

## Exporting environmental objectives or erecting trade barriers in recent EU free trade agreements<sup>1</sup>

JEFFREY MCNEILL  
Massey University  
[j.k.mcneill@massey.ac.nz](mailto:j.k.mcneill@massey.ac.nz)

### Abstract:

*The European Union (EU) has historically sought to influence environmental policies of other countries through multilateral environmental agreements. Under its 7th Environmental Action Plan and Trade for All strategy it now seeks to extend its environmental policy projection through trade; its recent free trade agreements now contain chapters addressing environment and sustainable development. However, by adopting high environmental standards the EU can also advance its own economic interests suggesting an ambiguous motivation. The recent Korean, Japanese and Canadian FTAs and the Mercosur agreements are examined in order to place the extent of this environmental turn within the context of economic advantage. The finding is that while environmental protection provisions in these FTAs may have environmental benefits, they may also serve EU domestic economic interests. This motivation has implications for new FTA negotiations, such as those with New Zealand and Australia, and now the UK.*

**Keywords:** Environment, environmental policy, free trade agreement; sustainable development; international trade, EU trade policy

### Introduction

Although the European Union's (EU<sup>2</sup>) internal environmental protection regime is widely seen as one of its more demonstrable successes,<sup>3</sup> its external environmental protection projection might be questioned. Historically, the EU was a laggard in addressing environmental issues beyond its borders; transboundary acid-rain and ozone layer depletion in the 1980s are examples.<sup>4</sup> It subsequently recognised the regional implications of managing larger environmental issues, such as transboundary air pollution, and watercourses and lakes and the governance arrangements required

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<sup>2</sup> For simplicity, EU is used to denote the European Union and its precursors, the European Economic Community and the European Community.

<sup>3</sup> Andrea Lenschow and Carina Sprungk, "The Myth of a Green Europe," *Journal of Common Market Studies* 48, no. 1 (2010); Anthony R Zito, Charlotte Burns, and Andrea Lenschow, "Is the Trajectory of European Union Environmental Policy Less Certain?," *Environmental Politics* 28, no. 2 (2019).

<sup>4</sup> Richard E. Benedick, *Ozone Diplomacy: New Directions in Safeguarding the Planet* 2nd ed. (Harvard University Press, 1998); Rachel Emma Rothschild, *Poisonous Skies: Acid Rain and the Globalization of Pollution* (Chicago, IL: University of Chicago Press, 2019); Jeffrey McNeill, "Process and Participation in the European Parliament: The F-Gas Directive," *Asia-Pacific Journal of EU Studies* 3, no. 1-2 (2005).

to address them.<sup>5</sup> More recently again the EU has recognised that many of the pressing environmental challenges of our time, such as climate change and biodiversity loss, have a global dimension requiring an international level of cooperation and policy alignment.

In response, the environment has become one of the primary values enshrined in the EU Treaties, establishing it as a shared competency. The Treaty on European Union (TEU) not only establishes the internal market, but also identifies sustainable development and a high level of protection and improvement of the environment as objectives.<sup>6</sup> *Title XX* Treaty on the Functioning of the European Union (TFEU) confirms the EU's competence in environmental matters and states EU goals, principles and criteria. Importantly, 'environment' is not defined, meaning that it can be and is widely interpreted, giving it a chameleon-like character legally.<sup>7</sup> Environment is additionally captured under 'sustainable development'.<sup>8</sup> Today, environmental protection driving member states' environmental legislation is embedded in some 365 regulatory acts addressing pollution and nuisance and some 1,300 others covering the broader environmental realm.<sup>9</sup>

The EU's environmental policies and regulations also affect non-member states, given impetus by the TEU requiring the EU 'in its relations with the wider world to uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to... the sustainable development of the Earth.' It has sought to realise these ambitions historically through multilateral environmental agreements (MEAs)<sup>10</sup> – a signatory to 44, including 13 relating to nature and biodiversity, and the 2016 Paris Agreement on Climate Change.<sup>11</sup> It also has sought to project its policies bilaterally using incentives and punishments such as conditional market access; capacity building, finance and other forms of support to third countries; and through dialogue and negotiations.<sup>12</sup> This ambition is projected in the seventh Environment Action Plan, *Living Well, Within the Limits of our Planet* (7th EAP) published in 2013. Its priority objectives include helping 'the Union address international environmental and climate challenges more effectively.'<sup>13</sup> It also calls for mainstreaming environmental and climate-related considerations in its trade and development policies. In particular, trade policies should support achieving environmental and climate goals and provide

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<sup>5</sup> Kai Schulze and Jale Tosun, "External Dimensions of European Environmental Policy: An Analysis of Environmental Treaty Ratification by Third States," *European Journal of Political Research* 52, no. 5 (2013).

