

Where to Next? Modernizing Environmental Commitments in EU-Latin America Free Trade Agreements

Javiera CACERES BUSTAMANTE^{*} & Christian DELEV^{**}

The European Union (EU) is renegotiating its trade agreements with Latin American States. The core objective of this process is to modernize the Trade and Sustainable Development (TSD) chapters of these agreements. As such, this article critically examines the prospects of the modernized TSD chapters in the Chile-EU Association Agreement and the EU-Mexico Global Agreement, drawing lessons for the potential amendment of the EU-Andes Agreement. For this purpose, the article addresses the modernization process of the EU-Chile Association Agreement by surveying Chile's negotiating practice in incorporating environment and climate change-related provisions in trade agreements. It compares the evolution of these provisions within the EU's practice and discusses the convergence or divergence of views that have shaped the existing agreement. Additionally, it explores the possible future review process of the TSD chapter in the agreement. Furthermore, the article discusses the ongoing renegotiating process of the Global Agreement between the EU and Mexico. It examines the opportunity to enhance the current environmental protection disciplines in this agreement. Finally, the article evaluates how these experiences can inform a future renegotiation of the EU-Andes Agreement, with a focus on prioritising the Parties' nationally determined contributions (NDCs) under the Paris Agreement.

Keywords: Environmental commitments, EU-Chile, EU-Mexico, EU-Andes, Free Trade Agreements, Trade and Sustainable Development

1 INTRODUCTION

The European Union (EU) is actively modernizing its trade agreements concluded with Latin American States. In November 2022, Josep Borrell, as High Representative, emphasized that for the EU to implement its 'political and economic instruments more coherently and [identify] not only risks but also opportunities more effectively', it 'must deepen its ties to the countries of Latin America and the

^{*} Instructor Prof., Institute of International Studies, University of Chile. Ph.D. Fellow, International Development Department. London School of Economics and Political Science, UK. CISDL Fellow. Email: javcaceres@uchile.cl.

^{**} PhD Researcher in Law, St Catharine's College, University of Cambridge, UK. CISDL Associate Fellow. Email: cpd29@cam.ac.uk.

Caribbean'.¹ At the same time, the need to address the climate crisis and related environmental protection concerns has become a priority for EU trade policy. In its 'The Power of Trade Partnerships' Joint Communication, the Commission identified six 'new policy orientations' through which the EU's trade agreements may 'optimise' how these agreements may contribute to sustainability objectives.²

To achieve this goal, the negotiations towards the modernization of trade agreements and their Trade and Sustainable Development (TSD) chapters with Latin American countries, the process must build on the existing environmental commitments and trade policy objectives of all States Parties involved. This includes their domestic legal instruments, commitments under existing multilateral environmental agreements (MEAs), and the unilateral Nationally Determined Contributions (NDCs) under Article 4 of the Paris Agreement, which contains specific 'contributions that [each Party] intends to achieve' through mitigation measures, which must be pursued through 'domestic mitigation measures'.³ The legal bindingness of NDC under international law and whether compliance would entail an obligation of conduct or result remain unclear.⁴ Nonetheless, even assuming that they are non-binding, Paris Agreement Parties are required to adopt mitigation measures 'with the aim of achieving the objectives of NDC'.⁵ In addition to this, incorporating environmental commitments under such modernized trade agreements must be consistent with the so-called principles of 'balance' that underpin MEAs. In particular, the principle of common but differentiated responsibilities serves to 'regulate access to certain resources or to distribute [...] the burden of managing certain environmental problems'.⁶

This article examines the experience and prospects of efforts to modernize the TSD chapters of existing EU trade agreements with the Latin American States.

¹ Josep Borrell, *Why Europe and Latin America Need Each Other* (EEAS Nov. 2022), www.eeas.europa.eu/eeas/why-europe-and-latin-america-need-each-other_en (accessed 10 Apr. 2023).

² European Economic and Social Committee, *The Power of Trade Partnerships: Together for Green and Just Economic Growth* (Communication) COM(2022) 409 final, 4–5, <https://www.eesc.europa.eu/en/our-work/opinions-information-reports/opinions/power-trade-partnerships-together-green-and-just-economic-growth> (accessed 10 Apr. 2023) [Power of Trade Partnerships].

³ Article 4 Paris Agreement (adopted 12 Dec. 2015, entered into force 4 Nov. 2016), unfccc.int/sites/default/files/english_paris_agreement.pdf (accessed 10 Apr. 2023) [Paris Agreement].

⁴ A wide range of legal views have been developed concerning whether NDC are legally binding unilateral declarations or relevant for the interpretation of the Paris Agreement under Art. 31(3) Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (adopted 21 Mar. 1986, not yet in force) UN Doc A/CONF.129/15 [VCLT IO], which applies as customary international law to treaties between States and International Organizations. For the purposes of this article, this question is not addressed, although NDCs are seen as being *at least* politically influential commitments made by the Parties to the Paris Agreement, which are achieved through legally binding measures.

⁵ Article 4.2 Paris Agreement, *supra* n. 3.

⁶ Pierre-Marie Dupuy & Jorge Viñuales, *International Environmental Law*, 61 (2d ed., Cambridge University Press 2018).

Relying on the Association Agreement between Chile and the EU and the EU-Mexico Global Agreement as case studies, it assesses the institutional mechanisms and environmental protection commitments found under each agreement.⁷ Moreover, it critically assesses the progress of the modernization process of each arrangement by comparing the negotiation results with the Parties' existing NDC commitments under the Paris Agreement. Finally, the article evaluates the existing TSD title under the provisionally adopted EU Association Agreement with Colombia, Peru, and Ecuador (EU-Andes Agreement).⁸ It considers the lessons that can be drawn from the renegotiation processes with Chile and Mexico, in case the EU-Andes Agreement is amended in the future.

Following this introduction, the second section focuses on Chile and Mexico's highest climate change priorities and trade-related NDC. The third section then analyses the modernization of the EU-Chile Association Agreement and the EU-Mexico Global Agreement. The fourth section examines the practical implications of implementing trade liberalization commitments, taking into consideration the results from impact assessments. The fifth section analyses the EU-Andean Agreement. Finally, the article concludes with some final lessons for modernizing trade agreements.

2 HIGHEST CLIMATE CHANGE PRIORITIES IN TRADE AND TRADE-RELATED NATIONALLY DECLARED CONTRIBUTIONS

2.1 THE NATIONAL AND REGIONAL STRATEGY OF CHILE

In 2020, the government of Chile, in collaboration with civil society organizations, updated its NDC in the context of the Paris Agreement. The updates of Chile's commitments were accompanied by the elaboration of the Law project 'Climate Change Framework', which was approved by the Chilean National Congress in 2022. This new Law establishes the goal of achieving carbon neutrality and resilience in 2050. It recognizes the principles of non-regression and progressiveness and incorporates the principles of an ecosystem approach, equity and climate justice, territoriality, transparency, and participation.⁹ In this sense, Chile incorporated

⁷ Chile-European Union Free Trade Agreement (signed 18 Nov. 2002, entered into force 1 Feb. 2003), https://eur-lex.europa.eu/resource.html?uri=cellar:f83a503c-fa20-4b3a-9535-f1074175eaf0.0004.02/DOC_2&format=PDF (accessed 12 Apr. 2023) [Chile-EU Agreement]; Economic Partnership, Political Coordination and Cooperation Agreement between the European Community and its Member States, of the one part, and the United Mexican States, of the other part. *Official Journal of the European Communities* 276/45 (1997) [Global Agreement].

⁸ Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part, *Official Journal of the European Communities* 354/3 (2012) [EU-Andes Agreement]. Ecuador acceded to the agreement in 2017.

⁹ Senado de Chile, *Despachada Ley marco de Cambio Climático* (9 Mar. 2022), <https://www.senado.cl/despachada-ley-marco-de-cambio-climatico> (accessed 10 Apr. 2023).

different pillars as structuring components to address climate change and comply with the provisions of the Paris Agreement. These pillars include the social pillar of transition –sustainable development; mitigation; adaptation; integration; and means of implementation. It is worth noting the first and last pillars. The first one considers variables such as water security, gender equality, and safeguarding the rights of the most vulnerable population in the decarbonization process of the energy matrix, among others, in order to implement NDC. This pillar aims to bring together Chile's international environmental commitments with its domestic agenda. In terms of implementation, through the third pillar, Chile is ensuring the coherence of these commitments with its long-term climate objectives, guaranteeing that the creation and strengthening of capacities, technology development and transfer, and climate financing are aligned with the priorities set by the emission neutrality objective by 2050.

