

Social and Sustainable Development Standards Provisions in European Union and United States FTAs

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Contents

1. Introduction.....	1
2. Key Messages.....	2
2.1. Context	2
2.2. Evolution of SDSS provisions.....	3
2.1.1. Pre-2004.....	4
2.1.2. New Generation FTAs	5
2.3. Summary	7
3. Social Standards.....	8
3.1. Labour Standards	9
3.2. Environmental Standards	11
4. Evolution of Social Standards in FTAs	12
4.1. Labour Standards	13
4.2. Environmental Standards	14
5. Social Standards in US Free Trade Agreements -	16
5.1. Labour Standards in US FTAs	18
5.2. Dispute Settlement on Labour standards.....	21
5.3. Environmental Standards in US FTAs –.....	25
5.4. Dispute Settlement on Environmental Standards -:	28
6. Social Standards in EU Free Trade Agreements.....	30
6.1. Labour Standards in EU FTAs	31
6.2. Environmental Standards in EU FTAs.....	33
6.3. Dispute Settlement	34
7. Inclusion of Social Standards in Mega FTAs	35
8. Conclusion	39

SOCIAL AND SUSTAINABLE DEVELOPMENT STANDARDS PROVISIONS IN EUROPEAN UNION AND UNITED STATES FTAS

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1. INTRODUCTION

In an increasingly interconnected world, the policies of one country can have an effect outside its own borders. Nowhere is this clearer than in the case of International Trade. With trade occurring through value chains, the action- particularly through lead actors - of one actor in the chain, can have knock on effects all along the chain. In other words, the blurring of borders with increasing trade liberalization has meant that the effect of increased trade is globalized rather than being restricted to national borders.

One of the consequences of the changing dynamics of international trade has been an increased scrutiny of new trade agreements and their possible impact on the environment. Since the days of the NAFTA, civil society actors and public officials alike have sought to understand the impact of Free Trade Agreements (FTAs) on the environment. Starting with sustainable impact assessments in the 90's, this effort culminated in the inclusion of Social and Sustainable Development Standards (SDSS) in the FTAs signed over the last decade.

The aim of this paper is to analyse SDSS provisions that have been incorporated in FTAs over the last decade with a focus on the broad trends in these provisions and to assess their possible effect. In particular, emphasis has been laid on the United States (US) and European Union (EU) FTAs post 2002, because they: 1) are the largest economies in the world; 2) are major hubs in GVCs; and 3) emphasize SDSS in their trade policy.

After presenting a summary of the conclusions of this paper in Section 2, Section 3 of this paper presents an understanding of what SDSS are and their import in the context of FTAs. Sections 4 maps the evolution of SDSS over the last 20 years and discusses

the tension between developed and developing countries in incorporating these standards in trade agreements. This is followed by an analysis of US and EU FTAs that contain SDSS provisions in Section 5 and 6 respectively. Section 7 looks at the role played by SDSS in the negotiation of mega-regional FTAs and analyses the effect SDSS FTAs could have on international trade and future trade negotiations.

2. KEY MESSAGES

While there are distinct US and EU approaches to SDSS provisions in FTAs, there are also commonalities. The inclusion of SDSS for instance was in response to domestic pressures in both the US and EU. We now turn to identifying and examining the broad trends that define the two approaches that should provide a basis for future research in this area.

2.1. CONTEXT

Provisions on sustainable development (and later SDSS) were first incorporated in US FTAs in response to domestic concerns over the environmental impact of trade agreements. The EU on the other hand has a long history of incorporating ‘democratic principles’ in its engagement with third parties. The first US trade agreement that incorporated sustainable development standards was the NAFTA which contained side agreements on the environment (NAAEC) and labour (NAALC). However, these agreements especially the NAAEC were a result of the legislative battle in the US over NAFTA rather than the “collective environmental conscience” among the governments of Canada, Mexico and the US.¹ This linking of trade agreements with SDSS was then confirmed as part of US trade policy by the Trade Act of 2002 and the Bipartisan Trade Agreement of 2007 which made it mandatory for US trade agreements to have provisions on environment and labour issues.

¹ Gary C. Hufbauer & Jeffrey J. Schott, *NAFTA Revisited: Achievements and Challenges* (Washington, DC.: Institute for International Economics, 2005) at 157. Also see, Freedom Kai-Phillips, “Climate Change, Sustainable Development and NAFTA: Regional policy harmonization as a sound basis for sustainable development”, Joint Workshop on Sustainable Development, the Submissions Process and Cross Boundary Energy Issues (2013).

The EU on the other hand has a different history with regard to SDSS. As discussed earlier, the EU included human rights provisions in its engagements with third parties starting with the Lomé IV Convention in 1989.² This provided a basis for inclusion of SDSS at the turn of this century when there was increased focus on the impact of trade agreements on the environment. Following the sustainability impacts of all FTAs commissioned by the EC in 2001, SDSS became part of EU trade policy in 2006. As part of its “Global Europe” strategy, the European Commission envisioned a new generation of trade agreements, which “...could include incorporating new co-operative provisions in areas relating to labour standards and environmental protection.”³ All EU FTAs concluding since (starting with EU-CARIFORUM in 2008) have included SDSS provisions.

It is interesting to note that the push for the inclusion of SDSS came from different sources, and trace their origins to different instruments in the US and EU. But, the formal recognition of SDSS as part of their respective trade policies happened at around the same time with the Bipartisan Trade deal (2007) in the US and the Global Europe strategy in the EU (2006). This culminated in the first new generation FTAs - US- Peru (2007) and EU-CARIFORUM (2008) - being signed within a year of each other.

2.2. EVOLUTION OF SDSS PROVISIONS

The evolution of SDSS provisions in FTAs can be divided into two phases. Until 2004, SDSS provisions were incorporated in FTAs in response to public pressure in the US and EU. These provisions were mostly non-binding commitments to promote sustainable development through trade. This phase is represented in Table 1. From 2004 onwards, the “new-generation” FTAs contain SDSS provisions that go much deeper and on a multiplicity of issues that were not on the agenda prior to 2004. This phase is represented in Table 2 below. The evolution of SDSS provisions from 2004

² Lorand Bartels, “Human rights and sustainable development obligations in EU free trade agreements” (2013), available at <http://www.academia.edu/1902855/Human_rights_and_sustainable_development_obligations_in_EU_free_trade_agreements>..

³ European Commission, “Global Europe: Competing for the World” (2006), at 12.

can be attributed to sustainable development goals becoming a part of both US and EU trade policy.

2.1.1. Pre-2004

Prior to 2004, both US and EU FTAs cited the promotion of sustainable development as one of the aims of the respective agreements. However, this was not backed up by concrete provisions. Most references to labour or environment issues were on non-binding commitments. An important component of US and EU trade policy at this point were impact assessment surveys which sought to understand the environmental impact of trade agreements. The NAAEC in the US and the impact assessment of all EU trade agreements in 2001 are examples of this. While the US extended the dispute settlement and enforcement mechanisms in the NAFTA to the environment chapter, this did not immediately result in the strengthening of the domestic regimes on environment issues.

Table 1: Overview of US/EU FTA provisions on SDSS prior to 2004

Issue	US FTAs	EU FTAs
Commitment to protection of environment as one of the goals of FTA	Yes Starting with NAAEC (1994)	Yes Starting with EU-South Africa (2000)
Commitment to improvement of labour standards as one of the goals of FTA	Yes Starting with NAALC (1994)	Yes Starting with EU-South Africa (2000)
Reference to ILO Core Principles	Yes	No
Reference to MEAs	No	No
Impact Assessment of FTAs	Yes Starting with NAFTA (1994)	No
Consultations/Dispute settlement on labour or environment issues	Yes Starting with NAFTA (1994)	No
Reform of Domestic legal regime	No	No
Creation of indigenous SDSS	No	No
Enforcement mechanisms	Yes Starting with NAFTA (1994)	No

2.1.2. New Generation FTAs

The US-Peru (2007) and EU-CARIFORUM (2008) FTAs marked the first “new-generation” FTAs, which dealt with more issues and had deeper commitments.

Environment and labour were two areas where both the US and EU began to make binding commitments on new issues. Reflective of the sustainable development issues discussed in other fora, these FTAs contain SDSS provisions on issues as diverse as decent work, climate change and marine conservation to name a few.

There has also been a discernible push to incorporate commitments made in other treaties like the ILO Core labour principles or Multilateral Environmental Agreements (MEAs). There are some overlaps in the US and EU approach to SDSS. The overlap is most evident in the labour standards provisions. Both US and EU FTAs refer to the core ILO standards in their respective sustainability provisions. This is in line with the ILO being the primary source of labour standards (as contrasted with environmental standards). Both US and EU FTAs set the ILO standards as a minimum level of protection which cannot be derogated from. While the US allows for disputes to be brought on labour issues, the EU follows an approach based on consultations, and monitoring and evaluation. The EU in some FTAs goes a step further by according the ILO a consultant role in technical matters related to labour standards. The EU-CARIFORUM FTA for instance calls for the involvement of the ILO as a technical expert in the monitoring and evaluation of labour practices (Article 195).

