

# **SOFT VS HARD GOVERNANCE FOR LABOUR AND ENVIRONMENTAL COMMITMENTS IN TRADE AGREEMENTS: COMPARING THE US AND EU APPROACHES<sup>a</sup>**

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Abstract:

Three methodologies are used to enforce labour and environmental commitments in the US and EU trade agreements: cooperative, sanctions and composite. In-depth analysis of the scope of commitments, level of protection, institutional framework as well as types of informal and formal dispute processes elucidates the pros and cons of such methodologies. Sanctions approach weakens cooperation by misjudging the complexity of domestic policy adjustments through transnational governance. Cooperative mechanism within the NAAEC's composite design emerges as the best approach: Submission on Enforcement Matters (SEM). As it provides for an independent secretariat supported by civil society group and factual records as a sunshine remedy to review citizen submissions. However, the process is constrained by political clout, lack of managerial capacity and legal dilemmas around informal lawmaking (IN-LAW) procedures.

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Water is fluid, soft and yielding. But water will wear away rock, which is rigid and cannot yield. As a rule, whatever is fluid, soft and yielding will overcome whatever is rigid and hard. This is another paradox: what is soft is strong!

In governing, don't try to control.

- Lao Tzu

## 1. Introduction

The new generation trade agreements include WTO-extra commitments, specifically on labour and environmental standards<sup>3</sup> to resolve public concerns pertaining to technology and trade-led economic globalization. The article maps 'all' the US and EU trade agreements' labour and environmental commitments and enforcement mechanisms to identify three main methodologies to implement such commitments: cooperative, composite and sanctions. The article further studies the scope of commitment, level of protection, institutional framework and dispute settlement processes to ascertain the pros and cons of these methodologies.

Although the EU trade agreements provide diverse scope of WTO-extra commitments with a deeper level of protection as compared to the US FTAs; the North American Agreement on Environmental Cooperation (NAAEC) – Citizen Submission on Enforcement Matters (SEM) emerges as the best approach to enforce labour and environmental commitments albeit it needs considerable improvement. As the SEM promotes an informal dispute process driven by independent expertise with an inclusive citizen participation thereby boosting the accountability and trust factor when compared to state-driven informal processes or sanctions approach.

The article consists of five parts. First part is the introduction; second part classifies all the US and EU trade agreements into the three methodologies and explains its main features; third part analyses the political economy, scope of commitments, level of protection, institutional framework and dispute settlement processes; fourth part explains the best approach and assesses its main challenges and fifth part concludes the article.

## 2. Methodologies to implement WTO-extra commitments

Three main methodologies are identified by the types of 'dispute settlement processes' to enforce or implement social and environmental commitments in the US and EU trade agreements:

- a) cooperative approach based on soft law;
- b) sanctions approach based on hard law; and
- c) composite approach based on both soft-hard law.

The cooperative approach promotes an inclusive transnational cooperation through bottom-up stakeholder networks. It aims to strengthen the national regulatory capacity through diverse cooperation tools. It resolves disputes through an informal dispute settlement (IN-DS) based on expert advice followed by recommendations, monitoring and diverse cooperative arrangements without recourse to a state-to-state arbitration for trade or financial sanctions against non-compliance of labour and environmental commitments in trade agreements.

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<sup>3</sup> Lorand Bartels, *Human Right, Labour Standards, and Environmental Standards in CETA*, in MEGA-REGIONAL TRADE AGREEMENTS: CETA, TTIP, AND TISA: NEW ORIENTATIONS FOR EU EXTERNAL ECONOMIC RELATIONS (Stefan Griller, Walter Obwexer and Erich Vranes eds., Oxford Scholarship Online 2017) 203-211, 203.

The sanctions approach promotes diplomatic consultations with limited positive inducements and relies on trade/financial sanctions. It does not give due credence for the participation of civil society networks or independent experts in the resolution of disputes. Instead it relies on a trade arbitration preceded by good offices that assesses comparative advantage (i.e., the financial profits) via bilateral trade or investment to domestic companies from low social and environmental standards. It does not have an informal dispute settlement (IN-DS) process unlike cooperative approach.

The composite approach combines the cooperative and sanctions approach with or without legally assessing the comparative advantage due to lower standards. The tools employed per agreement may vary but the main objective is to achieve cooperation through IN-DS before resorting to a formal trade arbitration. The composite approach has both IN-DS and formal dispute processes to enforce labour and environmental commitments.

Sanctions approach	Composite approach	Cooperative approach
<ul style="list-style-type: none"> <li>• 'No informal dispute process'</li> </ul>	<ul style="list-style-type: none"> <li>• Informal process to resolve the dispute</li> </ul>	<ul style="list-style-type: none"> <li>• Informal process to resolve the dispute</li> </ul>
<ul style="list-style-type: none"> <li>• Alternative remedies leads to formal dispute settlement process</li> </ul>	<ul style="list-style-type: none"> <li>• Alternative remedies leads to formal dispute process</li> </ul>	<ul style="list-style-type: none"> <li>• 'No formal dispute process'</li> </ul>

The US has free trade agreements (FTAs) whereas the EU trade agreements are distinguished into three kinds<sup>4</sup>: a) free trade agreements (FTAs); b) economic partnership agreements (EPAs) and c) association agreements (AAs).<sup>5</sup> The EU has a special socio-political and economic agenda behind each arrangement as delineated by its scope, content and legal status. The FTAs seek market-access opportunities, EPAs pursue economic development, (internally or externally by the EU) and the AAs provide for a special political partnership.<sup>6</sup>

Figure 2-1: Types of EU trade arrangements



The EU trade agreements mainly promote cooperative approach and the US FTAs administer a hard law approach. However, there are exceptions within the two models - the EU-CARIFORUM EPA and US's NAFTA, CAFTA-DR, Panama, Colombia and Peru FTAs provide for a composite approach. The EU-CARIFORUM EPA provides for a cooperative approach and in exceptional circumstances permits trade arbitration (no financial sanctions only trade measures or self-corrective action) with the main emphasis on mutually agreeable solution. The US's NAFTA, CAFTA-DR, Panama, Colombia and Peru FTAs provide for public submissions under a process called 'Submission on Enforcement Matters' (SEM) wherein any national citizen of the Parties can submit complaints for a public factual record (soft law instrument) by independent experts as a sunshine

<sup>4</sup> The EU has an international legal personality and exclusive competence to conclude FTAs via common commercial policy in Art. 3(1)(e) and 207(1) of the Treaty on the Functioning of the EU (TFEU).<sup>4</sup> While, the EPAs originated from the development pledges embedded in the Cotonou Agreement as the unilateral benefits were altered into reciprocal and WTO-compliant trade partnership with a special emphasis on economic and sustainable development. The Association Agreements are concluded as an international treaty under Art. 217 TFEU involving reciprocal rights and obligations to common and special procedures encompassing deep political cooperation on wide-ranging issues, e.g., human rights, humanitarian, rule of law and governance inclusive of labour and environmental standards.

<sup>5</sup> European Council of the European Union, *EU Trade Policy*, available at <http://www.consilium.europa.eu/en/policies/trade-policy/trade-agreements/>.

<sup>6</sup> *Id.*

remedy to guide state behavior. This mechanism is utilized in addition to a formal trade dispute settlement mechanism involving sanctions. Therefore, these six agreements are classified under the composite approach as they have both informal and formal dispute settlement processes.

**Table 2-1: Three methodologies to implement social and environmental commitments**

Trade Agreement	In force since	Cooperative		Composite		Sanctions	
		Stakeholder model	Stakeholder model	Stakeholder model	Stakeholder model		
EU's Economic Partnership Agreements (EPAs)							
1. CARIFORUM	2008			Y	JCC+Arb.		
2. East and South Africa (ESA)	2009	Y	EPA Committee				
3. Pacific	2011	Y	EPA Committee				
4. East African Community (EAC)	2014	Y	JCC				
5. Central Africa	2014	Y	EPA Committee				
6. South African Development Community	2016	Y	JCC				
7. West Africa	2016	Y	JCC				
8. Japan	2017	Y	TSD-SC				
EU's Free Trade Agreements							
1. Colombia and Peru	2012	Y	TSD-SC				
2. South Korea	2016	Y	TSD-SC				
3. Canada (CETA)	2017	Y	TSD-SC				
4. Vietnam	2018	Y	TSD-SC				
5. Singapore	Under ECJ opinion	Y	TSD-SC				
6. Mexico	2018	Y	TSD-SC				
EU's Association Agreements							
1. Palestine	1997	Y	JCC				
2. Tunisia	1998	Y	SAC				
3. Israel	2000	Y	SAC				
4. Morocco	2000	Y	SAC				
5. Jordan	2002	Y	SAC				
6. Egypt	2004	Y	SAC				
7. Algeria	2005	Y	SAC+CSP				
8. Chile	2005	Y	SAC+CSP				
9. Lebanon	2006	Y	SAC				
10. Western Balkans	2009	Y	SAC				
11. Central America	2013	Y	SAC+CSP+TSD-SC				
12. Georgia	2016	Y	SAC+CSP+TSD-SC				
13. Moldova	2016	Y	SAC+CSP+TSD-SC				
14. Ukraine	2016	Y	SAC+CSP+TSD-SC				
15. Cuba	2017	Y	JCC				
US's Free Trade Agreements							

1. NAFTA	1994			Y	SEM+Arb.		
2. Jordan	2001					Y	Arb.
3. CAFTA-DR	2003			Y	SEM+Arb.		
4. Chile	2004					Y	Arb.
5. Morocco	2004					Y	Arb.
6. Singapore	2004					Y	Arb.
7. Australia	2005					Y	Arb.
8. Bahrain	2006					Y	Arb.
9. Oman	2009					Y	Arb.
10. Peru	2009			Y	SEM+Arb.		
11. South Korea	2012					Y	Arb.
12. Panama	2012			Y	SEM+Arb	Y	
13. Colombia	2012			Y	SEM+Arb	Y	
14. CP-TPP (withdrawn by US)	2018			Y			Arb.

Source: Author's compilation.

### 3. WTO-extra commitments in the EU and US trade agreements

#### A. Political economy

This section provides that the incentives behind the inclusion of social and environmental commitments in trade agreements arose due to the political lobbying by civil society organizations in the US compared to an institutional aim to integrate the common commercial policy with external policies in the EU.

##### (i) Political economy behind labour and environmental commitments in the US FTAs

The US trade promotion authority (TPA) as amended in 2002 and 2007 provides the key negotiating objectives for labour and environmental commitments in US FTAs (see annex 2).<sup>7</sup> The debate began as the civil society raised concerns over NAFTA negotiations with Mexico which has depressed wages, inhumane labor conditions and lax environmental regulation ensuing a race-to-bottom economic competition given the arbitrage of free trade and capital flows in absence of a proportionate regulatory social and environmental remit.<sup>8</sup> President Clinton sponsored a political settlement by promising that NAFTA will be signed only if it is supplemented by labour and environmental commitments.<sup>9</sup>

Subsequently, the US Congress refused to grant TPA from 1994 until 2002 despite repeated attempts by President Clinton and Bush senior, till the enactment of the Bipartisan TPA Act, 2002 which accentuated a cohesive Congressional oversight and negotiating objectives for any future FTA negotiations.<sup>10</sup> The 2002 TPA provides for an enforceable non-derogation clause to uphold domestic laws.<sup>11</sup> However, the US democrats soon realized that the domestic standard of protection in the US trading partners were already too low for the

<sup>7</sup> Ian F. Fergusson and Christopher M. Davis, *Trade Promotion Authority (TPA): Frequently Asked Questions*, Congressional Research Service (25 May 2018), available at <https://fas.org/sgp/crs/misc/R43491.pdf>.

<sup>8</sup> Robert F. Housman and Paul M. Orbuch, *Integrating Labor and Environmental Concerns into the North American Free Trade Agreement: A Look Back and a Look Ahead*, 8 AM. U. J. INT'L L. POL'Y 4 (1993), at 724.

<sup>9</sup> The Washington Post, *Clinton's Conversion on NAFTA*, available at [https://www.washingtonpost.com/archive/business/1993/09/19/clintons-conversion-on-nafta/3a5b9cb5-dfc8-4b5c-9ae6-30781f0a99fc/?utm\\_term=.963badecbc90](https://www.washingtonpost.com/archive/business/1993/09/19/clintons-conversion-on-nafta/3a5b9cb5-dfc8-4b5c-9ae6-30781f0a99fc/?utm_term=.963badecbc90).

<sup>10</sup> Ian F. Fergusson, *Trade Promotion Authority (TPA) and the Role of Congress in Trade Policy*, Congressional Research Service (2015), available at [https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?referer=https://www.google.ch/&httpsredir=1&article=2430&context=key\\_workplace](https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?referer=https://www.google.ch/&httpsredir=1&article=2430&context=key_workplace).

<sup>11</sup> *Id.*

non-derogation clause to have any bearing.<sup>12</sup> Thus, the US Congress reached the ‘10 May 2007 deal’ whereby the ILO’s core labor rights were subject to reciprocal enforcement obligations affecting both ‘trade and investment’ between the Parties.<sup>13</sup> It did not change the definition of labor laws as the commitments applied to the federal labor regulations only.<sup>14</sup> Similarly, the TPA 2007 mandates commitment to a specific list of seven MEAs.<sup>15</sup>

**(ii) Political economy behind labour and environmental commitments in the EU trade agreements**

The Lisbon Treaty integrated the EU’s Common Commercial Policy with other external policies under Part V of the Treaty on the Functioning of EU (TFEU).<sup>16</sup> It changed the addressees and legal nature of the CCP by inserting ‘Union’ as against ‘member states’ as a predominant actor in external trade policy.<sup>17</sup> The CCP as integrated in the overall external policies of the EU was further subject to Art. 205 TFEU which clarified that all external policies shall be guided by the general principles (EU values) as laid down in Chapter 1 of Title V of TFEU<sup>18</sup> e.g., democracy, rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the UN Charter and international law<sup>19</sup>, specifically it stated:

The Union shall ensure consistency between the different areas of its external action and between these and its other policies.<sup>20</sup> The Council and the Commission, assisted by the High Representative of the Union for Foreign Affairs and Security Policy, shall ensure that consistency and shall cooperate to that effect.

