding this analysis from the EU's effectiveness to its performance to encompass more elements relevant for determining its weight in the global arena. Furthermore, although the questions of GHG emission reduction from shipping might seem technical, the subtle element of atmosphere in the multilateral negotiations is a relevant factor to be taken into account in the analysis of the EU's position. In that regard, the limitations of document-based research such as this one could be overcome by participatory observation.

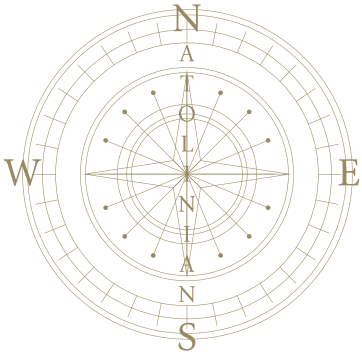
Finally, the research allows for drawing a number of policy conclusions:

The EU cannot do it alone – the EU should continue working on enhancing its diplomatic outreach and focus on preserving its existing partnerships with environmentally ambitious states. Moreover, the EU should use the momentum created by the renewed EU-US relations and the newly found US environmental ambition to push for more ambition in the IMO.

The horizontal and cross-sectoral nature of climate change issues should be reflected in the internal and external dimension of the EU's approach to the MEPC negotiations (links between different fora should be further emphasized and enforced on the EU and the Member States side and pushed for in the international sphere).

The EU's market power as a major bargaining chip should be enhanced in the coming period through the EU's financial mechanisms aimed at sustainable solutions for the (shipping) industry in line with the green and digital objectives.

Similarly, in the context of the greening of the EU's industry, the EU financial and policy mechanisms should be used to minimise the intra-EU differences and therefore enhance the cohesiveness of the EU's position in the international negotiations in sectors that are not an exclusive EU competence.



CHAPTER 10

EU's Critical Raw Materials Security: Reducing Reliance on China's Supply

BY XINCHUCHU GAO

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1. INTRODUCTION

The urgency of decarbonization of the EU's economy has made guaranteeing a stable supply of critical raw materials a strategic agenda for the EU. On the one hand, raw materials security is crucial to the EU's transition towards a green economy because they are closely linked to clean technologies, such as batteries used in electric cars. On the other hand, Europe is heavily dependent on raw materials imports from China. In particular, the supply of rare earth elements has raised additional concerns within the EU because of the dominance of Chinese state-run companies in rare earth elements' production. Aware of economic importance as well as supply risks of critical raw materials, the European Commission presented the Communication "Critical Raw Materials Resilience: Charting a Path towards Greater Security and Sustainability" in September 2020. Moreover, the European Commission announced the creation of the European Raw Materials Alliance. At the heart of these efforts lies the EU's commitment to strengthening its strategic independence and becoming carbon-neutral by 2050. Specifically, the EU seeks to reduce its dependence on critical raw materials imports from China and diversify sources of supply through opening opportunities for non-Chinese mineral producers, especially those in Africa.

Against this background, the paper aims to provide an analysis of supply chains of the EU's critical raw materials. In particular, it studies the EU's dependence on rare earth elements imports from China. It also examines the evolving EU strategy on the raw materials security, with a focus on its efforts to reduce dependence on China's supply and identifies challenges ahead. This paper argues that the EU's efforts to safeguard its access to critical raw materials and to open opportunities for non-Chinese minerals producers, especially those in sub-Saharan Africa are facing challenges. With significant involvement of Chinese companies in Africa's mining projects and the increasing risk of European companies' exposure to Environmental, Social and Government (ESG) related risks, these EU's diversification efforts may not be as effective as expected.

This paper is structured as follows. Following the introduction, the second section of the paper discusses the role of critical raw materials in the process of decarbonizing the EU's economy. It is followed by an overview of the EU's raw materials supply chains, with a focus on the political and economic risks of the EU's reliance on China's supply. The fourth section reviews the EU's recent efforts to shift away from China's supply and discusses how mineral producers in sub-Saharan Africa benefit from the EU's diversification efforts. The fifth section analyses the challenges, namely the competition with Chinese companies and ESG risks of importing critical raw materials from African countries. The

concluding section summarizes the findings of the paper and provides policy recommendations on how the EU could strengthen its security of critical raw materials supply.