On environment issues, however there is significant differences in the US and EU approaches. Starting with NAFTA, the US was concerned with effective enforcement of environmental laws as it raised concerns over competitiveness.⁴ This concern over effective enforcement is evident in the environmental provisions as the US FTAs link the environmental chapter to MEAs and is also subject to dispute settlement. The EU on the other hand follows a more incentive based approach. While EU FTAs are also linked to existing MEAs, the environmental chapters also reflect regional sensitivities in having separate provisions on Fish and Forest Products (EU-Central America

⁴ Chris Wold, “Evaluating Nafta and The Commission For Environmental Cooperation: Lessons For Integrating Trade And Environment In Free Trade Agreements”, 27 (1) Saint Louis University Public Law Review (2008), 201.

Articles 289 and 290). Further, EU FTAs also stress the importance of the development and exchange of scientific information, and capacity building in developing countries. This is reflected in their FTA strategy⁵ and also in the individual Sustainability Chapters. The former explicitly lists the exchange of information as a goal of EU trade policy, while the latter set up mechanisms to not only facilitate the exchange of information but to also develop local or regional standards (EU-CARIFORUM and EU-Central America).

The contrasting (and sometimes overlapping) approaches adopted by the US and EU will perhaps come to a head in the ongoing negotiations of the “Mega-FTAs”. The TPP to which the US is a party represents an extension of American policy in other FTAs as it seeks to negotiate an agreement based on strengthening enforcement mechanisms through dispute settlement and penalties. The TTIP, to which both the US and EU are parties is interesting as it could produce a synthesis of the two approaches.

Table 2: SDSS in FTAs/Mega-FTAs since 2004

Issue	US FTAs	EU FTAs	TPP	TTIP
Dispute Settlement on SDSS	Yes Environment and labour obligations in par with commercial provisions post bipartisan deal	No Sustainability Chapter excluded from Dispute Settlement E.g.- EU-Central America	Yes	N/A
Reform of domestic legal regime	Yes	No	No	Yes
Harmonizing standards	No	Yes, if domestic standards don not exist E.g.- EU-CARIFORUM	No	Yes
Regional Integration	No	Yes E.g.- EU-CARIFORUM	No, but calls for regional cooperation in marine conservation	N/A

⁵ European Commission, On Trade and Environment, COM (96), available at <<http://ec.europa.eu/environment/integration/pdf/9654.pdf>>.

Strengthening Enforcement mechanisms	Yes	No, binds to existing levels of commitment	Yes	Expected
Penalties for non-conforming standards	Yes through fines or suspension of tariff benefits. Eg. US - Peru	No	No	N/A
Technical Expert groups	No	Yes, in addition to Trade board sets up technical committees of experts E.g.- EU-CARIFORUM	No, but technical experts have a role to play in the dispute resolution process	On EU agenda for negotiations
Trade and Development Boards	Yes, through labour and environmental cooperation mechanisms	Yes, multi-stakeholder body including NGOs, citizen groups	Yes, a trade and environment committee fulfils this role	EU wants civil society participation in labour and environment issues
Commitments on Decent Work	No	Yes E.g.- EU-Korea	N/A	On EU agenda for negotiations
Voluntary Standards	Yes	No	Yes	Expected
Endangered species	Yes through CITES	Yes	Yes	Expected
Climate change	No	Yes E.g.- EU-Central America	Yes	Expected
Fisheries / Marine Conservation	Yes through IWC	Yes E.g., EU-Central America	Yes	Expected
Reference to MEAs	Yes but from US –Peru (2007)	Yes	Yes	Expected
Reference to ILO Core Principles	Yes	Yes	Yes	Expected

2.3. SUMMARY

There is a distinct US and EU approach to SDSS, with some overlaps. Both the approaches have evolved in different contexts and as a result of differing domestic concerns. While the US approach owes its origins to a legislative tussle over NAFTA, the EU approach is a product of the “European Social Model” that sought to export democratic and human rights principles to its trading partners.

This fundamental difference is evident in their respective FTAs. Since the NAFTA, domestic concerns over competitiveness due to the lack of effective implementation of labour and environment laws meant that US FTAs are centered on the implementation of existing international standards. The EU, which takes a more incentive based approach, relies on technical cooperation and information sharing. This is reflected in their FTAs, which stress on the importance of technical expertise, periodic reviews and civil society involvement.

With differing policy objectives, the dispute settlement mechanisms are oriented to serve these objectives. The US with its emphasis on effective implementation relies on a more adversarial approach with a panel being the last resort. The EU, which has eschewed a sanctions based approach, relies on further consultations with technical inputs and third party arbiters (like the ILO) to resolve disputes.

Keeping these differences in mind, it must however be pointed out that new generation FTAs signed by both the US and EU do have significant overlaps, such as:

- 1) Both still largely rely on consultations to resolve differences with arbitration a last resort even in US practice.
- 2) Both the US and EU FTAs favour a State centric approach in contrast with investment agreements that give the right to corporations/individuals to sue States.
- 3) Finally, in engaging with developing countries the US and EU FTAs have a lot in common in undertaking to provide technical support and capacity building in the creation and implementation of SDSS.
- 4) Both in their agenda promote international standards.

3. SOCIAL STANDARDS

SDSS comprise of both labour as well as environmental standards. They can be formal or informal. Formal SDSS are established at a national level by respective governments and authorities. Formal SDSS are statutory and compulsory, and non-compliance with formal standards could lead to sanctions. Informal SDSS on the other hand, comprise of Voluntary Standards, and a myriad of private standards and other international standards.

SDSS are often an issue of contention between developing and developed countries. Developed countries argue that SDSS are essential to promote sustainable development and welfare; and that lower standards can result in unfair competition, “social dumping” or “race to the bottom”. However, the opponents of SDSS from developing countries say that SDSS provisions, which are linked to trade, are mere protectionist measures in the guise of social welfare.

Voluntary standards are important informal SDSS in the context of trade agreements. The use of voluntary standards, including “private standards”, has been contentious, particularly under the SPS and TBT agreements. The use of these standards by developed countries in labelling products has come under criticism by developing countries who claim that it leads to an erosion of market access.⁶

In FTAs, voluntary standards are incorporated as market based mechanisms. These standards include Product and Production Measures (PPMs) related to social criteria like environmental protection and labour rights. While legally voluntary, they can *de facto* become mandatory through the market power of voluntary standards, with the applying companies using them as supply chain management tools. In quite a number of cases, governments in developed countries encourage or even insist on voluntary standards to achieve specific objectives.

3.1. LABOUR STANDARDS

Since 1919, the International Labour Organization (ILO) has developed and maintained a system of international labour standards to promote opportunities for women and men to obtain decent and productive work. The ILO believes that these standards are essential in ensuring that the growth of the global economy provides benefit to all.⁷

International labour standards as defined by the ILO are legal instruments, which define basic minimum standards in the world of work. These standards are drawn up

⁶ See for a discussion, Halina Ward and Mai-Lan Ha, “Voluntary Social and Environmental Standards and Public Governance: Reviewing the Evidence and Setting Principles for Standards-setters”, FDSD (September, 2012) at 12.

⁷ Introduction to International Labour Standards, available at <<http://ilo.org/global/standards/introduction-to-international-labour-standards/lang--en/index.htm>>

by ILO's constituents (governments, employers and workers).⁸ International labour standards are either in form of conventions or recommendations; the former are legally binding international treaties whereas the latter serves as non-binding guidelines.⁹

The ILOs governing body has identified eight conventions as “fundamental” on labour standards¹⁰ –

- (a) Convention on Forced or Compulsory Labour (1930);
- (b) Convention on Freedom of Association and Protection of the Right to Organise (1948);
- (c) Convention on Right to Organise and Collective Bargaining (1949);
- (d) Convention on Equal Remuneration (1951);
- (e) Convention on Abolition of Forced Labour (1957);
- (f) Convention on Discrimination (Employment and Occupation) (1958);
- (g) Convention on Minimum Age (1973);
- (h) Convention on Worst Forms of Child Labour (1999).

By 2011, the number of ILO conventions which consisted of labour standards were 189, which led to the adoption of the ILO Declaration on Fundamental Principles and

⁸ Available at <http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_318141.pdf>

⁹ Conventions and Recommendations, available at <<http://ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm>>

¹⁰ Available at <http://www.bmz.de/en/what_we_do/issues/wirtschaft/sozialstandards/kernarbeitsnormen/index.html>

Rights at Work and its follow up.¹¹ This declaration established Core Labour Standards, which are also known as “enabling rights”¹².