Further, the ECJ in its recent *EU-Singapore FTA* case (on shared competence under the EU treaty for TSD chapters) clarified that the objective of sustainable development henceforth forms an integral part of the common commercial policy within the exclusive competence of EU.<sup>21</sup> The sustainable development chapter has a direct and immediate effect on trade as per: a) the obligation not to encourage trade by reducing the levels of social and environmental protection in their respective territories below the standard laid down by international commitments and, on the other, not to apply those standards in a protectionist manner; b) the TSD commitments reduce the risk of major disparities between the parties in the production of goods and services meant for trade; c) certain specific commitments on illegally harvested timber or fisheries have a direct impact on the production process affecting trade and d) the violation of sustainable development

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> Markus Krajewski, *Reform of the Common Commercial Policy*, in EU LAW AFTER LISBON (Andrew Biondo, Piet Eeckhout and Stefanie Ripley eds., Oxford Scholarship Online 2012). Also, Henri de Waele, *LEGAL DYNAMICS OF EU EXTERNAL RELATIONS: DISSECTING A LAYERED GLOBAL PLAYER*, Second Edition (Springer-Verlag GmbH Germany 2017).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* Also see: ‘The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to: a) safeguard its values, fundamental interests, security, independence and integrity; b) consolidate and support democracy, the rule of law, human rights and the principles international law; c) preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the UN Charter, with the principles of the Helsinki Final Act and with the aims of the Charter of Paris, including those relating to external borders; d) foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty; e) encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade; f) help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development; g) assist populations, countries and regions confronting natural or man-made disasters; and h) promote an international system based on stronger multilateral cooperation and good global governance.’

<sup>20</sup> See *supra* note 14.

<sup>21</sup> In Opinion procedure 2/15, Request for an opinion pursuant to Article 218(11) TFEU, made on 10 July 2015 by the European Commission, ECLI:EU:C:2017:376, paragraphs 158-167, available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=190727&doclang=EN>.

chapter provides the concerned party as per Art. 60(1) VCLT to terminate or suspend the liberalization in other provisions of the trade agreement.<sup>22</sup>

## B. Scope and level of protection of labour & environmental commitments in the US & EU trade agreements

This section provides that the scope of international commitments is less ambitious in the US FTAs as compared to EU trade agreements as the latter includes human rights, good governance and humanitarian issues apart from labour and environmental concerns in the AAs. Further, the labour and environmental commitments in the EU trade agreements are more diverse than US FTAs.

On the level of protection, both US FTAs and EU trade agreements have four agreements which provide for a legally binding level of protection affecting trade and investment (not including CP-TPP, as the US withdrew from the pact). However, the EU trade agreements as compared to the US FTAs do not provide the phrase 'between the Parties' which makes the commitment legally applicable to their overall international economic relations with wider world than only between the Parties.

### (i) Scope of labour and environmental commitments in the US FTAs

All the US FTAs except for NAALC 'reiterate' the commitment to uphold five core ILO rights in the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up (1998) in their laws and practices: a) freedom of association; b) effective recognition of the right to collective bargaining; c) elimination of all forms of compulsory or forced labor; d) effective abolition of child labour, and a prohibition on the worst forms of child labour; e) elimination of discrimination in respect of employment and occupation; and acceptable conditions of work with respect to minimum wages, hours of work and occupational safety and health.<sup>23</sup>

**Table 3-1: Ratification of ILO Conventions by the United States**

Ratified by the US	Not ratified by the US
<ul style="list-style-type: none"> <li>• C105 - Abolition of Forced Labour Convention, 1957 (No. 105)</li> <li>• C182 - Worst Forms of Child Labour Convention, 1999 (No. 182)</li> <li>• C144 - Tripartite Consultations (International Labour Standards) Convention, 1976 (No. 144)</li> </ul>	<ul style="list-style-type: none"> <li>• C029 - Forced Labour Convention, 1930 (No. 29)</li> <li>• C087 - Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)</li> <li>• C098 - Right to Organise and Collective Bargaining Convention, 1949 (No. 98)</li> <li>• C100 - Equal Remuneration Convention, 1951 (No. 100)</li> <li>• C111 - Discrimination (Employment and Occupation) Convention, 1958 (No. 111)</li> <li>• C138 - Minimum Age Convention, 1973 (No. 138)</li> <li>• C081 - Labour Inspection Convention, 1947 (no. 81)</li> <li>• C122 - Employment Policy Convention, 1964 (No. 122)</li> <li>• C129 - Labour Inspection (Agriculture) Convention, 1969 (No. 129)</li> </ul>

Source: ILO Portal

<sup>22</sup> *id.*

<sup>23</sup> Free Trade Agreement between Australia and the United States, available at <https://ustr.gov/trade-agreements/free-trade-agreements/australian-fta/final-text>; Free Trade Agreement between Bahrain and United States, available at <https://ustr.gov/trade-agreements/free-trade-agreements/bahrain-fta/final-text>; Free Trade Agreement between Chile and the United States, available at <https://ustr.gov/trade-agreements/free-trade-agreements/chile-fta>; Free Trade Agreement between Colombia and the United States, available at <https://ustr.gov/trade-agreements/free-trade-agreements/colombia-fta/final-text>; Free Trade Agreement between Dominican Republic-Central America and the United States, available at <https://ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text>; Free Trade Agreement between Israel and the United States, available at <https://ustr.gov/trade-agreements/free-trade-agreements/israel-fta/final-text>; Free Trade Agreement between Jordan and the United States, available at <https://ustr.gov/trade-agreements/free-trade-agreements/jordan-fta>; Free Trade Agreement between Korea and the United States, available at <https://ustr.gov/trade-agreements/free-trade-agreements/korus-fta>; Free Trade Agreement between Morocco and the United States, available at <https://ustr.gov/trade-agreements/free-trade-agreements/morocco-fta/final-text>; Free Trade Agreement between Oman and the United States, available at <https://ustr.gov/trade-agreements/free-trade-agreements/oman-fta/final-text>; Free Trade Agreement between Panama and the United States, available at <https://ustr.gov/trade-agreements/free-trade-agreements/panama-tpa>; Free Trade Agreement between Peru and the United States, available at <https://ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text>; Free Trade Agreement between Singapore and the United States, available at <https://ustr.gov/trade-agreements/free-trade-agreements/singapore-fta/final-text>.

As compared to the EU trade agreements, the US FTAs refer to ILO Declaration and not to Conventions as the US has not ratified six out of the eight core ILO conventions. Weissbrodt and Manson provides that:

The US and the ILO take varying approaches to the right to organize, the right to bargain collectively, the right to strike, treatment of public employees, the rights of non-citizen workers, treatment of children, anti-union discrimination, and treatment of women.<sup>24</sup> Despite being bound to respect and promote the principles and rights established in the ILO Constitution and the principle of freedom of association, the US tends to provide lower levels of coverage and protection for employees than required by ILO standards....To achieve a higher level of compliance with ILO standards, the United States would need to ratify a greater number of conventions (particularly the core conventions) and accept more recommendations.

The ILO Declarations are resolutions of the International Labour Conference which makes a formal and authoritative statement to reaffirm the importance attached to certain principles and values.<sup>25</sup> They are not subject to ratification and is a political undertaking by states. The CP-TPP provides that all Parties shall adopt and maintain in their statutes and regulations as well as practices, the ILO fundamental rights as provided in ILO Declarations like other US FTAs.<sup>26</sup>

On environment, only Colombia, Korea, Panama and Peru – US FTAs ensure the promotion of seven MEAs subject to future modification: a) Convention on International Trade in Endangered Species in Wild Fauna and Flora (CITES); b) Montreal Protocol on Ozone Layer; c) International Convention for the Prevention of Pollution from Ships, 1972; d) Convention on Wetlands of International Importance, e.g., Waterfowl Habitat; e) Convention on the Conservation of Antarctic Marine Living Resources; f) International Conventions for the Regulation of Whaling; and g) Convention for the Establishment of an Inter-American Tropical Tuna Commission.<sup>27</sup> Other FTAs merely provide for a reconfirmation of obligations in MEAs. However, on environment, the CP-TPP provides that the Parties reaffirm their commitment to implement the MEAs to which they are a Party.<sup>28</sup>

All the US FTAs except Jordan FTA provide that the legal entities within their jurisdictions shall have an appropriate access to administrative, quasi-judicial, judicial or labour tribunals for the enforcement of the domestic labour laws.<sup>29</sup> It provides a list of procedural fairness principles to ensure proper administration of labour laws.

## (ii) Level of protection for labour and environment in the US FTAs

NAFTA provides for maintenance of domestic laws: *persistent pattern of failure to enforce environmental or labour law*.<sup>30</sup> With the Jordan FTA came the main non-derogation clauses for labour and environmental commitments as noted in the table 3-2 below. However, the environmental commitments were stricter than labour:

<sup>24</sup> David Weissbrodt and Matthew Mason, *Compliance of the United States with International Labor Law*, 98 MINN. L. REV. 1842 (2014) at 1846.

<sup>25</sup> International Labour Organization, *ILO Declarations*, available at [http://www.ilo.org/global/about-the-ilo/how-the-ilo-works/departments-and-offices/jur/legal-instruments/WCMS\\_428589/lang--en/index.htm](http://www.ilo.org/global/about-the-ilo/how-the-ilo-works/departments-and-offices/jur/legal-instruments/WCMS_428589/lang--en/index.htm).

<sup>26</sup> See CP-TPP FTA at art. 19.3: Labour Rights, *supra* note 21.

<sup>27</sup> Free Trade Agreement between Korea and the United States, available at <https://ustr.gov/trade-agreements/free-trade-agreements/korus-fta>; Free Trade Agreement between Panama and the United States, available at <https://ustr.gov/trade-agreements/free-trade-agreements/panama-tpa>; Free Trade Agreement between Peru and the United States, available at <https://ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text>; Free Trade Agreement between Colombia and the United States, available at <https://ustr.gov/trade-agreements/free-trade-agreements/colombia-fta/final-text>.

<sup>28</sup> *Id.*

<sup>29</sup> See CAFTA-DR-US at art. 16.3: Procedural Guarantees and Public Awareness, Chile-US at art. 18.3: Procedural Guarantees and Public Awareness, Morocco-US at art. 16.3: Procedural Guarantees and Public Awareness, Singapore-US at art. 17.3: Procedural Guarantees and Public Awareness, Australia-US at art. 18.3: Procedural Guarantees and Public Awareness, Bahrain-US at art. 15.3: Procedural Guarantees and Public Awareness, Oman-US at art. 16.2: Application and Enforcement of Labor Laws, Peru-US at art. 17.4: Procedural Guarantees and Public Awareness, South Korea-US at art. 19.3: Application and Enforcement of Labor Laws, Panama-US at art. 16.4: Procedural Guarantees and Public Awareness, Colombia-US at art. 17.4: Procedural Guarantees and Public Awareness and CP-TPP FTA at art. 19.8: Public Awareness and Procedural Guarantees, *supra* note 21.

<sup>30</sup> North American Agreement on Labor Cooperation (1993), available at <https://www.dol.gov/ilab/reports/pdf/naalc.htm>; North American Agreement on Environmental Cooperation, 1993, <http://www.cec.org/about-us/NAAEC>.

Labour: 'shall strive' to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws as an encouragement to trade.

Environment: 'shall not' fail to effectively enforce its laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties.

**Table 3-2: Level of Protection in the US FTAs**

FTAs	List of International Agreements		Persistent pattern of failure to enforce its environmental law	Persistent pattern of failure to enforce its labour law	Shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws as an encouragement				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				Shall not fail to effectively enforce its laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties					
	Env.	Lab.			Environment		Labour		Environment		Labour							
					Trade	Trade and Investment	Trade	Trade and Investment	Trade	Trade and Investment	Trade	Trade and Investment						
NAFTA			•	•														
Jordan								•										
CAFTA-DR								•										
Chile								•										
Morocco								•										
Singapore						•		•										
Australia								•										
Bahrain								•										
Oman								•										
Peru	•																	
KORUS	•																	
Panama	•																	
Colombia	•																	
CP-TPP																		

**Source:** Author's compilation.

The CAFTA-DR FTA changed the level of protection for labour commitments with the addition of similar clauses 'shall not fail to enforce...through a sustained or recurring course of action or inaction, in a manner affecting trade'.<sup>31</sup> Additionally, it introduced level of protection in both trade and investment relation between the Parties, less obligatory than the standard clause relating to trade relations: '...shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws as an encouragement for trade or investment'.<sup>32</sup>

This practice continued in Chile, Morocco, Australia, Bahrain and Oman FTAs with an exception of Singapore FTA.<sup>33</sup> In Singapore FTA, the two-standard non-derogation clauses were binding on trade relations between the Parties, removing the investment part as against the previous practice.<sup>34</sup>

Notable change was seen in Peru, Panama, Korea and Colombia FTAs as well as CP-TPP, whereby the level of protection for both trade and investment were made strictly binding, i.e., 'shall not fail' as against 'shall strive to ensure'. It became legally binding for Parties to uphold in the domestic laws a list of seven MEAs: '...Party shall adopt, maintain and implement laws, regulations, and all other measures subject to future modification'.<sup>35</sup> This legal obligation in light of the mandatory clause to uphold domestic environmental laws in the Peru, KORUS, Panama, Colombia and CP-TPP FTAs affecting both trade and investment between the Parties show that the seven MEAs are legally binding between Parties through FTA.

### (iii) Scope of labour and environmental commitments in the EU trade agreements

In the EU trade agreements, labour and environmental standards have been given a firm emphasis and the commitments have become more cohesive over time on the basis of improved cooperation per country profile

<sup>31</sup> See CAFTA-DR-US FTA at art. 16.2: Enforcement of Labor Laws, *supra* note 21.

<sup>32</sup> *Id.*

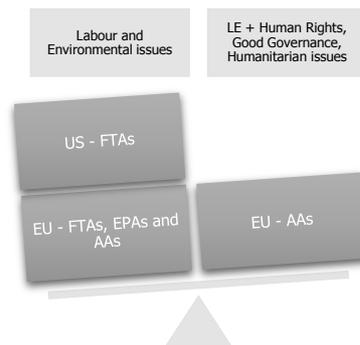
<sup>33</sup> See Chile-US FTA at art. 18.3: Procedural Guarantees and Public Awareness, Morocco-US FTA at art. 16.3: Procedural Guarantees and Public Awareness, Australia-US FTA at art. 18.2: Application and Enforcement of Labour Laws, Bahrain-US FTA at art. 15.3: Procedural Guarantees and Public Awareness and Oman-US FTA at art 16.3: Procedural Guarantees and Public Awareness, *supra* note 21.

<sup>34</sup> See Singapore-US FTA at art. 17.2: Application and Enforcement of Labor Laws, *supra* note 21.

<sup>35</sup> See Peru-US FTA at art. 17.2: Fundamental Labor Rights, Korea-US FTA at art. 19.3: Application and Enforcement of Labor Laws, Panama-US FTA at art. 16.3: Enforcement of Labor Laws and Colombia-US FTA at art. 17.3: Enforcement of Labor Laws, *supra* note 21.

whereas human rights, humanitarian and good governance issues are segregated under the ambit of AA's restricted political framework. It may be due to the political nature of the AA pact where the EU has a legal mandate to expansively promulgate its external policy.<sup>36</sup> As human rights, good governance and humanitarian issues are not specifically mentioned in the TSD chapters inclusive of labour and environmental issues. Separate provisions per country profile are allocated under the AAs to deal with certain human rights, governance or humanitarian issues. This indicates lack of balance and comprehension on the role of trade agreements to promote such standards.

