Characteristics of the Process for Securing Compliance with Labour and Environmental Provisions Included in Free Trade Agreements (FTAs)

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Abstract

The greatest issue of contention regarding the inclusion of labour and environmental provisions in FTAs is whether or not to set legal obligations and authorize the adoption of economic measures against the violation of the obligations through a dispute settlement process. While the United States authorizes the adoption of economic measures (sanctions approach), the EU does not grant authorization but requires the disputing Parties to formulate action plans (cooperative approach). Sufficient empirical analysis has not yet been conducted to evaluate which of these two approaches is superior. It is said that the implementation of labour and environmental obligations needs to be continuously monitored and that if compliance with international rules is to be secured, it is necessary to secure the legitimacy of the rules through the involvement of civil society. In other words, the threat of sanctions alone would not ensure the effectiveness of labour and environmental provisions. In fact, it may be pointed out that the process for securing compliance with labour and environmental provisions should be accompanied by the dispute settlement process and the process for securing implementation. The adoption of labour and environmental provisions under multilateral frameworks depends on individual countries' political will. However, it is important to complement the negative aspect of trade liberalization with FTAs and strengthen multilateral frameworks by recognizing the diversity of measures to secure compliance and adopting provisions suited to the needs of Contracting Parties.

Keywords: free trade agreements (FTAs), labour provision, environmental provision, dispute settlement process, process for securing implementation

JEL Classification: F13, F16, F18, F53

I. Introduction

This paper considers the possibility of bilateral or plurilateral frameworks and multilateral ones operating upon each other, by revealing the characteristics of labour and environmental provisions included in free trade agreements (FTAs) [1], particularly focusing on the process for securing compliance with these provisions. This paper defines labour and envi-

[1] This paper refers to any agreement concluded under Article XXIV of the GATT and Article V of the GATS, which are aimed at the liberalisation of trade among its contracting parties as an 'FTA', regardless of whether it is a bilateral trade agreement or a regional trade agreement (RTA), and regardless of whether it is called as an economic partnership agreement (EPA) or any other.

ronmental provisions as provisions that mention labour or environmental standards, that stipulate mechanisms for encouraging compliance with labour or environmental standards, or that stipulate frameworks for consultation or cooperation in building skills, etc. The agreements are different, whether the labour and environmental provisions are included in FTAs themselves, whether legal obligations are adopted in substantive stipulations, and how they are implemented. The author believes that it is important to first recognise this diversity of labour and environmental provisions and then compare various patterns and definitions of these provisions.

Labour and the environment are discussed together here because the motivations and backgrounds behind the inclusion of provisions addressing them are similar. Although they differ across agreements, a certain degree of commonality can now be found in the way such provisions are included and their structures, as well as their implementation process. Since 2011, the European Union (EU) has included Chapters on Trade and Sustainable Development (TSD chapters) in FTAs,[2] which provide that economic and social development and environmental protection are mutually reliant elements for sustainable development. Academic theories that have conventionally discussed this field agree upon discussing both topics as the social values.[3]

The General Agreement on Tariffs and Trade (GATT) on the one hand adopted a passive method of stipulating labour- and environment-related measures that states may take in the general exceptions under Article XX (b), (e), and (g) and did not actively confirm the labour- and environment-related measures that states should adopt. Labour has not been a topic in multilateral negotiations. While discussions within multilateral frameworks are ongoing in the field of the environment, there are no clear outcomes yet. On the other hand, as the recognition of 'mutual supportiveness' between trade liberalisation and securing labour standards and environmental protection spreads throughout international society,[4] recent FTAs—including those concluded by developing countries—increasingly mention labour and the environment, allowing the discovery of some degree of directionality.[5] This phenomenon demonstrates that FTAs that have been concluded thus far have contributed towards the development of some laws.[6] Accordingly, focusing on the function of FTAs in creating rules in the fields of labour and the environment and analysing the legal regulations and systems generated in these fields could bring some implications at multilateral negotiations of these fields in the future.

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[2] The FTAs concluded by the EU that include a TSD chapter are those with South Korea (entry into force from 2011), Central America (Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and Panama) (2013), Colombia and Peru (2013), Georgia (2014), Moldova (2014), Ukraine (2014), and Japan (2019).

[3] Charnovitz (1994), p. 17; Suami (2012), pp. 254-274; Bartels (2015), p. 364; Van den Bossce and Prévost (2016), p. 83.

[4] For example, the Japan–Brunei FTA provides that the Parties 'recognise that economic development, social development, and environmental protection are interdependent and mutually reinforcing components of sustainable development and that the economic partnership can play an important role in promoting sustainable development'.

[5] For a reference showing that the 'multilateralisation of regionalism' can resolve the overcrowding and fragmentation of FTAs, see Sekine (2013), pp. 99–199. For an explanation of the mechanism giving rise to the pressure of 'de-facto links' and 'global partnerships' in mega-FTAs among different parties, see Suami (2016), pp. 39-55.

[6] For an indication that mega-FTAs are forming a legal system more advanced than the WTO, see Mamiya (2012), pp. 224-228.

While analysing these fields with a focus on the rule-making function of FTAs, care must be taken with regard to how the dispute settlement process[7] and the process for securing implementation[8] for labour and environmental provisions are developed. One approach allows the use of the dispute settlement process to secure compliance with labour and environmental provisions and asserts that it can be achieved by allowing the adoption of economic measures against noncomplying parties ('sanctions approach'), while another approach demonstrates the idea that achieving true compliance with labour and environmental provisions requires the adoption of cooperative measures such as financial support and technical assistance rather than the use of sanctions ('cooperative approach'). The debate on how to develop the process for securing compliance affects the design for the system of labour and environmental provisions as a whole. The view that holds that the process for securing implementation should be adopted may believe that including legal obligations assuming the application of the dispute settlement process is not necessary and that the best effort obligations can be included in the FTA by concluding a side agreement or Memorandum of Understanding (MOU). While imagining the future multilateralisation of labour and environmental provisions, it seems necessary to propose systems that are acceptable to developing countries, which are likely to argue in favour of cooperative means, and how the process for securing compliance is developed is thought of as a major point of dispute in negotiations involving developing countries.

Now that labour and the environment are mentioned in FTAs involving developing countries and a certain common directionality can be pointed out in these provisions, tasks lying ahead before multilateralisation must be clarified by discovering the characteristics of the process for securing compliance with the labour and environmental provisions against which opposition is still remained considerably. This paper defines compliance as 'the conformity of a state's actions with international legal regulations',[9] and posits the dispute settlement process (sanctions approach) and the process for securing implementation (cooperative approach) as a means for securing the compliance. Below, the author reveals the basis and background for the inclusion of labour and environmental provisions in FTAs and confirms the existence of demands for ensuring the effectiveness of labour and environmental provisions. Based on this, the author considers what has conventionally been thought of as necessary elements to ensure compliance in international law and reveals how these elements have been incorporated into the process for securing compliance with labour and environmental provisions by examining actual provisions. Through this, the author hopes to

[7] Traditional dispute settlement methods in international law include negotiation, good offices, mediation, inquiry, conciliation, arbitration, and judicial trial. Besides these, noncompliance procedures in environmental conventions and individual complaints mechanisms in human rights conventions are also given the status of dispute settlement methods in some cases. In this paper, a dispute settlement process is defined as 'a system for seeking to resolve an international dispute, in which an independent and fair third party renders a binding decision, generally by the application of provisions of international law', and is limited to systems with a court-like (judicial) nature (Fukunaga (2013), p. 1).

[8] The basic characteristics of securing implementation is that it 'separates system maintenance into cases of compliance and noncompliance with the rules, having mechanisms for increasing the level of compliance for one, while diversifying responses to noncompliance for the other' (Komori (2015), p. 141). See also Mori (2014), pp. 274–278.

[9] Naiki (2010), p. 82.

clarify the characteristics of the labour and environmental provisions that are included in FTAs and to identify ways to include them in multilateral frameworks.

II. Relationship Between Trade, and Labour and the Environment

II-1. Background and Factors Behind the Inclusion of Labour and Environmental Provisions in FTAs

The preamble to the Agreement Establishing the World Trade Organization (WTO) lists raising standards of living and the optimal use of resources in accordance with the objective of sustainable development as a purpose of the WTO. However, although the GATT allowed contracting parties to take measures for labour-related and environmental purposes in the general exceptions under Article XX, it did not actively impose obligations on contracting parties to adopt measures to achieve labour and environmental protection.[10]

Attempts to include provisions on labour in trade agreements are known as the 'social clause' theory.[11] A social clause is 'a clause found in an international agreement that makes a determination on social dumping by a certain country or of certain products, measured against social and human rights standards, and imposes certain economic sanctions, with the objective of realising fair international competition'.[12] The US and France argued in favour of including a social clause both in the GATT and during multilateral negotiations towards framing the WTO Agreement.[13] However, developing countries opposed the inclusion on the grounds that including a social clause is a form of hidden protectionism to support domestic industries in developed countries, that a social clause can increase labour costs in developing countries and risk stealing the competitive advantage of developing countries' products in international trade, and that the best strategy to improve labour standards in developing countries is export-led growth and economic development, rather than a social clause.[14]

Trade and the environment attracted attention in the GATT/WTO in the late 1990s.[15] Pollution became a serious issue in various developed countries in the 1960s. Multilateral environmental treaties began to be concluded in the 1970s. 'Sustainable development' was advocated in 1980, followed by the holding of the Rio de Janeiro Conference in 1992, at which 'sustainable development' was a central topic.[16] As global environmental problems continued to attract the attention of the international society, the recognition of the need to

[10] Article XX of the GATT stipulates general exceptions to the principles of Most-Favoured-Nation Treatment (§I), National Treatment (§III), General Elimination of Quantitative Restrictions (§XI), etc., and permits measures 'necessary to protect human, animal or plant life or health' in sub-paragraph (b), measures 'relating to the products of prison labour' in sub-paragraph (e), and measures 'relating to the conservation of exhaustible natural resources' in sub-paragraph (g).
[11] In relation to social clause in GATT era, Mannou (1995), pp. 2-3; See also Nakagawa (2001), pp. 193-212; Ago (2010), pp. 26-31; Yoo (2003), pp. 199-227.
[12] Ago (2010), p. 26.
[13] Nakagawa (1997), p. 5.
[14] Nakagawa, Shimizu, Taira, and Mamiya (2012), p. 319.
[15] Porter and Brown (1998), pp. 153-168.
[16] Nishii (2005), pp. 8-21.

adjust trade liberalisation promoted by the GATT and environmental protection grew. The Marrakesh ministerial meeting of April 1994 decided on the establishment of the WTO and adopted the Decision on Trade and Environment, which created the Committee on Trade and Environment (CTE) to comprehensively consider these problems.[17] The US was particularly aggressive in its promotion of the CTE's role. In contrast, Japan and Australia, despite being developed countries, took the position that the WTO was not an appropriate forum for handling problems concerning the environment.[18]

The North American Free Trade Agreement (NAFTA, 1994) was the first trade agreement to include provisions addressing both labour and the environment. In an analysis of the negotiation process, Nakagawa pointed out the following three possibilities underlying the inclusion of labour and environmental provisions in trade agreements.[19] The first is the possibility of differences in labour and environmental legal systems and standards being reflected in the production costs for goods and the impact on the prices of goods and international competitiveness (the so-called argument on 'social dumping,' 'eco-dumping,' or a 'level playing field'). The second is the possibility that if differences in regulations and standards under each country's domestic laws are reflected in the production costs for goods, companies that manufacture such goods will transfer production locations to countries where regulations and standards are more relaxed, in search of more favourable production conditions, leading to the hollowing-out of the industry in countries with stricter regulations and standards and deteriorating labour standards and worsening environmental pollution at the destination. The third is the possibility of strict labour and environmental regulations and standards being used to protect the domestic industry.