In March 2022, leftist Gabriel Boric assumed the presidency of Chile. At the outset of his term, he signed the presidential message to facilitate Chile's accession to the Escazú Agreement.¹⁰ During the ceremony, government officials underscored the inseparable connection between the preservation of the environment and ecosystems and the future of Chile.¹¹ On 31 May 2022, the Chilean Senate approved the agreement with thirty-one votes in favour, three votes against, and one abstention.¹² The ensuing ratification served as a momentous milestone in Chile's environmental strategy, signifying President Boric's commitment to a new relationship between the State and its citizens in matters pertaining to the environment. This aligns with President Boric's vision of the construction of a novel development model that promotes a healthy environment, sustainable development, biodiversity conservation, prevention of land degradation, and adaptation to climate change.

In terms of trade, President Boric has declared that his economic and trade strategy aligns with the development objectives of the country, with a particular emphasis on advancing economic and trade integration with Latin America. He also proposed promoting the integration of small and medium-sized enterprises (SMEs) into global and regional value chains, while simultaneously working to strengthen the multilateral

¹⁰ The Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, known as Escazú Agreement, is a treaty signed by Latin American countries to ensure the rights of access to information about the environment, public participation in environmental decision-making, environmental justice, and a healthy and sustainable environment for current and future generations. Former Chilean President, Sebastián Piñera, refused to sign the agreement during his administration. For more details, see BBC, *Acuerdo de Escazú: el polémico rechazo de Chile al primer gran pacto medioambiental de América Latina y el Caribe* (23 Sep. 2020), <https://www.bbc.com/mundo/noticias-america-latina-54263916>.

¹¹ SUBREI, *Chile firma mensaje presidencial para la adhesión de Chile al Acuerdo de Escazú* (2022), <https://www.gob.cl/noticias/chile-firma-mensaje-presidencial-para-la-adhesion-de-chile-al-acuerdo-de-escazu/> (accessed 9 Apr. 2023).

¹² Swissinfo, *Acuerdo de Escazú es ratificado por el pleno del Senado chileno* (1 Jun. 2022), <https://bit.ly/3SN6xg7> (accessed 9 Apr. 2023).

trading system. Moreover, President Boric has advocated for an agenda aimed at mitigating the global climate and ecological crisis, all while ensuring the modernization of existing treaties.¹³ Therefore, it can be argued that as President Boric's mandate is primarily focused on constructing a new development model, trade agreements should increasingly prioritize commitments related to the environment. This is so that the Chilean National Congress approves them amid a strong rejection wave toward trade instruments and the current Chilean development model.

Even though Chile's NDC commitments play a significant role in shaping the environmental agenda, trade priorities are structured differently. NDCs are formulated and committed to at the multilateral level, whereas bilateral agreements recognize MEAs, but do not directly incorporate NDCs into trade relations. Furthermore, for negotiators the incorporation of NDC commitments into binding mechanisms, such as trade agreements, would contravene NDCs' voluntary nature. Chile's priorities within trade negotiations can be divided into several core provisions. According to senior Chilean trade negotiators, they aim to incorporate commitments that promote high environmental standards; ensure compliance with and respect for national environmental legislation; acknowledge MEAs that are directly or indirectly related to trade; encourage civil society participation; establish a consultation process; and outline offensive cooperation objectives. However, it is essential to note that Chile has given priority to labour provisions within trade agreements rather than including provisions specifically addressing the environment.¹⁴

2.2 THE NATIONAL AND REGIONAL STRATEGY OF MEXICO

In its 2022 NDC, Mexico has committed to reduce greenhouse gas (GHG) emissions to 35% from its 2030 business-as-usual (BAU) baseline rate.¹⁵ This target is set with the objective of achieving a 30% reduction without relying on foreign support, making it an 'unconditional commitment'. The remaining 5% reduction is

¹³ For more details on President Boric's declarations, see SUBREI, *Presidente de la República Gabriel Boric Font participa en encuentro empresarial del Comité de Comercio Argentina-Chile: Queremos avanzar hacia la justicia, igualdad, la mejor redistribución de la riqueza y el desarrollo productivo de nuestras naciones* (5 Apr. 2022), <https://prensa.presidencia.cl/comunicado.aspx?id=190387>; Swissinfo, *Boric y Trudeau escenifican sintonía antes de Cumbre de las Américas dividida* (6 Jun. 2022), https://www.swissinfo.ch/spa/chile-canad%C3%A1_boric-y-trudeau-escenifican-sinton%C3%ADa-antes-de-cumbre-de-las-am%C3%A9ricas-dividida/47652624; Presidencia de Chile, *Presidente de la República Gabriel Boric Font finaliza su última jornada en la Cumbre de las Américas* (10 Jun. 2022), <https://prensa.presidencia.cl/comunicado.aspx?id=196071>; UN, *Chile – President Addresses General Debate, 77th Session* (20 Sep. 2022), <https://media.un.org/en/asset/k1x/k1xpy1ffyh>.

¹⁴ For more details on this perspective, see Jean Baptiste Velut et al., *Comparative Analysis of Trade and Sustainable Development Provisions in Free Trade Agreements* (LSE 2022), <https://www.lse.ac.uk/business/consulting/assets/documents/TSD-Final-Report-Feb-2022.pdf>.

¹⁵ Gobierno de México, *Contribución Determinada a nivel Nacional – Actualización 2022*, 9 (2022) www.unfccc.int/sites/default/files/NDC/2022-11/Mexico_NDC_UNFCCC_update2022_FINAL.pdf (accessed 16 Apr. 2023).

contingent upon planned international cooperation and financing specifically aimed at promoting clean energy production.¹⁶ In addition to GHG emissions, Mexico has also made an unconditionally committed to reducing black carbon emissions by 51% from the BAU baseline rate.¹⁷

Mexico has also put forth a conditional contribution to reducing its overall GHG emissions by 40% based on its 2030 BAU baseline rate. However, this target is contingent upon certain conditions being met, including the receipt of technology transfer, international financial support, and equivalent efforts by developing countries to achieve the objectives of the Paris Agreement.¹⁸ Additionally, Mexico has conditionally committed to a 70% reduction in black carbon emissions for the same period.¹⁹ As reaching more ambitious conditional commitments presupposes international support and economic cooperation, a modernized EU-Mexico Global Agreement could potentially establish the necessary institutional mechanism for the EU to contribute to these efforts. Areas of cooperation could encompass economic sectors identified by Mexico in its NDC as requiring mitigating measures. These sectors include transport, power generation, the residential and commercial sector, oil and gas, industry, agriculture and livestock, waste management, land use, land-use change, and forestry management, respectively.²⁰ In principle, these sectors could serve as the substantive focus of disciplines within a modernized TSD chapter in the Global Agreement.

3 ANALYSING THE MODERNIZATION OF TRADE AGREEMENTS

The modernization of trade agreements reflects potential shifts in the global economic landscape. As countries engage in trade relations, there comes a time when agreements must be updated to ensure that primary and secondary producers, traders, workers, and civil society as a whole, receive additional benefits from their bilateral engagement. Moreover, modernization may be necessary to tackle emerging issues, including novel environmental challenges stemming from trade liberalization, or to adapt to the amplified effects of climate change.

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *Ibid.*, at 10–16.

3.1 THE EU-CHILE ASSOCIATION AGREEMENT: COMPARISON OF CLIMATE COMMITMENTS IN CHILE'S ECONOMIC TREATIES AND MOST SUITABLE PROVISIONS ON TRADE AND CLIMATE CHANGE

Chile was the first South American country to conclude an Association Agreement with the EU, a milestone achieved in 2003. This agreement is built upon three fundamental pillars: political dialogue, cooperation, and trade. Building upon this foundation, both parties have engaged in negotiations with other partners, expanding the scope of trade disciplines and covering a wider array of topics, such as the protection of innovations, government procurement, and sustainable development.²¹ During the fifth European Union – Latin America and Caribbean (EU CELAC) Summit in 2012, Chile and the EU expressed their shared interest in exploring the potential for modernizing the existing agreement. Following subsequent meetings to determine the scope and level of ambition of this possible modernization, both parties reached an agreement in 2016 to initiate the process.²² The objective of both partners in pursuing these negotiations was largely aligned and served as a driving force behind the commencement of the modernization process.