These are a set of four internationally recognized basic rights and principles at work:¹³

- (i) Freedom of Association and the effective recognition of the right to collective bargaining;
- (ii) Elimination of all forms of forced or compulsory labour;
- (iii) Effective abolition of child labour; and
- (iv) Elimination of discrimination in respect of employment and occupation.

Core Labour Standards are also known as *qualitative SDSS* and are not intended to alter the comparative advantage of any country. They are applied to all parties whether or not they have ratified them or not. These rights have already been articulated before in the Universal Declaration of Human Rights, 1948, the Convention on the Rights of Child and the International Covenant on Economic, Social and Cultural Rights.

3.2. ENVIRONMENTAL STANDARDS

Unlike labour standards, there exists no unified code of environmental standards at the international level. The standards that are developed are either developed at the national level by regulators (e.g. EPA) or by private (e.g. ISO) or public sector organizations (WTO Phytosanitary Standards) at the international level. Given the plurality of actors who design these standards, their scope, purpose and effect are naturally diverse.

Environmental standards were traditionally seen as instruments that would define the conditions necessary to protect plant and animal life;¹⁴ or as physical instruments that

¹¹ Available at <<http://ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm>>

¹² “To enable people to claim (on the basis of equality of opportunity) fair compensation and to fully achieve their potential as human beings.” (See Amy Luinstra, “Labor Standards and Trade,” 2004, at 3)

¹³ ADB and ILO, “Core Labor Standards Handbook”, October 2006.

¹⁴ See for instance the UK definition of an environmental standard, <http://www.sepa.org.uk/water/hydropower/applying_for_a_licence/environmental_standards.aspx>.

aim to avoid the negative health consequences of exposure to pollution and also protect the environment.¹⁵ However, the contemporary view of environmental standards and environmental policy is that they should support sustainable development.¹⁶

Since our concern is the nexus between SDSS and trade, in the following section, we will identify the trends in incorporation of labour and environmental standards in FTAs.

4. EVOLUTION OF SOCIAL STANDARDS IN FTAs

SDSS when linked with trade often become an issue of dispute between developed and developing countries. Particularly concerned with the increasing resource depletion, environmental degradation and instances of human rights abuses in the work place, developed countries make the case for the inclusion of SDSS. Developing countries see the entwining of SDSS with trade policy as a threat to their economic and political sovereignty. However, it is noteworthy that the WTO Agreement on Technical Barriers to Trade allows environmental objectives as a justification for establishing standards which may have trade effects.

The clearest sign of a major divide came out in the open during the 1996 Singapore WTO ministerial conference where labour issues were discussed and 1999 Seattle WTO Ministerial Conferences wherein issues relating to environmental protection were discussed. In both the ministerial conferences developing countries blocked the debate on including social clauses in trade agreements. Nonetheless, as part of the overall trend towards bilateralization of trade relations, developed countries have preferred to follow the FTA route to incorporate SDSS in trade instruments. The EU and the US are among members who have used their FTAs to incorporate SDSS as part of their trade policy.

Some agreements which strongly emphasize standards on labour and environmental protection include the US FTAs with Panama, Columbia and South Korea (KORUS).

¹⁵ Luc Hens, *Types of Standards* in "Environmental Regulations and Standard Setting", Encyclopaedia of Life Support Systems, available at <<http://www.eolss.net/Sample-Chapters/C09/E4-22-04-00.pdf>>.

¹⁶ Ibid.

These are also considered as Gold Standards Agreements with WTO Plus provisions.¹⁷

4.1. LABOUR STANDARDS

The main reasons put forth by those seeking strong labour standards include a range of diverse points: as long as poor labour standards exist in one country, workers everywhere will be hurt; Governments that neglect or oppress their labourers make the choice to strip their own citizens of their rights as human beings; they create unfair pressure in the global economy; low labour standards in countries competing on the basis of costs could lead to a global “race to the bottom” creating poor conditions and loss of freedom in the global South, and that they cause workers in the global North to lose their jobs to cheap outsourced labour.¹⁸

Emphasis on labour standards being met by producers has also come due to increasing demand for this by consumers and investors. This has led to establishing new norms for following labour standards in commercial transactions and also shaped the rules of international trade. One such example is the Foxconn Technology group, a Taiwanese multinational electronic contract manufacturing company, which was accused of poor labour conditions in the factory manufacturing Apple products.¹⁹ Due to this, Apple was also criticised for poor labour standards along the supply chain and Apple had to get verification of Foxconn by Fair Labour Association.²⁰

Thus, international labour standards respond to a growing number of needs and challenges faced by workers and employers in the global economy.²¹ Labour standards as such are not part of the WTO legal framework. The Ministerial Declaration at the Singapore meeting of WTO mentions ILO as the competent body to negotiate labour standards. Linking of these standards with trade evokes strong

¹⁷ Available at

<[http://www.europarl.europa.eu/RegData/etudes/briefing_note/join/2013/491479/EXPO-INTA_SP\(2013\)491479_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/briefing_note/join/2013/491479/EXPO-INTA_SP(2013)491479_EN.pdf)>.

¹⁸ International Labor Rights Foundation, “Changing Global Trade Rules”, available at

<<http://www.laborrights.org/creating-a-sweatfree-world/changing-global-trade-rules>>.

¹⁹ Available at <<http://www.theguardian.com/sustainable-business/apple-act-on-labour-right>>.

²⁰ Available at <http://www.fairlabor.org/press-release/final_foxconn_verification_report>

²¹ Subjects covered by International Labour Standards, see <<http://ilo.org/global/standards/subjects-covered-by-international-labour-standards/lang--en/index.htm>>

feelings and international enforcement of these standards becomes difficult due to lack of impartial or objective criteria for assessing the compliance of these standards or estimating their impact on trade.²²

The four basic internationally – recognized labour principles, as stated in the **ILO Declaration on Fundamental Principles and Rights at Work**²³ are: -

- (i) Freedom of association;
- (ii) The effective recognition of the right to collective bargaining;
- (iii) The effective abolition of child labour and a prohibition on the worst forms of child labour; and
- (iv) The elimination of discrimination in respect of employment between the parties

The first FTA involving labour standards was the North American Agreement on Labour Cooperation (NAALC). This agreement was negotiated along with the NAFTA.²⁴ Like the US, the European Commission has clearly stated their stance that through FTAs “they try to promote the link between trade and social development (outside the Doha development round) in a number of ways”.²⁵

Therefore, FTAs are one of the important ways to link labour standards and trade in an increasingly comprehensive manner. As per a study, 190 countries currently have FTAs out of which, 120 countries have agreements with provisions on labour standards.²⁶ Ongoing mega-regionals such as the Trans-Pacific Partnership Agreement also include labour issues among the subject covered by them.

4.2. ENVIRONMENTAL STANDARDS

The right of a Member to protect the environment has been recognised in the General Exception clause (Article XX) of the GATT from its very inception. The chapeau of WTO also includes sustainable development as a key objective of the Agreement.

²² Samira Salem, Faina Rozental , “ Labour Standards and Trade : Review of Recent Empirical Evidence” , available at http://www.usitc.gov/journals/LaborStandardsandTrade_final%209_12.pdf.

²³ Available at <<http://www.ilo.org/declaration/lang--en/index.htm>>.

²⁴ Available at <http://www.aienetwork.org/pdfs/aug_workshop/day3/3-5_Chia.pdf>

²⁵ Available at <http://www.wto.org/english/forums_e/ngo_e/posp63_ioe_e.pdf>.

²⁶ International Labour Organisation and International Institute for Labour Studies, “Studies on Growth and equity Social Dimension of Free Trade Agreements”.

The Doha Round negotiations include environment as a specific area for negotiating new rules. A Plurilateral Environmental Goods Agreement is currently being negotiated at the WTO at present. However, till now, the WTO has no specific agreement dealing with the environment. While there has been little progress in this area at the multilateral level, domestic pressures and the realization of the cost placed on the environment by international trade forced developed countries into looking at environmental standards more seriously at a bilateral level.

Today, most FTAs concluded by OECD countries contain provisions on environmental standards especially the EU, US, Canada and New Zealand. However, the trend of inclusion of environmental standards in FTAs started with NAFTA.²⁷ Given the domestic opposition to the NAFTA within the US based on growing concerns over environmental pollution, the inclusion of provisions on the environment became a necessary condition to this treaty receiving Congressional approval. As a result, the North American Agreement on Environmental Cooperation (NAAEC) was signed as a side agreement to the NAFTA. It also required the setting up of the Commission for Environmental Cooperation (CEC), which would conduct environmental impact assessments of the NAFTA.²⁸

Similarly, in the EU domestic pressure led to a request from the EU General Council to carry out sustainable impact assessments of all existing trade agreements in 2001.²⁹ The process began in 2003 and every FTA signed by the EU since then has included provisions on the environment and sustainable development.