Despite these arguments, the WTO refused to include these provisions. In relation to the inclusion of labour provisions, the Singapore Ministerial Declaration of 1996 confirmed compliance with the internationally approved 'core labour standards',[20] which the International Labour Organization (ILO) later presented in 1998 in its Declaration on Fundamental Principles and Rights at Work (the 'ILO Declaration'), and confirmed that the ILO is tasked with the function of defining core labour standards and supervision of compliance with them.[21] The 2001 Doha Ministerial Declaration reconfirmed the contents of the Singapore Ministerial Declaration relating to core labour standards described above.[22] In relation to the environment, the CTE has been debating 10 points since January 1995, and it was declared in the Doha ministerial declaration of 2001 that three of these points[23] would be considered in the special sessions of the CTE, but there has been no clear response so far on a multilat-

[17] WTO (1994).
[18] OECD (2007), p.43.
[19] Nakagawa (1997), p. 2.
[20] In 1998, the ILO indicated the 4 categories and the 8 conventions. These are (i) the Conventions 87 and 98 in relation to freedom of association and the effective recognition of the right to collective bargaining; (ii) the Conventions 29 and 105 in relation to the elimination of forced or compulsory labour; (iii) the Conventions 138 and 182 in relation to the abolition of child labour; and (iv) the Conventions 100 and 111 in relation to the elimination of discrimination in respect of employment and occupation.
[21] WTO (1996), para. 4.
[22] WTO (2001), para. 8.

eral framework to this effect.[24]

While debates on labour and environmental provisions in multilateral negotiations have not made any progress, the US, the EU, Canada and other countries are including such provisions in their own FTAs and are developing their contents. One factor leading to such an execution is the circumstance that negotiation between limited party states, like the parties to an FTA, allows for the more rapid formation of commercial regulations than multilateral debates. A recent investigation by the ILO showed that only one FTA included labour provisions in 1994, whereas 77 did so in 2016.[25] An Organisation for Economic Cooperation and Development (OECD) report in 2014[26] noted that the proportion of FTAs including substantial environmental provisions increased from 20% of those entering into force in 2007 and being subjected to OECD's investigation to 70% of those entering into force in 2012 and being subjected to OECD's investigation.

In the background behind the inclusion of labour and environmental provisions in FTAs, in addition to the aforementioned three underlying possibilities, we can point to the growing recognition that trade liberalisation and worker and environmental protection are mutually related in order to realise the value of human rights protection and sustainable development.

Some argue that if workers' rights are recognised as basic human rights, there is a moral requirement to limit a country's market access if it fails to apply universally recognised human rights, such as prohibitions against slavery and child labour.[27] The idea that trade liberalisation, sustainable development, and human rights operate mutually is also reflected in documents adopted by a range of international organisations and conferences. The 2004 Final Report of the World Commission on the Social Dimension of Globalization[28] established by the ILO in 2002 points out that 'Wisely managed [the global market economy] can deliver unprecedented material progress, generate more productive and better jobs for all, and contribute significantly to reducing world poverty'.[29] Through Goal 8, the '2030 Agenda for Sustainable Development' agrees with the promotion of inclusive and sustainable economic growth, employment and decent work, and supports the promotion of rule-based, equal, mutually multilateral trade structures. Through Goal 17, it seeks meaningful, ongoing trade liberalisation.[30] The Nairobi Maafikiano work programme, which was adopted by the 14th session of the United Nations Conference on Trade and Development (UNCTAD) reconfirmed that trade is a means of supporting sustainable development goals and that regional integration can be a major catalyst in lowering trade barriers, implementing policy reforms, reduc-

[23] (i) the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements (MEAs), (ii) procedures for regular information exchange between MEA Secretariats and the relevant WTO committees etc., (iii) the reduction or elimination of tariff and non-tariff barriers to environmental goods and services (WTO (2001), para. 31).

[24] Sinha (2013), pp. 1296-1297; Ministry of Economy, Trade and Industry of Japan (2016), 611-612; WTO (2017).

[25] ILO (2017), p.2.

[26] George (2014), p. 9.

[27] Melo Araujo (2018), p. 236.

[28] The Successor to the Working Party on the Social Dimensions of the Liberalization of International Trade established by the ILO in 1994 in response to debate in the WTO (Nakagawa (2001), pp. 211-212).

[29] World Commission on the Social Dimension of Globalization (2004), p. x.

[30] UN (2015), pp. 21, 28.

ing commercial costs, and expanding the participation of developing countries in global supply chains, and argued that these FTAs should harmonise with and contribute towards strong multilateral trade systems.[31] The resolution of the Committee on Decent Work in Global Supply Chains adopted at the 105th session of the ILO concluded that governments should consider the fact that breaches of workers' basic rights and principles cannot be supported as a legitimate comparative advantage, that labour standards should not be used for protectionist purposes, and that they should consider including workers' basic rights and principles in trade agreements.[32]

An OECD report on the environment lists the promotion of sustainable development, the improvement of cooperation for the environment, and the pursuit of the environmental agenda as various countries' motivations for including environmental provisions in FTAs, and pointed out the rising recognition of the mutual supportiveness of sustainable development and trade liberalisation.[33] 'Our Common Future', a report published by the World Commission on Environment and Development in 1987, broadly recognised that many environmental problems are of a cross-border or global nature and that action can be taken only through international efforts. The need for international action on environmental problems was also confirmed by the Rio de Janeiro Summit in 1992 and its follow-up conferences, the Johannesburg conference in 2002 and the Rio de Janeiro conference in 2012. The fact that Principle 4 of the 1992 Rio Declaration states, 'In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it', and Principle 12 states, 'Trade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade', indicates that consideration for the environment and the conclusion of trade agreements and other actions to promote economic development are inseparable and suggests that trade liberalisation itself aggressively contributes towards sustainable development. Section 1, paragraph 2.3 of Agenda 21 declares that, 'The international economy should provide a supportive international climate for achieving environment and development goals by: (A) [p]romoting sustainable development through trade; [and] (B) [m]aking trade and environment mutually supportive'. The mutual supportiveness of trade liberalisation and sustainable development can be considered as having been expounded further.

The mutual operation and supportiveness of trade and labour and the environment are now being recognised in FTAs led by the US and the EU, and also in FTAs between other countries. For example, in the South Korea-Turkey FTA (2013), the parties recognised the mutual reliance of economic and social development, and environmental protection, and inserted a TSD chapter (Chapter 5) based on these three elements and their mutual reinforcement of sustainable development. However, while the awareness of the relationship between achieving value-based goals for human rights or sustainable development and promoting

[31] UNCTAD (2016), para. 29.
[32] ILO (2016), p. 5, (h).
[33] OECD (2007), pp. 40-42; George (2011), p. 6.

trade liberalisation encourages the inclusion of labour and environmental provisions in FTAs, behind this lies economic considerations such as those indicated by Nakagawa, and the presence of such complex motivations for the inclusion of labour and environmental provisions makes it difficult to point to any kind of unity in the substance or systematic design of the labour and environmental provisions that are actually included in FTAs.

II-2. Requests to Ensure the Effectiveness of Labour and Environmental Provisions

Another major basis for arguing in favour of the inclusion of labour and environmental provisions in an FTA is that ensuring compliance through the ILO and international environmental organisations fundamentally respects the member states' voluntary compliance and that there are limits with respect to ensuring such compliance.[34] The argument is that by including obligations concerning labour and the environment in WTO agreements, compliance with labour and environmental standards can be ensured forcefully through the dispute settlement process and trade sanctions in accordance with the WTO agreements. In the NAFTA negotiation process, labour unions and environmental protection groups argued that the Parties should bear obligations to take measures to ensure that Mexico enforces labour and environmental laws and regulations.[35] Mexico's labour and environmental legal systems are similar to those of the US in many ways, and its labour and environmental standards are considered to compare favourably with those of the US.[36] However, it has been pointed out that the enforcement of these domestic laws has not been effective, and that labour unions and environmental protection groups raise this point as an issue. Even after the conclusion of the NAFTA, demands were made within the US to include more effective labour and environmental provisions.[37]

Demands for ensuring the effectiveness of labour and environmental provisions are mainly of two kinds and they derive from criticisms of the labour and environmental provisions that were included in the NAFTA.[38] The first relates to the adoption of legal obligations and obliges Parties to adopt and maintain domestic laws and regulations in line with specific international standards. It also calls for the effective enforcement of domestic laws and regulations and prohibitions on derogating from them to be made a legal obligation and not a 'shall strive to' one. The second relates to the dispute settlement process and seeks the application of the same dispute settlement process as in other fields of FTAs in the event of a breach of the obligations in the first demand. On 10 May 2007, the US Congress and Executive Branch agreed to pursue the reinforcement of labour and environmental standards through FTAs by relying on the two points mentioned above (the so-called 'May 10th agree-