On the one hand, the EU sought to assess the untapped potential of enhanced trade and investment flows with Chile. Their objectives included further reducing barriers to trade and investment; promoting smart, sustainable, and inclusive growth through the expansion of trade, investment, and relevant rules; levelling the playing field with other countries; establishing a new, up-to-date framework for the EU-Chile relationship; and improving sustainable economic, social and environmental conditions for workers, businesses and citizens in the EU and Chile; among others.²³ On the other hand, Chile aimed to expand its bilateral relationship with the EU, strengthening alliances in digital trade and services and establishing better standards for environmental protection and gender equality.²⁴

When negotiations commenced, Chile and the EU aimed at an ambitious text, which was supposed to cover environment, labour, and cross-cutting issues such as responsible business conduct. The parties agreed on high levels

²¹ European Parliament, *Briefing: Modernisation of the Trade Pillar of the EU-Chile Association Agreement* (2017), http://www.sice.oas.org/TPD/CHL_EU/Studies/Briefing_Modernisation_EU_CHL_Agt_e.pdf (accessed 10 Apr. 2023).

²² In parallel, in 2016, the EU conducted a public online consultation on a possible modernization of the trade part of the association agreement between the EU and Chile. For more information, see https://trade.ec.europa.eu/consultations/index.cfm?consul_id=209.

²³ See European Parliament, *supra* n. 21.

²⁴ SUBREI, *Finalizan negociaciones de la modernización del Acuerdo de Asociación entre Chile y la Unión Europea* (2021), <https://www.subrei.gob.cl/sala-de-prensa/noticias/detalle-noticias/2021/11/15/finalizan-negociaciones-de-la-modernización-del-acuerdo-de-asociación-entre-chile-y-la-unió-europea> (accessed 9 Apr. 2023).

of environmental protection. The first negotiation round took place on 16 November 2017.²⁵ While progress was made in some areas, further discussions were needed regarding dispute resolution through a panel of experts.²⁶ Finally, by the end of 2022, the political negotiation process was concluded, naming the agreement as the Advanced Framework Agreement. Chilean authorities have emphasized that the modernization of the agreement addresses new challenges including climate change and the effective implementation of the Paris Agreement; alliances on energy transition; being strategic partners to promote the EU Green Deal and the Chilean National Green Hydrogen Strategy.²⁷ In terms of the sustainable development/environment chapter, Chilean policymakers have declared this to be the greenest agreement signed by Chile. This is supported by the explicit incorporation of commitments from the Paris Agreement, obligations in line with the 2030 Agenda (economic, social, and environmental pillars), and surpassing the commitments outlined in the association agreement between the parties.

An analysis of thirty-three agreements subscribed by Chile between 1993 and 2022²⁸ reveals four incremental stages in the evolution of the Chilean trade strategy concerning environment-related issues. The first stage involves incorporating environment-related provisions in the Preamble of agreements such as those with the US, EU, China, and Brazil. The second stage focuses on incorporating environmentally related provisions into cooperation schemes. The third stage emphasizes protecting the environment while positively influencing trade, resulting in the incorporation of specific chapters on trade and the environment in trade agreements. These chapters contain various types of provisions, including general commitments aimed at not reducing environmental standards to increase trade or investment flows, as well as

²⁵ For more details on the negotiation rounds, see [Second round] European Union, *Report on the 2nd Round of Negotiations Between the EU and Chile for Modernising the Trade Part of the EU-Chile Association Agreement* (15–19 Jan. 2018), https://trade.ec.europa.eu/doclib/docs/2018/february/tradoc_156597.pdf; [Third round] European Union, *Report on the 3rd Round of Negotiations Between the EU and Chile for Modernising the Trade Part of the EU-Chile Association Agreement* (28 May–1 Jan. 2018), https://trade.ec.europa.eu/doclib/docs/2018/june/tradoc_156959.pdf; [Sixth round] European Union, *Report on the 6th Round of Negotiations Between the EU and Chile for Modernising the Trade Part of the EU-Chile Association Agreement* (25–29 Nov. 2019), https://trade.ec.europa.eu/doclib/docs/2019/december/tradoc_158512.pdf; [Eighth round] European Union, *Report on the 8th Round of Negotiations Between the EU and Chile for Modernising the Trade Part of the EU-Chile Association Agreement* (28 Sep.–9 Oct. 2020), https://trade.ec.europa.eu/doclib/docs/2020/october/tradoc_158998.pdf.

²⁶ European Union, *Report on the 9th Round of Negotiations Between the EU and Chile for Modernising the Trade Part of the EU-Chile Association Agreement* (11–22 Jan. 2021), https://trade.ec.europa.eu/doclib/docs/2021/february/tradoc_159408.pdf (accessed 9 Apr. 2023).

²⁷ See SUBREI, *supra* n. 24.

²⁸ Javiera Cáceres, *Brief on the Chile Inclusion of Environment Commitments in Trade Agreements and The Current EU-Chile Trade Agreement Negotiations*, https://www.cisd.org/wp-content/uploads/2022/05/Brief-on-the-Chile-Inclusion-of-Environment-Commitments-in-Trade-Agreements-and-The-Current-EU-Chile-Trade-Agreement-Negotiations_Javiera-Caceres-Bustamante_revised.pdf (accessed 7 Apr. 2023).

sectorial provisions focused on biodiversity, fisheries, forest protection, and climate change. Notably, these provisions have evolved from declarations to cooperation provisions and binding commitments. The fourth stage aims to build upon recent work in the field of environment and trade while exploring cutting-edge discussions on environmental topics. In this regard, Chile's trade approach is focused on developing a strategy that addresses climate change mitigation without compromising the scope of trade relations. Therefore, it prioritizes corporate social responsibility, renewable energy, critical minerals for the energy transition, and liberalization of environmentally-friendly goods and services.

As part of the overall analysis, twenty-five out of thirty-three agreements include provisions related to sustainable development or the environment within their preambles. These preferential trade agreements (PTAs) acknowledge the relationship between TSD or the environment. It is worth noting that, while recognition may not constitute a binding commitment between the parties, it serves as a starting point for the inclusion of environmental commitments and explicitly signifies that sustainable development is an objective of these types of agreements. For instance, their inclusion in the agreements' Preamble helps to sort the ultimate objective of the treaties and aids in the interpretation of other provisions in the light of the general objectives of the agreement.

Chile has negotiated trade and environment or sustainable development chapters with the following countries in chronological order: Canada, the United States, P4 (Brunei Darussalam, Chile, Singapore, and New Zealand), Colombia, Hong Kong, Uruguay, Argentina, Brazil, and Ecuador.²⁹ It is important to note that the

²⁹ Chile-Canada Free Trade Agreement (signed 5 Dec. 1996, updated 5 Jun. 2017), <https://www.subrei.gob.cl/acuerdos-comerciales/acuerdos-comerciales-vigentes/canada/> (accessed 10 Apr. 2023) [Chile-Canada]; United States-Chile Free Trade Agreement (signed 6 Jun. 2013, entered into force 1 Jan. 2004), <https://ustr.gov/trade-agreements/free-trade-agreements/chile-fta/final-text> (accessed 10 Apr. 2023) [Chile-US]; Trans-Pacific Strategic Economic Partnership (P4) between Brunei Darussalam, Chile, Singapore, and New Zealand (signed 18 Jul. 2005, entered into force 8 Nov. 2006), <https://www.mfat.govt.nz/assets/Trade-agreements/P4/Full-text-of-P4-agreement.pdf> (accessed 10 Apr. 2023) [P4]; Chile-Colombia Free Trade Agreement (signed 27 Nov. 2006, entered into force 8 May 2009), <https://www.subrei.gob.cl/acuerdos-comerciales/acuerdos-comerciales-vigentes/colombia> (accessed 10 Apr. 2023) [CLCOFTA]; Chile-Hong Kong Free Trade Agreement (signed 7 Sep. 2012, entered into force 29 Nov. 2014), <https://www.subrei.gob.cl/acuerdos-comerciales/acuerdos-comerciales-vigentes/hong-kong> (accessed 10 Apr. 2023) [Chile-HK]; Chile-Uruguay Free Trade Agreement (signed 4 Oct. 2016, entered into force 13 Dec. 2018), <https://www.subrei.gob.cl/acuerdos-comerciales/acuerdos-comerciales-vigentes/uruguay> (accessed 10 Apr. 2023) [Chile-Uruguay]; Chile-Argentina Free Trade Agreement (signed 2 Nov. 2017, entered into force 1 May 2019), <https://www.subrei.gob.cl/acuerdos-comerciales/acuerdos-comerciales-vigentes/argentina> (accessed 10 Apr. 2023) [Chile-Argentina]; Chile-Brazil Free Trade Agreement (signed 21 Nov. 2018, entered into force 25 Jan. 2022), <https://www.subrei.gob.cl/acuerdos-comerciales/acuerdos-comerciales-vigentes/brasil> (accessed 10 Apr. 2023) [Chile-Brazil]; Chile-Ecuador Free Trade Agreement (signed 13 Aug. 2020, entered into force 16 May 2022), <https://www.subrei.gob.cl/acuerdos-comerciales/acuerdos-en-negociacion-y-suscritos> (accessed 10 Apr. 2023) [Chile-Ecuador].

agreements with Canada and P4 are cooperation agreements that are annexed to the core text of the Free Trade Agreement (FTA). Therefore, it is understandable that not all the elements analysed are present in this type of agreement. The focus will be placed on the following elements from the analysis: the aims and objectives of the chapter; MEAs; obligations not to weaken standards; and enforcement mechanisms.