The existence of a unified set of labour standards administered by the ILO makes their incorporation simpler. However, environmental standards are numerous and are enacted by a plurality of sources. Thus the only instruments that have the same level of consensus as ILO standards are existing Multilateral Environmental Agreements (MEA). This is common to both EU and US FTAs. Given the complexity and diversity in environmental standards, FTAs also shy away from making explicit commitments for harmonization of environmental standards.

²⁷Stephen P. Mumme, "NAFTA and Environment, Foreign Policy in Focus", Oct. 1999, available at <<http://www.fpif.org/briefs/vol4/v4n26nafta.html>>

²⁸ Available at, <<http://www.cec.org/Page.asp?PageID=924&SiteNodeID=310>>

²⁹ Available at, <http://ec.europa.eu/environment/integration/trade_en.htm>.

Since we often need to understand or address environmental issues based on scientific data, the focus in these agreements is to emphasize the use and production of scientific information through government consultations and monitoring mechanisms. While NAFTA set the template for such cooperation, later agreements have relied on and improved this model.

We consider below the main features of social and environmental standards related disciplines in US FTAs.

5. SOCIAL STANDARDS IN US FREE TRADE AGREEMENTS -

There has been a steady rise in US FTAs with its trading partners since the Trade Act of 2002.³⁰ The US has signed 13 FTAs post 2002. The Act primarily focuses on ensuring that trade and environmental policies are mutually supportive to protect and preserve the environment, by –

- (i) Ensuring that parties to the agreement do not fail to effectively enforce their environmental laws;
- (ii) No weakening or reducing the environment or labour laws;
- (iii) Establishing a consultative mechanism to strengthen the capacity to develop and implement standards for the protection of environment and human health.

Another benchmark relating to US FTAs is the Bipartisan Agreement on Trade Policy, agreed on May 2007. This agreement makes it obligatory for the US and its trading partners to include labour and environmental provisions have to be included in their FTAs. The domestic legislation of both the parties, forming the basis of these FTAs, should be as per the ILO Declaration on Fundamental Principles and Rights at Work and their domestic labour laws should be properly enforced.³¹

³⁰ One Hundred Seventh Congress of the United States of America at the second session H.R 3009, available at, <<http://www.gpo.gov/fdsys/pkg/BILLS-107hr3009enr/pdf/BILLS-107hr3009enr.pdf>>.

³¹ Available at, <http://ilo.org/global/standards/information-resources-and-publications/free-trade-agreements-and-labour-rights/WCMS_115531/lang--en/index.htm>.

As per the bipartisan agreement, the dispute settlement procedure can be invoked by either party for a labour violation under a FTA. Violation of labour provisions in FTAs requires showing that non-enforcement of labour obligations has occurred through a sustained or recurring course of action or inaction. The available remedies are fines or trade benefit suspensions.³²

With respect to environment provisions, the bipartisan agreement has linked Multilateral Environmental Agreements (MEAs) with commitments in US FTAs and further to the dispute settlement mechanism. After the bipartisan agreement, the text was changed from a “shall ensure” to a “shall strive to ensure” obligation i.e. the domestic laws and policies provide for and encourage high levels of environmental protection. Therefore, domestic laws should not violate MEAs mentioned in agreement irrespective of whether they are a party to it or not. This could mean if any of the party does not adhere to standards in these MEAs the measure could be subject to the dispute settlement mechanism of the FTA. As we have seen that post-Bipartisan Agreement of 2007, environmental and labour provisions have the same status as commercial provisions of the FTAs and violation of a MEA could lead to fines or suspension of tariff benefits.³³

Prior to the Bipartisan Agreement, the US FTAs consisted of clauses enforcing existing labour laws, regardless of whether they met international standards. There were no penalties, such as fine or trade benefit suspension, for parties whose laws fail to uphold workers' rights.³⁴ It was also not compulsory to incorporate the provision of MEAs in their domestic legislations. Finally, both labour and environment chapters did not possess the same status as commercial provisions of FTA, with regards to the dispute settlement mechanism.

Following are the FTAs signed by US with its trading partners after 2001, with two aforementioned benchmarks, the Trade act of 2002 and the Bipartisan Agreement of

³²Available at

<http://www.ustr.gov/sites/default/files/uploads/factsheets/2007/asset_upload_file127_11319.pdf>

³³Available at

<http://www.ustr.gov/sites/default/files/uploads/factsheets/2007/asset_upload_file127_11319.pdf>

³⁴ Available at <<http://www.hrw.org/reports/2008/us1008/us1008web.pdf>>

2007: -

Table 3: Free Trade Agreements signed by the United States from 2001-Present

Year	Free Trade Agreement
2001	The United States–Jordan Free Trade Agreement (USJFTA)
2002	<u>The Trade Act of 2002</u>
2004	The United States -Singapore Free Trade Agreement (USSFTA)
2004	The Australia-United States Free Trade Agreement (AUSFTA)
2004	The United States-Chile Free Trade Agreement (USCFTA)
2005	Dominican Republic-Central America Free Trade Agreement (DRCAFTA)
2006	The US-Morocco Free Trade Agreement (USMFTA)
2006	The United States - Oman Free Trade Agreement (USOFTA)
2006	The United States–Bahrain Free Trade Agreement (USBFTA)
2007	<u>Bipartisan Agreement on Trade Policy, 2007</u>
2007	The United States–Peru Trade Promotion Agreement (PTPA)
2011	The United States—Panama Trade Promotion Agreement (TPA)
2011	The United States – Republic of Korea Free Trade Agreement (KORUS)
2011	The United States-Colombia Trade Promotion Agreement (CTPA)

5.1. LABOUR STANDARDS IN US FTAs

The mention of labour standards in US FTAs starts with the preamble itself, which recognizes the need to promote higher labour standards on the basis of international commitments and also ensuring that there is effective enforcement of labour laws.

All parties to FTAs reaffirm their commitment to the ILO declaration on Fundamental Principles and Rights at work. Agreements also clearly state that both parties have the right to establish their own domestic labour standards and laws with an exception that those standards are not lower than the internationally recognized labour rights.

The FTAs have defined the term labour laws as any statutes, regulations or provisions, which are directly related to the internationally recognized labour rights. The agreements make it obligatory for them to recognize and protect international labour rights in their domestic laws. Before 2007, i.e. before the Bipartisan trade deal, the FTAs used the language “shall strive to ensure” that the core ILO rights are recognized and protected by their domestic laws. However, after 2007 the language was changed to “adopt and maintain” ILO core labour standards in their domestic legislation.³⁵ Therefore, in FTAs of Panama, Peru, Colombia and Korea it is compulsory to adopt the ILO standards in the domestic legislations.³⁶

During the negotiations of several US FTAs, the parties have raised many issues on the existing SDSS that are considered a deadlock and hurdle to the FTAs. For instance, in the United States - Panama Free Trade Agreement, the US Trade Representative (USTR) pointed out the reservations on the aspect of freedom of association, abuse of temporary contracts and the enforcement of child labour legislation in Panama. Later, these issues were addressed by domestic legislative amendments in Panama and a bureau was established to combat child labour. Likewise, there were also other domestic amendments to improve freedom of association and provide legal protection to contract employees.³⁷

Meanwhile, during the negotiations for US – Peru FTA, concerns were raised of domestic legislation of using temporary employment, outsourcing arrangements for anti-union purposes. The FTA therefore provided powers to Peruvian labour

³⁵ Abby Lindsay, “FTA Innovation in Environmental Protection and Economic development”.

³⁶ Elliott and Freeman, “Can Labor Standards Improve under Globalization?” 2003; Mary Jane Bolle, “Overview of Labor Enforcement Issues,” 2008.

³⁷ International Labour Organisation & International Institute for Labour studies, “Studies and growth and equity, Social dimensions of Free Trade Agreements”, Available at <http://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_228965.pdf>

inspectors to sanction fraud of temporary contracts and outsourcing.³⁸ The FTA between United States and Morocco had brought some reforms in the labour laws of Morocco, by improving domestic labour standards.³⁹ In particular, the reforms accorded protection to the labourers, from any discrimination in joining trade unions including reinstatement and back pay, reduction of weekly work hours from 48 to 44, increase in working age, from 12 to 15 years and periodic review of minimum wage level.⁴⁰

In the FTA between Oman and the United States, during the negotiations, objections were raised by the United States on labour rights in Oman especially on the absence of the right to form trade unions. The Omani government later reformed the domestic laws to include rights to organize, bargain, to form trade unions and prohibition on forced and child labour.

Finally, in the US – Colombia FTA, there was a deadlock for several years due to concerns regarding the issue of labour standards, particularly serious instances of trade union violations, lack of adequate punishment for the perpetrators of violence, weak enforcement of International Labour Organization (ILO) core labour standards and addressing that through their incorporation in Colombian labour laws i.e. the right to organize and bargain collectively, prohibition of forced or compulsory labour, prohibition of child labour and minimum wage for employment etc⁴¹. To end this deadlock a labour related action plan was chalked down and the Colombian government took steps to improve the standards by increasing protection to the trade unions as well as by appointing labour inspectors. Finally, after five years of deadlock the US Congress ratified the agreement in 2011.⁴²

Another attempt by the United States to promote labour standards is the US GSP scheme, which provides that beneficiary countries could lose some or all of their privileges if they do not respect labour rights.⁴³ It is presumed that withdrawal of benefits result in improvement of enforcement of labour rights. However, in reality

³⁸ Id.