[34] For indications on this point on the field of labour, see Nakagawa, Shimizu, Taira, and Mamiya (2012), p. 323. In relation to the environmental field, see Jinnah and Morgera (2013), p. 324.
[35] Nakagawa (1997), p. 8-9.
[36] For details on the development of labour law systems to the extent of US levels, see Nakagawa, Shimizu, Taira, and Mamiya (2012), p. 321. For similar indications on the environment, see Nakagawa (1997), p. 26.
[37] Bolle and Fargusson (2015).
[38] Gantz (2011), pp. 297-356.

ment').[39] The Bipartisan Congressional Trade Priorities and Accountability Act of 2015 introduced these contents in relation to the fields of labour and the environment.[40]

Since 2010, the EU has also attracted attention for demands for the inclusion of more effective labour and environmental provisions, at least at the European Parliament level.[41] To date, the EU has adopted provisions with the title of cooperation on labour and the environment in FTAs,[42] which confirms international commitments between Parties concerning labour and the environment and their mechanisms to ensure that the enforcement emphasises on consultation and dialogue.[43]

The European Parliament has generally supported strong TSD chapters.[44] In the 2010 Resolution on Human Rights, Social and Environmental Standards in International Trade Agreements,[45] the European Parliament made the following demands concerning TSD chapters in FTAs under negotiation: the European Commission must include in all FTAs under negotiation labour standards corresponding to core labour standards and environmental standards corresponding to the list of multilateral environmental agreements (MEAs)[46] set out in the European regulation on the scheme of generalised tariff preferences.[47] Respecting these standards must be understood as including their ratification, incorporation into domestic laws, and effective implementation by the Parties.[48] It has been pointed out[49] that the dispute settlement process in the TSD chapters can be reinforced by making the following improvements. The first is to introduce filing procedures that are open to civil society. The second improvement involves making appeals to independent organs comprising experts in human rights, labour, and environmental laws and making the recommendations of those organs a clear part of the process accompanying implementation provisions, in order to promptly and effectively resolve disputes on labour and environmental issues. The third is to impose fines or temporarily suspend commercial benefits granted by the agreements within a certain

[39] USTR, Trade Facts: Bipartisan Trade Deal, May 2007.
[40] Bipartisan Congressional Trade Priorities and Accountability Act of 2015. P.L. 114-26. 129 Atat. 320ff. 19 U.S.C.4201. Section 102 (b) (10) Labor and Environment.
[41] Puccio and Binder (2017).
[42] e.g. EU-Mexico FTA (2000) §34, 36; EU-Chile FTA (2003), §28, 43.
[43] For example, the EU–Chile FTA includes stipulations in relation to cooperation in the fields of labour and the environment in Part III (Cooperation). However, the dispute settlement process is provided for only under Part IV (Trade-Related Matters) and does not apply in the fields of labour and environment.
[44] Puccio and Binder (2017), pp. 2-3.
[45] European Parliament Resolution on Human Rights, Social and Environmental standards in International Trade Agreements (2010), O.J. C 99 E, 3.4.2012, p.31.
[46] Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES, 1973); Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol, 1987); Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel Convention, 1989); Convention on Biological Diversity (CBD, 1992); United Nations Framework Convention on Climate Change (UNFCCC, 1992), Cartagena Protocol on Biosafety to the Convention on Biological Diversity (Cartagena Protocol, 2000), Stockholm Convention on Persistent Organic Pollutants (POPs, 2001); Kyoto Protocol (1997); Single Convention on Narcotic Drugs (1961); Convention on Psychotropic Substances (1971); United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988); United Nations Convention against Corruption (2003).
[47] Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalized tariff preferences and repealing Council Regulation (EC) No 732/2008, O.J. L303/1.
[48] European Parliament Resolution (2010), *supra* (note 45), paras. 15, 16.
[49] *Ibid*., para. 22.

scope in the event of material breaches of standards defined in the TSD chapters, as is done through provisions in other fields in the agreements.

Several elements of these recommendations have been included in agreements since the conclusion of the EU–South Korea FTA in 2010. In relation to the first point, dialogue with civil society has been positioned at the focal point of the TSD chapter through the introduction of civil society forums and the establishment of civil society advisory groups. The recommendation in the second point was introduced by the creation of a two-stage dispute settlement process comprising a consultation with and appeal to a panel of experts. The third point has generally not been recognised in the dispute settlement process accompanied by sanctions in EU agreements.

The European Parliament recommended to the European Commission that attention should be focused on improving the levels of obligations concerning labour, expanding the scope of the chapter on the environment, and strengthening the implementation scheme for MEAs[50] in the June 2011 resolution on EU–Canada trade relations,[51] which was adopted in the negotiation process for the EU–Canada Comprehensive Economic and Trade Agreement (CETA, 2017). The European Parliament repeatedly demanded that dispute resolution chapters should be made applicable to TSD chapters in the EU's trade agreement[52] in its 2016 resolution on the implementation of the 2010 recommendations of parliament on social and environmental standards, human rights, and corporate responsibility,[53] which also emphasised that the ratification and implementation of the ILO treaty and MEAs should be included.[54]

Demands for the inclusion of more enforceable labour and environmental provisions in FTAs have been made in this manner to the executive branch in the US since the conclusion of the NAFTA, and by the European Parliament to the European Commission in the EU as well. Even the EU, which has conventionally adopted a cooperative approach, has been subject to internal demands for the adoption of more enforceable labour and environmental provisions. The demands made in both regions share the following features: (1) they impose obligations to adopt and maintain labour and environmental standards under the ILO Declaration and certain MEAs in domestic laws and regulations; (2) they impose obligations to effectively enforce labour and environmental laws and regulations including these standards and to prohibit any derogation from them; and (3) they allow the use of a dispute settlement process that is similar to the provisions in other fields of FTAs, ultimately up to economic measures.[55] The demands that have these shared features with respect to labour and environmental provisions may enable a certain convergence between the labour and environmental

[50] *Ibid*., para. 8.
[51] European Parliament Resolution of 8 June 2011 on EU-Canada trade relations, P7_TA(2011)0257.
[52] *Ibid*., para 21.
[53] European Parliament Resolution of 5 July 2016 on implementation of the 2010 recommendations of parliament on social and environmental standards, human rights and corporate responsibility (2015/2038 (INI)), P8_TA(2016)0298.
[54] *Ibid*., para 21 (a).
[55] Nakagawa pointed out that the binding force of the rules is weaker only when legal obligations are stipulated in substantive provisions, and strongest when a dispute between the Parties concerning their interpretation, application, and performance can be remitted to a dispute settlement process (Nakagawa (2017), p. 23).

provisions in FTAs concluded by the US and the EU. The US and the EU are likely to be asked to perform such adjustments in the negotiation process for the Transatlantic Trade and Investment Partnership. However, there is still a large difference of opinion between the US and the EU on whether to allow the application of a dispute settlement process accompanied by sanctions for labour and environmental provisions.

II-3. Joint use of a dispute settlement process and a system for securing implementation

The opposition between the 'sanctions approach' adopted by the US and Canada and the 'cooperative approach' adopted by the EU in the labour and environmental provisions included in FTAs has been pointed out by conventional academic theory.[56] The sanctions approach allows the use of the same dispute settlement process as in other fields of FTAs, resulting in the provision of compensation, suspension of benefits, and other economic measures in the event of any failure to comply with obligations. The cooperative approach mainly consists of developing the Parties' abilities to achieve compliance with obligations. Means stipulated for this purpose include information exchange, technical assistance, financial support, and education. The cooperative approach also includes the important function of supervising the implementation of obligations.

If it is assumed that including labour and environmental provisions in trade agreements contributes towards securing a high level for labour and environmental standards, merely including them in FTAs between limited Parties would only go so far, and it would be desirable to have discussions among many countries in the future. If a suitable systematic design is proposed in these discussions, the parties must consider an approach that can secure countries' compliance with labour and environmental provisions. Answering this question requires an analysis of effectiveness by looking at the effects that are produced by including labour and environmental provisions in FTAs and by their actual operation, as well as whether high-level protection of labour and environmental standards was actually achieved. This analysis has not been conducted sufficiently thus far, and it is not possible to identify an approach that is more effective in securing compliance with labour and environmental provisions without this analysis.[57]

In the first place, is it possible to evaluate whether the sanctions approach (dispute settlement process) or the cooperative approach (process for securing implementation) is a better means for ensuring that countries comply?

The dispute settlement process and the process for securing implementation were initially separate and originated from different ideas.[58] The dispute settlement process is premised on a dispute between the states, which is premised on a bilateral relationship between the

[56] Ebert and Posthuma (2011), pp. 2-4; Jinnah and Morgera (2013), p. 333; Bartels (2015), p. 381; Vogt (2015), pp. 829, 849.
[57] This is gradually being performed in recent years through ongoing investigations and research by the ILO and the OECD. See ILO (2017); OECD (2018).
[58] Tamada (2017), pp. 101-102.

offending and the victim states, and this is suited to resolution by a judicial process with an adversarial structure. From this perspective, the original form of the dispute settlement process is held to have a private law nature.[59] In contrast, in the case of a multilateral treaty, such as human rights and environmental treaties, legal relationships involving such reciprocity do not arise, and the obligations borne by the Parties are not owed to a particular Party, but rather to all Parties.[60] For example, if a state breaches an obligation under international human rights law, the damage is primarily suffered by the citizens of that state and other states are not directly affected. In such cases, a dispute may not arise between the states, despite the breach of the treaty. Furthermore, whether the subject of the issue is a benefit shared by international society as a whole or a benefit shared by the treaty parties, their characteristics lie in the fact that the issue cannot be dealt with by the once-off operation of creating the treaty and complying with it, but instead, requires international society to continually oversee and make progress in attempting to deal with it. For this reason, systems supervising the implementation of treaty obligations through reporting and notification mechanisms are provided for, rather than a dispute settlement process. Thus, a process for securing implementation is necessary in cases where shared and general benefits that cannot be reduced to bilateral relationships of rights and obligations between states are established through treaties, with the added element of maintaining public order.[61]

Tamada pointed out that actual multilateral treaties often allow for the 'joint use' of a dispute settlement process and a process for securing implementation.[62] The United Nations Framework Convention on Climate Change established a reporting system, but the Kyoto Protocol considered the use of a dispute settlement process as well (§19). The ILO Constitution established a dispute settlement process (§37), while at the same time implementing a process for securing implementation by report and notification examinations by the ILO. Besides these, the Refugee Convention, the Convention on International Civil Aviation, and the Basel Convention are multilateral treaties that allow the joint use of a dispute settlement process and a process for securing implementation. This way, although the dispute settlement process and the process for securing implementation originate from different ideas, they can coexist in one treaty and can be used jointly to encourage observance of treaty obligations.[63]

Assuming that both processes are not mutually exclusive but may be used in conjunction, the next matter to consider is the kind of legal regulations and systems that can lead a state to compliance. As international society does not have a centralised organisation that compulsorily enforces international law, international law has relied in no small part on states' voluntary will for compliance with it. States comply voluntarily with international law to a broad extent,[64] but why they do so voluntarily, continues to be a major question of

[59] Miyano (2001), p. 37; Komori (2015), p. 144.
[60] This kind of obligation is called an 'obligation *erga omnes*', while an obligation created under a specific treaty is called an 'obligation *erga omnes partes*'.
[61] Miyano (2001), p. 38.
[62] Tamada (2017), p. 102.
[63] *Ibid.*

interest in both international law and international relations.