<sup>6</sup> Article 3 TEU.

<sup>7</sup> The European Union Committee; House of Lords, *Brexit: Environment and Climate Change. 12th Report of Session 2016-17 HL109* ([UK] House of Lords, 2017).

<sup>8</sup> Article 11 TFEU.

<sup>9</sup> Nicholas de Sadeleer, *EU Environmental Law and the Internal Market* (Oxford: Oxford University Press, 2014); Ludwig Krämer, "30 Years of EC Environmental Law: Perspectives and Prospectives," *Yearbook of European Environmental Law* 2 (2002); The European Union Committee; House of Lords, *Brexit: Environment and Climate Change. 12th Report of Session 2016-17 HL109*.

<sup>10</sup> Angela Liberatore, "Problems of Transnational Policymaking: Environmental Policy in the EC," *European Journal of Political Research* 19 (1991)., Zsuzsa Anna Ferenczy, "Green Power? European Normative Influence on Chinese Environmental Policy," *Australian and New Zealand Journal of European Studies* 11, no. 1 (2019); Schulze and Tosun, "External Dimensions of European Environmental Policy: An Analysis of Environmental Treaty Ratification by Third States."

<sup>11</sup> European Commission, "International Issues: Multilateral Environmental Agreements," [https://ec.europa.eu/environment/international\\_issues/agreements\\_en.htm](https://ec.europa.eu/environment/international_issues/agreements_en.htm).

<sup>12</sup> Diarmuid Torney, Katja Biedenkopf, and Camilla Adelle, "Introduction: European Union External Environmental Policy," in *European Union External Environmental Policy: Rules, Regulation and Governance Beyond Borders*, ed. Camilla Adelle, Katja Biedenkopf, and Diarmuid Torney (Palgrave MacMillan, 2018).

<sup>13</sup> European Parliament and Council, "7th Environment Action Plan 'Living Well, within the Limits of Our Planet,'" *Official Journal of the European Union* (2013).

incentives to other countries to upgrade and enforce their environmental regulatory frameworks and standards.

This intent is reflected in the 2015 *Trade for All* strategy that seeks a more responsible trade and investment policy in negotiating trade agreements that seek to safeguard internal environmental protection as well as promoting high environmental standards and sustainable development.<sup>14</sup> To do so, the EU has exploited provisions in the General Agreement on Tariffs and Trade, which although generally seeking a reduction in trade barriers globally, provides for individual states to control trade for phytosanitary and environmental protection, provided these controls are applied uniformly.<sup>15</sup> As a consequence, recent European Union free trade agreements address environmental protection explicitly in dedicated environment chapters as well as under the broader umbrella of sustainable development provisions.

Yet there remains a gap between act and intent that brings into question the EU's *motivation* for promoting environmental protection through its trade agreements. Despite a plethora of environmental laws – now some eight percent of all EU laws – the EU's own environmental performance has been decidedly mixed. Member state compliance has been inconsistent,<sup>16</sup> while failure to achieve environmental quality objectives has been particularly noticeable in the agricultural sector, an important negotiating element in many foreign trade agreements. Overall, European agricultural indicators for biodiversity show an increase in farm size and arable cropping<sup>17</sup> with consequent adverse impacts on water quality and biodiversity,<sup>18</sup> resulting in ongoing environmental degradation.<sup>19</sup> Essentially, Europe's environment is being treated as a cheap factor of agricultural production.

Its international projection of environmental protection, too, has been mixed. It is perhaps telling that Norway has ratified more United Nations Economic Commission for Europe MEAs than the EU.<sup>20</sup> One, the 1985 *Helsinki Protocol on the Reduction of Sulphur Emissions or their Transboundary Fluxes by at Least 30 Per Cent*, was not signed by the EU, though 15 member states are parties; a direct consequence of the UK, then a major emitter of sulphur from burning coal, abstaining.<sup>21</sup> The EU showed a similar reluctance to engage initially with global ozone-layer protection initiatives promoted by the United Nations Environmental Programme in the 1980s.<sup>22</sup> In both cases the EU has been shown to be primarily interested in protecting particular

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<sup>14</sup> European Commission, *Trade for All: Towards a More Responsible Trade and Investment Policy* (Luxembourg: European Commission, 2015).