1.1. The role of critical raw materials in decarbonizing EU economy

Decarbonisation is important to halt climate change. As Kalantzakos has rightly pointed out, the climate crisis implies that fossil fuels (coal, oil, natural gas) will be phased out as main sources of energy generation and clean energy deployment is seen as the way forward.[1] In a similar vein, "The World Energy Outlook" Sustainable Development Scenario (SDS) states that meeting climate change goals (1.5°C–2°C or below), as outlined in the Paris Agreement, requires a significant scale-up clean energy deployment.[2]

The EU has firmly established its leadership in the global fight against climate change and is well on track to meet its decarbonisation goal.[3] Triggered by the first summary report of the Intergovernmental Panel on Climate Change (IPCC) in 1990, climate change was first discussed within the EU in the same year with the aim of preparing for the upcoming negotiations on the United Nation Framework Convention on Climate Change (UNFCCC).[4] In the negotiations on the Kyoto Protocol in 1997, the EU accepted the highest reduction target among the major industrialised countries (-8 percent).[5] In 2001, the EU's leadership in international climate policy was further established when it secured enough followers for the Kyoto Protocol to enter into force in the aftermath of the withdrawal by the United States.[6] In the following years, the EU adopted a number of concrete climate policies that 'backed up the EU's global role'.[7] In 2005, the EU launched the Emission Trading Scheme (ETS), the world's most important greenhouse gas emissions trading scheme. In 2007, the EU adopted an ambitious climate legislative package that included the 20-20-20 targets: 20 percent reduction of greenhouse gas emissions compared to 1990 levels, 20 percent

1 Sofia Kalantzakos, *The Geopolitics of Critical Minerals* (Instituto Affari Internazionali 2019).

2 International Energy Agency, 'The World Energy Outlook' (2021) <https://www.iea.org/reports/world-energy-outlook-2020>.

3 Kalantzakos (n 1).

4 Sebastian Oberthür and Claire Kelly, 'EU leadership in International Climate Policy: Achievements and Challenges' (2008) 43(3) Italian Journal of International Affairs 35-50.

5 Ibid 36.

6 Charles Parker et al., 'Assessing the European Union's Global Climate Change Leadership: from Copenhagen to the Paris Agreement' (2017) 39 Journal of European Integration 239–252.

7 Marco Siddi, 'The European Green Deal: Assessing Its Current State and Future Implementation' (2020) 114 FIIA Working Paper.

increase in energy efficiency, and 20 percent renewable by 2020.[8] In 2014, the European Council agreed on the 2030 climate and energy framework for the EU which set a reduction target of 40 percent of greenhouse emissions by 2030 relative to 1990 levels.[9]

In recent years, despite the fact that several major emitters are reluctant to take more climate actions, the EU has continued to prioritise climate policies. In December 2019, the European Commission presented the European Green Deal which serves as a roadmap of key policies for the EU's climate agenda.[10] The European Green Deal has the overarching aim of making Europe climate neutral in 2015 and increasing the EU's greenhouse gas emission reduction target for 2030 to at least 55 percent compared with 1990 levels.[11] On the basis of the Green Deal, the EU has developed legislative proposals and strategies promoting decarbonisation of economy and addressing climate challenges. For instance, on 14 July 2021, the European Commission adopted a set of proposals to make the EU's climate, energy, land use, transport and taxation policies fit for the goal of the EU's Green Deal.[12]

The EU's decarbonisation efforts have far-reaching consequences for raw materials requirements because raw materials play a central role in the deployment of many clean technologies such as energy efficient lights, wind turbines, hybrid and full electric vehicles (electro motors and batteries). For instance, production of batteries for electric vehicles (EV) requires a large amount of lithium and cobalt. By 2050, the EU will need almost 60 times more lithium and 15 times more cobalt to cover the need for the mobility and energy storage sectors.[13] In the same period, demand for rare earth elements used

8 Council of the European Union, 'Presidency Conclusions' 7224/1/07 REV 1 (2007) <www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/93135.pdf>

9 Ibid.

10 Paola Tamma, Eline Schaart and Anca Gurzu, 'Europe's Green Deal plan unveiled', (11 December 2019) POLITICO <https://www.politico.eu/article/the-commissions-green-deal-plan-unveiled/> accessed 20 November 2021.

11 European Commission, 'European Green Deal: striving to be the first climate-neutral continent' (2022) <https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en> accessed 1 March 2022.<https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en> accessed 1 March 2022.

12 European Commission, 'European Green Deal: Commission proposes transformation of EU economy and society to meet climate ambitions' (2021) <https://ec.europa.eu/commission/presscorner/detail/en/IP_21_3541> accessed on 11 October 2021.