When examining the objectives and aims of trade and environment chapters, Chilean agreements contain statements that recognize the environment as ‘one of the three dimensions of sustainable development and that it must be addressed in a balanced manner with the social and economic dimensions’.³⁰ The nexus between trade, economic relations, and the environment is drawn and reiterated. In comparison to EU agreements, two notable differences can be highlighted. First, instead of choosing ‘the Parties recognise the contribution that trade could make to sustainable development’ (EU-Mercosur),³¹ all Chilean chapters focus on ‘promoting effective and economically efficient environmental measures’.³² Second, there is no mention or reference to international environmental instruments. Moreover, when comparing previous Chilean agreements with the EU-Chile sustainable development chapter, it can be argued that, when negotiating with stronger economic partners, there is an opportunity to strengthen Chile’s strategy and make references to international commitments.

Regarding MEAs, it is noteworthy that Chile’s agreements feature limited references to broader international environmental agreements. In the case of Chile-Ecuador, Chile-Uruguay, Chile-Argentina, and Chile-Brazil, general obligations are presented using similar wording. For example, Parties ‘recognize that MEAs play an important role at the national, regional and global level, in the protection of the environment’.³³ Conversely, the Chile-EU agreement shows that references to specific multilateral agreements are made, both in labour and environmental matters.³⁴ It can be argued that explicit references to MEAs could be encouraged in future Chilean agreements, as they can be useful for interpretation purposes. However, based on the current state of practice, it is unlikely that Chile will advocate for a detailed list of MEAs, opting instead for general references to fulfil commitments under MEAs.

When it comes to commitments not to weaken standards, not all trade and environment chapters negotiated by Chile have provisions on the right to regulate or levels of protection. Nevertheless, by comparing the formal structure of the chapters,

³⁰ Article 13.1(1) Chile-Argentina, *supra* n. 29; Art. 17.1 (1) Chile-Brazil, *supra* n. 29.

³¹ Javiera Cáceres, Marios Tokas, Markus Gehring & Fabiano de Andrade Correa, Environment and Climate Change in the Draft EU-Mercosur Trade Agreement (CISDL 2021), <https://www.cisdl.org/wp-content/uploads/2021/07/Environment-and-Climate-Change-in-the-Draft-EU-29.04.2021-Final.pdf> (accessed 7 Apr. 2023).

³² Article 1(i) Chile-Canada, *supra* n. 29.

³³ Article 17.4 Chile-Ecuador, *supra* n. 29.

³⁴ It is worth noting that labour chapters were not revised. This idea just points out that labour and environmental MEAs are included in the Chile-EU Agreement.

it can be argued that both types of provisions can be found, formulated as a single article or as two separate articles. Specific articles on ‘levels of protection’ are only present in the Chile-US and Chile-Canada agreements. The provisions that ‘uphold certain levels of protection’ can be found as (1) positive or negative obligations on the parties not to waive, derogate or offer to waive or derogate from their environmental standards; and (2) the previous provision plus the negative obligation not to fail to apply their environmental standards. For example, the Chile-US Agreement states that ‘it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in domestic environmental laws’.³⁵

Finally, in terms of enforcement, the trade and environment chapters negotiated by Chile are excluded from the main dispute settlement system and instead have a separate consultation process in place to address any emerging issues.³⁶ Chile’s approach to dispute resolution is focused on solving matters amicably through consultations, using two or more instances (including bilateral consultations, formal request to the TSD Committee, or ministerial consultations) if matters are not solved. Despite its increasing incorporation of environmental commitments within trade agreements, as widely discussed in the current practice, at this point it is not politically feasible to incorporate binding compliance mechanisms in the TSD chapter as opposition to this kind of arrangements would be encountered within domestic approval process. Furthermore, the inclusion of binding dispute settlement commitments within trade agreements is a relatively new incorporation, with the recent examples of United States-Mexico-Canada Agreement (USMCA), Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) or the UK-New Zealand agreement, but little international jurisprudence is available to serve as a basis for analysis of the convenience of this kind of mechanisms for the country.

3.2 THE EU-MEXICO GLOBAL AGREEMENT: ASSESSING THE ENVIRONMENTAL EFFECTS OF THE AGREEMENT IN PRINCIPLE

In May 2016, the EU and Mexico officially began the process of negotiating the modernization of the trade pillar of the 1997 Global Agreement. During the consultations, the parties engaged with domestic civil society stakeholders to determine their negotiating priorities. In April 2018, the Parties reached an Agreement in Principle, which outlined the main rules of the agreement, and the final negotiations concluded in

³⁵ Article 19.2 (2) Chile-US, *supra* n. 29.

³⁶ Chile’s agreements with Argentina, Brazil and Uruguay contain a specific article stating that ‘neither party may resort to the dispute settlement mechanism’ (Arts 13.14, 17.19 and 12.13, respectively); while Chile agreements with the US, Hong Kong and Ecuador exclude the trade and environment chapter from the dispute settlement mechanism in the article that directly addresses the mechanism (Arts 19.6(8), 17.1(3) and 17.24, respectively).

April 2020.³⁷ At the time of writing, the Parties have not yet adopted the final text of the modernized Global Agreement.

Unlike the 1997 Global Agreement, which required limited political cooperation between the EU and Mexico, the 2018 Agreement in Principle introduced a TSD chapter that creates scope for broader cooperation. This chapter contains a range of rights and obligations that build upon other trade agreements negotiated by the EU.³⁸ The specific norms adopted can be categorized into four groups: (1) reaffirmation of the right to regulate, (2) obligations to comply with and cooperate in implementing relevant MEAs, including the Paris Agreement and United Nations Framework Convention on Climate Change (UNFCCC), (3) obligations to encourage and promote sustainable trade and domestic production processes, and (4) obligations to promote best practices in the public and private sectors (including through corporate social responsibility).

In a broader sense, the environmental protection provisions within the TSD chapter serve three principal functions: (1) accumulating and facilitating existing international legal norms, (2) establishing additional *fora* to ensure norm compliance and cooperation between the Parties, and (3) ensuring the harmonious interpretation of the Global Agreement with the Parties' existing environmental commitments. These functions are supplemented by a non-binding dispute settlement mechanism for enforcing obligations under the TSD chapter.

The first function primarily deals with normative aspects, whereby the chapter reiterates existing legal obligations found in MEAs and introduces supplementary obligations for the Parties to cooperate or promote the achievement of, *inter alia*, specific environmental protection objectives.³⁹ Notably, one such norm repeated from the *same* treaty is the right to regulate found in Article 2 of the chapter. Seemingly drawing on the Appellate Body approach of equating the right to regulate trade with the applicability general exception provisions in *China – Audiovisual Products*,⁴⁰ the provision draws on the *mutatis mutandis* incorporation of Article XX

³⁷ Gisela Greiger, *Modernisation of the Trade Pillar of the EU-Mexico Global Agreement*, www.europarl.europa.eu/legislative-train/theme-a-stronger-europe-in-the-world/file-modernisation-eu-mexico-global-agreement (accessed 16 Apr. 2023).

³⁸ European Commission, *EU-Mexico Trade and Sustainable Development Chapter*, <https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/ec8b7432-1b1a-422a-86c5-7b9ab158694a/details> (accessed 16 Apr. 2023) [EU-Mexico TSD chapter]. For a review of level-playing-field obligations in EU trade agreements, see Matilda Gillis, *Let's Play?: An Examination of the 'Level Playing Field' in EU Free Trade Agreements*, 55(5) *J. World Trade* 715, 723–732 (2021), doi: 10.54648/TRAD2021030.

³⁹ Norm accumulation refers to circumstances where norms are either 'confirm[ed]' or where complementing 'rights and obligations' are created: Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law*, 161–162 (Cambridge University Press 2003). Concerning the Agreement in Principle, this may regard environmental obligations as setting a minimum level of environmental protection which Parties must attain. See on the purposes of level playing field language, See Gillis, *supra* n. 38, at 717–723.