<sup>15</sup> Kurt Hübner, Anne-Sophie Deman, and Tugce Balik, "EU and Trade Policy-Making: The Contentious Case of Ceta," *Journal of European Integration* 39, no. 7 (2017); [WTO] *Agreement on Agriculture*.

<sup>16</sup> Tanja Börzel, *Environmental Leaders and Laggards in Europe: Why There Is (Not) a 'Southern Problem'* (Aldershot: Ashgate, 2003); de Sadeleer, *EU Environmental Law and the Internal Market*.

<sup>17</sup> Guy Pe'er et al., "EU Agricultural Reform Fails on Biodiversity," *Science* 344, no. 6188 (2014).

<sup>18</sup> Stefan Schüler and Eva Maria Noack, "Does the Cap Reflect the Population's Concerns About Agricultural Landscapes? A Qualitative Study in Lower Saxony, Germany," *Land Use Policy* 83 (2019).

<sup>19</sup> Ian J. Bateman and Ben Balmford, "Public Funding for Public Goods: A Post-Brexit Perspective on Principles for Agricultural Policy," *ibid.* 79 (2018); David Kleijn, Frank Berendse, and Niels Gilissen, "Agri-Environment Schemes Do Not Effectively Protect Biodiversity in Dutch Agricultural Landscapes," *Nature* 413, no. 18 October (2001); Pe'er et al., "EU Agricultural Reform Fails on Biodiversity."

<sup>20</sup> Schulze and Tosun, "External Dimensions of European Environmental Policy: An Analysis of Environmental Treaty Ratification by Third States."

<sup>21</sup> Rothschild, *Poisonous Skies: Acid Rain and the Globalization of Pollution*; Peringe Grennfelt et al., "Acid Rain and Air Pollution: 50 years of Progress in Environmental Science and Policy," *Ambio* (2019).

<sup>22</sup> Benedick, *Ozone Diplomacy: New Directions in Safeguarding the Planet*.

industries from external regulation. Although somewhat historic, such reluctance to act suggests self-regarding rather than altruistic motives.

Such ambivalence is not surprising given the uncomfortable relationship between trade and the environment. Trade policy seeks to reduce regulation to ease movement of goods, while environmental protection typically imposes regulations that restrict such movement. It has long been argued that differentials in environmental standards between trading partners invite a regulatory race to the bottom as capital is incentivised to relocate to less regulated regimes and governments are motivated to relax regulation to retain and attract that capital, the 'Delaware effect'.<sup>23</sup> Simply, governments allow firms to externalise some of their costs of production onto the environment to protect industry to increase their competitiveness.

To some extent, the regulatory race to the bottom has not eventuated. Rather, both domestic producers and consumers have been incentivised to encourage their governments to maintain high regulatory standards – the 'California effect'.<sup>24</sup> In this scenario affluent consumers seek psychic benefit from products produced to high ethical, environmental or human health standards. In part it is successful because environmental protection is for many (Western) firms a small part of their production costs compared to labour, while compliance measures impose costs on importers and act as barriers to trade.<sup>25</sup> Further, firms benefit as front-runners where high domestic standards act to penalise foreign competition.

Firms in third countries are consequently forced to adopt these high standards for their products to enable them to export into these markets, regardless of their own domestic regulations. These regulatory barriers are most likely to affect products of which significant quantities are exported from countries with weaker environmental or other standards to nations with stricter ones. The New Zealand wine industry provides an excellent example of regulatory transfer; the New Zealand government's Overseas Market Access Requirements (OMAR) for wine exports explicitly apply rigorous EU standards to all exported wine.<sup>26</sup>

There is also a legitimacy dimension, the need for broad public acceptance of international trade, a need identified in *Trade for All*. Public concern about the environmental and social implications of globalisation and trade has increased, surfacing in Europe during the Transatlantic Trade and Investment Partnership (TTIP) negotiations between the EU and the USA.<sup>27</sup> The TTIP was seen by civil society as likely to reduce regulatory barriers, including European environmental legislation.<sup>28</sup> Unresolved, environmental concerns help undermine the public legitimacy of the trade agreements.