Fukunaga argued, 'When a rule of international law fits with a state's interests and norm consciousness, the state will voluntarily comply with that rule of international law'.[65] For instance, if a rule of international law fits with a state's interests, the state will choose to comply with that rule because compliance contributes to its interests. When a state recognises a rule of international law as something it should respect, it will independently elect to comply with that rule. This idea is compatible with the stance that imposing some form of detriment for breaches of international law rules increases the benefits of complying with international law and restricts breaches.[66]

The principle '*pacta sunt servanda*' has conventionally been seen as important and as the basis for the norm consciousness of states. However, in recent years, some have pointed out the instability of '*pacta sunt servanda*' as the foundation of the legal order of international society, because of the legislative function of international law, the conversion of international law to customary law, and the tendencies of legal technical methods in court-like dispute handling systems.[67] Given this, the legitimacy of international law processes and the appropriateness of their outcomes are indicated as other factors that can lead states towards norm consciousness.[68] Furthermore, specialisation, public participation, and transparency in international law processes are indicated as factors that can grant legitimacy to international law, but the one thing that has attracted particular attention in recent times is the participation of non-state entities.[69] Charnovitz asserted that allowing nongovernmental organisations (NGOs) to participate in international decision-making processes can enhance the legitimacy of the process itself, not to mention legitimacy in the sense of the effectiveness of the decisions made therein.[70] Participation by non-state entities in the process of forming international law has traditionally been limited, but more and more rules under international law have begun to affect the rights and interests of non-state entities in recent years.[71] It is increasingly being argued that non-state entities should be allowed to participate in the rule formation process in framing international law.[72]

The legitimacy of the process of interpreting and applying international law also affects states' norm consciousness under international law.[73] If a rule of international law affects the rights and interests of non-state entities, the interpretation and application of the rule can conceivably affect non-state entities as well, and if the rule is to be interpreted and applied, non-state entities must also be allowed to participate in international court proceedings.[74]

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[64] Henkin (1968), p. 42.
[65] Fukunaga (2013), p. 27.
[66] *Ibid.*, p. 29.
[67] *Ibid*., p. 36; Kasai-Okuwaki (1989), 98.
[68] *Ibid*., Bodansky (1999), p. 612; Kumm (2004), p. 914.
[69] *Ibid*., p. 38.
[70] Charnovitz (2006), pp. 367-368.
[71] Stein (2001), p.491.
[72] Fukunaga (2013), p. 38.
[73] *Ibid*., p. 41.
[74] *Ibid*., p. 43.

Conversely, it has also been recognised that non-compliance is not brought about by deliberate elements on part of states. A. Chayes and A. H. Chayes held that state non-compliance is not always deliberate, and pointed towards ambiguity or uncertainty in treaty wording, as well as states' limited capacity to comply with treaty obligations and the time needed for social and economic changes as envisaged by regulatory agreements[75] as factors that can explain this behaviour.[76] If the primary sources of non-compliance are treaty uncertainty, insufficient ability to comply, and priority problems rather than deliberate disobedience, then the utility of a compliance managerial model rather than an enforcement model can be proposed on the grounds that compulsory enforcement is expensive or misses the point.[77] Under a managerial model, the methods of ensuring 'transparency', 'dispute settlement', and 'capacity building' are emphasised rather than compulsion by force. Means of compliance management with characteristics of a managerial model include 'reporting', 'information collection', 'verification', and 'monitoring' for ensuring transparency, 'dispute settlement' mechanisms for ensuring the clarity of wording, 'technical assistance' to enhance the ability to fulfil treaty obligations, and 'policy review and assessment' aiming for compliance through dialogue with related countries. According to Miyano, such managerial models are considered to 'organically constitute a process for convincing through debate, as a whole', which is 'a process of mutually operating debate encouraging compliance, through the repetition of dialogue and convincing between related countries and treaty bodies, and the wider public of international society, including NGOs'.[78]

Whether in Fukunaga's argument that seeks the factors leading to state non-compliance with international law norms in its objective intention of the lack of benefit or norm consciousness, or in A. Chayes and A. H. Chayes' argument that held that there are factors leading to non-compliance with international law norms other than intentional ones, it is necessary to note that the participation of non-state entities has recently been indicated as an important element in ensuring the legitimacy of international law rules and in securing compliance with them.

Experiential or empirical research on the effects on labour and environmental standards of including labour and environmental provisions in FTAs remains limited. It is not possible to determine which approach contributes more towards improving labour and environmental standards. The motivations for countries to include labour and environmental provisions in FTAs vary widely from economic considerations to realising value in human rights, sustain-

[75] A regulatory agreement is a multilateral one that handles complex economic, political, and social issues that require long-term cooperation from member states (A. Chayes and A. H. Chayes (1995), p. 1).

[76] *Ibid*., pp. 9-17.

[77] *Ibid*., p. 14. 'International supervision' (contrôle international) is an approach oriented towards securing compliance through compulsory and non-compulsory measures, similar to the managerial model. Morita defined international supervision as 'supervision and guidance through multilateral international institutions aimed at securing implementation by the country that the objective obligations and standards are addressed to'. Under international supervision, securing implementation of 'obligations and standards under international law that are set as a distribution of administrative duties that should be uniformly satisfied among several countries' (objective obligations and standards) is achieved by ongoing international institutions (multilateral international institutions). According to Morita, concrete means of international supervision include reporting and complaints systems, fact-finding, and inspection (Morita (2000), pp. 12, 152-155).

[78] See the commentary by the supervising translator, Miyano (A. Chayes and A. H. Chayes (2018), p. 552).

able development, and circumstances differ between countries as to whether there is a domestic influence arguing in favour of including labour and environmental provisions and whether there are policy documents or legal requirements that demand that they actually be included.[79] As Tamada pointed out, if both a dispute settlement process and a process for securing implementation are allowed to be used within a single treaty, states may consider adopting a pattern that uses both in the process for securing compliance aimed at realising the value of public law on workers' rights and environmental protection. Surveys by the ILO and OECD have indicated that achieving a high level of protection for labour and environmental standards requires securing a fiscal base and human resources for implementing policies to achieve it, as well as sharing knowledge and practice around the protection of both workers and the environment, and that allowing the involvement of civil society and the business sector is useful for sharing knowledge.[80] Overcoming these points solely using the sanctions approach is difficult. Given that arguments for including labour and environmental provisions have caused problems in debates between developed and developing countries, and that the question of how to convince developing countries that are likely to oppose their inclusion, will arise while looking at future multilateralisation, a perspective that considers the kinds of systems and frameworks that will be necessary for developing countries which lack sufficient finances, human resources, and knowledge, to comply with labour and environmental provisions will also be needed. While considering this, it is necessary to take a broader view that appreciates the various mechanisms involved in ensuring compliance stipulated under current FTAs, rather than mentioning the opposition between the 'sanctions' and the 'cooperative' approaches in current FTAs and arguing over which one is more effective. Establishing this view can provide states with a range of options towards processes for ensuring compliance.

The next chapter presents the actual state of 'joint use' of the sanctions approach (dispute settlement process) and the cooperative approach (process for securing implementation) as mechanisms for ensuring compliance, and reveals the diversity of procedures, which is a characteristic of the process for securing compliance with labour and environmental provisions, and the consistency that can be found therein. While doing so, the analysis will also focus on the ways in which parties are trying to secure transparency through the participation and involvement of civil society and the business sector and to achieve collaboration with other international organisations, as a necessary element for securing compliance, as academic theory has pointed out previously.

[79] In relation to policies and laws supporting the inclusion of environmental provisions in the US, EU, APEC, and New Zealand (NZ) FTAs, see OECD (2007), pp. 27-30.
[80] ILO (2016), p. 136; OECD (2007), pp. 57-59.

III. Characteristics of the Process for Securing Compliance with Labour and Environmental Provisions

III-1. Substance of obligations under labour and environmental provisions

Labour and the environment are mentioned in various ways in FTAs, such as through side agreements[81] or MOUs[82] relating to labour and the environment separately, by mentioning the promotion of labour and environmental protection or similar goals in the preamble to the FTAs,[83] by making stipulations using general exceptions while citing Article XX of the GATT in relation to the protection of humans, plants, and animals,[84] or by including an independent chapter addressing labour and the environment in the main body of the FTAs. Although legal obligations are not adopted in many FTAs that mention labour and the environment,[85] it is now possible to point to a certain directionality in provisions that are independently included in FTAs. FTAs that include references to labour and the environment require Parties to make efforts to ensure that domestic labour and environmental laws, regulations, and policies stipulate a high level of labour and environmental protection and to continue the development of these laws, regulations, and policies (maintenance of protection level). States must not fail to effectively enforce labour and environmental laws and regulations in a manner that affects trade and investment (effective enforcement) and may not waive or derogate from labour and environmental laws and regulations in a manner that affects trade and investment (non-derogation). In addition to the above, provisions requiring cooperation by Parties in the fields of labour and the environment such as by information exchange and technical assistance, provisions requiring public participation and public release of information, provisions requiring states to ensure that domestic administrative, quasi-judicial, and judicial procedures are fair, equitable, and transparent, thus ensuring appropriate use of relief measures by individuals, and provisions seeking to encourage corporate social responsibility (CSR) are included in many FTAs.