**Figure 2: Inclusion of Social and Environmental Commitments in trade agreements**



The AAs in preamble and the text refer to the UN Declaration on Human Rights and the UN Charter in addition to the European Convention on Fundamental Freedoms and Human Rights, 1950.<sup>37</sup> Three AAs refer to the 1951 Geneva Convention relating to the Status of the Refugee and its Protocol, 1967 and other international instruments ensuring the respect of the non-refoulement principle.<sup>38</sup> Reference is made to fight against terrorism, specifically the Prevention and Penalization of Acts of Terrorism and UNSC resolution 1373.<sup>39</sup> The areas of cooperation on disarmament are discussed, specifically on the weapons of mass destruction (WMD) as well as illicit trade, production and sale of small weapons.

On good governance, specific guidelines are mentioned to regulate money laundering and drug use: Financial Action Task Force (FATF), the Guiding Principles on Drugs Demand Reduction as approved by the 20<sup>th</sup>

<sup>36</sup> Guillaume Van de Loo, THE EU-UKRAINE ASSOCIATION AGREEMENT AND DEEP AND COMPREHENSIVE FREE TRADE AREA: A NEW LEGAL INSTRUMENT FOR EU INTEGRATION WITHOUT MEMBERSHIP (Koninklijke Brill NV, 2016) 24.

<sup>37</sup> Agreement establishing an Association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part, Official Journal L 352, 2002, available at [https://eur-lex.europa.eu/resource.html?uri=cellar:f83a503c-fa20-4b3a-9535-f1074175eaf0.0004.02/DOC\\_2&format=PDF](https://eur-lex.europa.eu/resource.html?uri=cellar:f83a503c-fa20-4b3a-9535-f1074175eaf0.0004.02/DOC_2&format=PDF); Political Dialogue and Cooperation Agreement between the European Union and its Member States, on the one part, and the Republic of Cuba, of the other part, Official Journal LI 3373 (2016), available at <http://data.consilium.europa.eu/doc/document/ST-12504-2016-INIT/en/pdf>; Agreement establishing an Association between the European Union and its Member States, on the one hand, and Central America on the other, and the provisional application of Part IV thereof concerning trade matters, Official Journal L 346, available at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=689>; Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part, L 261/4, 2014, available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22014A0830\(02\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22014A0830(02)&from=EN); Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part, Official Journal L 260/4, 2014, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22014A0830%2801%29&from=EN>; Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, Official Journal L 161, 2014, available at [http://trade.ec.europa.eu/doclib/docs/2016/november/tradoc\\_155103.pdf](http://trade.ec.europa.eu/doclib/docs/2016/november/tradoc_155103.pdf).

<sup>38</sup> See *id.*, Albania AA at art. 80: Visa, border management, asylum and migration, Georgia AA at art. 15: Cooperation on migration, asylum and border management and Moldova AA at art. 14: Cooperation on migration, asylum and border management and Central America AA at art. 49: Migration.

<sup>39</sup> Moldova AA at art. 11: International cooperation in the fight against terrorism; Albania AA at art. 84: Counter-terrorism, *supra* note 35.

UNGA Special Section on Drugs, 1998 and the Chemicals Action Task Force (CATF).<sup>40</sup> The UN Convention on Corruption and Transnational Organized Crime is also explicitly mentioned.<sup>41</sup>

The EPAs give impetus to the concept of ‘sustainable development’ as the very origin of the EPA is based on the idea of development through economic integration.<sup>42</sup> However, in EPAs, only the CARIFORUM and Japan EPA stand-out in terms of key commitments. Other African EPAs, in contrast, merely mention the concept of sustainable development in preamble where it finds an empty recognition. Only the Japan EPA and Mexico FTA explicitly refers to the Paris Climate Accord<sup>43</sup> whereas other FTAs refer to the UNFCCC and its Kyoto Protocol.

On labour standards, the EU trade agreements commonly refer to the core ILO conventions, Ministerial Declaration on Attainment of Full, Productive Employment and Decent Work as adopted by the UN Economic and Social Council, 2006 and to the ILO Declaration on Fair Globalization, 2008. Singapore, Vietnam and Mexico FTAs as well as Moldova and Ukraine AAs mention CSR initiatives and guidelines: OECD Guidelines for Multinational Enterprises, the UN Global Compact and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy. Mexico FTA specifically mentions the UN Guiding Principles on Business and Human Rights and the OECD Due Diligence Guidance documents for responsible supply chains.<sup>44</sup>

All the EU trade agreements with TSD chapters promote four core ILO conventions: a) freedom of association; b) collective bargaining; c) elimination of compulsory labour; and d) abolition of child labour and elimination of discrimination in respect of employment and occupation.<sup>45</sup> CETA further provides that the Parties shall ensure that its labour law promotes international commitments such as:

...health and safety at work, including the prevention of occupational injury or illnesses and compensation in cases of such injury or illness; establishment of acceptable minimum employment standards for wage earners, including those not covered by a collective agreement; and non-discrimination in respect of working conditions, including for migrant workers.<sup>46</sup>

Common thread of international environmental agreements as mentioned in the EU FTAs are: a) Agenda 21 adopted by the UN Conference on Environment and Development; b) Rio Declaration; c) Johannesburg Declaration; d) Convention on Biodiversity and e) CITES. Specific mention to the UNCLOS Agreement relating to the Conservation and Management of Straddling Fish Stocks; Kigali amendment to control the production and consumption and trade in Ozone Depleting Substances and Hydro-fluorocarbons (HFCs) is noted.

#### (iv) Level of protection for labour and environment in the EU trade agreements

The CARIFORUM-EU EPA (the first EU trade agreement with WTO-extra commitments) generally promotes the level of protection as embedded in domestic laws and with an aim to ensure high level in compliance with international commitments:

Labour – Art. 193: ...Parties agree not to encourage trade or foreign direct investment to enhance or maintain a competitive advantage by: a) lowering the level of protection provided by domestic social and labour legislation; b) derogating from or failing to apply such legislation and standards.

<sup>40</sup> Tunisia AA at art. 61(2): Money Laundering, art. 62(3)(c): Combating drug use and trafficking ; Israel AA at art. 56: Drugs and money laundering; Morocco AA at art. 61: Money Laundering, art. 62: Combating drug use and trafficking; Jordan AA at art. 61: Money laundering, art. 62: Combating drug use and trafficking; Chile AA at art. 47: Cooperation on drugs and combating organized crime (CATF not mentioned); Albania AA at art. 82(2): Money laundering and terrorism financing (CATF not mentioned), Central America AA at art. 36(2): Money Laundering, including the Financing of Terrorism, *supra* note 35.

<sup>41</sup> Georgia AA at art. 17(2), Ukraine AA at art. 22(4), Cuba AA at art. 11(1), *supra* note 35.

<sup>42</sup> Yen Kong Ngangjoh-Hodu, *Development agenda in the WTO regional process*, in TRADE RELATIONS BETWEEN THE EU AND AFRICA: DEVELOPMENT, CHALLENGES AND OPTIONS BEYOND THE COTONOU AGREEMENT (Yen Kong Ngangjoh-Hodu and Francis A.S.T. Matambalya eds., Routledge 2010) 19.

<sup>43</sup> Multilateral Environmental Agreements, Agreement between the European Union and Japan for an Economic Partnership, *available at* [http://trade.ec.europa.eu/doclib/docs/2017/december/tradoc\\_156423.pdf](http://trade.ec.europa.eu/doclib/docs/2017/december/tradoc_156423.pdf), Art. 16.4

<sup>44</sup> Trade and Responsible Supply Chains, New EU-Mexico Agreement: The Agreement in Principle and its texts, *available at* <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1833>, Art. 9(2)(b).

<sup>45</sup> See Japan-EU EPA, *supra* note 41 at art. 16.3: International labour standards and conventions Colombia and Peru-EU FTA at art. 269: Multilateral Labour Standards and Agreements, South Korea-EU FTA at art. 13.4, CETA at art. 23.3, Vietnam-EU FTA at Chapter 15, art. 3, Singapore-EU FTA at art. 12.3, Mexico-EU FTA at art. 3 *supra* note 42, Central America-EU AA at art. 286, Georgia-EU AA at art. 229, Moldova-EU AA at art. 365, Ukraine-EU AA at art. 291, *supra* note 35.

<sup>46</sup> See CETA at art. 23.3(3), *supra* note 42.

Environment – Art. 188: ...Parties agree not to encourage trade or foreign direct investment to enhance or maintain a competitive advantage by: a) lowering the level of protection provided by domestic environmental and public health legislation; b) derogating from or failing to apply such legislation.

The Parties and the Signatory CARIFORUM States commit to not adopting or applying regional or national trade or investment-related legislation or other related administrative measures as the case may be in a way which has the effect of frustrating measures intended to benefit, protect or conserve the environment or natural resources or to protect public health.

Subsequent to CARIFORUM EPA, the obligations as regards level of protection became more cohesive and binding as noted in table 3-3 and 3-4 below.

**Table 3-3: Obligation to enforce multilateral commitments**

TAs with TSD Chapters	Commit to/reaffirm their commitment to effectively implement in domestic laws and practices		Shall promote and implement in domestic laws and practices	
	Labour	Environment	Labour	Environment
1. 2012 FTA Colombia	•	•		
2. 2013 AA Central America	•	•		
3. 2016 AA Georgia	•	•		
4. 2016 AA Moldova	•	•		
5. 2016 AA Ukraine		•	• (Core ILO Principles)	
6. 2016 FTA Korea	•	•		
7. 2017 EPA Japan	•	•		
8. 2017 FTA Canada	•	•		
9. 2018 FTA Mexico	•	•		
10. 2018 FTA Singapore	•			• (Parties are already party)
11. 2018 FTA Vietnam	•	•		

Source: Author's compilation.

Generally, all the EU TSD chapters provide for two kinds of obligations to enforce international commitments: '*commit to/reaffirm the commitment*' which is different from '*shall promote and implement*'. They are different as the former merely promotes and latter enforces international commitments.<sup>47</sup> The former may have a legally binding effect under international law if the Parties have ratified the relevant international treaties. Contrariwise, the latter ('*shall promote and implement*') enforces the international commitments without such a prerequisite.

There is a qualifier, if the agreement itself states that such obligation is applicable to the treaties to which the Parties are party; it is the case in Singapore FTA for environmental commitments.<sup>48</sup> However, in the Ukraine AA on labour, the obligation is to enforce the core ILO conventions under international law.<sup>49</sup> All FTAs provide that the Parties have a right to establish and modify the level of protection with respect to their

<sup>47</sup> See Japan-EU EPA at art. 16.2(2), *supra* note 41 Colombia and Peru-EU FTA at art. 277(2), South Korea-EU FTA at art. 13.7, CETA at art. 23.4 (labour), 24.5 (environment), Vietnam-EU FTA at chapter 15 art.10, Singapore-EU FTA at art. 17.2(1)(a), Mexico-EU FTA at art., 2(5) *supra* note 42, Central America-EU AA at art. 291(2), Georgia-EU AA at art. 235(3), Moldova-EU AA at art. 371(1), Ukraine-EU AA at art. 296(1), *supra* note 35.

<sup>48</sup> *Id*, Singapore-EU FTA.

<sup>49</sup> See Ukraine-EU AA, *supra* note 44.

national conditions in compliance with international law and strive to improve their respective levels of protection.

**Table 3-4: Obligation to uphold the levels of protection**

TAs with TSD Chapters	Shall not waive or otherwise derogate from such laws and regulations or fail to effectively enforce them through a sustained or recurring course of action or inaction to encourage trade or investment	Shall not waive or otherwise derogate from such laws and regulations or fail to effectively enforce them through a sustained or recurring course of action or inaction in a manner affecting trade b/w the Parties	Shall not fail to effectively enforce its labour and environmental laws in a manner affect trade or investment b/w Parties
1. 2012 FTA Colombia		•	
2. 2013 AA Central America			•
3. 2016 AA Georgia	•		
4. 2016 AA Moldova	•		
5. 2016 AA Ukraine		•	
6. 2016 FTA Korea		•	
7. 2017 EPA Japan		•	
8. 2017 FTA Canada	•		
9. 2018 FTA Singapore		•	
10. 2018 FTA Vietnam	•		
11. 2018 FTA Mexico	•		

**Source:** Author's compilation.

Japan EPA, Colombia, Korea, Singapore FTAs and Ukraine AA provide for the enforcement principle to assess violations for TSD provisions: 'a Party shall not waive or otherwise derogate from such laws and regulations or fail to effectively enforce them through a sustained or recurring course of action or inaction, in a manner affecting trade or investment between the Parties'.<sup>50</sup> However, Georgia, Moldova AAs and CETA doesn't use the phrase 'between the Parties', i.e., the obligation is general in nature for the Parties in the trade and investment with all states and not only with EU.

Central America AA provides that: '...a Party shall not fail to effectively enforce its labour and environmental legislation in a manner affecting trade or investment between the Parties'. Here too the obligation to respect TSD commitments is narrowed down to the 'bilateral trade and investment between the Parties' to the agreement.

The EU TAs, generally, provide that lower standards cannot be used or invoked as a legitimate comparative advantage, in line with the ILO's stance in the Declaration on Social Justice for a Fair Globalization, 2008. Lastly, only Colombia FTA provides an 'essential elements' clause under Art. 1: General Principles and Art. 2: Disarmament and non-proliferation of weapons of mass destruction whereby the EU makes certain commitments on human rights, democratic principles and disarmament an 'essential element' of the FTA, i.e., the FTA is subject to unilateral suspension if the essential element is not respected.

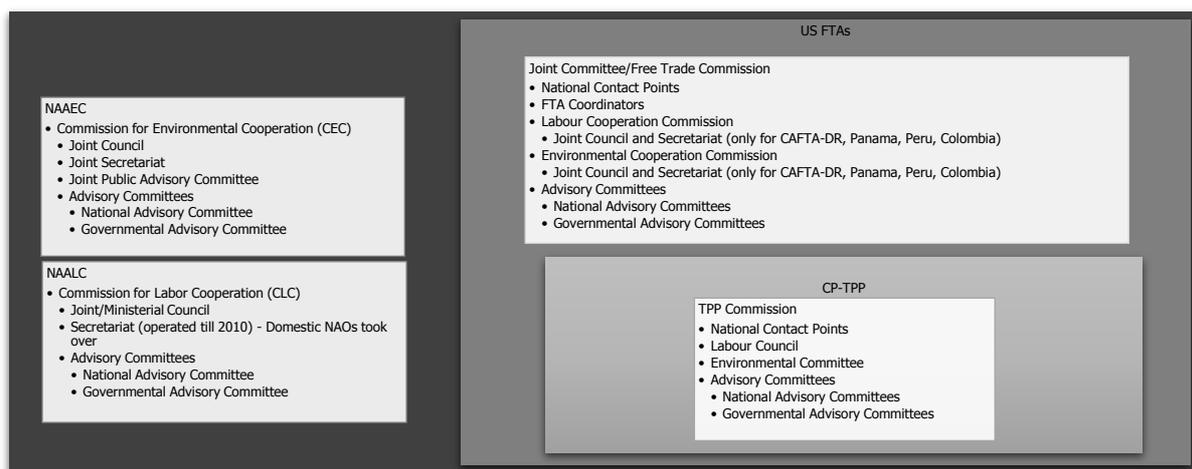
### C. Implementation of commitments

#### (i) Institutional framework

##### 1.1. United States

**Figure 3-3: Institutional framework in the NAFTA -> US FTAs -> CP-TPP**

<sup>50</sup> See Japan EPA; Colombia/Peru-EU FTA, Korea-EU FTA, Singapore-EU FTA and Ukraine-EU AA, *supra* note 44.