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<sup>23</sup> David Vogel, "Trading up and Governing Across: Transnational Governance and Environmental Protection," *Journal of European Public Policy* 4, no. 4 (1997).

<sup>24</sup> "Environmental Regulation and Economic Integration," *Journal of International Economic Law* 3, no. 2 (2000); *ibid*.

<sup>25</sup> Evgeny Postnikov, "Environmental Instruments in Trade Agreements: Pushing the Limits of the Dialogue Approach," in *European Union External Environmental Policy: Rules, Regulation and Governance Beyond Borders*, ed. Camilla Adelle, Katja Biedenkopf, and Diarmuid Torney (Palgrave MacMillan, 2018).

<sup>26</sup> Henrietta McNeill, "She'll Be Right: Some Observations on Diffused European Union Standards in a New Zealand Context," *Australian and New Zealand Journal of European Studies* 6, no. 1 (2014).

<sup>27</sup> Gracia Marín Durán and Elisa Morgera, *Environmental Integration in the Eu's External Relations: Beyond Multilateral Dimensions*, Modern Studies in European Law (Oxford, [U.K.]: Hart Publishing, 2012).

<sup>28</sup> Ferdi De Ville and Gabriel Siles-Brügge, *TTIP: The Truth About the Transatlantic Trade and Investment Partnership* (John Wiley & Sons, 2015).

The California effect therefore suggests domestic industries, together with civil society, will seek to maintain high standards in trade agreements, but for quite different reasons, serving simultaneously to restrict imports and maintain domestic values. Indeed, part of EU nervousness around Brexit is that UK producers decoupled from EU regulations and therefore able to produce goods more cheaply could undermine European producers' internal market competitiveness. At the same time, UK civil society and producers are railing against importing USA's 'chlorinated chicken', symbolic of the USA's lower food safety and animal welfare standards, and cheaper produce expected to result from any trade deal between the two countries.<sup>29</sup>

The EU by adopting the 'California' negotiating position, would project the EU's environmental values and bolster trade agreement legitimacy among Europeans. Nevertheless, the EU's history in environmental matters together with the fundamental tension between trade and environmental protection suggest the inclusion of environmental controls in FTAs may also serve also to protect European industry. This paper now considers whether environmental provisions in EU FTAs can be seen to be economically motivated as well as promoting environmental protection. It does this by examining recent environment and sustainable development provisions in recent FTAs to see whether alternative readings can be made for their intent. The possibility of such a self-serving motivation gains saliency in the context of the current negotiations for free trade agreements between the EU with Australia and New Zealand, and with the UK.

## **Environmental dimensions of EU trade policy**

At the core of EU economic integration is the internal market based on free movement provisions promoting access to different national markets and on the absence of distortion of competition – that formed the original intention of the EU, i.e. deregulation. The internal market was concerned with liberalising trade flows. In contrast, environmental policies are largely regulatory and therefore hinder trade. The EU first sought to harmonise environmental regulation in order to avoid distortions of competition within the economic community, seeking to avoid the Delaware effect. It has also sought to address legitimacy concerns while pursuing an aggressive bilateral trade liberalisation agenda in order to gain access to new markets by incorporating environmental provisions in its FTAs.<sup>30</sup>

A fundamental tension therefore exists between the EU's internal market goals and environmental law. The EU's economic integration is based on a single internal market based on the free movement of goods and the absence of distortion of competition, achieved through regulatory liberalisation. Its environmental protection regime in contrast largely concerns the protection of vulnerable natural resources through regulation, resulting in spatial differentiation.<sup>31</sup>

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<sup>29</sup> e.g. Shraddha Kaul, "Accommodating US Trade Demands Risks Creating a Dangerous Two-Tier Food System," British Poultry Council, <https://www.britishpoultry.org.uk/accommodating-us-trade-demands-risks-creating-a-dangerous-two-tier-food-system/>.

<sup>30</sup> Alberta Sbragia, "The EU, the US, and Trade Policy: Competitive Interdependence in the Management of Globalization," *Journal of European Public Policy* 17, no. 3 (2010).