The labour provisions incorporated by the US tend to stipulate the adoption and maintenance of the core labour standards as mentioned in the ILO Declaration on domestic laws

[81] Although the US adopted the side letter format with the NAFTA, since its FTA with Jordan, it has incorporated labour and environmental provisions into the main part of the FTA. However, the US–Mexico–Canada Agreement (USMCA) was concluded with an environmental cooperation agreement as a side agreement. Canada frequently adopts the side agreement method in FTAs after the NAFTA as well. The FTAs concluded by Canada that use the side agreement method are those with Chile (1997), Costa Rica (2002), Peru (2009), Colombia (2011), Jordan (2012), Panama (2013), and Honduras (2014). Canada relied on incorporation of provisions into the main agreement in its FTAs with South Korea (2015), Ukraine (2017), and Israel (amending protocol signed in 2018), and the CETA and CPTPP.

[82] For example, Canada has concluded MOUs on labour cooperation with Brazil, Argentina, and China.

[83] Although the Canada–Costa Rica FTA (2002) does not have independent chapters on labour and the environment, in its preamble, the parties resolve to promote sustainable development and recognise the increased cooperation between both countries in the fields of labour and environment.

[84] The US' FTAs incorporate Article XX of the GATT *mutatis mutandis* and make it a part of the main agreement in these FTAs.

[85] For example, in 2005, NZ concluded an FTA with Thailand and concluded arrangements on labour and the environment, but the arrangement on environment explicitly states that this 'represents a political commitment but does not legally bind either country' (in section 4).

and regulations in relation to the maintenance of protection levels and include effective enforcement and non-derogation obligations with legally binding force.[86] For example, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), 2018 provides, in relation to the maintenance of protection levels, that 'Each Party shall adopt and maintain in its statutes and regulations, and practices thereunder, the following rights as stated in the ILO Declaration [author's note: the core labour standards]' (§19.3). Addressing effective enforcement, it stipulates, 'No Party shall fail to effectively enforce its labour laws through a sustained or recurring course of action or inaction in a manner affecting trade or investment between the Parties,' (§19.5) and addressing non-derogation, it states, 'no Party shall waive or otherwise derogate from, or offer to waive or otherwise derogate from, its statutes or regulations… in a manner affecting trade or investment between the Parties' (§19.4). The trend in adopting legal obligations pertaining to the maintenance of protection levels, effective enforcement, and non-derogation can also be seen in EU agreements, which conventionally adopted the cooperative approach and did not provide anything but the best-effort obligations in labour and environmental provisions. For example, the CETA of 2017 provides in relation to maintenance of protection levels that each Party 'shall ensure that its labour law and practices embody and provide protection for… fundamental principles and rights at work' (§23.3.1), and provides legal obligations concerning effective enforcement and non-derogation (§23.4) in identical wording to the US' FTA.[87]

Next, the following two points may be raised as characteristics of environmental provisions included in recent FTAs. First, in the environmental field, provisions on the maintenance of protection levels are still no more than best-effort obligations. The CPTPP provides, 'Each Party shall strive to ensure that its environmental laws and policies provide for, and encourage, high levels of environmental protection and to continue to improve its respective levels of environmental protection' (§20.3.3). On the other hand, some FTAs have demanded that Parties should implement MEAs that they have signed as a legal obligation. For example, the US–Korea FTA (2012) provides, 'A Party shall adopt, maintain, and implement laws, regulations, and all other measures to fulfil its obligations under the multilateral environmental agreements listed… ('covered agreements')' (§20.2). Second, in relation to the maintenance of protection levels, even the US' FTAs are written in ways that show consideration for the Parties' right to regulate, as shown above, but in relation to effective enforcement and non-derogation, FTAs concluded by the US, and by the EU, tend to include these two points as legal obligations, similar to what is seen in the field of labour.[88] Howev-

[86] The 2001 US–Jordan FTA sets forth maintenance of protection level and non-derogation as 'shall strive to' obligations (§6.1, 6.2), but since the May 10th agreement, both have been established as legal obligations.

[87] While US FTAs tend to include wording that limits state discretion on the effective enforcement of obligations in the field of labour, EU FTAs tend to protect the Parties' right to regulate. For example, the CPTPP provides, 'If a Party fails to comply with an obligation under this Chapter (author's note: the chapter on labour), a decision made by that Party on the provision of enforcement resources shall not excuse that failure' (§19.5.2). CETA §23.2 confirmed 'the right of each Party to set its labour priorities, to establish its levels of labour protection and to adopt or modify its laws and policies accordingly'. References to the parties' right to regulate have been deleted in US FTAs in conjunction with provisions for the maintenance of protection levels becoming legal obligations since the May 10th agreement (e.g. US–Chile FTA §19.1).

[88] e.g. EU-South Korea FTA §13.7.1-2, and CETA §24.5.2-3.

er, caution is necessary because of the slight differences between effective enforcement and non-derogation obligations in the field of labour in the following two respects. First, maintaining protection levels is a best-effort obligation, and thus, whether a Parties' environmental laws and regulations achieve high levels of protection is left to the Parties' own judgement. In other words, even if one party believes that another's domestic laws and regulations offer only a low level of protection, as long as they are being enforced effectively, they should not breach the obligation under the chapter on the environment. Second, in the environmental field, Parties are granted discretion and are allowed to make decisions on distributing resources to fields that they determine as having high priority in relation to investigation, prosecution, regulation, and compliance. Therefore, it is explicitly provided that if a course of action or inaction reasonably reflects this discretion or is the result of a decision made in good faith, it will not breach the obligation of effective enforcement (CPTPP §20.3.5).

In the labour chapter, the provisions on maintenance of protection levels required the adoption of core labour standards in domestic laws and regulations, but the environmental field does not have any reference standards of this kind and its provisions addressing protection demand that high levels of protection be secured and promise the implementation of MEAs, with individual provisions in specific environmental fields being included.[89] The fields specifically mentioned in the environmental chapter are ozone layer protection, air pollution, biodiversity, invasive species, ocean fisheries,[90] preservation of ocean species, fishing subsidies, preservation of wild flora and fauna, and goods and services relating to the environment. The US–Mexico–Canada Agreement (USMCA, signed in 2018) also added new provisions on marine litter (§24.12). The EU's FTAs tend to include provisions on forestry products.[91] A position paper from the EU during TTIP negotiations listed the Washington Convention, Montreal Protocol, Basel Convention, Convention on Biological Diversity and its protocols, Framework Convention on Climate Change, Stockholm Convention on Persistent Organic Pollutants, and the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemical and Pesticides in International Trade (1998) as 'core MEAs', and provisions relating to the above fields are likely to be included in FTAs in the future. The inclusion of provisions seeking the maintenance of appropriate processes for environmental impact assessments may also be raised as a characteristic of provisions in environmental fields.[92]

Finally, attention has been directed to the inclusion of provisions on the involvement and

[89] For an analysis of the CPTPP chapter on the environment, see Takamura (2017), pp. 541-547. She pointed out that although the subject matter handled by the agreement has expanded, the provisions demanding clear implementation of existing MEAs remain limited.

[90] EU FTAs also include aquaculture, but US FTAs exclude aquaculture (see, e.g. footnotes of CPTPP §20.16 and USMCA §24.16).

[91] e.g. CETA§24.10; Japan-EU FTA (2019) §16.7.

[92] e.g. USMCA§24.7. Komori noted that monitoring that is internal in the sense that it is carried out within a country, like environmental impact assessments, is considered important as a system for securing implementation, in addition to external monitoring by international bodies, as a characteristic of international compliance securing systems for upholding public order (Komori (2015), p. 151).

enlightenment of the public and the business sector as a characteristic common to labour and environmental provisions. Several FTAs require their Parties to encourage companies to voluntarily adopt spontaneous CSR activities relating to labour and environmental problems.[93] Several FTAs also require their Parties to establish a domestic consultation body, an advisory body, or similar mechanism for the public of the Parties to submit opinions on matters relating to provisions in the labour and environmental chapters, and to seek opinions and recommendations from the consultation or advisory body, or any other similar mechanism.[94] To do so, Parties must ensure public awareness of labour and environmental laws and regulations through releases of information to interested persons, in order to encourage public debate with (or between) nongovernmental entities on policies linked to the adoption of labour and environmental laws and regulations.[95]

In the US and Canada's agreements, Parties must receive and give proper consideration to complaints from the public concerning issues relating to the labour and environmental chapters[96] and if the complaints are valid, they must respond in writing.[97] The EU's FTAs do not have such complaint procedures. The environmental chapters in agreements concluded by the US, the EU, and Canada make it possible for 'voluntary mechanisms', such as voluntary audits and reporting, market-based encouragement, voluntary sharing of information and expert knowledge, and public-private cooperation to contribute towards the achievement and maintenance of environmental protection at a high level, and they encourage the use of voluntary mechanisms involving relevant domestic authorities, businesses and business organisations, nongovernmental organisations, and other interested persons.[98]

III-2. Process for Securing Compliance

Securing compliance with labour and environmental provisions is ensured by the two-stage process inherent in the chapters on labour and environment and processes under the chapter on dispute settlement. Chapters on labour and the environment define the process for cooperation, dialogue, and consultation primarily between the parties ('labour consultation' or 'environmental consultation') and the process for referring an issue to a council or other special committee established by the agreement. The EU's and Canada's FTAs provide processes for a panel of experts in their chapters on labour and the environment. US FTAs allow for the application of the chapter on dispute settlement, subject to following the process defined in the chapters on labour and the environment first. Below, the processes inherent to labour and environmental provisions are analysed as processes for securing implementation (cooperative approach), and those defined in chapters on dispute settlement as dispute settlement processes (sanctions approach).

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[93] e.g. CPTPP§19.7, 20.10; CETA§22.3.2 (b); Canada-Israel FTA (2018) §11.7; Korea-Turkey FTA §5.10.2 (b).
[94] e.g. CPTPP§19.14, 20.8; USMCA§23.16, 24.5.3; CETA§23.8.4, 24.13.5; Canada-Israel FTA §12.8, 11.11.
[95] e.g. CPTPP§19.8; CETA§23.6, 24.7; Canada-Israel FTA §11.6, 12.6.
[96] CETA§23.8.5, 24.7.3; Canada-Israel FTA §12.8.3.
[97] CPTPP§19.9.3 (a), 20.9.1; Canada-Israel FTA §11.11.4.
[98] CPTPP§20.11; USMCA§24.14; CETA§22.3.2 (a).