13 European Commission, ' In-depth reviews of strategic areas for Europe's interests' <https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/european-industrial-strategy/depth-reviews-strategic-areas-europes-interests_en> accessed 4 April 2021.

in permanent magnets, a critical component of products like wind generators, could increase ten-fold.[14]

To sum up, the urgency of decarbonization of the EU's economy has made guaranteeing a stable supply of critical raw materials a strategic agenda for the EU because they are a critical component of many green technologies. As European Commission Vice President Maroš Šefčovič has stated, the EU need to 'ensure a secure and sustainable supply of raw materials to meet the needs of the clean and digital technologies'.[15] Similarly, the new *Industry Strategy for Europe* states that raw materials are key enablers for EU's competitive transition to green economy.[16]

1.2. The EU's reliance on China's supply of raw materials and the economic and political risks

Europe is highly dependent on a limited number of non-EU countries for its raw materials imports. Clean energy transitions in the EU therefore raise concerns about the security and resilience of critical raw materials supply chains. This section examines the current status of the EU's raw materials supply chains with a focus on its dependence on imports from China.

Many raw materials central to clean energy technologies are geographically concentrated. For lithium, cobalt and rare earth elements (REEs), the top three producing nations control over three-quarters of global output.[17] South Africa and the Democratic Republic of the Congo account for about 70% of global production of platinum and cobalt respectively, and China was responsible for 60% of global rare earths production in 2019.[18] An even higher level of concentration can be observed in processing operations. For instance, China's share of refining operations is about 35% for nickel, 50-70% for lithium and co-

14 Maroš Šefčovič, 'Speech at the Press Conference on critical raw materials resilience in the EU' (2020) <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_20_1558> accessed 4 April 2021.

15 Ibid.

16 European Commission, 'Communication from the commission to the EP, the Council, the European economic and social committee and the Committee of the regions' (2021)

17 International Energy Agency, 'Share of top 3 producing countries in total production for selected resources and minerals' (2019) <https://www.iea.org/data-and-statistics/charts/share-of-top-3-producing-countries-in-total-production-for-selected-resources-and-minerals-2019> accessed 4 April 2022.

18 Ibid.

balt, and up to 90% for rare earth elements.[19] High levels of concentration led to more risks arising from physical disruption and trade restrictions in major producing countries. Moreover, higher exposure to climate risks also poses threats to supply chains of critical raw materials. Additionally, existing vulnerabilities have been magnified since the outbreak of the COVID-19 pandemic which has triggered unprecedented obstacles to free trade.[20]

Therefore, geographic concentration, exposure to climate risks as well as COVID-19 have made supply chains of critical raw materials highly vulnerable. In the case of the EU, the EU's relative resource scarcity means that domestic production is unable to meet its demands. Moreover, the EU has limited upstream involvement in the value chain of many critical materials, such as antimony, beryllium, bismuth, borates, molybdenum, niobium, PGMs, rare earths, tantalum, titanium, vanadium and zirconium.[21] A number of factors might explain limited upstream development in the EU, including a lack of mineral fields in the EU, the limited economic motivation, as well as environmental and societal factors that limit exploration or extraction.[22]

The EU's relative resource scarcity and its absence from the upstream steps of the value chain leaves it reliant on raw materials imported from outside the EU. As of 2020, the EU imports between 75% and 100% of most metals from non-EU countries.[23] For instance, Turkey provides 98% of the EU's supply of borate, and South Africa provides 71% of the EU's supply of platinum and an even higher share of platinum group metals iridium, rhodium and ruthenium.[24] The EU's import reliance is also evidenced in the case of the supply for cobalt. Cobalt is key to the implementation of the EU long-term strategy for the carbon-neutral economy by 2050 as it is widely used in the manufacture of rechargeable batteries for electric vehicles and energy storage systems. It is predicted that the expansion of the electric vehicle market globally and in the EU should lead to an increasing demand

19 International Energy Agency, 'Share of top producing countries in total processing of selected minerals and fossil fuels' (2019) <https://www.iea.org/data-and-statistics/charts/share-of-top-producing-countries-in-total-processing-of-selected-minerals-and-fossil-fuels-2019> accessed 19 March 2022.

20 Sophia Kalantzakos, 'The Race for Critical Minerals in an Era of Geopolitical Realignments' (2020) 55 The International Spectator 12.

21 Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs, *Study on the EU's list of Critical Raw Materials. Final Report* (European Commission 2020) <https://op.europa.eu/en/publication-detail/-/publication/c0d5292a-ee54-11ea-991b-01aa75ed71a1/language-en>.

22 Ibid.

23 Šefčovič (n 14).