Source: Author's compilation.

All the US FTAs establish an environmental and labour commission comprising of cabinet-level state officials. In NAAEC and NAALC, the Commission is headed by a joint council composed of cabinet-level officials with an equal national representation.<sup>51</sup> Specific commissions under other US FTAs including CP-TPP are headed by state officials and co-chaired by USTR as well as its counterpart. The Commission establishes a specific environmental and labour Council composed by cabinet-level officials.

Only NAAEC and NAALC establishes a functional Secretariat to administer the environmental and labour commitments. It provides technical, administrative and operational support to the Council and other committees or public. The Secretariat is headed by an executive director (ED) - national expert who is selected by Council for a 3-year period on a rotating basis.<sup>52</sup> The Council has the authority to remove the ED.<sup>53</sup> The Secretariat in NAALC was surpassed by National Administrative Offices (NAOs) of NAFTA parties in 2010, i.e., the NAALC Secretariat stopped functioning and NAOs took its function.

The ED supervises staff of the Secretariat as well as fixes their remuneration as per general standards provided by the Council.<sup>54</sup> The ED takes into account the list of candidates prepared by the Parties and the Joint Public Advisory Committee (JPAC).<sup>55</sup> Due regard is given to the equitable representation of nationality.<sup>56</sup> The ED informs the Joint Council of all appointments.<sup>57</sup> The Council can decide by a 2/3<sup>rd</sup> vote to reject any appointment which doesn't meet the general standards.<sup>58</sup> These decisions are held in confidence.<sup>59</sup> The ED and its staff cannot seek or receive instructions from any government or external authority apart from the Council.<sup>60</sup> The Party cannot influence the CEC Secretariat in discharge of its responsibilities.<sup>61</sup>

<sup>51</sup> See NAALC at art. 9 and NAAEC at art. 9, *supra* note 28.

<sup>52</sup> See NAALC at art. 10 and NAAEC at art. 10, *supra* note 28.

<sup>53</sup> See NAALC at art. 11 and NAAEC at art. 11, *supra* note 28.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

Only NAAEC provides for JPAC comprising of 15 civil society members appointed by each Party in equal number of 5.<sup>62</sup> JPAC chooses its own chair and convenes once a year at same time as regular session of the Council and at such times as the Council provide or the Committee's chair with the consent of the majority of its members.<sup>63</sup> JPAC provides advice to the Council on any matter within the scope of NAAEC, including on the implementation and further elaboration.<sup>64</sup> JPAC may provide relevant technical, scientific or other information to the Secretariat on issues for developing a factual record.<sup>65</sup>

The CAFTA-DR established a Central American Commission for Environment and Development (CCED) similar in function to CEC under NAAEC.<sup>66</sup> It includes Environmental Affairs Council (EAC) and a Secretariat. However, the Secretariat lacks staff members: only a coordinator and technical advisor appointed by the Council for 2 years.<sup>67</sup> Critically, the CCED identifies initiatives for environmental concerns and initiates projects through the joint US international development (USAID) for capacity-building.<sup>68</sup> There is no civil society group like JPAC.<sup>69</sup>

All the US FTAs provide for special advisory bodies, namely, the National Advisory Committee (NAC) and Governmental Advisory Committee (GAC).<sup>70</sup> The former comprises of members of public, representatives of NGOs, whereas latter comprises of representatives of the federal or state or provincial governments for advice on implementation and further elaboration of the agreement.<sup>71</sup>

## 1.2. European Union

The EU trade agreements have six types of institutional mechanisms to resolve and cooperate on TSD issues: a) trade and sustainable development (TSD); b) joint consultative committee (JCC); c) stabilization and association committee (SAC); d) SAC + civil society forum (CSF); e) -> a) + d); and f) EPA committee.

**Table 3-4: TSD institutional framework in the EU's trade agreements**

TSD-SC	JCC	SAC	SAC+3	SAC+3+TSD-SC	EPA Committee
National Contact Points	National Contact Points	National Contact Points	National Contact Points	National Contact Points	National Contact Points
Trade and Sustainable Development Committee	Joint Council	Stabilization and Association Council	Stabilization and Association Council	Stabilization and Association Council	EPA Committee
Domestic Advisory Groups	Joint Trade and Development Committee	Association Committee	Association Committee	Association Committee	
Civil Society Forum	Joint Parliamentary Committee		Association Parliamentary Committee	Association Parliamentary Committee	
Expert Panels	Joint Consultative Committee		Civil Society Platform	Civil Society Platform	
	Committee of Experts			Trade and Sustainable Development Committee	
				Domestic Advisory Groups	
				Civil Society Forums	
				Expert Panels	

**Green:** Stakeholder groups/forums; **Yellow:** Inter-Governmental Committees/forums and **Grey:** Expert Panels

**Source:** Author's compilation.

<sup>62</sup> See NAAEC at art. 16, *supra* note 28.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> See CAFTA-DR-US FTA at art. 17:7, *supra* note 21.

<sup>67</sup> Hoi L. Kong and L. Kinvin Wroth, *NAFTA AND SUSTAINABLE DEVELOPMENT: HISTORY, EXPERIENCE, AND PROSPECTS FOR REFORM* (CUP 2015).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> Ian F. Fergusson and Christopher M. Davis, *Trade Promotion Authority (TPA): Frequently Asked Questions*, Congressional Research Service, 2018, available at <https://fas.org/sgp/crs/misc/R43491.pdf>.

<sup>71</sup> *Id.*

As noted in the table above, the SAC+3+TSD-SC has four inter-governmental institutions whereas SAC, SAC+3 and JCC have three and the TSD-SC as well as EPA committee has only one. It is important because apart from the civil society networks, it is often the civil servants in relevant governmental ministries, who are responsible for the functioning of trade committees in terms of knowledge-sharing, funds availability, cooperation among relevant national and international institutions as well as civil societies. It can be noted that under the TSD mechanism, the role of transnational governmental networks is not clearly recognized, which is not to say that SAC+3+TSD-SC has a clear strategy on how to best utilize its four inter-governmental committees for an optimal outcome.

Similarly, the SAC+3+TSD-SC has three stakeholder mechanisms: civil society platform; domestic advisory group and the civil society forum. Both civil society forum and platform are a dialogue space rather than an actual unit like the domestic advisory group. Yet, the possibility to engage civil society in two forums with public participation certainly adds to the impetus. The TSD-SC and JCC mechanisms have a single forum, i.e., the civil society forum and the joint consultative committee.

Intergovernmental committees are established to monitor and implement the TSD chapters and provisions in the EU trade agreements - TSD-SC-> Sub-Committee, JCC->Joint Council and SAC-> SAC Council. The TSD Sub-Committee is composed of high-level official representatives of the Parties whereas the Joint Council and the SAC Councils are composed of the EU Council members and its counterpart.

Additionally, the JCC has a Trade and Development Committee, specifically to foresee the impact of agreement on sustainable development concerns and the SAC has an assistant committee as the association committee to help SAC council. Both JCC and SAC have Parliamentary Committee which is actually a political forum for the EU Parliament and its counterpart to exchange views on the implementation of the agreement as a whole, inclusive of the TSD concerns.

## (ii) Informal Dispute Settlement (IN-DS)

### 2.1. United States

#### 2.1.1. SEM

SEM approach is outlined in the NAAEC, CAFTA-DR, Panama, Peru and Colombia FTAs of the US *only for environmental informal dispute settlement*. The information on the secretariat, public registry of submissions and factual records is available online for NAAEC, CAFTA-DR and Peru.<sup>72</sup> The submission process for factual records is not significantly different in CAFTA-DR and Peru as compared to NAAEC, however, the composition of the Secretariat, timing process and availability of a civil advisory group changes in the subsequent SEM models. The CP-TPP text as proposed and negotiated by US (remains unchanged in CP-TPP) eliminates the SEM by providing for only public submissions directed at Parties for comment or cooperation.

Figure 3-4: US FTAs with informal SEM mechanism



#### 2.1.1.1. Factual records

NAAEC art. 14 and 15 provides for the factual record process in the CEC's public registry which is same under CAFTA-DR, Peru, Panama and Colombia - US FTAs. A factual record provides certified information relating to

<sup>72</sup> Secretariat for Submissions on Environmental Enforcement Matters, US-Peru Trade Promotion Agreement (TPA), available at <https://www.saca-seem.org/news>. Secretariat for Environmental Matters, CAFTA-DR, available at <http://www.saa-sem.org/en/home-en/>; Commission for Environmental Cooperation, Registry of Submissions, available at <http://www.cec.org/sem-submissions/registry-of-submissions>.

alleged failures by NAFTA party to uphold domestic environmental protection.<sup>73</sup> It fills the gap created by the doctrine of standing and reviewability under domestic law. Factual records are a type of soft law instrument aimed at the behavior of states towards self-correction without necessitating a recourse to formal dispute settlement.<sup>74</sup> It provides objective facts, history of non-compliance and the responsibility of the Party under the domestic law. However, it is a non-adversarial process and cannot provide any legal opinion<sup>75</sup> even though, it can be used as a gateway for other Parties to take the matter into formal consultations which could lead to a formal dispute process under Part V of NAAEC in specific cases.<sup>76</sup>

#### Phase I

- The SEM process begins with a public submission which needs to comply with six criteria to be eligible for factual record by the Secretariat:
- in writing (official CEC languages);
- identifies the person or organization making the submission;
- provides sufficient information to allow review, inclusive of documentary evidence;
- appears to be aimed at promoting enforcement than harassing industry;
- indicates that the matter was raised to the concerned NAFTA party and the latter's response, if any; and
- is filed by a person residing or established in the NAFTA territory.

#### Phase II

- Once the Secretariat determines that the submission meets the above six criteria, it further determines whether the content of the submission merits the concerned NAFTA Party's response through four criteria:
- allege harm to the submitter;
- issues for further study will promote the goals of NAAEC;
- private remedies have been pursued; and
- submission is drawn exclusively from mass media reports.

#### Phase III

- If the submission passes the second phase by the Secretariat, the Party response is issued. Thereafter, the concerned Party is required to notify the Secretariat within 30 days or in exceptional circumstances, 60 days of the delivery of response request with special emphasis on two pertinent concerns:
- whether the matter raised under the submission is pending under judicial or administrative proceedings; and
- whether the private remedies in respect of the submission is available and were so pursued?

In case of CAFTA-DR, Peru, Panama and Colombia – US FTAs, there is no 'residence' requirement for the citizens of the Party to the FTA to file submissions as compared to NAAEC.<sup>77</sup> If the above three phases are fulfilled, the submission is reviewed by the Secretariat for a factual record with the permission of Council.<sup>78</sup> The Council has the prerogative to define the scope of the factual record or even dismiss the process without a factual record against the Secretariat's recommendations.<sup>79</sup> However, if the Council permits the Secretariat to prepare the factual record by giving necessary instructions, the Secretariat formulates and shares a draft factual record whereby the NAFTA parties can comment on the accuracy of facts within 45 days of the submission.<sup>80</sup> Further, in the preparation of the final factual record, the CEC Secretariat may consider any information which is publicly available; submitted by interested civil society members; joint public advisory

<sup>73</sup> Commission for Environmental Cooperation, 'Wetlands in Manzanillo: Factual Record regarding Submission SEM-09-002', available at [http://www.cec.org/sites/default/files/submissions/2006\\_2010/sem\\_manzanillo\\_en\\_e-version.pdf](http://www.cec.org/sites/default/files/submissions/2006_2010/sem_manzanillo_en_e-version.pdf).

<sup>74</sup> Commission for Environmental 'Cooperation of North America, Art. 15(1) Notification to Council that Development of a Factual Record is warranted, available at, [http://www.cec.org/sites/default/files/submissions/1995\\_2000/6064\\_97-2-adv-e.pdf](http://www.cec.org/sites/default/files/submissions/1995_2000/6064_97-2-adv-e.pdf).

<sup>75</sup> Commission for Environmental Cooperation, 'Wetlands in Manzanillo: Factual Record regarding Submission SEM-09-002, available at [http://www.cec.org/sites/default/files/submissions/2006\\_2010/sem\\_manzanillo\\_en\\_e-version.pdf](http://www.cec.org/sites/default/files/submissions/2006_2010/sem_manzanillo_en_e-version.pdf).

<sup>76</sup> Marirose J. Pratt, 'The Citizen Submission Process of the NAAEC: Failures to Enforce Environmental Laws', 20 EMORY INT'L L. REV. 741 (2006).

<sup>77</sup> All the select FTAs provide: 'Any person of a Party (national not necessarily a resident – General Definitions) may file a submission asserting that a Party is failing to effectively enforce its environmental laws. Such submissions shall be filed with a secretariat or other appropriate body that the Parties designate.' CAFTA-DR FTA, Art. 17.7 – Environmental Chapter; Peru FTA, Art. 18.7 – Environmental Chapter; Panama FTA, Art. 17.8 – Environmental Chapter; and Colombia FTA, Art. 18.8 – Environmental Chapter.

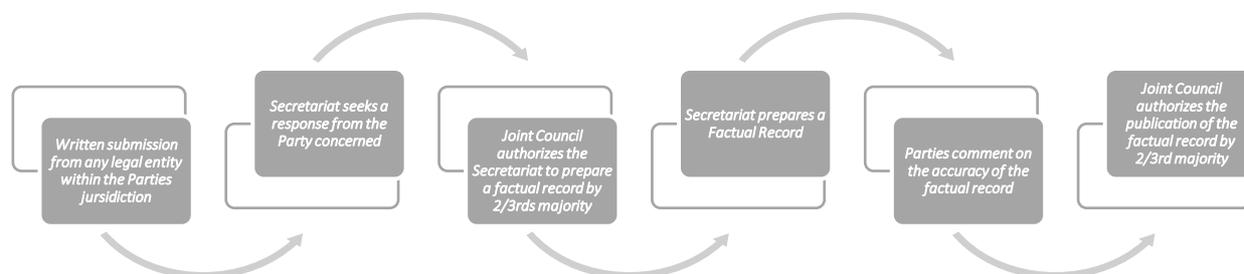
<sup>78</sup> See NAAEC *supra* note 28.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

committee under CEC or external experts.<sup>81</sup> Thereafter, the Secretariat prepares final factual record for CEC public registry and the Council is required to permit the publication of record by a 2/3<sup>rd</sup> majority vote within 60 days of the submission.<sup>82</sup>

Figure 3-5: SEM process under NAAEC



Source: NAAEC.