III-2-1. Process for Securing Implementation

Even US FTAs that allow the application of chapters on dispute settlement do not treat cooperative methods lightly. For example, in the CPTPP, the Parties recognise the importance of cooperation as a mechanism for the effective implementation of the provisions under the chapters on labour and the environment (CPTPP §19.10, 20.12). Furthermore, in carrying out cooperative activities, they recognise the importance of the principles of considering each Party's development level and other circumstances, the relationship with skills development activities, the creation of meaningful outcomes, resource efficiency, complementarity with other voluntary activities, and transparency and public participation. In carrying out cooperative activities, Parties seek the opinions of stakeholders in their own countries and request their participation if appropriate. Regional or international bodies and non-parties that are related to the cooperative activities can be involved (CPTPP §19.10.3).

The areas of cooperation with respect to labour include the exchange of best practices concerning labour laws and regulations, exchange of information concerning related activities and initiatives, promotion and effective implementation of the 1998 ILO Declaration and its follow-ups and the 2008 Decent Work Agenda, promotion of CSR, and cooperation with the WTO and the ILO, among others.[99] The CETA, which details information on cooperation in environmental fields, lists the assessments of the environmental impacts of FTAs and methods of strengthening or weakening such impacts, activities in the WTO, OECD, United Nations Environment Programme, MEAs, and other international forums that handle problems relating to trade and environmental policy, CSR with environmental aspects, impacts of environmental regulations and standards on trade, trade-related aspects of climate change regimes, trade and investment in environment-related goods and services, cooperation relating to the preservation of biodiversity and trade-related aspects of sustainable use, promotion of product life cycle management, improving the understanding of the environmental effects of economic activities, and exchange of opinions on the relationship between MEAs and international trade rules, among others, as the areas of cooperative activities.[100] This Cooperation is implemented through activities and means such as technical exchanges, exchanges of information and best practices, investigative projects, research, reporting, and conferences.[101]

The processes in the chapters on labour and the environment establish mechanisms that allow the public to submit opinions on matters determined to be related to these chapters. For example, CETA provides that the Parties shall consider views of the public and stakeholders with an interest in the definition and implementation of the Parties' cooperative activities and may involve stakeholders in cooperative activities if appropriate (CETA §24.12.3). Parties are required to make processes for receiving and considering written opinions easy to use and available to the public, and to respond suitably in writing if appro-

[99] CPTPP§19.10.6; CETA§23.7; Canada-Israel FTA Annex §12.9.1.
[100] CETA§24.12.
[101] CPTPP§20.12.5; CETA§24.12.2; Canada-Israel FTA §12.9.2, China-NZ Environment Cooperation Agreement §2.3; Chile-Malaysia FTA §9.3.

priate. The outcomes of consideration must also be released in a timely manner. Similar opportunities for public participation are also prepared in the CPTPP (CPTPP §19.9, 20.9).

The CPTPP and the USMCA enable a Party to request dialogue with another Party on any issue arising under the chapters on labour and the environment.[102] For example, in a dialogue under the chapter on labour of the CPTPP, Parties may decide to develop an action plan, engage in the independent verification of compliance, or implement programmes either by an individual or a group as the Party finds appropriate, and develop appropriate incentives (cooperative programmes, capacity building, etc.) to identify and address labour issues (CPTPP §19.11.6). In the process of the dialogue, the parties are requested to provide a means for receiving and considering the opinions of interested persons (CPTPP §19.11.3). The results of the dialogue are published (Ibid., paragraph 5). In the CETA, the EU and Canada agree to promote cooperation and provide procedures for bilateral dialogue and cooperation with respect to market access for agriculture-related biotechnology products, trade in forest products, issues with raw materials like minerals, metals, and agricultural products used in industry, and cooperation in science, technology, research, and innovation (CETA §25.1). Bilateral dialogue begins at the request of one party or the CETA Joint Committee. The dialogue is conducted by co-chairs who represent each party. They decide on the schedule and agenda for the dialogue. The co-chairs must report the outcomes and conclusions of the dialogue to the CETA Joint Committee when appropriate or at the committee's request.

The Parties may request labour and environmental consultations with other Parties on any issue arising under the provisions on labour and the environment, without prejudice to the commencement or continuation of the abovementioned dialogue.[103] Each consulting Party may request information or advice from experts and relevant international bodies, and may also use good offices, conciliation, mediation, or other procedures to resolve the issue.[104]

If an issue is not resolved by labour and environmental consultation, a request may be made for (senior) representatives of each consulting Party to convene a special committee comprising representatives or designees of each Party responsible for the matters of the chapters on labour and the environment, such as the council, the committee or the sub-committee. The name differs across agreements. At the meeting, opinions of independent experts are sought if appropriate, and the parties aim for the resolution of the issue by using their good offices, or by relying on conciliation, mediation, or other procedures.[105] Under US FTAs, if the issue cannot be resolved even after a consultation process among (senior) representatives at the council, etc., the country requesting such a consultation may request the establishment of a panel under the chapter on dispute settlement.

EU FTAs do not allow the application of the chapter on dispute settlement, with one ex-

[102] CPTPP§19.11, 20.20.1; USMCA§23.13, 24.29.
[103] CPTPP§19.15, 20.20; CETA§23.9, 24.14.
[104] *Ibid*., See also CETA§23.11.2, 24.16.2
[105] The environmental chapters in the CPTPP and the USMCA provide for consultations between ministers as the process thereafter (CPTPP §20.22; USMCA §24.31).

ception,[106] and an independent process for securing compliance is prepared in the TSD chapter.[107] This process is similar to the dispute settlement process in that independent experts may make findings of non-compliance of treaty obligations. However, it can be considered a process for encouraging cooperation among the Parties, as well. This is because of three reasons. First, the matters that may be examined by the panel of experts is not limited to those relating to interpretation and application of the treaty. They may examine all matters relating to the chapters on labour and the environment. Second, the panel of experts is considered unsuitable as a forum for examining breaches of trade agreements, as it comprises experts in human rights, the environment, and labour. Third, the measures taken in the case of an actual finding of noncompliance of obligations develop an action plan and other 'appropriate measures', rather than economic ones, such as compensation and suspension of benefits. For example, the CETA provides as follows with respect to the process for a panel of experts.

Reaching the stage of establishing a panel of experts requires labour and environmental consultations and examination in a special committee established under the agreement. A Party may request consultation with another Party on any issue arising under the chapters on labour and the environment (CETA §23.9, 24.14). Parties must make all attempts to arrive at a mutually satisfactory resolution of the issue. If relevant, and if both parties consent, the Parties shall seek information from or views of any person, organisation, or body, including relevant international organisations or bodies (CETA §23.9.3, 24.14.3). If a Party considers that additional discussions of the matter are necessary, that Party may request that the Committee on Trade and Sustainable Development ('TSD Committee')[108] be convened to consider the matter (CETA §23.9.4, 24.14.4). The TSD Committee shall convene promptly and endeavour to resolve the matter. If appropriate, it shall seek the advice of the Parties' domestic labour or sustainable development advisory groups (*Ibid.*).

For any matter that is not satisfactorily addressed through consultations, a Party may, 90 days after the receipt of a request for consultations, request that a panel of experts be convened to examine the matter (CETA §23.10, 24.15). The panel comprises three experts who must have specialised knowledge or expertise in labour or environmental law, or dispute resolution under international agreements (CETA §23.10.7, 24.15.7). The panel of experts are expected to examine, in light of the relevant provisions of the chapters on labour and the environment, the matter referred to in the request for the establishment of the panel of experts, and to deliver a report that makes recommendations for the resolution of the matter[109] (CETA §23.10.8, 24.15.8). The panel of experts shall deliver to the Parties the interim report within 120 days after the last panellist is selected, and the final report within 60 days of the

[106] The EU–CARIFORUM FTA (2008) is the only FTA concluded by the EU that allows for the application of the dispute settlement chapter. However, if there is any noncompliance with obligations, nonmonetary compensation and other appropriate measures may be taken by the complaining party (Article 213, paragraph 1).

[107] For example, the EU–South Korea FTA and the CETA stipulate that the parties must use only the provisions and procedures under the Trade and Sustainable Development Chapter for matters arising under the TSD chapter (EU–South Korea FTA §23.11.1, CETA §24.16.1).

[108] The committee comprises high-level officials from the parties who are responsible for trade and labour or trade and environmental issues and oversees the performance of the TSD chapter (CETA §22.4.1, 26.2.1 (g)).

[109] FTAs concluded by the EU do not explicitly state whether reports by the panel of experts are legally binding.

submission of the interim report (CETA §23.10.11, 24.15.10). The interim report shall set out the findings of facts, its determinations on the matter, including whether the responding Party has conformed with its obligations under the treaty and the rationale behind any findings, determinations, and recommendations (*Ibid.*). The Parties may present their comments before the panel of experts on the interim report within 45 days of its delivery (*Ibid.*).

In relation to the case in which an expert panel report finds non-compliance with obligations under the chapters on labour and the environment, the EU–South Korea FTA provides that Parties shall make their best efforts to accommodate advice or recommendations of the panel of experts, the implementation of which shall be monitored by the TSD Committee (EU–South Korea FTA §13.15.2). The measures taken to accommodate the advice of the panel of experts, etc., is left to the Parties' discretion. In this respect, the CETA provides that the parties to the dispute shall engage in discussions and shall endeavour, within three months of the delivery of the final report, to identify appropriate measures[110] or, if appropriate, to decide upon a mutually satisfactory action plan (CETA §23.10.12, 24.15.11). In relation to the process in the case of failure to implement the panel's report, the CETA can be considered as stipulating the process more concretely, but it cannot be determined at this point how effective these processes actually are.[111] The EU, which has adopted only a cooperative approach, is now developing procedural stipulations to this effect.

III-2-2. Dispute Settlement Process

The chapter on dispute settlement under the CPTPP provides (CPTPP §28.3.1) that its scope of application in the fields of labour and the environment shall be: (a) the avoidance or settlement of disputes regarding the interpretation or application of the agreement; and (b) when a Party considers that an actual or proposed measure of another Party is or would be inconsistent with an obligation of the agreement or that another Party has failed to carry out an obligation under the agreement. The absence of restrictions on the scope of the subject matter and obligations that the dispute settlement process applies to is a characteristic of recent FTAs. For example, the North American Agreement on Labour Cooperation (NAALC), a side agreement to the NAFTA, limits matters that the dispute settlement process may handle to those concerning occupational safety and health, child labour and minimum wages, and matters relating to the right to organise, the right to collective bargaining, and the right to strike are excluded.[112] In the Dominican Republic–Central American FTA (CAFTA-DR, 2006), the dispute settlement process may be applied only in relation to the effective enforcement of labour and environmental laws and regulations.[113] Such restrictions have not been imposed in recent FTAs. The case in which a benefit accruing under the treaty is nullified or impaired as a result of the application of a measure of another Party that is not incon-

[110] It is not certain whether 'appropriate measures' under the CETA include monetary ones, but Article 214 of the EU–CARIFORUM FTA excludes the suspension of trade benefits and the provision of monetary compensation from appropriate measures in explicit terms.
[111] Bartels (2017), p. 208.
[112] NAALC § 27.1.
[113] CAFTA-DR §16.6.7, § 17.10.7.

sistent with the treaty (a so-called 'non-violation complaint') is not allowed as grounds for a complaint under the chapters on labour and the environment (CPTPP §28.3.1 (c)).