24 European Commission, 'Critical Raw Materials' (2020) <https://ec.europa.eu/growth/sectors/raw-materials/specific-interest/critical_en> accessed 04 April 2020

for cobalt in the next decade, at an annual growth rate ranging from 7% to 13%.[25] As of 2020, the EU consumption of cobalt ores, concentrates and intermediates is 13,856 tonnes of contained cobalt, the majority of which originate from imports from the DRC (68% of EU sourcing) and domestic production in Finland (14% of EU sourcing).[26] The import reliance for cobalt ores, concentrates and intermediates is up to 86%.[27] With regard to refined cobalt, the EU consumption is 17,585 tonnes of cobalt content, which mainly is sourced from domestic production in Finland (54% of EU sourcing) and Belgium (7% of EU sourcing). The import reliance for refined cobalt is 27%.[28]

Therefore, EU industry is largely dependent on import for many raw materials and is exposed to vulnerabilities along the supply chain. Specifically, the China factor is of critical importance to the EU's supply chains for critical raw materials because China dominates the EU's access to many critical raw materials. In addition, EU's other critical raw materials mostly import from developing countries where China has consolidated its strong relationships and secured its dominant position in supply chains (see detailed discussion regarding this point below). This has also left the EU feeling exceedingly vulnerable.

In particular, the security of supply chain of rare earth elements has raised additional concerns within the EU as the EU depends on China for as high as 98% of its rare earths imports.[29] While rare earth elements exist in other countries outside China, in most places it makes no economic sense to extract and process them.[30] Also, even when it is economically feasible to mine rare earths, both extraction and processing raise significant environmental risks.[31] Furthermore, to bring a rare earths mine into operation requires at least a decade and is a capital-intensive endeavour.[32] Moreover, China has been looking to move from being solely a raw commodities exporter of rare earths to a producer of high-valued end products.[33] It is noteworthy that for the first time since

25 Directorate-General for Internal Market (n 21) 135.

26 Ibid.

27 Ibid.

28 Ibid.

29 European Commission, 'In-depth reviews of strategic areas for Europe's interests'.

30 Cindy Hurst, *China's Rare Earth Elements Industry What Can the West Learn* (IAGS 2010) 4 <http://www.iags.org/rareearth0310hurst.pdf> accessed 11 November 2021.

31 Kalantzakos (n 20) 3.

32 Ibid.

33 Ibid.

1985, China became a net importer of several rare earth elements in 2018 demonstrating China's increasing need for imported rare earths for downstream processing.[34] All these factors have led to China's dominant role in the global supply chain of rare earth elements, thus exerting a significant influence on the security of the EU's imported rare earth elements.

The EU's import reliance for critical raw materials, in particular rare earth elements, from China has presented concerns about the security and resilience of supply chains within the EU. Observers have pointed out that China appears to recognize the strength of its critical minerals supply chain as geopolitical leverage.[35] For instance, in 2010, the Chinese government restricted rare earth exports to Japan due to an incident near the contested Diaoyu islands in the East China Sea.[36] Although these quotas were lifted in 2014 following a World Trade Organization ruling, the rare earth crisis of 2010 was seen as a proof of China's control over the production and export of rare earths. Since 2016 China consolidated all official mining and separation companies into six state-owned enterprises: Northern Rare Earth (Group) Hi-Tech (including Baotou), Aluminum Corporation of China (Chinalco), China Minmetals Corporation, Xiamen Tungsten Corporation, China Southern Rare Earth Group and Guangdong Rare Earth Industry Group.[37] More recently, during the heightened phases of the U.S.–China trade war in 2019, Beijing raised tariffs to 25% on rare earth exports to the U.S. and threatened to halt exports.[38] Moreover, President Xi Jinping's call in April 2020 for the need to strengthen global supply chains' dependence on China and 'develop powerful retaliation and deterrence capabilities against supply cut-offs by foreign parties'[39] has reinforced growing concerns in Western countries about their vulnerability to mineral supply chain disruption, particularly in the event of a clash between China and the West.

34 Li Liuxi and Denise Jia, 'China Became Net Importer of Rare Earths in 2018' *Caixin Global* (16 March 2019) <https://www.caixinglobal.com/2019-03-16/china-became-net-importer-of-rare-earths-in-2018-101393333.html> accessed 2 March 2022.

35 Jane Nakano, 'The Geopolitics of Critical Minerals Supply Chains' (11 March 2021) CSIS <https://www.csis.org/analysis/geopolitics-critical-minerals-supply-chains> accessed 6 June 2021.

36 Keith Bradsher, 'Amid Tension, China Blocks Vital Exports to Japan' *The New York Times* (New York, 22 September 2010) <https://nyti.ms/2HOinnx> accessed 8 April 2021.

37 European Commission, 'The Role of Rare Earth Elements in Wind Energy and Electric Mobility: An analysis of future supply/demand balances' (2020) <https://op.europa.eu/en/publication-detail/-/publication/2ea6ecb2-40e2-11eb-b27b-01aa75ed71a1/language-en> accessed 9 April 2021.