³⁹ Susan Ariel Aaronson & Jamie M. Zimmerman, “Trade Imbalance: The Struggle to Weigh Human Rights Concerns in Trade Policymaking”, Available at <<http://www.ejil.org/pdfs/20/2/1810.pdf>>

⁴⁰ ICFTU Annual Survey of Trade Union Rights, 2006

⁴¹ Available at <<http://fas.org/sgp/crs/row/RL34759.pdf>>

⁴² Available at, <<http://colombiareports.co/us-congress-ratifies-colombia-fta/>>

⁴³ Available at http://unctad.org/en/docs/itcdtsbmisc58rev2_en.pdf

the only example is of Chile, the basis for whose beneficiary status being withdrawn was to improve domestic labour rights. Later the beneficiary status was restored apparently without concrete evidence of any substantive improvement in domestic labour laws.⁴⁴

US FTAs also establish a labour cooperation mechanism with a special Annex between the US and its trading partners, recognizing that it is very important to promote the ILO declaration. The mechanism in the Annex on labour cooperation entails in detail several arenas where the parties can work jointly, namely, promoting the collection and publication of comparable data on labour standards, promoting ILO declarations, sharing information on standards etc. This cooperation mechanism could also be seen as an attempt to for capacity building to ensure that the standards are enforced.

Therefore, we can very well see that the US in their FTA negotiations has been very serious about enforcement of international labour standards. This at times has also led to reforms in domestic labour laws of their trading partners.

5.2. DISPUTE SETTLEMENT ON LABOUR STANDARDS

The US FTAs stress importance on effective enforcement of labour laws through sustained or recurring course of action or inaction. After the bipartisan deal of 2007, the US FTAs link the dispute settlement mechanism of FTAs with not just enforcement of domestic labour laws of the parties but the whole labour chapter. In case of non-implementation of certain disputes, the complaining party may request a panel to impose annual monetary assessment not exceeding 15 million dollars. This money is paid into a fund established by the Joint Committee for 'appropriate labour initiatives' such as efforts to improve or enhance law enforcement in the territory of the party complained against, consistent with its law. However, if the funds cannot be obtained, then the final measures could include suspending tariff benefits under the agreement.

⁴⁴ Available at http://www.icrier.org/pdf/Policy_Series_No_7.pdf

As of February, 2015 a total of 7 labour disputes have been filed under US FTAs. The disputes have been filed under the North American Agreement on Labour Cooperation (NAALC), US- CAFTA - DR, US- Peru and US-Bahrain FTAs.⁴⁵ The complaints in CAFTA – DR against Dominican Republic, Guatemala and Honduras, were allegedly on systematic failure to enforce domestic labor standards.⁴⁶ Importantly, the dispute with Costa Rica was withdrawn, and with Peru was closed after issues raised were addressed.⁴⁷

The North American Agreement on Labour Cooperation (NAALC) was the first FTA having a dispute settlement mechanism on labour standards on the basis of a party's failure to occupational safety, health, child labour and minimum wage standards and is enforceable, under certain circumstances, with sanctions.⁴⁸ In 2011, under the North American agreement on labour cooperation a dispute arose between the US and Mexico. The main contention was the failure of the Mexican government in upholding their commitments under the agreement. Currently, the dispute is still under investigation.⁴⁹

The US – Jordan FTA (2001), much before the bipartisan deal of 2007, was the first attempt by the parties to have the same dispute resolution mechanism for labour right violations as well as commercial issues. However, later the Bush administration in a side letter to the Government of Jordan, mentioned that the US did not intend to invoke the agreements dispute settlement process in labour issues.⁵⁰

The US – Peru FTA in 2007, which was the first FTA to bring the whole labour chapter under the purview of dispute settlement mechanism, including provision on

⁴⁵ American Federation of Labor and Congress of Industrial Organizations, available at <<http://www.aflcio.org>>

⁴⁶ Available at, <http://www.ilo.org/wcmsp5/groups/public/---dgreports/--inst/documents/publication/wcms_228965.pdf>

⁴⁷ The case was closed in August 2012 after the US Office of Trade and Labor Affairs (OTLA) determined that the issues raised by the complaint had been sufficiently addressed and did not require consultations; OTLA 2012

⁴⁸ Mary Jane Bolle, "Overview of Labour Enforcement Issues", 2008.

⁴⁹ Available at <<http://www.dol.gov/ilab/reports/pdf/FRNMexicoExtension.pdf>>.

⁵⁰ Available at, <<http://www.hrw.org/reports/2008/us1008/us1008web.pdf>>; Side Letter on Labor and Environment from Ambassador Robert B. Zoellick, US Trade Representative, to His Excellency Marwan Muasher, Ambassador of the Hashemite Kingdom of Jordan to the United States, July 23, 2001.

labour standards. In the labour dispute between the US and Peru under their FTA, allegations by the employees were against their employer and also the Peruvian government for not complying with their domestic laws on collective bargaining. The investigation done by the Department of labour did not find the government guilty but the employer guilty of not complying with Peruvian Law on collective bargaining. However, due willingness of the parties to resolve the issue further consultations did not happen.⁵¹

Under the US – CAFTA DR, United States have labour disputes with Guatemala, the Dominican Republic and Honduras. In the dispute with Guatemala, the US Department of Labour received submission from worker organizations alleging non-enforcement of domestic labour laws. In the investigation conducted by the US Department of Labour, it was established that there was non-enforcement of domestic labour laws⁵². This led to establishment of a panel under the dispute settlement mechanism of the FTA, to enforce domestic labour standards and a 18 point enforcement plan was set up. However, the same 18 point enforcement plan was also not implemented by the Guatemalan government.⁵³ ⁵⁴ As of now, the USTR announced that it is continuing with the case against under Guatemala under CAFTA DR and to that Senator Ben Cardin made a very interesting statement saying “International trade is good for America, but it must be based on international standards that protect workers, both at home and with our trading partners.”⁵⁵ This is an example of how the US is serious about enforcement of domestic labour laws of other parties, through FTAs.

Another dispute regarding failure of domestic labour laws is with the Dominican Republic on the issues child labour, forced labour and human trafficking.⁵⁶ A report was published by the US Department of Labour giving recommendation to the

⁵¹ Available at <<http://www.dol.gov/ilab/reports/pdf/PeruSubmission2012.pdf>>

⁵² Available at, <<http://www.dol.gov/ilab/trade/agreements/guatemalasub.htm>>

⁵³ Available at <<http://www.dol.gov/ilab/trade/agreements/guatemalasub.htm>>

⁵⁴ Available at <<http://www.dol.gov/ilab/reports/pdf/0413GuatEnforcementPlan.pdf>>

⁵⁵ Available at <<https://ustr.gov/about-us/policy-offices/press-office/blog/2014/September/What-Theyre-Saying-US-Proceeds-with-Labor-Enforcement-Case-Against-Guatemala>>

⁵⁶ Available at <<http://www.dol.gov/ilab/reports/pdf/DRSubmission2011.pdf>>

government of the Dominican Republic in addressing this issue of non- enforcement of labour laws in their sugar industry. A differing fact in this dispute is that the US department of labour after issuing the report, decided to work with the Dominican Republic government in implementing the recommendations given in the report.⁵⁷⁵⁸

The third dispute under US - CAFTA DR is with Honduras, in which the US Department of Labour received a submission from the trade unions alleging that the Honduran government has denied them the right to freedom of association, to organize and right to bargain collectively, child labour and unacceptable conditions of work in the auto manufacturing, agriculture and port sectors.⁵⁹ This was alleged to be in violation of the FTA. In February 2015, the US Department of labour issued the investigation report raising serious concerns on the protection and promotion of internationally recognized labor rights in Honduras and non-enforcement of their domestic labour laws.

Finally, under the US-Bahrain FTA, the US department of Labour received a submission from trade unions in Bahrain alleging that the government had not upheld the right of association and discriminated against the trade unionists.⁶⁰ It was also alleged that labour standards in Bahrain were not consistent with internationally recognized labour rights and that the government not striving to improve those standards. This was in contravention of the FTA. However, this led to reforms in Bahraini law by making dismissal of any workers for union activities as illegal and a provision for compensation and reinstatement if any worker has been discriminated because of his membership in a trade union.

It is pertinent to note that the US through dispute settlement mechanism of its FTAs ensures that internationally recognized labour standards are present in the domestic laws of their partners and their labour laws are correctly and effectively enforced.