A Party may request consultations with another Party on matters inside the scope of application indicated above. Unlike labour and environmental consultations under the chapters on labour and the environment, which permit consultations on 'any matter' relating to labour and the environment, consultations here are limited to matters within the scope of application of the chapter on dispute settlement. A Party other than a consulting one that has a substantial interest in the matter may participate in such consultations (CPTPP §28.5.3). Consultations generally commence within 30 days from the receipt of the request. The Parties shall examine how the measure may affect the operation or application of the treaty and make every attempt to arrive at a mutually satisfactory resolution. To this end, a consulting Party may request another consulting Party to make personnel of its government agencies or other regulatory bodies who have expertise in the matter at issue available (CPTPP §28.5.7). At any time during the consultations, Parties may agree to undertake another method such as good offices, conciliation, or mediation, which may continue after the panel has been established (CPTPP §28.6). Some treaties also allow issues to be referred to a committee comprising senior government officials in charge of trade matters without going through this consultation.[114]

In principle, the Party that requested consultations may request the establishment of a panel if the consulting Parties fail to resolve the matter within 60 days from the receipt of the request for consultations (CPTPP §28.7). The terms of reference for the panel shall be identified by the complaining Party in the request to establish a panel. A panel shall comprise three experts in law or international trade, etc., and in disputes concerning labour and the environment, the two panellists other than the chair must have expertise or experience in labour or environmental law or practice (CPTPP §28.9.5 (a), (b)). A panel should make an objective assessment of the matter before it and make the findings and determinations as called for in its terms of reference, and at the request of the Party, or on its own initiative, seek information and technical advice from any person or body that it deems appropriate, provided that the disputing parties agree (CPTPP §28.15). The panel shall draft an 'initial report' based on submissions and arguments of the disputing and third Parties, and on any information or advice put before it (CPTPP §28.17). In its report, the panel shall make findings of fact, determine whether the measure at issue is inconsistent with obligations under the treaty, whether a Party has failed to carry out its obligations under the treaty, and other matters, and make recommendations, if the disputing Parties have jointly requested them for the resolution of the dispute. A disputing Party may submit comments on the initial report no later than 15 days after its presentation. After considering any written comments by the disputing Parties, the panel shall present a final report to the disputing Parties no later than 30 days after the presentation of the initial report (CPTPP §28.18).

[114] For example, the US–Korea FTA provides that if the parties cannot resolve a matter by labour and environmental consultations under the chapters on labour and the environment, either party may refer the matter to the Joint Committee without resorting to consultations under the dispute settlement chapter (§22.8.2).

The Parties recognise the importance of prompt compliance with determinations made in the final report, and if the panel determines that the measure at issue is inconsistent with a Party's obligations in the treaty or a Party has failed to carry out its obligations in the treaty, the Party shall, whenever possible, eliminate the non-conformity (CPTPP §28.19). The responding Party shall have a reasonable period of time in which to eliminate the non-conformity if it is not practicable to do so immediately (CPTPP §28.19.3).

The responding Party shall, if requested by a complaining Party, enter into negotiations with the complaining Party, with a view to developing mutually acceptable compensation, if such responding Party does not intend to eliminate the non-conformity or if there is a disagreement between the disputing Parties as to whether the responding Party has eliminated the non-conformity (CPTPP §28.20.1). A complaining Party may suspend benefits if such complaining Party and the responding Party have been unable to agree on compensation within a period of 30 days after the period for developing compensation has begun or have agreed on compensation but the complaining Party deems that the responding Party has failed to observe the terms of the agreement (CPTPP §28.20.2). While suspending benefits, the complaining Party shall first seek to suspend benefits in the same subject matter, and if it finds that it is not practicable or effective to do so, and that the circumstances are serious enough, it may suspend benefits in a different subject matter (CPTPP §28.20.4).[115]

If the responding Party finds that the level of benefits identified by the complaining Party is manifestly excessive, or that the complaining Party has failed to follow the abovementioned principles and procedures while suspending benefits, or the responding Party has eliminated the non-conformity that the panel has determined to exist, it may request that the panel be reconvened to consider the matter (CPTPP §28.20.5). The reconvened panel shall present its determination no later than 90 days after it reconvenes, and if the panel determines that the level of benefits that the complaining Party proposes to suspend is manifestly excessive, it shall determine the level of benefits it considers as having an equivalent effect (CPTPP §28.20.5 (b)). The responding Party can provide written notice to the complaining Party that it will pay a monetary assessment after the complaining Party proposes to suspend benefits (CPTPP §28.20.7). The disputing Parties shall begin consultations on the assessment no later than 10 days after the date on which the notice is given. If the disputing Parties are unable to reach an agreement within 30 days after consultations begin and are not engaged in discussions regarding the use of a fund as described below, the amount under shall be set at a level that is equal to 50 per cent of the level of the benefits that the panel has determined, or if the panel has not determined the level, it shall be equal to 50 per cent of the level that the complaining party has proposed to suspend, and shall be payable in US dollars (CPTPP §28.20.7).[116] If the circumstances warrant, the assessment may be paid into a fund designated for appropriate initiatives to facilitate trade between Parties (CPTPP §28.20.8). At the same time, as the payment of its first quarterly instalment is due, the re-

[115] The principle of suspension of benefits relating to the labour and environmental provisions was first clearly set forth in the CPTPP.

sponding Party shall provide to the complaining Party an outline of the steps that it intends to take towards eliminating the non-conformity (CPTPP §28.20.9).

Thus far, there have been no cases of complaints under the labour and environmental provisions that have been examined in a dispute settlement process, but on 14 June 2017, the first report by an arbitration panel under a dispute settlement process[117] was presented in a matter wherein the US relied on the dispute settlement process in the CAFTA-DR to file a complaint against Guatemala in relation to a failure of its effective enforcement obligations stipulated under Article 16.2.1 (a) of the agreement.[118] The US argued that Guatemala had failed to enforce its labour laws, first by failing to compel compliance with orders of its own courts for reinstatement or compensation that were issued against workers dismissed for attempting to organise into a labour union, and second by failing to appropriately observe working conditions in workplaces.[119] The arbitration panel examined whether there was a failure to effectively enforce labour laws and regulations, whether there was a sustained or recurring course of action or inaction, and whether it was in a manner affecting trade or investment between the Parties. With respect to the first issue, the panel found that there had been a failure to effectively enforce labour laws and regulations in relation to 74 workers across 8 workplaces. It also inferred *prima facie* the existence of a sustained or recurring course of action or inaction and accepted that it affected trade between the Parties for only one company, but denied a breach of the obligations under the provision[120] as the effective enforcement obligations are 'cumulative in nature'.[121] In relation to the second issue, it found that there had been a failure to effectively enforce labour laws and regulations in relation to only one company, but held that this case alone would not satisfy the test in the second stage.[122] In conclusion, although the arbitration panel dismissed the US' complaint, this case involved the first interpretation of the effective enforcement obligation and hinted at the evidence necessary to prove a non-conformity of the obligation and the ways in which the evidence should be produced.[123] The author believes that it is an important case that can guide countries in handling similar provisions in the future.

[116] Before the agreement dated 10 May 2007, US FTAs included special procedures to address a failure to implement panel reports concerning disputes in the fields of labour and the environment, and the monetary assessment was capped at US $15 million per year (e.g. US-Chile FTA §22.16.1, CAFTA-DR §20.17.2).

[117] Final Report of the Panel, In the Matter of Guatemala–Issues Relating to the Obligations under Article 16.2.1 (a) of the CAFTA-DR, June 14, 2017.

[118] CAFTA-DR §16.2.1 (a) provides that 'A Party shall not fail to effectively enforce its labour laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties…'.

[119] *Ibid*., para. 60.

[120] The failure to effectively enforce labour laws and regulations in eight workplaces allows an inference of a sustained or recurring course of action or inaction, but the panel determined that if only the failure concerning one of these workplaces affected trade between the parties, and the failure concerning the other seven workplaces did not do so, the failure to effectively enforce labour laws and regulations cannot be considered to have affected trade between the parties 'through a sustained or recurring course of action or inaction' (*Ibid*., para. 505).

[121] *Ibid*., para. 500.

[122] *Ibid*., paras. 588, 590-91.

III-3. Developing Institutional Mechanisms

In the FTA, the Parties are required to develop institutional mechanisms such as the following to implement labour and environmental provisions.

Each Party either establishes or designates a contact point for the implementation of the chapters on labour and the environment. The contact point offers a window for dialogue, consultation, and submission of public opinions, and is engaged with other Parties on scheduling meetings and composition of special committees as described below.

For the public of the Party to submit opinions on matters relating to labour and the environment as a mechanism for public involvement, the Party must establish a new or maintain an existing domestic consultation or advisory body, or a similar mechanism and seek opinions from it.[124] For example, CETA requires the Parties to use existing or establish new consultative mechanisms, such as 'domestic advisory groups', to seek views and recommendations on issues relating to the chapters on labour and the environment (§24.13.5). These consultative mechanisms comprise representatives from civil society groups, environmental and business groups, and other stakeholders. Through such consultative mechanisms, stakeholders are able to submit opinions and make recommendations on any issue relating to the chapters on labour and the environment. CETA also provides that Parties must facilitate a 'civil society forum' comprising representatives of civil society organisations established in their territories, in order to conduct a dialogue on the sustainable development aspects of the agreement (CETA §22.5.1). This enables cross-border dialogue between civil societies.[125] The forum generally meets once each year. The Parties shall promote a balanced representation of relevant interests, including employers, unions, business organisations, and environmental groups (CETA §22.5.2). To implement labour and environmental consultation, a 'special committee' comprising Parties' representatives that are responsible for labour and environmental problems is established, although the actual name differs across agreements.[126] The primary duty of the special committee includes examining matters relating to the chapters on labour and the environment,[127] providing a forum for consulting on and considering cooperative activities, examining and endeavouring to resolve matters referred from consultations by senior representatives, promoting public participation and education on implementing the labour and environmental chapter, and verifying the operation and effective-

[123] The arguments and proof submitted by the US are thought of as insufficient for the following reasons. In this case, the US kept the witnesses anonymous on the grounds of protecting the workers. As a result, the identity of the people listed in the reinstatement order issued by the Guatemalan court and the witnesses became a point of dispute while finding facts. While proving 'in a manner affecting trade', the US argued that a causal relationship would naturally arise between cost reductions by the shipping companies that had allegedly failed to effectively enforce labour laws and regulations and cost reductions by the exporting companies that were the customers of the shipping companies (para. 454) and argued that denying the right to organise and the right of collective bargaining could be considered 'in a manner affecting trade' (para. 487).