<sup>31</sup> de Sadeleer, *EU Environmental Law and the Internal Market*, liii; "Free Movement of Goods and Environmental Product Standards. Jean Monnet Working Paper Series: Environment and Internal Market 2017/3," (Brussels: University of St Louis, 2017).

Environmental instruments in EU trade agreements have evolved significantly, moving from multilateral to bilateral agreements each with a legally binding chapter on sustainable development: environment provisions in earlier agreements (e.g. South Africa, signed in 1999; Chile, in 2002) are not legally binding and lack penalties or enforcement. The new generation, signalled with the 2006 European Commission's communication, *Global Europe: Competing in the World*, signalled a move to bilateral agreements.<sup>32</sup> The new FTAs contain legally binding chapters on sustainable development, stress the importance of MEAs and agree not to game domestic environmental protection regulations for economic advantage.<sup>33</sup>

The EU has also set out an agenda for responsible trade and investment in its *Trade for All* strategy.<sup>34</sup> As well as promising greater economic value to smaller enterprises and transparency in negotiations, the strategy calls for the European Commission to adopt a negotiating approach that 'involves using trade agreements and trade preference programmes as levers to promote, around the world, values like sustainable development human rights, fair and ethical trade and the fight against corruption' and extends interest across the production chain. It also promotes corporate social responsibility, and consumer information on the environmental aspects of goods and services in promoting sustainable development.

The Korean, Canadian and Japanese FTAs are all examples of the 'new' generation of EU FTAs.<sup>35</sup> They cover a broad range of trade liberalisation issues and seek to integrate markets to give depth. They are also 'competitiveness-driven' compared to the earlier ones that had a strong emphasis on development issues and targeted developing countries.

The EU-South Korea FTA is the first of these FTAs. It has been provisionally applied from July 2011 and was ratified in December 2015. It goes further than any previous agreements in lifting trade barriers and was also the EU's first trade deal with an Asian country. The EU-Japan Economic Partnership Agreement entered into force on 1 February 2019, negotiations having begun in 2013. The EU-Japan FTA is the most 'traditional' of the new FTAs, focusing on tariff reductions of motorcars, electronics and agricultural products. Consequently, it has been relatively uncontested.<sup>36</sup> The Canadian-EU FTA, the *Comprehensive Economic and Trade Agreement* (CETA), finalised in 2016, in contrast was notable for its comprehensiveness and for recognising global supply. The South American EU-Mercosur trade agreement was only agreed on 1 July 2019 and is now being ratified by EU member state parliaments.<sup>37</sup>

All these FTAs address environmental matters, primarily through a Trade and Sustainable Development (TSD) chapter. They show an evolution in writing and structure but are broadly similar in content (Table 1). They are based on the premise that increased trade should not come at the expense of the environment or labour

<sup>32</sup> Commission of the European Communities, *Global Europe: Competing in the World* (Com(2006) 567) (Brussels, 2006).

<sup>33</sup> Postnikov, "Environmental Instruments in Trade Agreements: Pushing the Limits of the Dialogue Approach."

<sup>34</sup> European Commission, *Trade for All: Towards a More Responsible Trade and Investment Policy*.

<sup>35</sup> Annmarie Elijah et al., eds., *Australia, the European Union and the New Trade Agenda* (Canberra: ANU Press, 2017); Finn Laursen and Christilla Roederer-Rynning, "Introduction: The New EU FTAs as Contentious Market Regulation," *Journal of European Integration* 39, no. 7 (2017).

<sup>36</sup> Hitoshi Suzuki, "The New Politics of Trade: EU-Japan," *ibid.*

<sup>37</sup> Mercosur is a customs union consisting of Argentina, Brazil, Paraguay and Uruguay. Venezuela is a full member but has been suspended since 1 December 2016.

conditions but should promote sustainable development. They reference MEAs, such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and the UNCED Agenda 21, as well as climate change agreements, such as the Paris Agreement. The FTAs also commit the parties to promoting corporate social responsibility and responsible business conduct in line with international guidance such as that proposed by the OECD and the UN.<sup>38</sup>