38 Ibid.

39 Nakano (n 35).

Increasing bilateral geopolitical tensions between the EU and China have also contributed to mounting concerns regarding the security of the EU's critical raw materials supply chains. In recent years, the EU–China relationship, based on a joint strategic agenda agreed in 2013, has shifted direction. In EU Commission document titled "EU–China – A strategic outlook" presented in March 2019, the EU labelled China as a 'systemic rival' in some areas.[40] More recently, the EU's criticism of Chinese government's reaction to the COVID-19 pandemic and increasing scrutiny of Chinese investments further led to rising geopolitical tensions between the EU and China.[41] Observers have pointed out that it has become obvious that 'EU–China relations have reached a new low'.[42]

Due to the vulnerable situation of the EU's raw materials supply chains and tougher bilateral relations between EU and China, reducing the Chinese share of critical minerals supplies has been a priority for the EU. The following section examines the EU's recent efforts to diversify its minerals supplies and to strengthen its strategic independence with regard to the supply of raw materials.

2. EUROPEAN EFFORTS TO REDUCE DEPENDENCE ON CHINA FOR CRITICAL RAW MATERIALS

The EU's efforts to securitise supply chains of critical raw materials can be traced back to the launch of the Raw Materials Initiative in 2008. The European Commission argued that the lack of an integrated policy response to market-distorting practices would limit the EU's ability to guarantee access to raw materials at 'fair and undistorted prices'.[43] Also, the European Commission explicitly pointed out that minerals, such as rare earths and cobalt, are the key to Europe's shift toward making 'environmental-friendly technologies and products'.[44]

40 European Commission, 'European Commission and HR/VP contribution to the European Council: EU-China—A strategic outlook' (2019) <https://ec.europa.eu/info/publications/eu-china-strategic-outlook-commission-contribution-european-council-21-22-march-2019_en> accessed 5 May 2021.

41 European Parliament, 'China: From partner to rival' (2020) <https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/659261/EPRS_BRI(2020)659261_EN.pdf> accessed 11 November 2021.

42 Alicia García-Herrero, 'Non-summit Shows EU-China Ties at New Low' (2020) Bruegel <https://www.bruegel.org/2020/09/non-summit-shows-eu-china-ties-at-new-low/> accessed 1 April 2021.

43 European Commission, 'Communication from Commission to The European Parliament and The Council: The raw materials initiative—meeting our critical needs for growth and jobs in Europe' (2008) <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0699:FIN:en:PDF> accessed 8 August 2021.

44 Ibid.

A decade later, import-dependence for critical raw materials remains an ongoing challenge for the EU. To address this issue, the EU released "Critical Raw Materials Resilience: Charting a Path towards greater Security and Sustainability" in September 2020.[45] "Critical Raw Materials Resilience" included a list of critical minerals (see table below) and an action plan to increase the resilience of critical minerals supply chains for the European Union, with the following four aims:

– develop resilient value chains for EU industrial ecosystems;

– reduce dependency on primary critical raw materials through circular use of resources, sustainable products, and innovation;

– strengthen the sustainable and responsible domestic sourcing and processing of raw materials in the European Union;

– diversify supply with sustainable and responsible sourcing from third countries, strengthening rules-based open trade in raw materials and removing distortions to international trade.

The Communication unveiled the fourth iteration of its list of critical raw materials, adding lithium, bauxite, strontium, and titanium.

45 European Commission, 'Critical Raw Materials Resilience: Charting a Path towards greater Security and Sustainability' (2020) <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0474&from=EN> accessed 9 August 2021.

Table: European Commission 'Critical Raw Materials Resilience: Charting a Path towards greater Security and Sustainability' (2020)

Strontium*	Titanium*	Bauxite*
Lithium*	Antimony	Light rare earth elements
Phosphorus	Baryte	Gallium
Magnesium	Scandium	Beryllium
Germanium	Natural graphite	Silicon metal
Bismuth	Hafnium	Natural rubber
Tantalum	Borate	Niobium
Tungsten	Cobalt	Heavy rare earth elements
Platinum group metals	Vanadium	Coking coal
Indium	Phosphate Rock	Fluorspar

*** Bauxite, lithium, titanium and strontium are added to the list for the first time**

Source: European Commission

To accompany "The Critical Raw Material Resilience" document, the EU also issued "The Critical Raw Materials for Strategic Technologies and Sectors in the EU – A Foresight Study".[46] This document provided detailed analysis of the critical minerals supply chains per sectors that are of strategic importance to the EU. Also, the European Raw Materials Alliance (ERMA) was established to increase European capacity at all stages of the critical minerals value chain.

46 European Commission, 'Critical Raw Materials for Strategic Technologies and Sectors in the EU: A Foresight Study' (2020) <https://ec.europa.eu/docsroom/documents/42849> accessed 11 April 2021.