⁴⁰ Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products* (adopted 19 Jan. 2010) WT/DS363/AB/R, paras

GATT in the Exceptions chapter of the Global Agreement.⁴¹ The related ‘right of each Party to determine its sustainable development policies and priorities’ further reflects the well-established interpretation by the Appellate Body that WTO Members maintain the right to set their own level of protection of non-trade values covered under general exceptions, albeit here subject to a general non-regression obligation in Article 2(5) of the TSD chapter.⁴² However, it remains unclear under what circumstances a violation of the non-regression obligation would qualify as being done ‘in order to encourage trade or investment’.⁴³

These incorporated norms are supplemented by the obligations to cooperate, effectively implement treaty obligations, and promote best practices. These obligations are particularly relevant in areas such as MEA commitments, climate change (including the Paris Agreement and the Parties’ NDCs under Article 5(2)(a)), biological diversity, the sustainable management of forests, fisheries management, and supply chains.⁴⁴ Moreover, Article 9 ‘recognise[s]’ the ‘importance’ of supply chain management based on ‘responsible business conduct and corporate social responsibility’.⁴⁵

The express incorporation of norms from other treaties may further shape the interpretation of the Agreement in Principle. As a matter of treaty interpretation, the ‘presumption of harmony’ between different sources of international law is a rebuttable one.⁴⁶ Under Article 31(3)(c) VCLT IO, interpreting in line with the principle of systemic integration is available in limited circumstances in which certain

214–229 concerning the phrase ‘right to regulate trade in a manner consistent with the WTO Agreement’ found in Protocol on the Accession of the People’s Republic of China (23 Nov. 2001) WT/L/432, para. 5.1. The Appellate Body equated this right to the application of Art. XX GATT through reasoning by analogy (para. 229).

⁴¹ Article XX(1) European Commission, *EU-Mexico Free Trade Agreement – Exceptions*, trade.ec.europa.eu/doclib/docs/2018/april/tradoc_156830.pdf (accessed 16 Apr. 2023). Lorand Bartels, *Social Issues: Labour, Environment and Human Rights*, in *Bilateral and Regional Trade Agreements: Commentary and Analysis*, 369–370 (Simon Lester & Bryan Mercurio eds, Cambridge University Press 2009). Notably differentiates such conditional exceptions from the more ‘intrusive’ proportionality test under EU free movement of goods law.

⁴² See for instance, Appellate Body Report, *Korea – Various Measures on Beef* (adopted 10 Jan. 2001) WT/DS161/AB/R; WT/DS169/AB/R, paras 176–178; Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres* (adopted 17 Dec. 2007) WT/DS332/AB/R, para. 210 (‘the fundamental principle is the right that WTO Members have to determine the level of protection that they consider appropriate in a given context’). See also Donald Regan, *The meaning of ‘necessary’ in GATT Article XX and GATS Article XIV: The Myth of Cost–Benefit Balancing*, 6(3) *World Trade Rev.* 347 (2007), doi: 10.1017/S1474745607003424.

⁴³ For existing jurisprudence on the area of trade and labour rights when such a determination was required, see Arbitral Panel, *In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR* Final Report, para. 594 (14 Jun. 2017) emphasizing actual trade effects; avoiding the need for establishing such a link, see Panel of Experts Report, *Panel of Experts Proceeding Constituted Under Article 13.15 of the EU-Korea Free Trade Agreement*, paras 61–68 (20 Jan. 2021).

⁴⁴ Articles 4(4), 5(2)(c), 6(2), 7(2), 8(2)(g)–(i) and 9(4) EU-Mexico TSD chapter, *supra* n. 38.

⁴⁵ Article 9 (1) EU-Mexico TSD chapter, *supra* n. 38.

⁴⁶ ILC, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* UN Doc A/CN.4/L.682, para. 32 (13 Apr. 2006).

international environmental law norms are deemed relevant for interpreting an international trade agreement. This requires consideration of several factors, including the relevance of the international environmental norm, its classification as a ‘rule’ under international law, and the States that are bound by it.⁴⁷ By contrast, express textual incorporation forms part of the text and context of the incorporating treaty, and treaty interpreters may more easily justify considering it. As Merkouris argues⁴⁸:

When rules have been incorporated, they are exactly that part of the *corpus* of the treaty being interpreted. They do not help in interpreting the text. *They are the text.* (original emphasis)

Third, the TSD chapter establishes a dispute settlement mechanism to resolve disputes, including *vis-à-vis* level-playing-field obligations. Should the Parties disagree on ‘the interpretation or application of’ the TSD chapter, they can seek resolution through a series of primarily non-judicial dispute settlement mechanisms, provided there is political will.⁴⁹ These mechanisms include consultation procedures in pursuit of a ‘mutually satisfactory resolution’⁵⁰ (Article 16) and receiving non-binding findings and recommendations from a panel of experts (Article 17). As Article 15 specifies, these procedures must be applied ‘exclusively’ and as carve-outs from the dispute settlement chapter of the Agreement in Principle.⁵¹ It is important to point out that in trade agreements with other developed countries, notably the United States–Mexico–Canada Agreement, Mexico has agreed to settle disputes over covered environmental protection commitments through binding dispute settlement procedures.⁵²

Finally, it is worth highlighting that the Trade in Goods (TG), Cross-Border Trade in Services (CBTS), and Energy and Raw Materials (ERM) chapters of the Agreement in Principle encourage the production, import, and export of sustainable goods and services. Along with the elimination of customs duties (Article X.3), the TG chapter incorporates *mutatis mutandis*, the prohibition on quantitative restrictions under Article XI GATT through Article X.8 TG chapter, as well as the national treatment obligation under Article III GATT through Article X.2 TG chapter.⁵³

⁴⁷ Article 31(3)(c) VCLT IO expressly refers to ‘any relevant rules of international law applicable in the relations between the parties’. The views on what this entails are, however, varied and conflicting. Compare, for instance, Ulf Linderfalk, *On the Interpretation of Treaties*, 177–192 (Springer 2001); Panos Merkouris, *Article 31(3)(c) VCLT and the Principle of Systemic Integration: Normative Shadows in Plato’s Cave*, (Brill/Nijhoff 2015) Ch. 1.

⁴⁸ *Ibid.*, at 69.

⁴⁹ Article 15 EU–Mexico TSD Chapter, *supra* n. 38.

⁵⁰ Article 16(2) EU–Mexico TSD Chapter, *supra* n. 38.

⁵¹ Article 15, EU–Mexico TSD Chapter, *supra* n. 38.

⁵² Articles 24.32 and 31.8(3) United States–Mexico–Canada Trade Agreement (signed 13 Mar. 2020, entered into force 1 Jul. 2020), ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between (accessed 16 Apr. 2023).

⁵³ Articles X.2 and X.8, European Commission, *EU–Mexico Chapter on Trade in Goods*, circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/a68b6b8f-c509-448a-9453-7575a4d4f59d/details (accessed 16 Apr. 2023).

Similarly, the CBTS chapter restricts quantitative restrictions on service suppliers, service transactions, and service operations under Article 4.⁵⁴ Article 6 further creates an obligation to offer ‘treatment no less favourable than that it accords, in like situations, to its own services and service suppliers’ to be provided by both the State and the regional level of government.⁵⁵ Finally, the ERM chapter establishes access to the exploration and production of energy goods and energy transport infrastructure with conditional scope for derogations.⁵⁶

4 PRACTICAL IMPLICATIONS OF IMPLEMENTING TRADE LIBERALIZATION COMMITMENTS

The practical implications of implementing trade liberalization commitments outlined in both the Agreement in Principle and the EU-Chile Advanced Framework Agreement alongside TSD disciplines have been evaluated through impact assessments. In the case of the Agreement in Principle, the most recent assessment is the extensive 2019 London School of Economics and Political Science Consulting-authored Sustainability Impact Assessment (SIA) Report prepared for the European Commission.⁵⁷ The report clarifies that the disciplines are expected to have ‘low’ effects, ‘in particular for the EU’.⁵⁸ As regards the EU-Chile Advanced Framework Agreement, a final version of the relevant SIA report was published in 2019 to support the negotiations. This report, authored by BKP Development Research & Consulting, provides an evaluation of the potential impacts.⁵⁹ Both reports utilize a mixed methods approach, incorporating baseline change modelling to analyse the potential outcomes.

In the Agreement in Principle, the TSD chapter is expected to positively affect the agriculture, agri-food, chemical and industrial production, land, and other

⁵⁴ Article 4, European Commission, EU-Mexico *Cross-Border Trade in Services*, circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/0a1fec82-0eda-4c6e-879e-83d31fcad47c/details (accessed 16 Apr. 2023) [EU-Mexico CBTS Chapter].

⁵⁵ Article 6, EU-Mexico CBTS Chapter, *supra* n. 54.