⁵⁷ Available at <<http://www.dol.gov/ilab/trade/agreements/dominicanrepub.htm>>

⁵⁸ The report is available at <<http://www.dol.gov/ilab/reports/pdf/20130926DR.pdf>>

⁵⁹ Available at <<http://www.dol.gov/ilab/reports/pdf/HondurasSubmission2012.pdf>>

⁶⁰ Available at <<http://www.dol.gov/ilab/trade/agreements/bahrainsub.htm>>

5.3. ENVIRONMENTAL STANDARDS IN US FTAs –

The need for environmental protection in a US FTA starts from the preamble itself by mentioning about promoting sustainable development to protect and preserve the environment and importance of MEAs in doing so.

Generally, environmental standards in FTAs aim to serve the following purposes:

- (i) Promote sustainable development;
- (ii) Create a level playing field and improve environmental cooperation through environmental standards; and
- (iii) Pursue an international environmental agenda through trade agreements by linking them with Multilateral Environmental Agreements (MEAs).

Environment chapters in US FTAs are based on the North American Agreement on Environmental Cooperation (NAAEC), a side agreement of NAFTA, which is an agreement between the United States, Mexico and Canada. The main reason behind NAAEC was the difference among the three countries in their environmental standards, due to which, there was a concern about the inability of firms with higher labour standards to compete with firms in low standard countries,⁶¹ It is pertinent to note that, the main problem between countries that prefer a higher level of standards and those with lower standards, is not in the existence or non-existence of the environmental standards, but in the enforcement.

Therefore, if we look at the provisions of NAAEC it is very clear that competitiveness concerns due to weak enforcement were apparent, with each Party committing to ensure that its laws and regulations provide for “high levels” of environmental protection and to “effectively enforce” its environmental laws through appropriate government action.⁶² This trend of effective enforcement of environmental laws has continued to later FTAs and similarity in provisions can be seen in annex of the paper.

⁶¹ Chris Wold, Sanford Gaines & Greg Block, *Trade and the Environment: Law and Policy*, Carolina Academic Press (2005) at 7, available at <<http://www.cap-press.com/pdf/2135.pdf>>.

⁶² Supra, Wold, n4.

The Trade Act, 2002 established a consultative mechanism to strengthen the capacity of US trading partners to develop and implement standards for protection of the environment. By the Act of 2002, the US Congress called upon the negotiators to ensure that trade and environmental policies are mutually supportive, to have provisions in the trade agreements under which the parties strive to ensure that they do not weaken or reduce the protection accorded in domestic environmental laws.⁶³

The inclusions of these provisions in FTAs have further evolved with the Bipartisan Trade agreement of 2007. All current US FTAs have a provision making it obligatory for the parties to effectively enforce their environmental laws. If parties do not do so then it could be subject to the dispute resolution procedure of the agreement. Before the bipartisan deal, effective enforcement of environmental laws was the only provision in the environment chapter, which was subject to dispute resolution system but after 2007-deal the whole environment chapter was brought into that purview.

The only exception was the US – Jordan FTA in 2001, which came close to stronger enforcement of environmental standards. However, later both governments in side letter stated that if either fails to meet their commitments to enforce such standards, or any other provision of the agreement, they do not expect or intend to use traditional trade sanctions to enforce them and rather use alternative mechanisms.⁶⁴

Thus, one of the main aspects of the Bipartisan agreement was to link the environment chapter in the FTAs of US to the dispute settlement chapter and keep it at par with commercial provisions of the agreement. This agreement significantly impacted the already existing negotiations during that time per se with Peru, Columbia, Korea and Panama. As a part of the Bipartisan trade deal, the relationship between US FTAs and MEAs was further increased when seven MEAs were explicitly listed.

Thus, after 2007, the FTAs of US make it obligatory for the parties to adopt certain multilateral environmental agreements (MEAs) in their domestic laws and regulations

⁶³ OECD, "Environment and Regional Trade Agreements", OECD Publishing, 12 June 2007

⁶⁴ Ibid at 11; Available at <<http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010928-12.html>

to fulfill environmental objectives. The US- Peru agreement was the first US FTA which went beyond just recognizing the importance and made it compulsory for the parties to adopt MEAs in their environmental laws.

Following is the list of Multilateral Environmental Agreements (MEAs) linked with US FTAs –

- (i) The Convention on International Trade in Endangered Species (CITES);
- (ii) The Montreal Protocol on Ozone Depleting Substances;
- (iii) The Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter;
- (iv) The Inter-American Tropical Tuna Convention (IATTC);
- (v) The Ramsar Convention on Wetlands;
- (vi) The International Whaling Convention (IWC) and;
- (vii) The Convention on Conservation of Antarctic Marine Living Resources (CCAMLR).

We have to see whether these MEAs actually encompass some environmental standards, which could be implemented through these FTAs. This often causes a dilemma between contracting parties on *de facto* enforcement of MEAs through trade agreements, which they are not a party to. Whether violation of MEAs would tread to a trade dispute under a US FTA and could further lead to trade sanction or suspension of tariff benefits is yet to be seen. However, on the other hand this measure also increases the enforcement of environmental protection through MEAs.

US FTAs specially provide for voluntary and market based mechanisms like corporate stewardship and voluntary standards (Good Agriculture practices (GAP)) for protection and conservation of environment. The parties recognize that these mechanisms can contribute to the achievement and maintenance of environmental protection. For instance, in the FTA between the United States and Chile, for the first time an attempt was made to delve into details and a definition of the phrase corporate

stewardship was established.⁶⁵ Even though the definition was ambiguous and far from clear. We could say that mentioning and promoting such voluntary and market-based mechanisms in these FTAs, in a way to promote voluntary standards or private standards to contribute towards environmental protection. However, how these mechanism in FTAs would be used in practice to promote environmental protection is still to be seen

Finally, US FTAs also provide for an environmental cooperation mechanisms, to promote environmental activities with its trading partners. The mechanism establishes a cooperation commission with tasks like implementation and assessment of environmental policies and standards, the collection, publication and exchange of information on environmental policies, laws, standards, and strengthening enforcement of such standards. Example of a cooperation mechanism would the US – CAFTA – DR wherein the US has invested over \$77 million in cooperative environmental projects. Cooperation mechanisms also exist with other FTA partners including Chile, Morocco, Jordan, Bahrain, Oman and Singapore.⁶⁶ Setting up of environmental cooperation mechanisms under the FTAs is going beyond just mentioning standards but also making sure that they are implemented through a collaborative mechanism.

5.4. DISPUTE SETTLEMENT ON ENVIRONMENTAL STANDARDS -:

Until 2006, only one part of the Environment chapter i.e. effective enforcement of environmental laws, was subject to the dispute settlement mechanism. As mentioned above, after the bipartisan deal in 2007, there was a consensus reached between the administration and the Congress that Peru, Colombia, Panama and Korea FTAs

⁶⁵ Each Party should encourage enterprises operating within its territory or jurisdiction to voluntarily incorporate sound principles of corporate stewardship in their internal policies, such as those principles or agreements that have been endorsed by both parties

⁶⁶ Available at <<http://www.state.gov/e/oes/eqt/trade/>>

environment chapters would be subject to the same dispute settlement as other FTA chapters.⁶⁷ The same would continue in the later FTAs.

Previously environmental dispute settlement procedures focused on the use of fines, as opposed to trade sanctions, and were limited to the obligation to effectively enforce environmental laws. However, now environmental obligations in US FTAs are at par with the commercial provisions i.e. violation would be subject to the same remedies, procedures and sanctions for both types of provisions.

The FTAs encourage that laws and policies of the parties provide for and encourage high levels of environmental protection, and shall strive to continue to improve those laws and policies. The parties to the agreement should not fail to effectively enforce their environmental laws through a “sustained or reoccurring course of action or inaction, in a manner affecting trade between the parties” and has linked the same to the dispute settlement mechanism. There is also a state-to-state system for collaborative environmental consultations in these agreements, which enables parties to request consultations under any matter arising under the environment chapter. Beyond that, if parties still fail to reach a solution, consultations may be requested under the dispute settlement chapter which may lead to measures like suspension of tariff benefits, penalties etc.

In US FTAs, any interested person can also request investigations into alleged violations of domestic environmental law for judicial, quasi-judicial or administrative proceedings with effective remedies or sanctions. So, in order to ensure domestic enforcement, there must be a regulatory, prosecutorial authority to ensure that there is compliance with environmental protection laws and in case of any violation, there must be a sanction or remedy available in a fair, equitable and transparent manner.

It is also pertinent to note that, after inclusion of the whole environment chapter under the dispute settlement mechanism, a dispute can also arise on violation of an environmental standard as prescribed in or more listed multilateral environmental agreements. Violations of these environmental obligations shall be enforced "on the

⁶⁷Available at

<https://ustr.gov/sites/default/files/uploads/factsheets/2007/asset_upload_file127_11319.pdf>

same basis as the commercial provisions" of FTAs, including through trade sanctions.⁶⁸ However, if one of the parties is not a signatory to the MEAs, whether the dispute settlement mechanism can still make them conform to the standards, is something we have to see in the future.