In particular, diversification has been central to the EU's efforts to securitise supply chains of critical raw materials. As Peter Handley from the European Commission stated, the key to the stable supply of critical raw materials is diversification.[47] To achieve this goal, the EU firstly seeks to increase domestic production. The Commission plans to take advantage of the fact that many EU critical raw materials (CRMs) resources are in regions that are heavily reliant on coal or carbon-intensive industries. In these regions, the EU will support CRMs-focused projects and the transition from coal to CRMs exploitation.[48] Examples of EU support instruments include the Just Transition Mechanism, the InvestEU programme and the European Skills Agenda.[49] In particular, the EU has attached significant importance to ensuring the domestic production of lithium. The EU imports almost all of its lithium – a key component of the batteries used to power electric vehicles. The European Commission pointed out that batteries are a strategic part of Europe's clean and digital transition and therefore the Commission seeks to make the EU a global leader in sustainable battery production and use.[50] To boost its domestic capacities in lithium industry, the European Commission established the EU Battery Alliance in 2017. In 2018, the Commission further adopted a strategic action plan for batteries, which sets out a comprehensive framework of regulatory and non-regulatory measures to support all segments of the battery value chain.[51] Moreover, four key industrial projects in sustainable mining and processing at a cost of almost €2 billion are expected to cover 80% of the EU's lithium needs in the battery industry by 2025.[52]

However, Europe's relative resource scarcity means that domestic production will be unable to meet Europe demand. The EU therefore need to source from a wider range of countries. The documents "Critical Raw Materials Resilience" mentions that it is necessary to open opportunities for non-Chinese producers through pursuing critical raw materials partnership with Canada, various African countries and EU neighbours. In particular,

47 Paul Hackett, 'Green future: how will European power its low-carbon economy' <https://www.euronews.com/2021/01/07/green-future-how-will-europe-power-its-low-carbon-economy> accessed 19 March 2021.

48 European Parliament, 'Critical raw materials for the EU Enablers of the green and digital recovery' (2020) <https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2020)659426> accessed 11 May 2021.

49 Ibid.

50 European Commission, 'European Battery Alliance' (2022) <https://ec.europa.eu/growth/industry/policy/european-battery-alliance_en> accessed 8 August 2021.

51 European Commission, 'Europe on the move: sustainable mobility for Europe: Safe, connected, and clean' (2018) <https://eur-lex.europa.eu/resource.html?uri=cellar%3A0e8b694e-59b5-11e8-ab41-01aa75ed71a1.0003.02/DOC_1&format=PDF> accessed 11 April 2021.

52 Maroš Šefčovič, 'Statement of Vice-President of the EU commission following the meeting with high-level industrial actors under the European Battery Alliance' (2020) <https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_20_914> accessed 10 April 2021.

mineral producers in sub-Saharan Africa will benefit from the EU's diversification efforts. However, with significant involvement of Chinese companies in Africa's mining projects and the increasing risk of European companies' exposure to Environmental, Social and Government (ESG) related risks, the EU's diversification efforts to reduce its dependence on raw materials imports from China are facing challenges. The following section compares advantages and disadvantages of importing critical raw materials from China and African countries.

3. THE CHALLENGES OF EU'S IMPORTING CRITICAL RAW MATERIALS FROM AFRICAN COUNTRIES

3.1. Significant involvement of Chinese companies in Africa's mining projects

Over the past decade, China has appeared as a major competitor of European countries in sourcing critical raw materials. As Nakano has stated, 'where it lacks access to resources, China has invested in mining projects abroad'.[53] In 2003, the white paper titled "China's Policy on Mineral Resources", outlined China's 'going out policy' in minerals.[54] Africa is one of the major destinations of Chinese companies' investments. According to a study done by the German Institute of Global and Area Studies (GIGA), between 2005–2016, around half of China's total outbound investments were in the energy and mining sectors, and about one third of this was dedicated to sub-Saharan Africa.[55] There is no official figure for total Chinese investments into Africa, but a recent estimate from the China Africa Research Initiative (CARI) at Johns Hopkins University place concessional loan totals at around $5 billion per year.[56] Chinese investors' interest in Africa is primarily driven by Africa's rich raw materials and Beijing's desire to secure the upstream supply of critical raw materials that China is lacking. Africa is home to an abundance of high-grade natural resources such as copper and cobalt which can meet China's growing industrial needs. For instance, there is a great deal of copper deposits in Africa, which is one critical mineral that China is lacking and seeks to exploit in Africa. Cobalt is another mineral for which China is keen to find a stable source. Cobalt is an element, along with lithium, which makes up the essential components of lithium batteries. As the largest producer of

53 Nakano (n 35).

54 Information Office of the State Council of the People's Republic of China, 'China's Policy on Mineral Resources' (2003) <http://www.china.org.cn/english/2003/Dec/83092.htm> accessed 7 June 2021.