⇒ **CP-TPP erases the SEM process**

The CP-TPP effectively eliminates the SEM for environmental issues. It makes this departure by emphasizing only on public submissions on both labour and environment issues directed at the Parties for replies followed by appropriate studies for cooperative policies.<sup>83</sup> The national contact points of the parties establish procedure for public submissions from its jurisdiction.<sup>84</sup> The submissions are directed at Parties only, there is no independent Secretariat or civil society advisory body to note the submissions.

The submissions at the minimum should raise an issue directly relevant to the Chapter; clearly identify the person or organization making the submission and explain to a degree possible, how and to what extent the issue raised affects trade and investment between the Parties.<sup>85</sup> The Parties consider such matter raised and timely respond to the submitter, including in writing as appropriate and make the submission as well as the results of the consideration available to the Parties and public as appropriate.<sup>86</sup> A Party may request from the person or organization making the submission any additional information.<sup>87</sup>

The CP-TPP provides in addition that the submissions explain how and to what extent the issue raised affects trade or investment between the Parties, not raise concerns subject to pending judicial or administrative proceedings and indicate whether the matter has been communicated to the relevant authorities and their reply, if any.<sup>88</sup> It provides that within 180 days of the enforcement of the agreement, the Party shall notify the other Parties of the entity responsible for public submissions.<sup>89</sup> The submissions may be studied for remedy through cooperative activities and regular reports shall be provided on the implementation

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> See CP-TPP at art. 20.9 Environment Chapter and Art. 19.9 Labour Chapter, *supra* note 21.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

of the article to the Commission.<sup>90</sup> The CP-TPP provides to acclimate requests for information on the implementation by new or existing consultative mechanisms like the National Advisory Committees.<sup>91</sup>

⇒ **Review report for labour violations as a state-centric informal process**

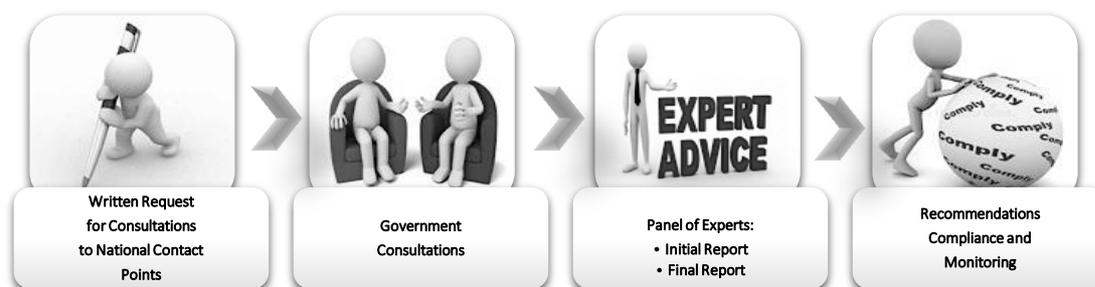
Public submissions on labour issues is filed at the Office of Trade and Labour Affairs (OTLA), US government with identification of the submitter.<sup>92</sup> It needs to include the supporting information and laws in reference to the submission.<sup>93</sup> The submission needs to explain as clearly as possible: a) whether the matter demonstrates lack of enforcement as regards Party's commitments under the labor chapter; b) such action or inaction has caused harm to the submitter or other persons, and to what extent; c) there have been a demonstrated sustained or recurring pattern; d) affecting trade between the parties or relating to it; e) whether legal remedies were pursued and f) if the matter is being dealt at international level.<sup>94</sup> Within 60 days of the submission, OTLA determines whether to pursue a public review of the matter.<sup>95</sup> The public reviews can be followed by bilateral ministerial agreements for a resolution or escalate into an arbitration dispute in case of no resolution.

## 2.2. European Union

⇒ **TSD-SC dispute settlement mechanism**

The TSD-SC mechanism is a simple process whereby a concerned party is required to submit written request for consultations to initiate cooperative dialogue for a resolution. The written request needs to clearly identify the issue and provide a brief summary of the claim under the TSD chapter, including the relevant provisions and explain how it affects the objectives of the Chapter as well as any pertinent information. The Parties enter into consultations promptly after the request for consultations is delivered to the national contact points.

Figure 3-6: TSD-SC Dispute Process



Source: Author's compilation.

During the consultations, Party provides all facts surrounding the issue to enable a thorough examination of the matter. The Parties are required to take into consideration the work of relevant international organizations and their ad hoc expert advice for an appropriate resolution of the matter; they are free to consult outside experts. In case the consultations fail, the Parties take recourse to specific Panel of Experts (PoEs) to determine recommendations for compliance. The PoEs are selected from a list of experts

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> 'Notice of Procedural Guidelines: Public Submissions to OTLA under US FTAs, Federal Register', Vol. 71, No. 245, December 21, 2006, available at <https://www.dol.gov/ilab/media/pdf/2006021837.pdf>.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

prepared in the first year after the agreement enters into force comprising national and non-national experts in trade, labour, environment or international dispute resolution.

Usually, the list comprises of 10:5 – nationals : non-nationals (who can act as chairs).<sup>96</sup> The TSD chapters provide that there shall be three panelists appointed from a prepared list of experts by the TSD-SC. Each party chooses one expert and the two experts choose the third non-national expert as Chair. The Panelists within a given timeframe deliver interim reports subject to Parties comments and the final report which takes into account the Parties comments and relevant outside expertise as necessary. The violating Party has a deadline, usually, three months to deliver an official statement of the compliance measures after the final report.

#### ⇒ JCC dispute settlement mechanism

The JCC mechanism is similar to TSD-SC in terms of consultations -> Panel of Experts -> initial and final report with recommendations. However, only in the CARIFORUM EPA, if the Party in violation does not comply with the recommendations of the experts, the concerned Party can proceed with an arbitration.<sup>97</sup> The arbitration process involves: consultations -> mediation -> arbitration -> panel report findings -> compliance/non-compliance -> relevant compensation but no financial amount only trade measures subject to self-correction by the violating Party.<sup>98</sup>

#### ⇒ Meeting minutes

There are no informal disputes on labour and environmental issues under the EU's TSD or JCC mechanism till date. However, the key meetings of DAGs, CSFs, JCCs and CSPs provide some detail on how the issues have been discussed. The ratio of DAG:CSF meetings held till date under Korea and Colombia FTA is 15:6 and 5:2.<sup>99</sup> All the EU FTA meetings have a similar style of exchange. The civil advisory groups have special information on the domestic conditions which can highlight pertinent violations. Otherwise, the main impetus of the meetings is to exchange information, highlight best practices and policy developments, coordinate through joint projects, workshops, seminars, forums as well as cooperate in international agenda-setting.

### (iii) 3. Formal dispute processes

The EU does not have a formal dispute settlement process for labour and environmental commitments. The formal dispute settlement process in US FTAs begins with a request for consultations followed by varied levels of consultations before the establishment of the arbitration panel with the exception of NAALC. As NAALC encompasses informal process just before the formal process can be launched. Of all the US FTAs, the CP-TPP on environmental commitments provides an extensive 'three-level' consultation procedure as provided in figure below.

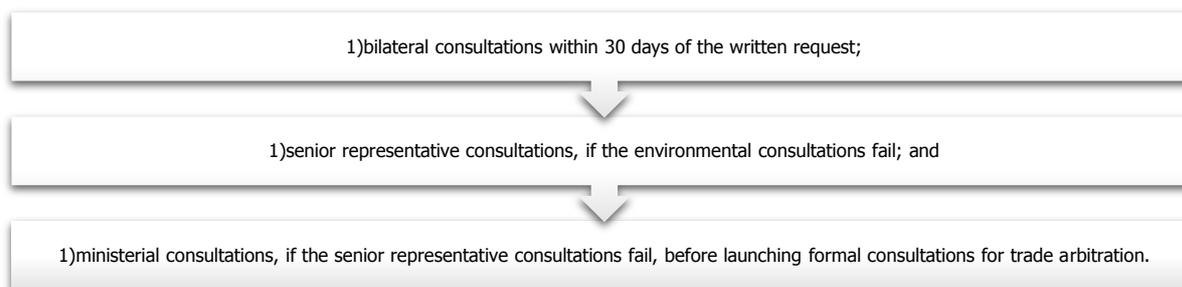
Figure 7: CP-TPP tri-level consultations in environmental chapter

<sup>96</sup> However, in the case of Singapore, the ratio is 8:4, Mexico 10:5, Central America 12:5 and CETA 6:3.

<sup>97</sup> Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part, the CARIFORUM States, Official Journal L 289/1, 2008, art. 206.

<sup>98</sup> *Id.*

<sup>99</sup> European Economic and Social Committee (EESC), *External Relations Section (REX)*, available at <https://www.eesc.europa.eu/en/sections-other-bodies/sections-commission/external-relations-section-rex>.



Formal dispute settlement process in all the US FTAs is essentially similar. Consultations follow an initial report and final report of the panel. In case of non-compliance and no mutually acceptable resolution/compensation, suspension of trade benefits (except NAFTA) or compensation (except CP-TPP) is possible of an equivalent amount of violation. The suspension of benefits or deposit of monetary compensation is terminated if the Party has complied in light of the compliance review.

**Table 3-5: Dispute process in US FTAs**

NAAEC	NAALC	US FTAs	CP-TPP Labour	CP-TPP Env.
Written request for consultations	Written request for consultations	Written request for consultations	Written request for consultations	Written request for consultations
Special Session of the Council	Ministerial Consultation b/w Parties	Request for Joint Commission to resolve the issue via good offices, conciliation and mediation	Labour consultations no later than 30 days of the written request	Environmental consultations no later than 30 days of the written request
	Request for establishment of an Evaluation Committee of Experts (ECE)		Labour Council consultations no later than 30 days of the request circulation	Senior representative consultations if the environmental consultations fail
	Draft expert report within 120 days			Ministerial consultations if the Senior Representative Consultations fail
	Final evaluation report within 60 days of the draft report			Request for Consultations under Dispute Settlement Chapter within 60 days of the receipt for environmental consultations or otherwise
	Party consultations for Mutually Satisfactory Resolution			
	Non-compliance			
	Request for the establishment of the Special Session of the Council to resolve the dispute			
	No resolution within 60 days			
Request for the establishment of an Arbitral Panel	Request for an Arbitration Panel	Request for an Arbitration Panel	Request for an Arbitration Panel no later than 60 days after the receipt of consultations	Request for an Arbitration Panel and establishment of the Panel if the consultations fail within 60 days
Initial report (180 days after the last panelist is selected)	Initial report within 180 days of the last panelist being selected	Initial report	Initial report no later than 150 days after the appointment of the last panelists	Initial report, no later than 150 days after the date of appointment of the last panelist
Final report	Final report within 60 days of the initial report	Final report	Final report no later than 30 days after the presentation of initial report	Final report, no later than 30 days after the presentation of initial report
Non-compliance	Non-compliance	Non-compliance + no mutually acceptable resolution or acceptable compensation	Non-compliance	Non-compliance
Suspension of benefits in cases of non-implementation	Suspension of benefits: monetary enforcement assessment within 180 days of the imposition by the Panel or suspension of equivalent trade benefits	Suspension of equivalent trade benefits/compensation. In case of TSD issues, Joint Committee may decide that an assessment needs to be paid to the fund established.	Compensation and suspension of benefits	Compensation and suspension of benefits
Monetary enforcement				
Assessment/escrow account/trade measures				
Compliance review	Compliance review	Compliance review	Compliance review	Compliance review

**Orange:** Written request; **Blue:** Consultations; **Green:** Informal process and **Yellow:** Establishment of Arbitral Panel to Compliance processes.

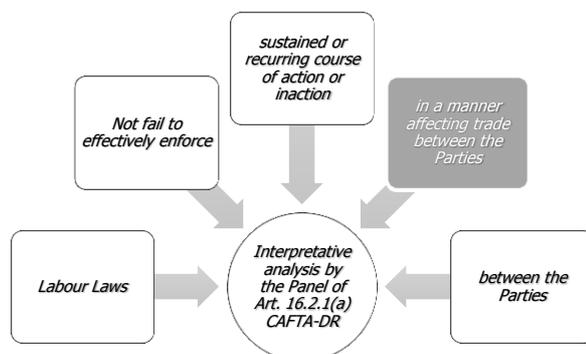
Source: Author's compilation.

### ⇒ **US-CAFTA-DR Guatemala labor dispute**

There is only one dispute till date under the formal dispute settlement mechanism of the US FTAs, i.e., *CAFTA-DR Guatemala labor dispute*. The USTR requested for the arbitral panel to assess whether Guatemala is

complying with its obligations under Art. 16.2.1(a) of the FTA.<sup>100</sup> The complaint alleges lack of an effective enforcement of Guatemalan labor laws relating to the right of association, the right to organize and bargain collectively, and acceptable conditions of work.<sup>101</sup> The critical aspect of the dispute was concerned with the interpretation of Art. 16.2.1(a) of CAFTA-DR:

'A Party shall not fail to effectively enforce its labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement.'



On the scope of 'labor laws' under Art. 16.2.1(a), the Parties had divergent views due to an adversarial nature of the dispute.<sup>102</sup> Guatemala contended that the scope pertains to the conduct of executive branch and not of non-executive branch or judiciary<sup>103</sup> whereas the US argued for a broad scope that encompasses actions or inactions of both executive and non-executive branches<sup>104</sup>. The Panel decided in the favor of US with a caveat that the law in question should be enforceable by the executive body.<sup>105</sup>

With respect to 'not fail to effectively enforce', the US provided that it means a compulsion towards compliance in law that produces results thereby putting an end to the non-enforcement whereas Guatemala contended that it means absence of neglect to compel in a manner that ensures compliance.<sup>106</sup> The Panel opted for a middle approach more tilted towards Guatemala for the phrase to mean a reasonable compulsion sufficient to achieve compliance.<sup>107</sup>

As regards, 'sustained or recurring course of action or inaction', the Panel held that it means a stream of connected or repeated behavior by an institution in time to indicate non-randomness or disconnected instances of non-compliance.<sup>108</sup>

The most critical aspect of the dispute revolved around the interpretation of 'in a manner affecting trade between the Parties'<sup>109</sup> as this phrase clarifies the limits of hard law enforcement of labour provisions in

<sup>100</sup> USTR Ron Kirk Announces Next Step in Labor Rights Enforcement Case against Guatemala, available at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2011/august/us-trade-representative-ron-kirk-announces-next-ste>.

<sup>101</sup> *Id.*

<sup>102</sup> USTR, *In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR*, available at <https://ustr.gov/issue-areas/labor/bilateral-and-regional-trade-agreements/guatemala-submission-under-cafta-dr>.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

relation to trade and their efficacy in pursuing the same.<sup>110</sup> The US argued for a broad reading of the phrase where an influence on comparative advantage affecting trade between the parties, without a recourse to specific econometric analysis on cost savings from non-compliance.<sup>111</sup> Guatemala proposed a stringent cause and effect test which unambiguously illustrates that the issue has an impact on trade between the Parties and this will be possible through an econometric analysis.<sup>112</sup> However, the Panel found a creative yet an ambiguous middle path.