Hence, on the basis of how SDSS (labour and environmental) have evolved, US FTAs can be divided into two categories -:

(i) Agreements, which keep trade commitments and environmental and labour obligations separately in relation to the dispute settlement mechanism, i.e US – Jordan FTA, US – Singapore, US-Australia. US-Chile, US-CAFTA, US – Morocco, US – Oman, US – Bahrain (2001 – 2006);

(ii) Agreements, which place environmental and labour obligations on par with commercial provisions i.e. whole labour and environment chapter is under the purview of the agreements' dispute settlement procedure, i.e. US – Peru, US – Panama, US – Korea and US Columbia (2007 – 2011)

We now consider the main aspects of EU's FTAs for social and environmental standards.

6. SOCIAL STANDARDS IN EU FREE TRADE AGREEMENTS

The EU has always had an accession requirement, which meant that prospective members had to respect human rights and democratic principles in order to be considered a 'European country'.⁶⁹ This policy later evolved as a condition for external relations as well, leading to the inclusion of a human rights clause in

⁶⁸ Available at <<http://www.asil.org/insights/volume/11/issue/15/bush-administration-and-democrats-reach-bipartisan-deal-trade-policy>>

⁶⁹ Supra, Bartels, n2.

cooperative and trade agreements with third countries.⁷⁰ The incorporation of SDSS in FTAs is an evolution of this policy, and also an acknowledgement of the increasing importance placed by the European Commission on sustainable development principles.⁷¹

While some argue that from a policy perspective this is a means exporting to others the “European Social Model”,⁷² the use of this policy can be traced back to growing public concerns about the interactive effect of international trade on labour rights and the environment in developing countries.⁷³

SDSS are incorporated in EU FTAs through a “Sustainable Development” Chapter. This Chapter contains provisions on both environment and labour issues. The first EU trade agreement to mention the principle of sustainable development was the EU-Hungary Europe agreement in 1993.⁷⁴ But the 2008 EU-CARIFORUM FTA was the first to give effect to the principle of sustainable development through the incorporation of labour and environmental standards.

To give effect to the SDSS, the EU pursues an incentive based approach. It uses the GSP+ scheme to support sustainable development and good governance in developing countries, granting special tariff rate cuts to developing countries committed to core international agreements on human and labour rights, the environment, and good governance.⁷⁵

6.1. LABOUR STANDARDS IN EU FTAs

The EU approach in the incorporation of labour standards in its FTAs is to focus more generally on social development objectives within a cooperative framework. EU

⁷⁰ Ibid.

⁷¹ See for instance, European Commission, “A Sustainable Europe for a Better World: A European Union Strategy for Sustainable Development”, COM (2001)264.

⁷² Maarten Keune, EU Enlargement and SDSS: Exporting the European Social Model?, EUTI-REHS, WP 2008.01.

⁷³ See for instance, Kym Anderson, “Social Policy Dimensions of Economic Integration: Environmental and Labor Standards” in Takatoshi Ito and Anne O. Krueger (eds), *Regionalism versus Multilateral Trade Arrangements* (1997), pp.57-90.

⁷⁴ Ibid.

⁷⁵ Available at <<http://ec.europa.eu/trade/policy/policy-making/sustainable-development/>>.

agreements recognise and promote social rights and cooperation, including specific issues such as gender and health.⁷⁶ The EU, however, does not pursue a trade sanctions-based approach to social and labour standards. Instead, it offers additional tariff preferences to countries, which have signed and are effectively implementing the core International Conventions on Labour Rights.

In their FTAs, the EU make explicit reference to the ILO's Declaration on Fundamental Principles and Rights at Work which are:

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

Further, the FTAs also refer to the implementation of the 8 Core ILO Conventions:

- (a) Convention 138 concerning Minimum Age for Admission to Employment;
- (b) Convention 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour;
- (c) Convention 105 concerning the Abolition of Forced Labour;
- (d) Convention 29 concerning Forced or Compulsory Labour;
- (e) Convention 100 concerning Equal Remuneration for Men and Women Workers for Work of Equal Value;
- (f) Convention 111 concerning Discrimination in respect of Employment and Occupation;
- (g) Convention 87 concerning Freedom of Association and Protection of the Right to Organise; and

⁷⁶ Available at <<http://ilo.org/global/standards/information-resources-and-publications/free-trade-agreements-and-labour-rights/lang--en/index.htm>>.

- (h) Convention 98 concerning the Application of the Principles of the Right to Organise and to Bargain Collectively.

6.2. ENVIRONMENTAL STANDARDS IN EU FTAs

The EU first recognized the link between trade and environment issues through the release of a communication by the European Commission on Trade and Environment in 1996.⁷⁷ Following this, starting in 2001, the Commission began to conduct Sustainability Impact Assessments on all FTAs signed by the EU to understand the environmental impacts of such agreements.

The growing realization of the importance of environmental issues in the context of trade within the EU leads to the incorporation of environmental standards in its FTAs. Starting with the EU-CARIFORUM FTA in 2008, the provisions on environmental standards focused on 4 key areas:

1. Maintaining or improving existing levels of protection
2. Use of international standards where national standards do not exist
3. Monitoring the impact of trade on the environment
4. Exchange of scientific information and technical assistance.

The nature and scope of the above provisions vary based on the trading partner. But the above represent the areas in which EU FTAs contain commitments on environmental standards.

For instance, the EU-CARIFORUM FTAs contains provisions on technical assistance and the use of regional or international standards⁷⁸ and stress the importance of regional integration in the conservation of the environment. The EU-Korea FTA on the other hand does not contain such provisions and instead focusses on the harmonization of standards⁷⁹ and transparency.⁸⁰ Due to a focus on upgrading

⁷⁷ Supra, European Commission, n5.

⁷⁸ See Article 185.

⁷⁹ See Article 13.4.

⁸⁰ See Article 13.9.

capacities, the EU-Central America and EU-CARIFORUM FTAs place a lot of importance on upgrading technical expertise and scientific knowledge.

The Sustainable development chapters in EU FTAs are notable for the role they envisage for civil society participation. In addition to the Trade and Sustainable Development (a body of government representatives from both parties responsible for the implementation of the Chapter), the FTAs require the establishment of a Civil Society Forum to facilitate the participation of civil society groups in the implementation of sustainable development initiatives.⁸¹

EU FTAs (Central America and CARIFORUM) are also notable for commitments on the conservation of endangered species, forests and marine life. This is done by referring and undertaking specific commitments on CITES (Convention on International Trade in Endangered Species of Wild Fauna and Flora) and seeking to create regional arrangements for the protection of forests and to regulate trade of fish products.⁸²

Thus, we find that the EU policy with respect to environmental standards is varied based on geography, level of development and number of partners. While FTAs with poorer developing countries contain provisions on technical assistance, the focus in the EU-Korea FTA is on harmonization. Similarly, FTAs with partners rich in biodiversity focus on conservation efforts and seek to promote regional initiatives. The common theme through the EU FTAs so far is in the sharing of scientific information and reliance on consultations and incentives rather than dispute settlement.

6.3. DISPUTE SETTLEMENT

The sustainable development chapters in EU FTAs do not give the parties the right to resort to the normal dispute settlement procedures established under the agreements. Disputes on these matters are to be resolved in a self-contained system of dispute settlement involving consultations, and then referral to a Panel of Experts. Such a Panel has the power to examine whether there has been

⁸¹ See for instance, Article 13.13 of the EU-Korea FTA.

⁸² See for instance, Articles 289 and 290 of the EU-Central America FTA.

a failure to comply with the relevant obligations, and to draw up a report and to make non-binding recommendations for the solution of the matter.⁸³ The next steps vary across agreements, but any non-compliance is subject to monitoring and impact assessment.

Dispute Settlement in EU FTAs is very similar to the US approach pre-2006 in excluding the Sustainability Chapter⁸⁴ from normal dispute settlement procedures. Instead of dispute settlement before an independent panel, EU FTAs rely on a Board on Trade and Sustainable Development (EU-CARIFORUM, EU-Central America) comprising representatives from both parties to oversee the implementation of the Sustainability Chapter. This is in addition to dialogues with Civil Society and government consultations. The EU approach also requires a “Sustainability Review” to be carried out to review the implementation of the Sustainability Chapter. In the event that the parties fail to reach a settlement even after consultations, a Panel of Experts is convened to submit a non-binding report to aid in further consultations.

These provisions are supported by the EU’s GSP+ scheme of providing special tariff cuts to developing countries committed to core international agreements on human and labour rights, the environment, and good governance. On the other hand, to promote labour standards, the US GSP scheme provides that beneficiary countries could lose some or all of their privileges if they do not respect labour rights. As we can see above that both US and the EU use the GSP scheme to promote labour rights however the former is based on a punitive or a withdrawal of benefits approach whereas the latter is an incentive based approach.