55 Lindsay Davis, 'The Geographic Spread of Africa's Mining Investors' Global Business Reports (26 April 2019) <https://www.gbreports.com/article/the-geographic-spread-of-africas-mining-investors> accessed 1 June 2021.

56 Lucy Hornby and Tom Hancock, 'China pledge of $60bn loans to Africa sparks anger at home' *Financial Times* (September 2018) <https://www.ft.com/content/fb7436d6-b006- 11e8-8d14-6f049d06439c> accessed 01 March 2021.

lithium cells, accounting for around 70 percent of the global lithium cell manufacturing capacity, China therefore seeks to find a stable source for low-cost cobalt by exploring and discovering cobalt deposits in Africa.

Due to their large high-graded copper and cobalt deposits, African countries such as Zambia, South Africa and Democratic Republic of Congo (DRC) have benefited from China's investments. For instance, Chinese enterprises have proactively invested in cobalt mining industry in the DRC to guarantee stable access to cobalt resources.[57] In 2018, China formed a 35-member Union of Mining Companies with Chinese capital, which is supported by both the PRC and the DRC governments.[58] As a result of China's efforts, as for 2018, Chinese companies controlled around 24% of the total value of minerals and metals produced in the DRC.[59] China is also home to 65% of cobalt refinery capacity globally demonstrating its great control over downstream processing of the commodity.[60]

Another key driver behind Chinese investors' ambition in Africa is enhancing intergovernmental collaboration between China and African countries. An action plan adopted at the 2018 Beijing Summit of the Forum on China-Africa Cooperation called for the further development of China-Africa cooperation. In particular, the BRI has played a significant role in Chinese investment in Africa. The BRI, launched in 2013, can be understood as a roadmap for China's international engagement. It is estimated that sub-Saharan Africa receives up to 25% of BRI investments in the 2020s.[61]

In comparison with their European counterparts, Chinese miners are less encumbered. Firstly, due to their easy access to competitive state capital and more favourable financing conditions which gives Chinese companies a competitive advantage over international competitors in Africa. China financing for mining projects in Africa has come mainly from state-controlled banks, such as China Exim Bank and China Development Bank.

57 Nicolas Niarchos 'The Dark Side of Congo's Cobalt Rush' *The New Yorker* (24 May 2021) <https://www.newyorker.com/magazine/2021/05/31/the-dark-side-of-congos-cobalt-rush> accessed 9 September 2021.

58 William Clowes, 'China Marks Cobalt, Copper Ascendancy in Congo With New Group' Bloomberg (18 June 2018) <https://www.bloomberg.com/news/articles/2018-06-18/china-marks- cobalt-copper-ascendancy-in-congo-with-new-group> accessed 11 November 2021.

59 Magnus Ericsson, Olof Löf and Anton Löf, 'Chinese control over African and global mining — past, present and future' (2020) 33 Mineral Economics 153-181.

60 International Energy Agency, 'Share of top producing countries in total processing' (n 19).

61 Bee Boo, 'China Aims for Win-Win Partnership with African Mining Sector' (2020) Lexology <https://www.lexology.com/library/detail.aspx?g=fca53597-defd-4517-a811-6f02576ef4c9> accessed 9 November 2021.

With government support, Chinese loans to Africa have a lower interest rate and longer repayment period compared to the market average.[62]

Secondly, Chinese companies face far less scrutiny on ESG encouraging more appetite to operate in high-risk areas. Many critical raw materials are mined in countries characterized by civil unrest and challenging governance environment. Cobalt is a prime example. Almost three quarters of global cobalt production originates from DRC, where internal conflict has lasted for decades. In DRC, western miners face prohibitive ESG risks that are not comparably felt by Chinese companies. Therefore, it is not surprising that China's cobalt refining capacity almost exactly matches the DRC's share of global output.