The Panel clarified that the interpretation of word ‘affecting’ in CAFTA-DR is different as applied under GATT Art. III:4 (National Treatment on Internal Taxes and Regulation) and GATS Art. I:1 (Scope and Definition).<sup>113</sup> It clarified that the term ‘affecting’ has a different purpose in WTO’s GATT and GATS as compared to the CAFTA-DR FTA.<sup>114</sup> In the former, the term ‘affecting’ serves to define the scope of application, i.e., the types of measures which must conform to the obligation to not accord ‘less favorable treatment’ or are subject to the disciplines in GATS but doesn’t impose any obligation.<sup>115</sup> However, in the latter, the term not only provides the scope of application but also forms an essential part of the obligation itself.<sup>116</sup> A different inquiry is required by the Panel when it considers the former as compared to latter.<sup>117</sup> In the former, a simple examination of the nature of conduct is sufficient to assess the scope of application, i.e., whether the measure is of such kind rather than how it in fact operates.<sup>118</sup>

In the only public debate on this dispute, Pauwelyn provides that the legal distinction opined by the Panel (i.e., scope of application in GATT vs. conditions for breach CAFTA-DR FTA) is not very convincing to depart from the established WTO jurisprudence while interpreting similar clauses.<sup>119</sup>

The Panel provided a three-step test to find a violation of the phrase ‘*in a manner affecting trade*’ (de facto): a) competition between the enterprises in CAFTA-DR with respect to trade; b) there are effects of non-enforcement of labour laws; c) the effects are ‘sufficient’ to confer comparative advantage. Lastly, the Panel held that the obligation refers to trade, ‘severally or individually’ between the CAFTA-DR parties.<sup>120</sup>

#### ⇒ Procedural aspects

The dispute took nine years till final report was made public from the date of submission. The Parties delayed the process via letters of suspension in the hope of a cooperative solution from 30 November 2012 till September 19, 2014 accounting for 1 year, 9 months and 20 days.<sup>121</sup> The dispute process involved various steps till the initial and final reports were published on 27 September 2016 and 17 June 2017, respectively.<sup>122</sup> The

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<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> ICTSD Talking Disputes, US-Guatemala Labor dispute at 32:35 mins, <https://www.youtube.com/watch?v=IFq1vNGW34w> (last visited on 26 August 2018).

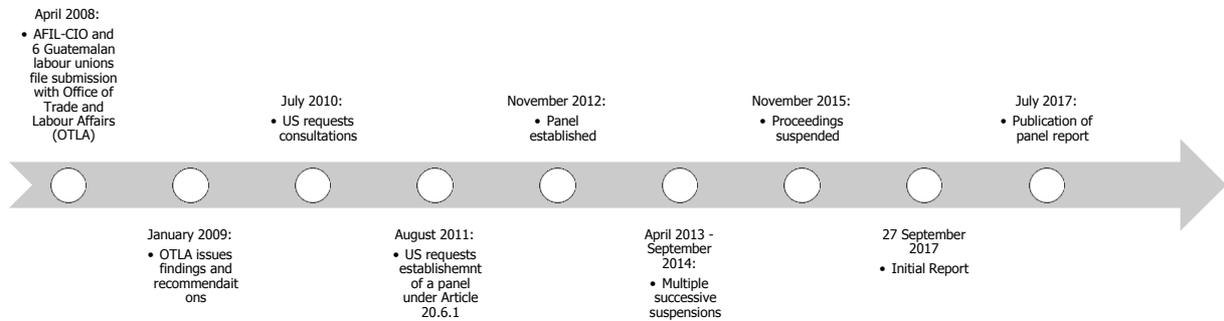
<sup>120</sup> *Id.*

<sup>121</sup> See *supra* note 100.

<sup>122</sup> *Id.*

main reason for delay was repeated suspension by Parties to try and resolve the issue through cooperation than pursue trade arbitration.<sup>123</sup>

**Figure 3-8: Procedural aspects of CAFTA-DR Guatemala Labour Dispute**



**Source:** ICTSD Talking Disputes, <https://www.youtube.com/watch?v=IFq1vNGW34w> at 10.6 mins.

To achieve ‘cooperation’, the US engaged ‘diplomatically’ with its Guatemalan counterpart, raising matters on submissions filed by AFL-CIO - a trade union organization.<sup>124</sup> Although the engagement brought some amendments to the enforcement of labor laws through 11-point action plan and a time line of mutually agreed enforcement plan to subdue an adversarial dispute resolution; it could only do so much.<sup>125</sup> There was no bottom-up stakeholder, inclusive approach to resolve the apparent violation of labour law through ILO coordinates, national and international civil society networks, capacity-building or financing administrative reforms.<sup>126</sup> Consequently, the extensive work behind critically listing action plans in a state-driven informal process is only so useful as it could be effectively implemented.<sup>127</sup>

Shortly, the cooperation between parties came to a halt post threat of trade sanctions; ‘sanctions’ which could’ve hardly made any difference on the ground while the non-enforcement remains at large: 87 leaders in total from 2004 to September 2017 were murdered in Guatemala without a single conviction.<sup>128</sup> Alternatively, if the parties would’ve cooperated for a long-term, inclusive, systematic development of labour administration reform in Guatemala working with the affected communities than a short-term list of political plans; more could have been achieved for all the parties involved, especially, the unfortunate murders of trade union leaders could have been tackled.

#### **4. Best approach to implement labour and environmental commitments in trade agreements: TSD or SEM?**

The best approach to implement the labour and environmental commitments is the Citizen’s Submission on Enforcement Matters (SEM) as envisaged in the NAAEC with the only drawback that it requires ‘residence’ of citizens who can submit their complaint as compared to SEM in other US FTAs.

The NAAEC’s SEM has an independent and functional secretariat assisted by a civil society advisory group. The TSD doesn’t provide an independent secretariat whereas other US FTAs with SEM have weak

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

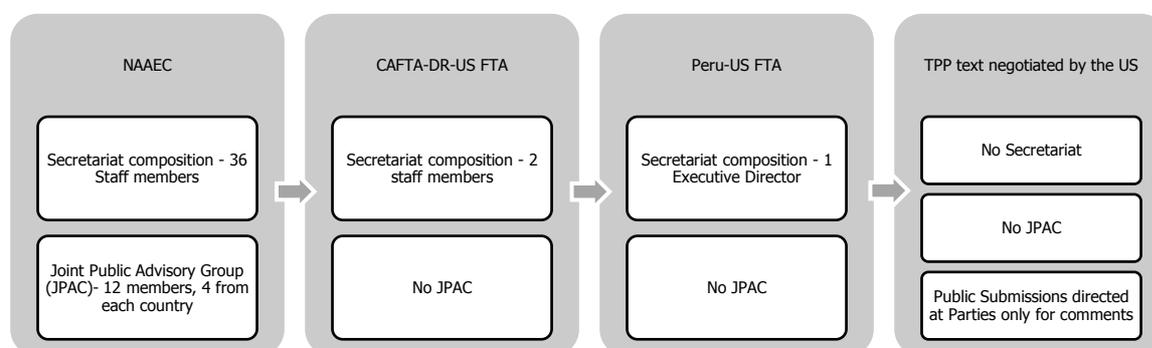
<sup>128</sup> Solidarity Center AFL-CIO, Kate Conradt, *Guatemala: Another Union Leader Murdered*, 7 September 2017, available at <https://www.solidaritycenter.org/guatemala-another-union-leader-murdered/>.

secretariat. The secretariat under the SEM autonomously takes into consideration the public submissions for review as well as issues for transnational cooperation or studies.

The SEM provides for the preparation of a comprehensive ‘factual record’, which is a legally non-binding instrument to certify and lay out an assessment of facts for further action. It provides detailed information to the states and other interested stakeholders. The expert panel report process as foreseen in the TSD has never been triggered and is constrained by the facts submitted by states compared to an independent submission from affected stakeholders in SEM.

The SEM promotes citizen submissions or complaints whereas the EU’s TSD mechanism promotes an inter-state complaint mechanism where the states are required to file disputes against their counterparts on domestic labour and environmental law enforcement. It is argued that the EU’s state-centric approach to enforce labour and environmental commitments is wholly ‘impractical’ due to absence of any political economy basis. States enjoy equal sovereignty in trade agreements which makes it unfeasible to credibly pursue domestic policy changes in foreign jurisdictions. Further, states have different motivations when they pursue disputes in an international forum which necessitates further scrutiny.

The above argument is validated by the fact that the states perceive citizen submissions as adversarial and have consistently intended to constrain the scope of review under their authority. Further, the US has in the TPP text erased the SEM after attempts at limiting the independence of the Secretariat and the very existence of civil society to coordinate in the previous FTAs, see figure below. The main reason behind this move, it is believed is that the informal process as embedded in SEM is conceived as ‘adversarial’ by states. Whereas in the EU’s TSD mechanism, the civil society is organized at a national level as domestic advisory groups and the two national advisory groups meet once a year to coordinate on TSD issues. While the SEM foresees a joint transnational civil society advisory group to continually deliberate on transnational cooperation together.



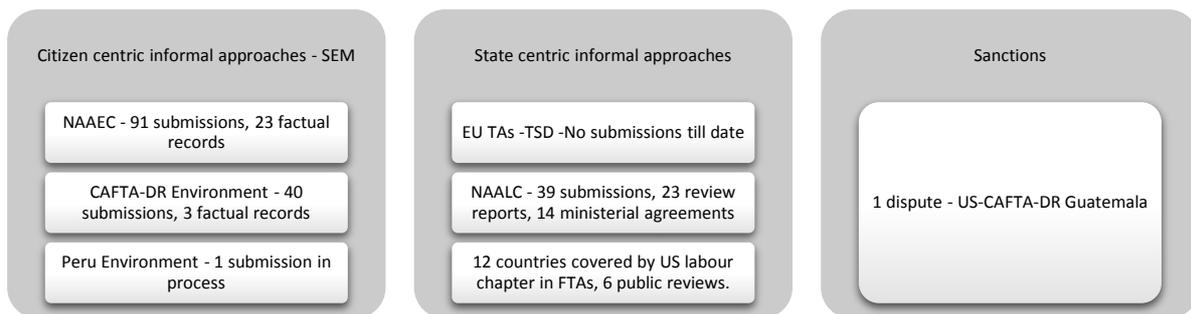
Pacquin *et al* provides that states perceive factual records as ‘adversarial’ and in NAAEC they have tried to limit the mechanism through political means:

The SEM process is supposed to have a ‘sunshine as a disinfectant’ effect. In other words, embarrassing governments by exposing their enforcement failures should, in principle, trigger domestic efforts to address those failures.<sup>129</sup> This has not been the prevalent reaction of the North American governments, probably because addressing the issues raised in submissions would strengthen the submissions process and increase the threat of embarrassment. **While enforcement officials directly involved with issues raised in submissions sometimes admit that the submission led them to take action, the approach at the policy level is to present those actions as evidence of effective enforcement and turn a blind eye on any connections between submissions and changes in enforcement behavior. Also, the Parties have so far refused to allow the CEC to follow-up on**

<sup>129</sup> UNISFERA- Centre International, Marc Paquin, Karel Mayrand and Carla Sbert, *The Effectiveness of the Articles 14 & 15 Process of the North American Agreement on Environmental Cooperation : Discussion Paper*, available at [https://unisfera.org/sn\\_uploads/0Unisfera\\_\\_SEM\\_Process\\_Effectiveness.pdf](https://unisfera.org/sn_uploads/0Unisfera__SEM_Process_Effectiveness.pdf).

submissions and document those connections. Rather, the threat of embarrassment has triggered efforts to dim the spotlight by liming the scope of the process and the autonomy of the Secretariat in administering it.

The SEM mechanism has been more active in resolving issues pertaining to environmental chapters in FTAs than the sanctions approach or state-centric informal dispute settlement. The EU's TSD mechanism has not been used since its inception. Especially in the case of EU-Korea FTA (the first FTA with TSD chapter) wherein the civil society has been consistently complaining of diminishing labour standards and Korea's non-ratification of core ILO conventions. Similarly, state-centric informal dispute processes for labour under the US FTAs has witnessed less public submissions for state action since its inception as compared to NAAEC. The scenario gets worse in other US FTAs. As for sanctions approach, apart from the *CAFTA-DR Guatemala labor* dispute, there is not a single dispute filed under the US FTAs till date given the 'no result' outcome in the *Guatemala labor* dispute as discussed previously.



Source: Author's compilation.

### ⇒ Successes of SEM

The ten-year review of NAAEC outlines that due to a lack of mandatory follow-up or recommendations provision, it is hard to provide concrete impact of the SEM process on domestic regulatory climate, however, anecdotal evidence suggests that the impact has been positive. It lists examples of such positive impacts<sup>130</sup>:

- The proposed Conzumel development was downsized and additional measures introduced to protect a threatened reef. In addition, this case influenced the reform of Mexico's environmental assessment legislation (Cozumel – SEM-96-001).*
- The filing of the submission in BC Hydro case spurred the resolution of issues that had long been stalled. For its part, the factual record generated ideas for improving the application of the provincial Water Use Planning Process and the federal No Net Loss policy (BC Hydro- SEM-97-001).*
- The Secretariat's investigation conducted as a result of the BC Logging submission uncovered deficiencies in the procedures of Fisheries and Oceans Canada that Department subsequently sought to address. Fisheries and Oceans Canada increased its presence in the prairie provinces (BC Logging- SEM-00-004).*
- In a letter to BC government authorities, Environment Canada cited the BC Mining submission when it rejected a proposal to adopt a less costly, but less effective, effluent treatment method at the Britannia Mine (BC Mining – SEM-98-004).*
- The submission related to the operations of a shrimp farm in Mexico (Aquanova) encouraged negotiations among the submitters, local and environmental authorities and the developers that led to actions to reduce the impact of the farm's waste water discharge and a mangrove replanting program (Aquanova- SEM-98-006).*

The CAFTA-DR SEM Secretariat lists three examples of successes through citizen submissions:

- Fighting noise pollution in Antigua Guatemala*

<sup>130</sup> Ten Years of North American Environmental Cooperation- Report of the Ten-Year Review and Assessment Committee to the Council of the Commission for Environmental Cooperation, available at [http://www.cec.org/sites/default/files/documents/reviews/7287\\_TRAC-Report2004\\_en.pdf](http://www.cec.org/sites/default/files/documents/reviews/7287_TRAC-Report2004_en.pdf).

The submission alleged 18 years of noise pollution generated by a Mexican sports club in violation of Mexican Environmental Protection Law.<sup>131</sup> After the submission, the CAFTA-DR Secretariat raised the matter for cooperation between the minister of environment in Mexico and the submitters to resolve the problem. Cooperation led the Ministry of Environment to establish technical regulations on noise pollution. Study of the allegations led to official confirmation of the facts by the Ministry and the sports club was fined for the lack of environmental permits. Following these actions, the submitters withdrew the complaint.