⁵⁶ Articles 6 and 7, European Commission, EU-Mexico *Chapter on Energy and Raw Materials*, circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/200a4030-45b1-46a1-8812-ad757eef961f/details (accessed 16 Apr. 2023).

⁵⁷ For the effectiveness of SIAs as tools for measuring the socio-economic effects of international trade agreements, see Marie-Claire Cordonier Segger, *Crafting Trade and Investment Accords for Sustainable Development: Athena's Treaties*, 34–36 (Oxford University Press 2021).

⁵⁸ LSE Consulting, *Sustainability Impact Assessment (SIA) in Support of the Negotiations for the Modernisation of the Trade Part of the Global Agreement with Mexico*, 119 (European Commission Aug. 2019), trade.ec.europa.eu/doclib/docs/2020/january/tradoc_158558.pdf (accessed 16 Apr. 2023) [EU-Mexico SIA].

⁵⁹ BKP Development Research & Consulting, *Sustainability Impact Assessment (SIA) in Support of the Negotiations for the Modernisation of the Trade Part of the Association Agreement With Chile*, 380 (European Commission, Jun. 2019), <https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/1b9340d6-ce09-4be8-b501-7ec753cc70ce/details?download=true> (accessed 10 Apr. 2023) [EU-Chile SIA].

transportation sectors for Mexico and the EU.⁶⁰ However, the water transportation sector in Mexico is projected to face negative consequences compared to the baseline.⁶¹ At the same time, the SIA specifies that the Agreement in Principle, more broadly, is expected to have a ‘negative/minor’ impact on enforcing the UNFCCC and Paris Agreement due to increased GHG emission projections from the energy, agriculture, and mining sectors.⁶² The report also highlights concerns regarding compliance with the Rotterdam and Stockholm Conventions due to the projected increase in the use of fertilizers and pesticides originating from the EU in Mexico, which are expected to ‘undermin[e] efforts to protect human health and the environment’ in Mexico.⁶³ The significance of these findings appears to be acknowledged in a Commission position paper on the SIA, which ‘largely agree[s]’ with the analysis even though it subsequently claims that ‘the modernised Agreement’s provisions on TSD and energy efficiency and sustainable energy could help mitigate any potential negative environmental effects’ without specifically challenging any of the concerns raised in the SIA.⁶⁴

In the case of the EU-Chile Advanced Framework Agreement, the SIA report concludes that overall environmental impacts will be modest. The TSD chapter is expected to contribute to the sustainability of salmon farming in Chile. However, it should be noted that this finding relies on potential provisions that could lead to regulatory changes, as the trade in fresh and frozen salmon is already liberalized. Similar positive impacts are identified for the TSD chapter and its potential positive impact on lithium batteries and renewable energies is found. And, similarly to the SIA report on the Agreement in Principle, the conclusions are accepted by the European Commission in its position paper. Nevertheless, it clarifies that ‘some of the suggestions, like provisions on low-energy and low-carbon technologies or sustainable aquaculture, are already included in the EU proposal for a TSD Chapter’.⁶⁵

Two important points of clarification must be made regarding the conclusions reached in the EU-Mexico Agreement in Principle’s SIA. First, the SIA does not directly specify the extent to which the Mexican and EU NDCs influenced the technical analyses and recommendations. Instead, the report simply acknowledges that ‘they will

⁶⁰ See EU-Mexico SIA, *supra* n. 58, at 119–120.

⁶¹ *Ibid.*, at 119.

⁶² *Ibid.*, at 128–129.

⁶³ *Ibid.*, at 129.

⁶⁴ European Commission, *European Commission Services’ Position Paper on the Sustainability Impact Assessment in Support of Negotiations for the Modernisation of the Trade Part of the Global Agreement with Mexico*, 13 (Jan. 2020), trade.ec.europa.eu/doclib/docs/2020/january/tradoc_158559.pdf (accessed 16 Apr. 2023).

⁶⁵ European Commission, *European Commission Services’ Position Paper on the Sustainability Impact Assessment in Support of Negotiations for the Modernisation of the Trade Part of the EU-Chile Association Agreement*, 13 (Jun. 2020), <https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/118c8984-9c2b-4426-801f-323807511cb9/details?download=true> (accessed 16 Apr. 2023).

undoubtedly have trade impacts once they enter into force'.⁶⁶ Second, assuming that the technical analysis considered the then-intended NDCs, it was concluded in 2019 and did not reflect the more ambitious commitments adopted by Mexico and the EU during and following the 2021 UNFCCC Conference of the Parties in Glasgow. A similar situation arises in the SIA of the EU-Chile Agreement. Even though both the EU and Chile submitted their NDCs to the UNFCCC, the report states that Chile's ambitions are lower than the EU's. It is worth noting that the report does not contain the updated Chilean NDC.⁶⁷ Therefore, both parties have more space to work on their commitments. In both agreements, the SIA lends support for more precise policy objectives for the bilateral cooperation on environmental protection as well as more specific civil society engagement obligations.⁶⁸

Finally, considering its current limited material scope, a revision of the Agreement in Principle could introduce specific disciplines addressing air quality and ozone layer protection. This revision would formalize trade liberalization commitments related to forest products and adjust preferential rules of origin vis-a-vis energy-efficient vehicles and sustainable goods. In terms of institutional design, the dispute settlement mechanism under the TSD chapter is inconsistent with the drive towards binding dispute resolution and trade sanctions for non-compliance under the EU's new trade policy.⁶⁹ Ultimately, it remains uncertain whether the text of the Agreement in Principle will be reopened for negotiation prior to the widely-anticipated adoption of the modernized Global Agreement.

5 ENVIRONMENTAL PROTECTION UNDER THE EU-ANDES AGREEMENT

The EU-Andes Agreement was initially concluded and provisionally applied in 2013 between the EU, Colombia, and Peru following the earlier unsuccessful attempts to establish a region-to-region trade agreement between the EU and Andean Community.⁷⁰ Ecuador subsequently acceded in 2017, while Article 329 EU-Andes Agreement establishes scope for Bolivia to agree at a later stage.⁷¹

⁶⁶ See EU-Mexico SIA, *supra* n. 58, at 58.

⁶⁷ Chile modified the emission intensity indicator (conditional and unconditional) by an unconditional absolute indicator, with a goal to reach 95 million Tonnes of carbon dioxide equivalent (MtCO₂eq) by 2030, also committing to reach the maximum emissions (peak year) by 2025, and a GHG emissions budget that will not exceed 1,100 MtCO₂eq for the period 2020–2030. This goal corresponds to a halfway point on the path to carbon neutrality by 2050.

⁶⁸ See EU-Mexico SIA, *supra* n. 58, at 200; EU-Chile SIA, *supra* n. 59.

⁶⁹ Power of Trade Partnerships, *supra* n. 2, at 11–12.

⁷⁰ Daniel Schade, *The EU in Association Agreement Negotiations: Challenges to Complex Policy Coordination* (Routledge 2020) Ch. 5.

⁷¹ Article 329 EU-Andes Agreement, *supra* n. 8.

This section focuses on (i) analysing the disciplines under the EU-Andes Agreement; (ii) pointing out how a modernization process could improve the existing TSD title, even though the EU-Andes Agreement is not presently being renegotiated; and (iii) identifying Andean States' environmental priorities based on their NDC commitments.

5.1 DISCIPLINES UNDER THE EU-ANDES AGREEMENT

The EU-Andes Agreement has a dual purpose of promoting trade liberalization and fostering cooperation on sustainable development between its Parties. As Article 4(j) stipulates, the 'objectives' of the treaty include, inter alia, 'promot[ing] international trade in a way that contributes to the *objective of sustainable development*, and to work in order to integrate and reflect this objective in the Parties' trade relations'.⁷² Furthermore, Article 4 underscores the objectives of 'liberalization' of goods and services trade, as well as 'conduct of economic activities [...] in conformity with the principle of free competition'.⁷³ Throughout the agreement, this duality in objectives is consistently emphasized. In framing the object and purpose of the TSD title, Article 267(1) 'recall[s]' various international environmental instruments and 'the objective of sustainable development', while Article 267(2) highlights the objectives of 'cooperation' and 'strengthen[ing]' of rules on sustainable development.⁷⁴ While these provisions do not explicitly clarify the relationship between trade liberalization and sustainable development as treaty objectives, a closer examination of the broader treaty obligations, particularly the right to regulate and general exception provisions, suggests that the latter are conditionally superior.