**Table 1: Environment and sustainable development topics in recent EU FTAs (sections and chapters where addressed)**

	<b>Korea</b> 2011	<b>Canada</b> 2016	<b>Japan</b> 2019	<b>Mercosur<sup>1</sup></b> 2019
<b>Environment</b>				X
Freshwater	13.5	1.9 Rights and obligations	16.8	
Biological diversity	10.40 Intellectual property of indigenous and local communities	24.12 wrt cooperation on environmental issues	16.6	-
Convention on International Trade in Endangered Species	-	24.10 wrt timber species	16.6.1	X
Sustainable forestry and timber	-	24.10	16.7	X
Sustainable fisheries	-	24.11	16.8	
Air quality		2.11(d) used car imports		
<b>Sustainable Development chapter</b>	Ch.13	Ch.22	Ch.16	Ch.14
Agenda 21	13.1	22.1.1	16.1.1	-
<b>Climate change</b>		24.9 mitigation technology		X
Multilateral agreements	13.5.3: commitment to Kyoto Protocol	-	16.4.4: commitment to Paris Agreement	Implement Paris Agreement
<b>Organised civil society</b>				X
Civil society dialogue	13.1.13	22.5	16.16	
Corporate social responsibility	Annex 13(d)	22.3.2(b)	16.5(e)	X

<sup>1</sup>Full agreement is not yet available; all references are identified generally in Chapter 14 Trade and Sustainable Development.

The Mercosur agreement has only been agreed in principle. However, its Trade and Sustainable Development chapter is intended to maintain the standards established in other modern agreements such as those with Mexico and Japan. The expectation is that increased trade should not come at the expense of the environment or labour conditions, but rather should promote sustainable development:

The Parties agree that they should not lower labour or environmental standards in order to attract trade and investment. They also agree that the trade agreement should not constrain their right to regulate on environmental or labour matters, including in situations where scientific information is not conclusive.<sup>39</sup>

<sup>38</sup> United Nations Human Rights Office of the High Commissioner, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework (New York and Geneva: United Nations, 2011).

<sup>39</sup> European Commission, New EU-Mercosur Trade Agreement in Principle, 1 July 2019 (2019).

In addition to more general matters, these FTAs all address concerns about trade-related aspects of natural resource use, some specific to individual negotiating partners. These include biodiversity, forests, and fisheries. The Japanese FTA, for example, addresses particularly migratory fish stocks and responsible fisheries; combatting illegal, unreported and unregulated (IUU) fishing. CETA ring-fences water in its natural state, 'considered neither a good nor product, and parties have a right to protect and preserve their natural water resources, with no obligation to permit commercial use'. It also puts restrictions on used car imports into Canada, presumably for maintaining air quality.

The Mercosur agreement includes commitments to fight deforestation, implicitly referencing clearing of the Amazon rainforests. Private sector initiatives strengthen these commitments, for example not to source meat from farms in recently deforested areas. The Trade and Sustainable Development chapter includes commitments regarding the sustainable management of forests and illegal logging as well as on responsible business conduct. It safeguards relevant initiatives on sustainable agriculture, including EU private-sector actions on zero deforestation supply chains and producer-led initiatives, such as the soy moratorium in Brazil to limit the expansion of soy plantations in forestland.

To ensure transparency, the FTAs contain mechanisms for civil society oversight by providing for civil society forums that are consulted by the EU. EU civil society representation oversight is provided in turn by domestic advisory groups (DAGs), committees of the EU's European Economic and Social Committee (EESC).<sup>40</sup> EESC consists of the different sectors of 'organised civil society' including environmental campaigners and so can be expected to run an environmental legitimacy rule over FTA performance. For example, CETA establishes a Civil Society Forum consisting of representative of civil society organisations that convene annually in order to conduct a dialogue on the sustainable development aspects of the Agreement. The parties shall promote a balanced representation of relevant interests, including independent representative employers, unions, labour and business organisations, environmental groups, as well as other relevant civil society organisations as appropriate.

Member states can also provide a check at the ratification stage of agreements that include 'mixed agreement' matters, which under the TFEU all member states must agree for the deal to proceed. This check was first demonstrated when Belgium's regional Walloon parliament initially refused to ratify CETA in 2016, demanding stronger safeguards on labour, environmental and consumer standards. The importance of environmental objectives in FTAs has more recently been clearly demonstrated when nearly all parties in the Austrian parliament's European Union subcommittee rejected the proposed EU-Mercosur agreement in June 2019. The Austrian veto was in protest at Brazil's environmental policies and an epidemic of forest fires in the Amazon basin.<sup>41</sup> France and Ireland also threatened to vote against the deal. Such checks were likely unanticipated when negotiations were initiated, but with implications for designing future agreements.