3.2. The risk of European companies' exposure to Environmental, Social and Government (ESG) related risks

Increasing critical raw materials imports from Africa will also increase the exposure of European companies to significant ESG risks. Analysts say Africa's mining sector, with its intensive labour and technical risks, is structurally exposed to ESG-related risks.[63] The COVID-19 pandemic has only made this situation worse. A combination of factors including limited ability to operate the mine, decreased global commodity demand, and shrinking foreign investment has led to African countries having fewer resources to manage ESG compliance. As a result, it becomes more difficult for African countries to match the ESG expectation of European miners. Many of them will likely turn to Chinese investors instead who are more flexible with ESG conditions. For example, Guinea, a major greenfield bauxite producer, has been strengthening commodity trade with China amid strong criticism from Brussels and Washington over President Condé's third term in office.[64]

In recent years, there has been a push by the EU for global production of critical raw materials to be sourced and produced sustainably. In 2017, the EU adopted its law concerning conflict minerals, Regulation (EU) 2017/821, which takes effect on 1 January 2021. The EU regulation covers tin, tantalum, tungsten, and gold because they are the four

62 Ben Blanchard, Christian Shepherd, 'China says its funding helps Africa develop, not stack up debt' *Reuters* (4 September 2018) <https://www.reuters.com/article/us-china-africa/china-says-its-funding-helps-africa-develop-not-stack-up-debt-idUSKCN1LK0J6> accessed 19 November 2021.

63 David McKay, 'How rising market and ESG standards can work in favour of under-fire SA mining' *Miningmx* (25 September 2020) <https://www.miningmx.com/news/markets/43783-how-rising-market-and-esg-standards-can-work-in-favour-of-under-fire-sa-mining/> accessed 19 October 2021.

64 BBC, 'Guinea elections: Alpha Condé wins third term amid violent protests' BBC (24 October 2020), <https://www.bbc.co.uk/news/world-africa-54657359> accessed 11 November 2021.

minerals that are most often imported from conflict regions and linked to human rights abuses. As the world's largest trading bloc and a major market of raw materials, the EU's conflict minerals regulation marks a big step in addressing ESG issues in the global supply chain of critical raw materials. However, some believe that legal requirements introduced by the conflict minerals regulation make it more difficult for European mining companies to compete with Chinese companies, which face no such accountability.[65] What is more, due to a lack of African countries' interest to strengthen their ESG framework significantly, efforts to tackle ESG risks in order to adhere to strict European regulatory framework will likely have to be shouldered by producers and end-users.

While the EU's diversification efforts are facing challenges, including Chinese competitors and increasing ESG-related risks, the EU can take advantage of its role as a regulation setter. Chinese companies' involvement in African mining projects is not without controversy. The impression that China has exploited natural resources in Africa without building up local economies has led to fierce criticism from some leaders. For instance, Michael Sata won Zambia's presidency partly as a result of tapping into anti-Chinese sentiment after Chinese managers shot protesters at a local coal mine in southern Zambia.[66] In 2013, Sanusi Lamido Sanusi, then-governor of Nigeria's Central Bank, stated that 'we must see China for what it is: a competitor'.[67] Environmental concerns have also been raised by international and local non-governmental organizations due to Chinese companies' lack of resource transparency and limited efforts to guarantee animal and environmental protection. In such context, the EU can use its experience in tackling ESG issues to act as a regulation setter in Africa and therefore get more actively involved in the local mining projects. By doing so, the EU would be able to secure a stable source for critical raw materials in Africa and reduce its import dependence on China.

4. CONCLUDING REMARKS

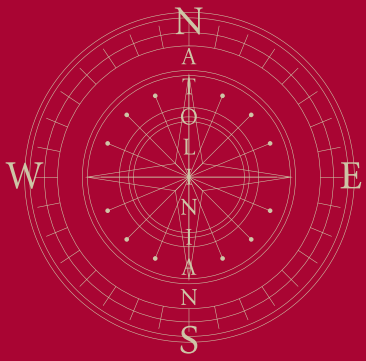
The security of critical raw materials supply is of paramount importance to the EU's strategic autonomy as it navigates the path to a low-carbon economy. This paper analyses the challenges in the supply chains of the EU's critical raw materials, especially the region's

65 Heidi Vella, 'Blessing and curse: understanding the social impact of Chinese mining in Africa' *Mining Technology* (18 January 2018) <https://www.mining-technology.com/features/blessing-curse-understanding-social-impact-chinese-mining-africa/> accessed 9 August 2021.

66 Eleanor Albert, 'China in Africa' *Council on Foreign Relations* (12 July 2017) <https://cfr.org/backgrounder/china-africa> accessed 6 June 2021.

67 Ibid.

dependence on rare earth metals imports from China, which presents both political and economic risks. In an attempt to mitigate these risks, the EU has strived to safeguard its access to critical raw materials from non-Chinese minerals producers, especially those in sub-Saharan Africa. However, these efforts are not obstacle-free. Competition from Chinese investors in Africa's mining projects and the potential exposure of European companies to ESG-related risks in Africa have posed additional hurdles to EU's plan to diversify its critical raw materials supply. However, the EU can still leverage its experience in sustainable development and its role as a regulation setter to enhance its supply chain ties with African countries.



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