7. INCLUSION OF SOCIAL STANDARDS IN MEGA FTAs

⁸³ Supra, Bartels n 2, 15-16.

⁸⁴ EU FTAs incorporate SDSS in a separate Chapter dealing with both labour and environment issues.

The incorporation and evolution of SDSS over the last two decades has been an important step in aligning trade policy goals with the ideals of sustainable development. The US and EU have been at the forefront of this development through a new generation of trade agreements that seek to harmonize and enforce labour and environment standards with their respective trading partners.

At the time of NAFTA, and in similar EU agreements in the 90's, labour and environment issues were considered "side issues". However, as we have seen, in both the US and EU FTAs, labour and environment are now central to the agreement, and sometimes subject to the same dispute settlement mechanism as commercial provisions in the FTAs. With the advent of Mega-FTAs, the issue of SDSS could attain more significance. Several so-called Mega-FTAs are under negotiations, namely including the Trans-Pacific Partnership (TPP), a Transatlantic Trade and Investment Partnership (TTIP), and a Regional Comprehensive Economic Partnership (RCEP) in the Asia-Pacific region.

But the question of what comprise SDSS and how they are to be incorporated in trade agreements is far from settled. The divide between developed and developing countries on some of these questions was a stumbling block for progress on this issue at the WTO. This lead the US and EU to pursue the issue bilaterally and more recently in "mega-regional" settings. Given that both the US and EU are involved in two out of three Mega FTAs, it is very likely that SDSS provisions would be given particular focus.

As per Bartels there are also some provisions that are regularly used to establish social obligation covering minimum standards, non – derogation clauses, non – fail to enforce, and, more recently, lock in clauses.⁸⁵ We can see that these provisions are going to be a part of mega regional such as TTP and TTIP. It has been confirmed by reports that the TPP is set to contain separate chapters on labour and environment, along with substantive provisions on new issues such as marine fisheries and other conservation issues, biodiversity, invasive alien species, climate change, and

⁸⁵ Simon Lester, Bryan Mercurio and Lorand Bartels (eds), *Bilateral and Regional Trade Agreements: Commentary, Analysis and Case Studies*, 2nd ed (Cambridge: CUP, 2015 forthcoming)

environmental goods and services, in addition to cooperation for capacity building.⁸⁶

As per Singh, the inclusion of SDSS in Mega-FTAs would force the standards upwards and have a wide-scale impact on varied sectors of the economy.⁸⁷ It is likely that the SDSS in TTP and TTIP would become *de facto* global standards by its reference in the negotiation of other FTAs such as the Economic Partnership Agreement (EPA) and the East Asian Regional Comprehensive Agreement (RCEP).⁸⁸ In terms of labour standards, TTIP and TPP would largely play a role in raising the standards around the world, thus contributing to the important objective of US and EU to create a level play field in terms of standards, between developed countries and developing countries.

In the TTIP, it is expected that SDSS will be a less controversial issue as the US and EU have a lot more in common in their respective positions.⁸⁹ This does not however mean that the TTIP negotiations on SDSS will be straightforward. As pointed out throughout this paper, the US and EU have different approaches to SDSS provisions. The EU with its emphasis on consultations, technical experts groups and decent work has signaled that it would be pursuing these issues in the TTIP negotiations,⁹⁰ while the US has a different approach to each of these issues. As an agreement that seeks harmonization or equivalence of trade practices in the US and EU, it will be interesting to see the synthesis of these differing approaches in the TTIP.

In the TPP negotiations, resistance is expected from developing countries, but the topic is very much being addressed in the negotiations and the US is the largest economy in the negotiations, and is a key entity moving the TPP towards its new sets

⁸⁶ World Economic Forum, Global Agenda Council on Trade and Foreign Direct Investment, "Mega-Regional Trade Agreements: Game Changers or Costly Distractions for the World Trading System?", at 15.

⁸⁷ Available at

<http://www.iisd.org/sites/default/files/publications/implications_trans_pacific_partnership_tp_p_india.pdf>

⁸⁸ Junji Nakagawa, "TPP and Global Governance" Available at

<<http://www.worldfinancialreview.com/?p=2597>>

⁸⁹ Supra, no 81, at 21.

⁹⁰ European Trade Commission, "Trade and Sustainable Development Chapter /Labour And Environment:

EU Paper outlining key issues and elements for provisions in the TTIP", available at <http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153024.pdf>.

of disciplines. Therefore, TPP is likely to go towards the US model while some participants will seek flexibilities. Emphasis on “platinum” standards in Trans-Pacific Partnership (TPP) agreement would reflect the interest of United States and thus TPP could lead to strong and binding provisions relating to labor and environmental standards, including to make a level playing field for American workers and firms.⁹¹

Critics of this approach argue that the US advocating for “platinum” standards could delay the successful conclusion of TPP negotiations.⁹² The inclusion of SDSS in Mega-FTAs as an important emphasis may create difficulties for non-members to have access to markets covered by TPP, with a “ratcheting-up” effect on standards in large parts of global markets.⁹³ Whereas, Baldwin is of the opinion that inclusion of standards in mega FTAs is both good and bad news, the good news is that they will tidy up the “spaghetti bowl” of RTAs. On the other hand, it could involve inappropriate restrictions on developing nations.⁹⁴

We have seen above, especially in the case of US FTAs that parties make sure that each one of them effectively enforce and implement national laws relating to environment and labour standards. If the principle of effectively enforcing domestic laws through FTAs continues into the mega regionals then it could lead to further conflict than resolution of the existing ones. The prime reason being when international panels would be set up under the dispute settlement mechanism to judge whether the standards are implemented correctly or not this could lead to further

⁹¹ Available at <<http://www.cfr.org/trade/us-trade-negotiations-aim-raise-labor-environmental-standards/p33141>>, U.S. Trade Negotiations Aim to Raise Labor and Environmental Standards a Conversation on the President's Trade Agenda with Michael Froman.

⁹² Available at <[http://www.europarl.europa.eu/RegData/etudes/briefing_note/join/2013/491479/EXPO-INTA_SP\(2013\)491479_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/briefing_note/join/2013/491479/EXPO-INTA_SP(2013)491479_EN.pdf)>

⁹³ Peter Draper, “New Regional Trade Architecture, Systemic Coherence and Development”, Presentation at the Conference entitled ‘*Towards an enabling multilateral trading system for inclusive and sustainable development*’, UNCTAD (December, 2014).

⁹⁴ Richard Baldwin, “Mega Regional trade Agreements Game-Changers or Costly distraction for the World Trading System” Available at <http://www3.weforum.org/docs/GAC/2014/WEF_GAC_TradeFDI_MegaRegionalTradeAgreements_Report_2014.pdf>

conflicts.⁹⁵ As the question of enforcement is often a domestic issue, the adjudication of such issues by an international panel could be controversial. For instance, if a FTA demands “adequate enforcement” of national laws and it is not complied with then an international panel would be established to judge whether the enforcement mechanisms were adequate. However, as there is no definition of the word “adequate” it could lead to further dispute whether the enforcement was adequate or not.

8. CONCLUSION

Over time and owing differing contexts, the US and EU have evolved distinct approaches to SDSS provisions in their FTAs. These different approaches point to different pathways for future progress on labour and environment issues. Mega-FTAs could well be the fora where such progress is made. Like most international trade issues, the outcome of the Mega-FTA negotiations will be crucial to the shape of SDSS provisions and their effect on the global trading system.

With the inclusion of SDSS in mega regionals like TPP, TTIP and RCEP it will be interesting to see the impact on firms. We have established that these agreements would lead to higher standards than which are already there in the present FTAs. Developing countries, which are party to these agreements such as TPP, will over time have to upgrade domestic standards and commercial production on a significant scale. Developing countries outside these negotiations already have difficulty in enforcing existing international labour and environmental standards. Higher standards would be quite difficult to comply with and non-compliance could lead to difficulties in linking up with Global value supply chains, especially involving lead firms from EU and the US.

TPP and RCEP have many common members and both the agreements have countries with varied social development, ranging from Vietnam to Japan in RCEP, and with the US being a party of TPP. It is going to be interesting to see the evolution of the commercial implications of SDSS on these countries, including how the member countries enforce such standards.

⁹⁵ John R. Magnus, “Dispute Settlement in the Free Trade Agreement of the Americas: There Is A Better Way”, available at <<http://www.tradewinsllc.net/publi/Miami-FTAA-speech-2-96.pdf>>

However, on the other hand if countries can establish processes and schemes to adapt to such standards, it would provide a great opportunity to balance sustainable development goals with the need for economic growth. This is especially so since developed countries are likely to make concessions in terms of technical assistance and a staggered stage-wise implementation of the provisions of the Mega-FTAs.