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<sup>40</sup> European Commission, "Implementation of the Trade and Sustainable Development (TSD) Chapter in Trade Agreements - TSD Committees and Civil Society Meetings," European Commission, <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1870>.

<sup>41</sup> "Austrian Parliament Rejects EU-Mercosur Pact," *Reuters* 2019.

## Motivation

The modern FTAs show that environment and sustainable development are now features of contemporary EU trade agreements. Their impact could be thought to be symbolic, largely reaffirming commitments to existing MEAs and UN protocols and as such might be seen to restate the status quo. Nevertheless, some aspects suggest a more assertive positioning that also serve EU internal industry interests.

The IUU fishing provisions in the Japanese and more latterly Brazilian FTAs reinforce EU regulations introduced to give effect to various UN agreements to ensure sustainable management of marine resources.<sup>42</sup> A sustainable marine fishery is desperately needed with a third of the world's fisheries overfished.<sup>43</sup> However, the EU and Japan, together with the USA, fish most of the world's marine waters and consume a third of the world's marine fish.<sup>44</sup> They all subsidise their fishing fleets, which in no way deals to overfishing.

The EU has taken the high moral high ground on tropical forestry, for example, in the 7th EAP and Mercosur FTA reflecting the International Tropical Timber Agreement (1994). However, meeting these requirements raises the entry level for otherwise cheaper timber from tropical forests that could threaten expensive EU forestry. The requirement for sustainable forestry and protection of endangered tree species in the Canadian FTA could also be interpreted as a nod towards protecting European forestry. Similarly, Austria and other member states may balk at ratifying the Mercosur FTA because of uncontrolled Brazilian tropical forest burning. Brazil's forest fires threaten biodiversity and impact on climate change. But it also creates grazing land the country's beef production to increase. The veto may well have conveniently delayed larger volumes of South American beef entering the EU market. Austrian farmers, with their high level of relatively expensive organic produce, might well welcome impositions on cheap Brazilian meat.

The traffic is not all one way. The Canadian FTA, for example, exempts removing controls of imports of used vehicles that do not conform to Canada's safety and environmental requirements.<sup>45</sup> Automobile manufacturing is one of Canada's largest industrial sectors albeit only a seventh of the EU in production. Banning cars with smoky exhausts may help keep Canadian air quality high, but it also keeps cheaper foreign competition out of the Canadian market.

The requirements to engage with civil society reflects EU's domestic legitimacy concerns, but the DAGs may struggle to engage with reciprocating peak civil society organisations in partner countries. Postnikov regards the meetings as having been somewhat toothless, noting for example that those required by the earlier Chile FTA were irregular, partly reflecting the lack of a developed environmental NGO presence in Chile.<sup>46</sup> Orbie et al., examining labour, found success varied widely. Some of their

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<sup>42</sup> Council Regulation (EC) No 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing (2008); United Nations Convention on the Law of the Sea (1982); Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (1995).

<sup>43</sup> FAO, *The State of World Fisheries 2018: Meeting the Sustainable Development Goals* (Rome: Food and Agriculture Organization of the United Nations, 2019).

<sup>44</sup> Wilf Swartz et al., "Sourcing Seafood for the Three Major Markets: The EU, Japan and the USA," *Marine Policy* 34, no. 6 (2010).

<sup>45</sup> CETA Article 2.11 (4)(a).

<sup>46</sup> Postnikov, "Environmental Instruments in Trade Agreements: Pushing the Limits of the Dialogue Approach."

respondents considered them a ‘fig leaf’ or ‘talking shop’, while others were more optimistic about its potential to empower marginalised groups with the EU’s trading partners.<sup>47</sup> While beyond the scope of this paper, younger activist environmental groups may not seek to engage with established peak bodies, potentially reducing the meetings’ future legitimacy.<sup>48</sup>