*b) Fighting for the future of sea turtles in the Dominican Republic*

Humane Society International (HSI) complained of mass illegal hunting of sea turtles in danger of extinction for illegal wildlife trade in Dominican Republic.<sup>132</sup> In light of the submission, the Ministry of Environment of the Dominican Republic took measures to combat illegal wildlife trade in sea turtles by enacting law for a total prohibition of possessing, selling or transporting sea turtle products; initiated a wildlife campaign to confiscate and destroy sea turtle products throughout the country, especially in tourist centers and a public campaign on the sea turtle as an endangered species. Studies reported that these actions were significant, and the illegal trade had drastically reduced- 99% reduction of sea turtle products in Dominican Republic.

*c) Villa Veranda: access to environmental information and public participation in El Salvador*

The submission alleged that the El Salvadorian state and central government did not consult with them on the housing project (Villa Veranda) under their homes.<sup>133</sup> The land area is one of the most active seismic zones in Central America and deforestation in the hill area due to the project can lead to adverse outcomes for the submitters. After the submission, cooperation was promoted among the stakeholders as the Secretariat studied the matter by sending experts on the ground to hold consultations with the affected communities. After the Secretariat published the factual record, it held a joint workshop with the affected communities and public officials as well as private construction associations to evaluate the prospective actions. Through the factual record, the community availed all the missing information without any cost. The public officials accepted that there were coordination issues and rectified it through a support fund to repatriate affected communities for damage due to the construction of the housing project.

Pacquin *et al* further provides that:

...it is hard to determine whether the SEM process has had an impact on any improvements or deterioration that may have occurred.<sup>134</sup> It is tempting to assume that compliance with environmental laws in North America improved, at least modestly, with the NAAEC commitment to enforcement and the creation of the SEM process. But it is not easy to find evidence of this. Some submissions have triggered immediate concrete actions by the companies named in them and the responsible enforcement agencies to improve compliance or enforce the law, in response to the heightened attention brought upon them by the involvement of the CEC. Examples of concrete actions include: inspections and a warning letter issued to one of the loggers after the filing of the BC Logging submission; government responses to the hundreds of citizen complaints that the Tarahumara submission alleged had never been resolved; increase in Department of Fisheries and Oceans presence in Prairie Provinces following the Oldman River submissions; a recent federal proposal to create a fund for certain waste sites in Canada, in which Britannia Mine (BC Mining) was specifically named, etc. However, because there is no follow-up by the CEC on factual records and submissions, the concrete improvements in effective enforcement that may have occurred as a result of the SEM process have not been documented systematically.

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<sup>131</sup> SAA-SEM CAFTA-DR-US FTA, *Success Stories*, available at <http://www.saa-sem.org/en/success-stories/>.

<sup>132</sup> *Id.*

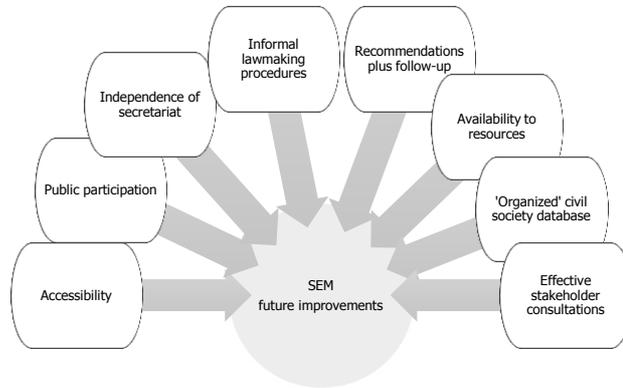
<sup>133</sup> *Id.*

<sup>134</sup> See Marc Paquin *et al*, *supra* note 127.

## A. Improvements in the SEM process

There is a need for considerable improvements to make the SEM process efficient and effective. This section discusses a list of such improvements to highlight the shortcomings of SEM as implemented so far.

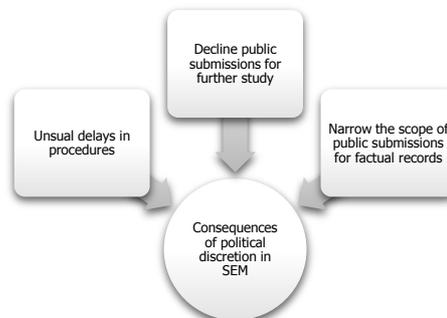
Figure 4-1: Improvements in the SEM process



### (i) Independent secretariat

There is a conflict of interest embedded in the SEM's institutional design whereby the Parties are meant to promote NAAEC's objectives even though they are inclined to protect their own political interests.<sup>135</sup> The Secretariat as well as JPAC cannot act outside the political authority of Council.<sup>136</sup> The NAAEC doesn't define the contours of Secretariat-Council interaction in CEC as regards the preparation of factual records. Consequently, a high degree of political discretion leads to diminished procedural justice.<sup>137</sup>

Figure 2: Consequences of political discretion in SEM



The states do not respond in time when a reply is sought on submission by the secretariat to proceed with the factual record consideration.<sup>138</sup> Further, when the secretariat sends factual records to the council for voting to make them publicly available, the request is met with unreasonable delays.<sup>139</sup> NAAEC doesn't set a standard on how the council should proceed to vote.<sup>140</sup> The average time to release the factual records is five

<sup>135</sup> Commission for Environmental Cooperation, Discussion Paper prepared by Jane Gardner, JPAC member, Analysis 14 and 15 of the NAAEC Council's Emerging Conflict of Interest (28 April 2004), available at [http://www.cec.org/sites/default/files/documents/jpac\\_advice\\_council/4831\\_Discussion-paper-28Apr\\_en.pdf](http://www.cec.org/sites/default/files/documents/jpac_advice_council/4831_Discussion-paper-28Apr_en.pdf).

<sup>136</sup> See Report of the Ten-Year Review NAAEC, *supra* note 128.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> See Hoi L. Kong and L. Kinvin Wroth, *supra* note 65.

<sup>140</sup> *Id.*

years and five months which makes any prospective factual record irrelevant and obsolete.<sup>141</sup> According to a feedback survey by the secretariat, citizens who have taken part in the SEM process have stressed that the submission takes considerable effort in the review process irrespective of stated timelines.<sup>142</sup>

In at least six cases, the Council declined to proceed when the secretariat sought its permission to prepare a factual record without providing any reasons. Further, in six cases, the council narrowed the scope of a factual record. The council has stated in public record that:

The NAAEC is very clear that the Council is the ultimate authority for determining the scope of the Factual Record, and the treaty does not, either explicitly or implicitly, contemplate providing submitters with an opportunity for a rebuttal on this issue.<sup>143</sup>

In a petition by Ecojustice, the Parties delayed responding for almost four years and thereafter arbitrarily narrowed the scope of investigations to the threatened species from 197 to 11, prompting a withdrawal of submission by the petitioner in revulsion.<sup>144</sup>

In *Migratory Birds* submission, the submitters requested the secretariat to prepare factual record concerning the nationwide failure of the US to enforce the Migratory Bird Treaty Act (MBTA) against loggers and the secretariat agreed that such a factual record was warranted.<sup>145</sup> However, the council, in an arbitrary manner held that the Secretariat could investigate the failure to enforce the MBTA with respect to only two minor examples and not on illustrations provided in which thousands of birds were likely harmed as a widespread practice by the US government.<sup>146</sup>

## **(ii) Public participation**

In 13 documented cases, the submission was rejected due to lack of documentary evidence justifying the assertion. The requirement to submit nearly complete information for a preliminary review from citizens, communities or NGOs in light of the various resource constraints they face, makes it a highly cumbersome process. In cases of lack of sufficient information, the secretariat returns the submission to seek further information within 30-60 days, failing which the process is terminated. Further, the council has often impeded the independent process of the secretariat to determine the sufficiency of information.

In *Ontario Logging* submission, the council disputed the secretariat's discretion to determine if submission was providing sufficient information.<sup>147</sup> The dispute related to the clear-cutting activity which devastated over 85,000 migratory birds' nests in central and northern Ontario as per a statistical model.<sup>148</sup> The council overruled the assessed value and ordered that submitters provide evidence of the number of nests 'actually' destroyed.<sup>149</sup>

It is noted that the SEM process in CAFTA-DR has similar issues as NAAEC.<sup>150</sup> Request for more than sufficient information from the submitters led to 14 cases being terminated.<sup>151</sup> Further, once the submission is

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<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> See Report of the Ten-Year Review NAAEC, *supra* note 128.

<sup>144</sup> See Report of the Ten-Year Review NAAEC, *supra* note 128.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> See Hoi L. Kong and L. Kinvin Wroth, *supra* note 65.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

made the citizen has no role in the process till the publication of the factual record. A cooperative process should increase the level of public review and transparency to enhance trust in the process.<sup>152</sup>

**(iii) Informal lawmaking (IN-LAW) process**

Two main issues arose with respect to IN-LAW in the SEM - a substantive and procedural.

On substantive issue, the interpretative contours of 'environmental law' raised systematic concerns in defining the scope of review. Although the secretariat promoted a broad interpretation to uphold the objectives of NAAEC, the Council has consistently argued for a narrow interpretation.<sup>153</sup> Further, the secretariat follows WTO precedents to interpret the term 'laws and regulations' as provided by the WTO AB report on *Mexico – soft drinks* and *India- solar cells*: 'laws and regulations' should be incorporated into domestic legal system and should be legally binding.<sup>154</sup>

Specifically, the AB in *India-solar cells* has held that the UNFCCC and relevant international instruments were not laws and regulations under Art. XX(d) GATT as they were not incorporated in India's domestic law and have no direct effect on compliance.<sup>155</sup> Importantly, it laid six criteria to assess whether a legal norm falls under the scope of 'laws and regulation' on a case-to-case basis:

...i) degree of normativity of the instrument and the extent to which the instrument operates to set out a rule of conduct or course of action that is to be observed within the domestic legal system; ii) degree of specificity of the relevant rule; iii) whether the rule if legally enforceable, including, e.g., before the court of law; iv) whether the rule has been adopted or recognized by a competent authority possessing the necessary powers under the domestic legal system of a Member; v) the form and title given to any instrument or instruments containing the rule under domestic legal systems of a member and iv) the penalties or sanctions that may accompany the relevant rule.<sup>156</sup>

Clearly, international soft law commitments such as the Paris Climate Accord cannot pass the test laid down by the WTO Appellate Body. The WTO jurisprudence doesn't accept a 'broad spectrum of legal normativity' as suggested by Pauwelyn since the former doesn't delve into whether the rule is 'law', however murky or informal in status which narrows the scope of a factual record in SEM:

Legal normativity must not be confused with and includes more than legal imperativity. The normative is a genus with two main species: the imperative and the appreciative.<sup>157</sup> Something can therefore be law – but at the same time be murky...the core question is: how to find a balance between, efficiency, flexibility and effectiveness thought to be inherent in informal rule-making, and on the other hand, the legitimacy, control and accountability that is widely regarded to go hand-in-hand with formal legal process.

The procedural concern in SEM relates to the application of *res judicata* and *lis pendens* to inhibit an expert review of specific public submissions which are simultaneously pending in other legal forums.

*Res judicata* is a recognition of fact that the terms of an award are definitive and obligatory. *Lis pendens* means a law suit pending when a parallel proceeding between same parties and cause of action is pursued in two different legal regimes. These two principles are recognized principles of procedure in international law to restrict forum shopping as there is an absence of hierarchy of international legal regimes. In order to apply *res*

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<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> Appellate Body Report, *India - Certain Measures Relating to Solar Cells and Solar Modules*, WTO Doc. WT/DS456/AB.

<sup>156</sup> *Id.* at paragraph 5.113.

<sup>157</sup> Joost Pauwelyn, *Is it International Law or Not, and Does it Even Matter?*, in *INFORMAL INTERNATIONAL LAWMAKING* (Joost Pauwelyn, Ramses A. Wessel and Jan Wouters, eds., OUP 2012).

*judicata* and *lis pendens*, a triple identity test needs to be satisfied: a) same parties, b) same claims and c) same legal basis.<sup>158</sup>

The SEM is an IN-LAW process which cannot have a same 'legal basis or claim', even if the parties may be same. In the SEM process, public submission is a request for inquiry into the facts of matter raised against possible violations of international commitments. The claim is not to expound a legal opinion on whether the violation has actually taken place under international or domestic laws. The process is based on the preparation of a factual record as a soft law instrument to steer state behavior. Although the process is defined in a treaty, it's not hard law but an IN-LAW process where the procedures should be more flexible.

Research is warranted to critically analyze IN-LAW procedures vis-à-vis traditional legal procedures to enable a common understanding among practitioners. Suffice here to say that an imprudent application of hard law procedures in IN-LAW processes will take away the required flexibility, efficiency and effectiveness of IN-LAW processes.

#### **(iv) Recommendations and follow-up**

The final outcome of SEM provides a factual record which is devoid of recommendations, action plan, follow-up monitoring or civil society action.<sup>159</sup> Although the certification of facts establishing the violation may create subsidiary pressure among NAAEC parties through diplomatic channels, it is not enough.<sup>160</sup> On the contrary, the Council has stated on record that: 'we believe that any follow-up which a Party may choose to undertake in respect to the development of a factual record is a domestic policy matter'...opposing the idea of recommendations and follow-up.

#### **(v) Lack of resources**

Lack of resources in Secretariat has led to issues like termination of financing programs in NAAEC due to low budget, slow rate of reporting and factual records, direct dependence on the Council of Ministers to carry out independent functions, etc.<sup>161</sup> Dependency on funds from states can jeopardize the independence of Secretariat. Independent financing sources with the flexibility to accept funds from various organizations in a transparent manner is necessary.<sup>162</sup> The NAAEC Commission's budget remains \$9 million since 1994 unadjusted to inflation, reducing the buying power by 55%. In contrast the budget for the CAFTA-DR's Commission has been more than twice as much, i.e., \$19.3 million in 2007 although the latter's Secretariat consists of 2 person-1 coordinator and 1 technician.<sup>163</sup>

#### **(vi) Organized civil society database**

The US lacks a centralized civil society database as compared to the EU which is a unique experiment to organize civil society through a transparency database<sup>164</sup>. It is an online EU-level database where all the lobby groups, participating in EU policy-making -- register for a certified access to the EU institutions.<sup>165</sup> The

<sup>158</sup>Michael Waibel, *Coordinating Adjudication Processes*, in THE FOUNDATIONS OF INTERNATIONAL INVESTMENT LAW: BRINGING THEORY INTO PRACTICE (Zachary Douglas, Joost Pauwelyn and Jorge Viñuales eds., OUP 2014) 499.

<sup>159</sup> See Report of the Ten-Year Review NAAEC, *supra* note 128.