[124] CPTPP§19.14.2, §20.8.2; CETA§23.8.4, 24.13.5; Canada-Honduras Labour Cooperation Agreement (2014) §8.

[125] ILO (2017), p. 47.

[126] e.g., Joint Committee, Council, Environmental Sub-Committee, Trade and Sustainable Development Committee, etc.

[127] e.g., Article 20.19, paragraph 7 of the CPTPP provides that during the fifth year after the entry into force of the agreement, the Environmental Sub-Committee must review the implementation and operation of the environmental chapter.

ness of labour and environmental provisions after a certain period has elapsed from the agreement's entry into force, among other matters. For example, CETA imposes an obligation on the Parties to establish a TSD Committee (CETA §22.4, 26.21). The TSD Committee comprises high-level representatives of the Parties that are responsible for the chapters on labour and the environment. The TSD Committee oversees the implementation of the chapters on labour and the environment, including cooperative activities and the review of the impact of the treaty on sustainable development. The TSD Committee shall meet within the first year of the entry into force of the treaty and may hold dedicated sessions to address specific problems with the chapters on labour and the environment. Each regular meeting or dedicated session includes a session with the public to discuss matters relating to the implementation of the chapters on labour and the environment, unless the Parties decide otherwise. To promote transparency and public participation, the TSD Committee shall generally make public any decision or report it, make and present updates on any matter related to the chapters on labour and the environment, including their implementation, to the civil society forum and report annually on any matter that it addresses pursuant to public information and awareness. Decisions and reports of special committees shall be made public. Some FTAs, such as the CPTPP, require special committees to liaise with relevant regional and international organisations (e.g., APEC, ILO) (CPTPP §19.12.9). Committees responsible for the treaty as a whole are also established as superior to the special committees. In the CETA, the CETA Joint Committee that comprises representatives from the EU and Canada fulfils this role (CETA §26.1). The joint committee is responsible for all matters concerning trade and investment between the Parties and the implementation and operation of the treaty. The Parties may refer all matters concerning the implementation and interpretation of the treaty, and trade and investment among Parties to the joint committee. The joint committee supervises and promotes the implementation and operation of the treaty and the work of all special committees established under it.

IV. Conclusion

International society is gradually beginning to share the awareness that trade liberalisation and labour and the environment should work together for sustainable development and is slowly beginning to show a certain degree of understanding towards including labour and environmental provisions in FTAs to achieve this. However, different countries have different motivations for including labour and environmental provisions in their FTAs and focus on different points while doing so. This has resulted in a variety of patterns in mentioning labour and environmental provisions, including the method of concluding the treaty, adopting legal obligations in substantial provisions, and processes in case of breach of those provisions while considering systemic design of labour and environmental provisions.

The US and the EU have adopted the method of incorporating labour and environmental provisions into the main part of their FTAs, given their background of domestic and regional debates seeking the realisation of substantial labour and environmental provisions through

the application of the same dispute settlement process as in other fields of FTAs. Whereas the US has inserted independent chapters on labour and the environment into its FTAs, the EU has inserted chapters on labour and the environment following the TSD chapters. On the other hand, although Canada has adopted the method of incorporating them into the body of its main treaty in its FTAs with South Korea and other countries, it adopted the method using a side agreement in its FTAs with Panama, Honduras, and other countries, and stipulated cooperation on labour and the environment in its MOUs with Brazil and China.

There are variations that each treaty presents between incorporating labour and environmental provisions into the main treaty or creating a side agreement, and between making the stipulations so adopted either a best-effort or legally binding obligation. Despite this, the labour and environmental provisions included in recent FTAs increasingly provide stipulations on cooperation between parties, ensuring high levels for labour and the environment, effective enforcement of and non-derogation from domestic laws and regulations that adopt high levels. Further, they also ensure the involvement of the public, civil society, and related international organisations, and approaching the business sector through encouragement of CSR. Among these, the tendency to prescribe legal obligations for effective enforcement and non-derogation in both labour and environmental fields, and for the maintenance of protection in the case of the labour field in FTAs concluded by the US, the EU, and Canada, has attracted attention as a recent development in substantive stipulations of labour and environmental provisions.

In relation to the means for ensuring compliance with the substantial obligations mentioned above, the difference between the 'sanctions approach' adopted by the US and the 'cooperative approach' adopted primarily by the EU has been pointed out. Under the US dispute settlement process, the interpretation and application of labour and environmental provisions and breaches of obligations are examined by an arbitration panel comprising experts in trade, labour, and the environment, and ultimately, the economic measures of provision of compensation, suspension of benefits, and payment of monetary assessments are authorised to be adopted if a breach of obligation is found. On the other hand, under the EU's TSD chapters, all matters concerning labour and the environment can be examined by a panel comprising experts in the fields of human rights, labour, and the environment without experts in the field of trade, and if a breach of obligations set forth in the labour and environmental provisions is found, the Parties are required to formulate an action plan, the performance of which is overseen by a special committee. Although the process for securing compliance that each approach stipulates ultimately arrives at different consequences, the US treaties also value cooperation to improve the Parties' abilities to comply with labour and environmental laws and regulations. If a problem arises, they are oriented towards resolution through dialogue and consultation. These procedures for dialogue and consultation provide for the involvement of representatives of the public, labour, environmental, and business groups, independent experts, and relevant international organisation. There is a question on whether the two approaches can merely be understood as being in opposition to each other.

The argument that the 'sanctions approach', which ultimately leads to the adoption of economic measures, is more effective as a means of securing compliance with labour and environmental provisions appears convincing at first, but it cannot be accepted uncritically without analysing the impact on domestic labour and environmental legal systems and standards because of the inclusion of labour and environmental provisions in FTAs. Another line of thought suggests that in order to secure compliance with obligations under labour and environmental provisions that include the maintenance of high levels of labour and environmental laws and regulations and the effective enforcement of domestic laws and regulations, a 'cooperative approach' involving technical assistance and capacity building, among other things, may be more useful in achieving these targets in view of the other country's domestic circumstances concerning its economy, finances, and human resources. To perform the obligations set forth in labour and environmental provisions effectively, it is important to involve civil society and business groups in some cases. Companies will actually conform to the labour and environmental standards defined by the government. They play a major role in distributing benefits obtained from trade liberalisation to individuals. This is overseen by civil society. In ensuring participation by non-state entities like these and improving the legitimacy of norms by encouraging CSR, procedures for the public to submit opinions are also essential elements for successfully securing compliance with labour and environmental provisions.

In the fields of labour and the environment, the creation of laws in FTAs has moved forward while undergoing various changes and it is difficult to point to a unified form for its processes for securing compliance, but the process for securing compliance adopted by recent labour and environmental provisions can be understood as jointly using the dispute settlement process and the process for securing implementation. EU treaties generally do not allow the application of a dispute settlement process, so caution would usually be required while generalising such a characterisation, but the fact that US treaties that follow the sanctions approach are also provided with a process for securing implementation suggests the utility of considering the new option of jointly using a dispute settlement process and a process for securing implementation while thinking about the process for securing compliance with regulations in the labour and environmental fields, which have not been regulated by a multilateral framework. In the future, whether the execution of these is reflected in the multilateral framework or not will be determined by the political will in each country. At present at least, the labour and environmental provisions included in FTAs are of various types and cannot be incorporated into the WTO Agreement while they are still under development. On the contrary, it is more realistic for each country to recognise the diversity of labour and environmental provisions included in FTAs and then select those that suit the economic, financial, and development levels of the country it is negotiating with. While doing so, the author believes that it would be useful to include the cooperative approach in examination at the same time from the perspective of consideration in practice. This is because the information obtained through dialogue between Parties and from civil society and the general public brings information on the other country's domestic labour and environmental laws and regu-

lations and their implementation to policymakers. The broad-ranging information so obtained can be submitted to a dispute settlement body as valid evidence to support the country's own arguments if it predicts the application of a dispute settlement process. These practical aspects of the cooperative approach should not be underestimated while thinking about the systematic design for the process for securing compliance.

The WTO and FTAs are expected to improve the mutual supportiveness of trade liberalisation and protection for workers and the environment by complementing, rather than substituting, each other. Including labour and environmental provisions in FTAs can provide a new method enabling defects in labour and environmental standards and legal systems, which are sought to be improved primarily through domestic systems, to be raised as an issue or presented appealingly on an international plane, thus contributing towards the achievement of labour and environmental protection. However, garnering the support of many countries to introduce provisions aimed at achieving these purposes requires an appropriate process for securing compliance to suppress Parties' protectionist application of labour and environmental provisions. The joint use of the cooperative approach may suppress Parties' arbitrary application of sanctions by following a cooperative process comprising many stages. Improving domestic laws and regulations by appreciating the state of their development and implementation and formulating action plans in the case of defects may fulfil the desires of stakeholders among the Parties that wish to develop fair conditions for competition. It is possible that exchanging information and ongoing supervision of performance by special committees and providing necessary financial and technical assistance may improve the capabilities of the Parties in the fields of labour and the environment, resulting in a contribution towards securing fair conditions for competition. In relation to systematic design for an appropriate process for securing compliance with labour and environmental provisions, a comprehensive analysis of performance in each country, including experiential and empirical analyses of the effectiveness of including labour and environmental provisions, will continue to be necessary. However, countries should examine measures that enable the dual purposes of obtaining economic benefits through trade liberalisation and achieving labour and environmental protection to operate in a mutually supportive manner, including whether it is possible to extend this multilaterally. While doing so, they should refer to legal systems that have been developed previously through FTA negotiation and practice.

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