## Future agreements

Regardless of their motivation, the inclusion of environment and sustainable development chapters in EU FTAs has implications for negotiating future FTAs, such as those underway with New Zealand and Australia, and now the UK. For many years, New Zealand’s agriculture has been able to claim an environmental moral ascendancy, with its ‘clean, green’ image in comparison with those many industrialised countries with their intensive farming. However, eutrophication and general degradation of freshwater bodies and systems, biodiversity loss, and greenhouse gas emissions, primarily from intensive (dairying) farming operations now dominate popular discourse.<sup>49</sup> Such concerns are backed up by a recent state of the environment report that explicitly links New Zealand’s environmental degradation with agriculture.<sup>50</sup> At first blush either sides might use environmental policy as a bargaining chip in the EU-New Zealand FTA negotiations. However, both sides are disadvantaged by their environmental records and state meaning little leverage is possible.<sup>51</sup> Furthermore New Zealand has little countervailing power. Additionally, a change in government resulted in New Zealand adopting a more ambitious climate change policy regime, culminating in the Zero Carbon Act 2019 removing a potential EU leverage point.

Nevertheless, there are wider implications that New Zealand and other countries need to be aware of. They need to be cognisant of the possibility for new environmental issues to be incorporated within EU trade policy – the inclusion of trade in the 7th EAP is such a warning. Perhaps more importantly, they need to recognise that trade has shifted over time with new constellations of actors being empowered as the EU project evolves. Notably, the European Parliament has been increasingly empowered to the point where it can now block trade agreements. Additionally, member states are now required to sign off on comprehensive trade agreements, given some elements are shared competencies with the EU, as the Mercosur veto by Austria has shown. This underlines the appearance of new, second-order negotiating parties to the FTAs. They have different constituencies who in turn have different agendas than in the past. They also have veto power. The extent of participation depends on the scope of the FTA and whether it includes shared competency matters that require member state agreement.

<sup>47</sup> Jan Orbie, Lore Van den Putte, and Deborah Martens, "Civil Society Meetings in EU Free Trade Agreements: The Purposes Unravelling," in *Labour Standards in International Economic Law*, ed. Henner Gött (Springer, 2018).

<sup>48</sup> For example, in New Zealand, the youth-led ‘Generation Zero’ organization, cited by the Minister for Climate Change as providing impetus for that country’s Zero Carbon Act 2019 does not belong to nor seeks membership of New Zealand’s established peak environmental body, the Environment and Conservation Organisation (ECO). Jenny Coatham, "The Young Climate Activists Who Broke through to the Halls of Power," *The Spinoff*, <https://thespinoff.co.nz/politics/12-11-2019/how-a-group-of-young-climate-activists-broke-through-to-the-halls-of-power/?fbclid=IwAR3NR2gXlJaCL3qjYIRf7EEwIx2rQNxL9soSIyInhEjxqXCUetSRydgI-sQ..>

<sup>49</sup> Mike K. Joy, *Squandered. The Degradation of New Zealand's Freshwaters*, (2015), <https://freshwaternz.files.wordpress.com/2015/05/squandered.pdf>.

<sup>50</sup> Ministry for the Environment and Stats NZ, *New Zealand's Environmental Reporting Series: Environment Aotearoa 2019* (Wellington: Ministry for the Environment and Stats NZ, 2019).

<sup>51</sup> Pers. Comm. Negotiating official, June 2019.

Negotiating an environment and sustainable development chapter in an EU-UK FTA might altogether be more challenging. New Zealand has shown itself, for example with the wine OMAR, to be prepared to accept and step up to EU regulations – it had little choice given its negotiating position of weakness as a small importer into a large EU market. The UK Brexit rhetoric in contrast is partially framed around relaxing the high EU internal environmental regulatory level – conjuring up the Delaware effect. Such a position would challenge EU producers, consumers and civil society so that the EU has no negotiating legitimacy if it were to accede to the British negotiating demands.

Environmental concerns are now an established element of current trade negotiations, though scope and enforceability vary. These concerns are in response to increasing discourse about potential environmental costs of globalisation. They can be expected that these will continue and consolidate – with possibility for strengthening in the future when agreements are reviewed. They also have public and/or organised civil society reviews built into the FTAs where protagonists can articulate these concerns. At the present these forums appear to have had little traction, remaining ‘talk shops’, but the potential remains for them to be increasingly leveraged in the future by astute civil society organisations. The EU has a strong environmental regulatory framework, with a wide public support. How this evolves in the future and is unclear, but they may provide impetus for demanding change by the EU’s trading partners. The EU has clearly sought to emulate the California effect in its negotiations: the ‘new’ FTAs may indeed seek to export EU environmental policies and values bilaterally, but environmental quality may not be the only goal their environment provisions advance.

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