The TSD title of the EU-Andes Agreement serves several important functions related to environmental protection. These functions can be broadly categorized into four areas. First, to incorporate norms from other chapters or international legal instruments. Second, to establish norms requiring cooperation or the promotion of best practices. Third, to enable citizen participation in the application of the title. Fourth, to create a mechanism for dispute settlement. These disciplines primarily focus on procedural aspects or build upon existing commitments under MEAs, emphasizing cooperation between the treaty Parties or transnational engagement with civil society. The incorporation or reference to two central norms from other treaties, or potentially other chapters of the EU-Andes Agreement, are particularly notable: the right to regulate and level-playing-field obligations derived from the Parties' MEAs.⁷⁵

⁷² Article 4(j) EU-Andes Agreement, *supra* n. 8.

⁷³ See in particular, Art. 4, paras (a), (b), (c) and (h) EU-Andes Agreement, *supra* n. 8.

⁷⁴ Article 267(2), EU-Andes Agreement, *supra* n. 8.

⁷⁵ For level-playing-field obligations, see Arts 270, 272(1), 273, 274, and 275, while the right to regulate is chiefly expressed in Arts 268 and 270(4), EU-Andes Agreement, *supra* n. 8.

Additionally, the EU-Andes Agreement stipulates that the Parties ‘cooperate’ on sustainable development and ‘promote’ certain legal practices. The main areas which are addressed include trade in forest products (Article 273), sustainable fishing (Article 274), climate change (Article 275), and more general obligations to cooperate on TSD (Article 286). In general, the provisions must be understood as forming obligations of conduct rather than of result. While no specific legal outcome is required to be achieved, the obligations have commonly been understood to require good faith engagement from all Parties⁷⁶ and ‘in accordance with the principle of common but differentiated responsibilities’ per Article 267(4).⁷⁷

Similarly, the Agreement establishes procedures for dialogue and engagement with civil society. Article 282 requires the Sub-committee on TSD to organize ‘a session with civil society organizations and the public at large, in order to carry out a dialogue on matters related to the implementation of the TSD title.’⁷⁸ This provision complements the obligation of individual Parties, as outlined in Article 281 to ‘consult domestic labour and environment or sustainable development committees or groups, or create such committees or groups when they do not exist’. Furthermore, under Article 276, Parties are obliged ‘to review, monitor and assess the impact of the implementation of this Agreement on [...] environment [...] through its respective domestic and participative processes’.⁷⁹

Finally, the TSD title of the EU-Andes Agreement includes provisions on recourse to dispute settlement procedures. According to Article 285(5), the TSD title is excluded from judicial methods for dispute settlement under Title XII.⁸⁰ The alternative procedure first requires a resort to inter-governmental consultations under Article 283. Should these fail to resolve the dispute, recourse may be made to a Group of Experts that can issue non-binding recommendations.⁸¹

5.2 THE ENVIRONMENTAL EFFECTS OF THE EU-ANDES AGREEMENT: A NEED FOR CHANGE?

Two studies have examined the environmental implications of the EU-Andes Agreement.⁸² According to the 2009 SIA report, which conducted initial modelling,

⁷⁶ See for instance, *Obligation to Negotiate Access to the Pacific* (Bolivia v Chile) (2018) ICJ Rep 507, para. 148; *Railway Traffic between Lithuania and Poland* (*Railway Sector Landwarów-Kaisiadorys*) [1931] Series A/B No 42, 116; *Puerto Rico Regulations on the Import, Distribution and Sale of UHT Milk from Quebec*, Final Report of the Panel, USA-CDA-1993-1807-01 (3 Jun. 1993), para. 5.28.

⁷⁷ Article 267(4) EU-Andes Agreement, *supra* n. 8.

⁷⁸ Article 282, EU-Andes Agreement, *supra* n. 8.

⁷⁹ Article 281, EU-Andes Agreement, *supra* n. 8.

⁸⁰ Article 285(5), EU-Andes Agreement, *supra* n. 8.

⁸¹ Articles 283, 284(1) and 285, EU-Andes Agreement, *supra* n. 8.

⁸² Development Solutions et al, *EU-Andean Trade Sustainability Impact Assessment – Final Report*, (European Commission, Oct. 2009) circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/699b4fb7-95b9-4b80-ac3f-7810e039d0dd/details (accessed 16 Apr. 2023)

it was found that the expansion of trade liberalization would generate adverse effects (i.e., increased CO₂ emissions) over time.⁸³ While the EU and Colombia were expected to experience the greatest ‘absolute’ increase in emissions, the report concluded that ‘the [predicted] overall effects are small’ and – even if there were ‘ambitious liberalization’ of trade – the Agreement would only have contributed to an increase in global emissions by 0,01%.⁸⁴

More specifically, the SIA indicates that increased trade in agricultural and processed goods under the EU-Andes Agreement ‘is expected to place additional pressure on both land and water’.⁸⁵ It highlights the potential for increased deforestation in all four Andean Community States, which are expected to be affected by the ‘conversion of pristine habitats and natural resources to agricultural production and mining’.⁸⁶ As a result, services liberalization is expected to ‘increase the utilization of environmentally efficient technologies and management techniques’ and ‘reduce pressures on the consumption of water and other resources’.⁸⁷ However, any positive environmental effect depends on how such services are ‘sourced’: for instance, transport-related pollution or other externalities may offset the expected environmental gains from environmental services.⁸⁸

The final evaluation report conducted in 2022 largely supports the modelling findings of the SIA. In particular, the evaluation report details that the environmental impact of the EU-Andes Agreement is ‘very small [...] and mixed’.⁸⁹ In particular, it identifies the negative effects of increased deforestation, which are said to result from ‘the increased production’ and harvesting of specific agricultural and aquacultural products for export to the EU (for instance, Peruvian avocado production affecting forests and Ecuadorian shrimp farming damaging mangrove forests).⁹⁰ Nonetheless, there are limited findings on whether trade-related deforestation has a generally ‘permanent’ impact, with only ‘a small impact on permanent deforestation in Colombia’ being established.⁹¹

(EU-Andes SIA); BKP Economic Advisors, *Ex Post Evaluation of the Implementation of the Trade Agreement Between the EU and its Member States and Colombia, Peru and Ecuador* (European Commission, Jan. 2022), www.fta-evaluation.eu/images/reports/I_Final_Report_ex_post_eval.pdf (accessed 16 Apr. 2023) [EU-Andes Final Evaluation Report].

83

See EU-Andes SIA, *supra* n. 82, 68.

84

Ibid.

85

Ibid., at 84.

86

Ibid., at 84–89.

87

Ibid., at 104.

88

Ibid.

89

See EU-Andes Final Evaluation Report, *supra* n. 82, xvi, para. 11.

90

Ibid., at 158.

91

Ibid.

Regarding GHG emissions, the report highlights that although there is a noticeable increase in emissions for Andean Community Parties, the trade adjustment has led to ‘lower gross GHG emissions in the rest of the world’ and ‘an estimated overall marginal decrease in gross GHG emissions’.⁹² This effect is explained in the following terms⁹³:

The increase in the Andean countries and in the EU is predominately driven by the positive impact of tariff reduction on production in the *petroleum and chemical, utilities, and transport* sectors. The decrease in the Rest of the World is driven by decreases in output in the *petroleum and chemical* and *utilities* sectors. The net-reduction impact is driven by differences in emission intensities (GHG emissions per unit of product) in the EU and the RoW. For example, an item produced in the EU may be produced with lower GHG emissions than the same item in a different country. If production shifts to the EU from that country, net GHG emissions reduce.

The evaluation report similarly provides a brief commentary on the interaction between the existing EU-Andes Agreement and the Paris Agreement. Although the report acknowledges that the TSD title ‘did create a platform through which the importance of ratification [of the Paris Agreement] was voiced by stakeholders’, it nonetheless holds that ‘it is very unlikely that the [EU-Andes Agreement] influenced these [sic] development’.⁹⁴

5.3 ANDEAN STATES’ NATIONALLY DECLARED CONTRIBUTIONS

A more ambitious modernized EU-Andes Agreement could enhance the alignment of the agreement with the TSD policy priorities developed by the EU. This could be achieved by incorporating further level-playing-field obligations and adopting binding dispute settlement procedures.⁹⁵ At the same time, such an agreement must also align with the environmental protection priorities of the Andean States. Therefore, any endeavour to modernize the EU-Andes Agreement TSD title must consider Andean States’ overall emissions reduction objectives and their stated need for economic and technical support for economic sectors where mitigating measures will be adopted.

In its updated 2020 NDC, Colombia agreed to reduce its GHG emissions by 51% by 2030 based on the BAU baseline projections. Additionally, Colombia aims to achieve a 40% reduction in black carbon emissions from its 2014 rate.⁹⁶ While this

⁹² *Ibid.*, at 156.

⁹³ *Ibid.*

⁹⁴ *Ibid.*, at 156–157.

⁹⁵ The misalignment was raised during the ninth meeting of the EU-Andes Agreement Sub-Committee on TSD in Oct. 2022: European Union, 9th Meeting–Oct. 2022–Joint Minutes, 20–21 (Feb. 2023), circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/e5d278ea-d19b-4b27-9082-5ec4c08e191b/details (accessed 16 Apr. 2023).

⁹⁶ Gobierno de Colombia, *Contribución Determinada a Nivel Nacional (NDC) de Colombia 2020*, 32–34 (2020), unfccc.int/sites/default/files/NDC/2022-06/Adjunto%202020Medidas%20de%20mitigaci3n_NDC%20de%20Colombia%202020.pdf (accessed 16 Apr. 2023).

objective is based on economy-wide considerations, the main mitigating and planning measures that will be adopted target six priority sectors: transport, energy, agriculture, housing, health, commerce, tourism, and industry.⁹⁷ Peru also updated its NDC in 2020, setting its unconditional commitments to reducing BAU-projected GHG emissions by 30% and its conditional commitments by 40% overall.⁹⁸ The target sectors where mitigation measures are adopted have been maintained since Peru's first NDC. These are energy, industrial processes, waste, land use, land use change and forestry (LULUCF), and agriculture.⁹⁹ In the 2019 Ecuadorian NDC, the country sets an unconditional commitment to GHG emission reductions from the BAU projection at around 12% and its conditional commitment at 21%.¹⁰⁰ It also identifies its target sectors as energy, industrial processes, agriculture, land use, land use and forestry changes, and waste management.¹⁰¹

As a potential acceding Party to the EU-Andes Agreement, Bolivia's 2022 NDC commitments may shape how ambitious the modernized TSD chapter could be. In its updated NDC, Bolivia rejects the capitalist approach to preventing the climate crisis, albeit without making any concrete GHG reduction commitments.¹⁰² Nonetheless, there are four sectors in which mitigation measures intend to adopt mitigating measures: water management, energy, forest management, and agriculture.¹⁰³ In this sense, despite the divergence in targets, there is broad convergence in the economic sectors where all Andean States – both current and potential parties to the EU-Andes Agreement – intend to adopt mitigating measures.

6 MODERNIZING TRADE AGREEMENTS: WHAT LESSONS CAN NEGOTIATORS LEARN?

This article examined the prospects of the modernized Chile-EU Association Agreement and EU-Mexico Global Agreement TSD Chapters and drew lessons for a potential renegotiation of the EU-Andes Agreement.

⁹⁷ *Ibid.*, Annex A4.

⁹⁸ UNFCCC, *Contribuciones Determinadas a Nivel Nacional Del Perú – Reporte de Actualización Periodo 2021–2030*, 9 (18 Dec. 2020), www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Peru%20First/Reporte%20de%20Actualización%20de%20las%20NDC%20del%20Perú.pdf (accessed 16 Apr. 2023).

⁹⁹ *Ibid.*, at 12.

¹⁰⁰ This rate is based on data provided in Image 1, UNFCCC, *Primera Contribución Determinada a Nivel Nacional Para el Acuerdo de París Bajo la Convención Marco de Naciones Unidas Sobre Cambio Climático*, 17 (29 Mar. 2019), www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Ecuador%20First/Primera%20NDC%20Ecuador.pdf (accessed 16 Apr. 2023).

¹⁰¹ *Ibid.*, at 14.

¹⁰² Estado Plurinacional de Bolivia, *Contribución Nacionalmente Determinada (CND) del Estado Plurinacional de Bolivia*, 3–4 (2022) unfccc.int/sites/default/files/NDC/2022-06/CND%20Bolivia%202021-2030.pdf (accessed 16 Apr. 2023).

¹⁰³ *Ibid.*, at 13–38.

Overall, it can be argued that, while the EU-Chile Agreement's trade and environment chapters acknowledge the importance of the topic, the commitments vary in scope and depth. Similarly, although these chapters are excluded from the agreement's general dispute settlement, they provide a specific consultation process. The text of the TSD chapter includes specific commitments for the implementation of the Paris Agreement; recalls other MEAs which are not commonly mentioned by previous Chilean agreements; deepens articles providing more detailed information and expanding on concepts for specific thematic areas of TSD; provides detailed and thorough information on cooperation activities; and, elaborates on the creation of a panel of experts after the consultation process as an alternative for dispute resolution, as included in the most recent TSD negotiated chapters. Considering Chile's broader sustainable development agenda and its evolving trade agreements strategy, Chile is open to discussing and incorporating new trade and environment provisions, deepening its relationship with partners such as the EU.

The EU-Mexico Agreement in Principle illustrates that a modernization process could establish level-playing-field obligations based on the Parties' existing commitments under MEAs without introducing binding dispute settlement or civil society engagement. This form of political cooperation builds on pre-existing EU trade agreements with the Latin American States. While the Agreement in Principle expands the areas where political cooperation could be achieved beyond the existing Global Agreement, it falls short of creating legal norms to govern critical areas of environmental protection. Notably, it merely requires political cooperation regarding ozone depletion and the management of waste and dangerous chemicals.¹⁰⁴ The problem of overcoming the limits of the EU-Mexico Agreement in Principle may serve as an indication of the difficulties involved in reopening negotiations over a trade agreement whose modernized text has already been agreed.¹⁰⁵

Even though the EU-Andes Agreement TSD Title establishes level-playing-field obligations and procedures for achieving political cooperation, the 2022 evaluation report rightly emphasizes the untapped potential of the TSD Title and recommends a wide range of areas where disciplines and mechanisms for cooperation could be strengthened or introduced.¹⁰⁶ These include specific and proactive rules addressing deforestation and forestry management, LULUCF emissions and water use in Andean States' agricultural sectors, the need for extended producer responsibility and stricter standards for EU products, knowledge exchange in the mining sector, and the creation of concrete environmental

¹⁰⁴ Articles 5(3) and 13(h) and (m) EU-Mexico TSD Chapter, *supra* n. 38.

¹⁰⁵ Andy Bounds, Sam Fleming & David Agren, 'Mexico resists EU pressure to approve trade deal after legal changes' (*Financial Times*, 8 Jan. 2023), www.ft.com/content/c692fc26-602c-4318-a299-8fad973b482 (accessed 16 Apr. 2023).

¹⁰⁶ See EU-Andes Final Evaluation Report, *supra* n. 82, 156–157.

targets.¹⁰⁷ These enhancements would further strengthen the effectiveness of the TSD title in promoting sustainable development and environmental protection.

Such a modernization process may be achieved either within the framework of the existing EU-Andes Agreement or based on a renegotiation. Crucially, under Article 270(3), the Trade Committee is already enabled to extend level-playing-field obligations to cover other 'MEAs', such as the Paris Agreement and potentially even the WTO Agreement on Fisheries Subsidies, given that the term has not been defined, 'following a proposal by the Sub-committee on Trade and Sustainable Development'.¹⁰⁸ This process creates the potential for modernizing the agreement to respond to more immediate environmental protection concerns in the short term. Additionally, the Trade Committee could adopt secondary instruments to establish stricter timelines for implementing treaty obligations, establish clear expectations for the outcomes of Trade Committee meetings, allocate a budget for engaging with civil society, and provide financial contributions to support Andean States' mitigation measures.¹⁰⁹ However, any amendments to the dispute settlement procedures – including the adoption of binding dispute settlement, trade sanctions for non-compliance, and additional procedures for civil society participation in EU-Andes cooperation – would require formal treaty amendment.

Furthermore, the process of modernizing the EU-Andes Agreement not only shapes but could also be shaped by the prospect of Bolivia's future accession to the agreement. Given the earlier failure to conclude a trade agreement with the Andean Community, this process may well depend on striking the right balance between the Parties' environmental aspirations and broader trade policy preferences.

Finally, future research might focus on how dispute settlement mechanisms may be incorporated into environmental-related commitments. In the case of Chile, one of the key aspects to analyse in future negotiations is how new environment and trade trends are being applied and assess the feasibility of incorporating them into Chilean agreements. While certain agreements selectively include dispute settlement rules within their environmental chapters, it would be interesting to see if the Chile-EU Association Agreement, the Modernized EU-Mexico Global Agreement, or the EU-Andes Agreement eventually adopt the binding dispute settlement proceedings and trade sanctions resolutions proposed by the EU, and how this will impact the future of their negotiations.

¹⁰⁷ *Ibid.*, at 159–161.

¹⁰⁸ Article 270(3) EU-Andes Agreement, *supra* n. 8.

¹⁰⁹ The authors would like to thank Yilly Vanessa Pacheco and Gregory Messenger for useful discussion on this point.