<sup>160</sup> *Id.*

<sup>161</sup> CEC, JPAC, Lessons Learned: Citizen Submissions under Articles 14 and 15 of NAAEC, Final Report to the Council, 2001, *available at* [http://www.cec.org/sites/default/files/documents/jpac\\_advice\\_council/3253\\_rep11-e-final\\_EN.PDF](http://www.cec.org/sites/default/files/documents/jpac_advice_council/3253_rep11-e-final_EN.PDF).

<sup>162</sup> *Id.*

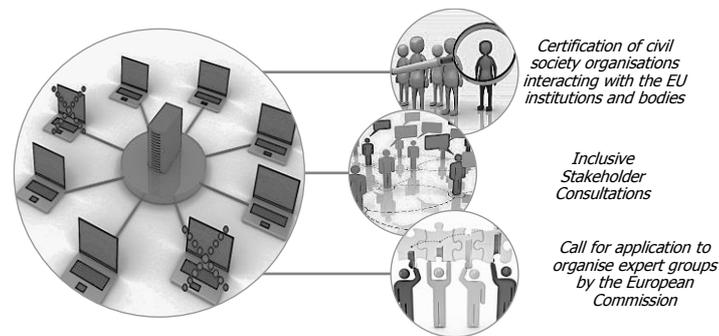
<sup>163</sup> *Id.*

<sup>164</sup> European Commission, Transparency Register, *available at* [http://ec.europa.eu/transparencyregister/public/staticPage/displayStaticPage.do?locale=en&reference=WHY\\_TRANSPARENCY\\_REGISTER](http://ec.europa.eu/transparencyregister/public/staticPage/displayStaticPage.do?locale=en&reference=WHY_TRANSPARENCY_REGISTER).

<sup>165</sup> European Commission, Proposal for a Interinstitutional Agreement on a mandatory Transparency Register, COM(2016) 627 FINAL (2016), *available at* [https://eur-lex.europa.eu/resource.html?uri=cellar:8a8de191-8648-11e6-b076-01aa75ed71a1.0001.02/DOC\\_1&format=PDF](https://eur-lex.europa.eu/resource.html?uri=cellar:8a8de191-8648-11e6-b076-01aa75ed71a1.0001.02/DOC_1&format=PDF). European Council,

database is based on an inter-institutional agreement between the EU Parliament and Commission to maintain an open, transparent and regular dialogue with the representatives of the EU civil society.<sup>166</sup> It ensures transparency and accountability of civil society engagement in the EU's trade agreement.<sup>167</sup> The business lobby dominates the EU's transparency register, although it is open to all the civil society within the EU which shows lack of organizational ability or willingness by the social and environmental organizations to participate. The US lags behind the EU in organizing its civil society methodically to empower and engage them in trade agreements.

**Figure 4-1: Transparency Database for Civil Society Organizations**



#### **(vii) Effective stakeholder consultations**

There is a general lack of balance in representation of civil society in the expert advisory bodies in: TSD, JCC and SEM. The balance is either skewed in favor of the businesses as against trade union and NGOs or the seats are filled-up by national university academicians. This lack of balance can cause capture of the advisory groups by powerful lobbies 'business sector or by state loyalists – national university professors (e.g., Korea's advisory group in EU-Korea FTA)' – as highlighted in the OECD Guidelines on Stakeholder Consultations.

Both the TSD and SEM mechanism lack a cohesive strategy to ensure the development of distributed network of stakeholders to process concerns pertaining to sustainable development. This lack of strategy wastes time and resources by repetitive dialogues through a captured advisory group leading to an overall 'consultation fatigue' among stakeholders.

Trade agreements have various chapters which can tackle social and environmental concerns beyond a specific chapter – which should be studied with experts and enable stakeholders to use trade agreements for their specific objectives. A distributed stakeholder network inclusive of the most affected stakeholders should be a priority who can participate in expert groups on a rotating basis.

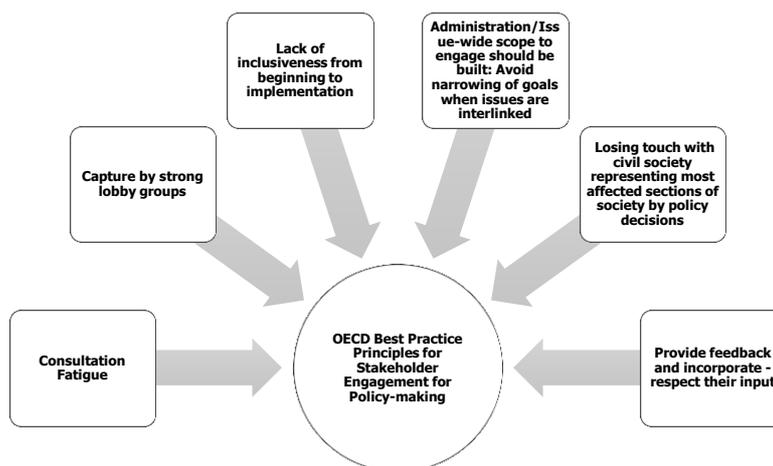
Feedback of stakeholders internally (national civil society) and externally (transnational advisory group in FTA) should be duly taken into account with an inclusive discussion on how their inputs are being pursued.

**Figure 3: OECD Guidelines for Stakeholder Consultations**

Transparency register: Council agrees mandate for negotiations, 2017, available at <http://www.consilium.europa.eu/en/press/press-releases/2017/12/06/transparency-register-council-agrees-mandate-for-negotiations/>.

<sup>166</sup> *Id.*

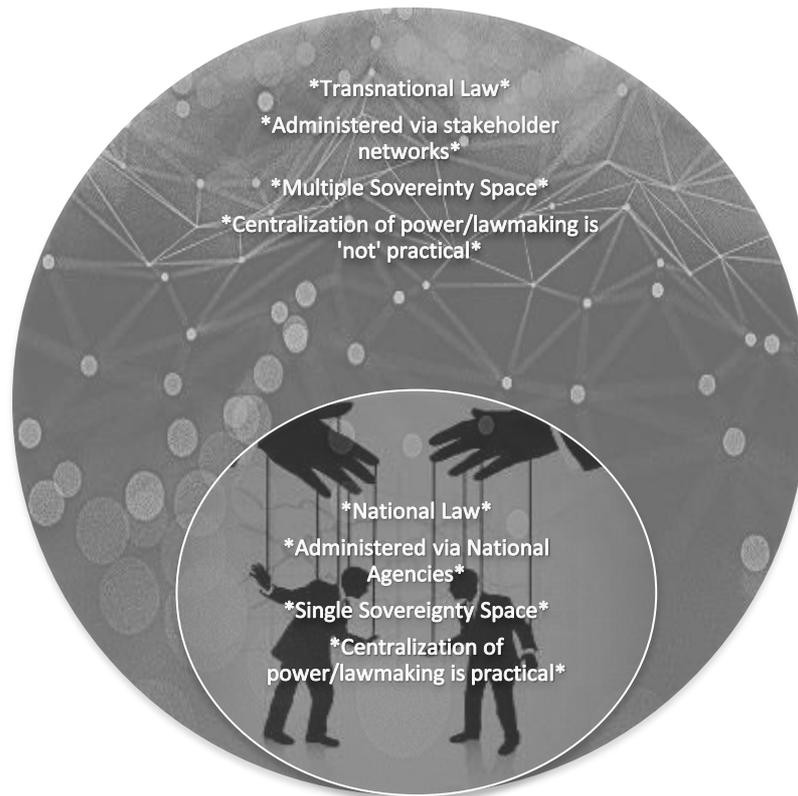
<sup>167</sup> *Id.*



⇒ ***Citizen vs. state centric enforcement of WTO-extra commitments in trade agreements***

The preoccupation of legal practitioners, NGOs, trade unions as well as policy-makers with state-centric formal and informal dispute processes in cases of social and environmental concerns is a serious misstep. It is due to a failure to acknowledge the practical limitations of state-centralism at a transnational level. Beyond national jurisdictions, the power of law enforcement dramatically transforms from national administration to stakeholder networks at transnational level. It is reflective of a transition from a single sovereignty to multiple sovereignty space where no one state has an absolute authority to regulate domestic policies in other jurisdictions, see figure below. At a transnational level any legal commitment to amend domestic policies are mainly enforced via stakeholder networks than state-centric administrative or enforcement agencies especially for social and environmental concerns due to subjective circumstances per jurisdiction where one rule cannot account for complex circumstances.

Figure 4: Single Sovereignty vs. Multiple Sovereignty Space



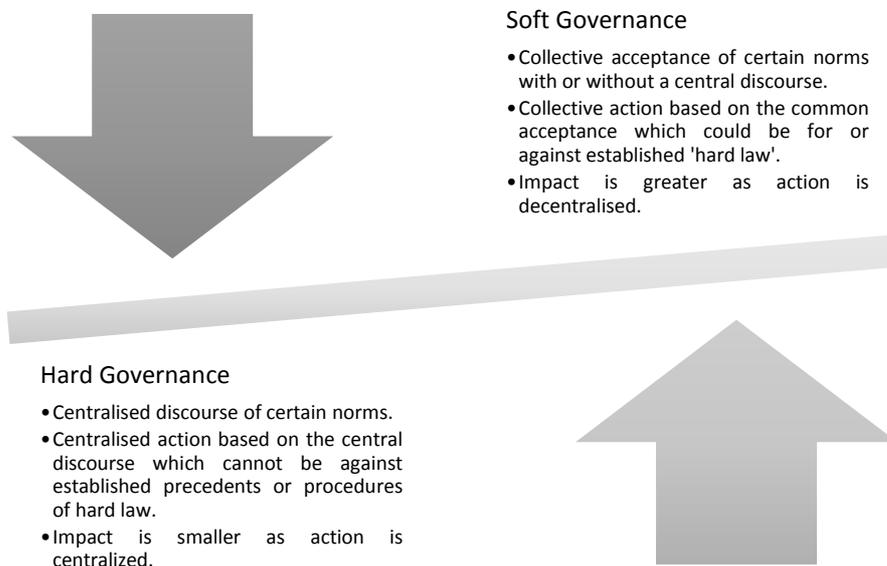
Law as an expression of sovereign power over its subjects is managed at the center by high-level diplomats and politicians. It is made visible to the subjects – stakeholders through legal enforcement mechanisms but *it remains unverifiable*<sup>168</sup>, i.e., no one stakeholder is really aware whether the law backed by an enforcement mechanism is the main reason behind a well-behaved society or whether it is the collective acceptance of the principles itself, e.g., the Paris Climate Accord is an international soft law treaty - designed to encourage national commitments from states on a voluntary basis to combat climate change. It is not very obvious whether the commitments under the Paris Accord are binding because the ‘states’ signed the treaty or due to the fact that a credible percent of stakeholders accept the science behind human-induced climate change (Anthropocene)? We can at least agree that - *it is debatable* - as when the US withdrew from the Accord, many states within the US, independently continued to promote their pledges to the Paris Accord, e.g., California.

As a result, the article argues for a broad citizen-centric informal dispute settlement like SEM for social and environmental commitments in trade agreements as state-centralism through informal or formal means introduces unwarranted political clout leading to managerial and legal inefficiencies that undermines the trust in the mechanism making it unserviceable to the stakeholders. Lastly, the informal processes should enable

<sup>168</sup> Theory of Central Power based on Bentham’s Panopticon from Michel Foucault, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON, Translated by Alan Sheridan, [https://monoskop.org/images/4/43/Foucault\\_Michel\\_Discipline\\_and\\_Punish\\_The\\_Birth\\_of\\_the\\_Prison\\_1977\\_1995.pdf](https://monoskop.org/images/4/43/Foucault_Michel_Discipline_and_Punish_The_Birth_of_the_Prison_1977_1995.pdf) (last visited on 14 June 2018). See, Power is managed at the center as Michael Foucault explains: *All that is needed, then, is to place a supervisor in a central tower and to shut up in each cell a madman, a patient, a condemned man, a worker or a schoolboy. By the effect of backlighting, one can observe from the tower, standing out precisely against the light, the small captive shadows in the cells of the periphery. They are like so many cages, so many small theatres, in which each actor is alone, perfectly individualized and constantly visible. The panoptic mechanism arranges spatial unities that make it possible to see constantly and to recognize immediately. In short, it reverses the principle of the dungeon; or rather of its three functions - to enclose, to deprive of light and to hide - it preserves only the first and eliminates the other two. Full lighting and the eye of a supervisor capture better than darkness, which ultimately protected. Visibility is a trap...induces in the inmate a state of conscious and permanent visibility that assures the automatic functioning of power... power should be visible and unverifiable.*

complex stakeholder and civil society networks in order to aid multiple levels of civil society engagements to promote varied levels of accountability.

**Figure 5: Brief outline of Soft vs. Hard Transnational Governance**



## 5. Conclusion

There are three methodologies (when all the US and EU trade agreements are mapped) to implement social and environmental commitments: cooperative, sanctions and composite. NAAEC's SEM approach is identified as the best approach to implement social and environmental commitments in trade agreements as it provides for public submissions followed by factual records as a sunshine remedy and an independent secretariat supported by a group of transnational civil society advisory group. However, the SEM process has its challenges which needs to be appreciated: political obstruction, lack of managerial capacity and the unexplored legal dilemmas in applying hard law procedures and precedents in IN-LAW processes. Research in the field of informal judicial processes and an optimal distribution of stakeholder networks to enforce WTO-extra commitments, especially labour and environmental commitments in trade agreements should be advanced.

## Annex 1. EU trade agreements civil society meetings

## EU-Korea FTA

- CSF meetings
- In the EU-Korea FTA, the main point of contention in the meetings has been Korea's lack of ratification and compliance with four core ILO conventions: C029 -Forced Labour Convention, 1930 (No. 29); C087 – Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); C098 – Right to Organise and Collective Bargaining Convention, 1949 (No. 98) and C105- Abolition of Forced Convention, 1957 (No. 105). In the 5<sup>th</sup> CSF meeting, the members provided that Korea did not adhere to its commitment to share before the meeting intended steps to counter obstacles in the ratification of the core ILO conventions. During the meetings, Korea ratified the Maritime Labour Convention wherein the EU shared its practices in the area. Specially, the Parties discussed the implementation of the international guidelines and principles in the area of CSR wherein the EU suggested further discussions on the operation of the EU and Korean companies bilaterally and in third countries besides the role of the OCED National Contact Points to ensure that their companies observe the international CSR principles and guidelines to which both Parties subscribe. Critically, the discussions revolved around the initiatives pertinent to green growth, circular economy, climate change, core labour standards and voluntary international CSR principles or guidelines.

## EU-Colombia FTA

- CSF meetings
- In the EU-Colombia FTA, the main point of concern between the Parties remained the composition and capacity of civil society organisations in the Colombian and Peruvian Domestic Advisory Groups, respectively. The issue caused delays, disappointments and discontent with the EU DAG members who wanted to have proper representation and disclosure of contact points to enable information flow and preparation for CSF meetings. Further, during the subsequent discussions various human rights violations in Colombia and specially, in Peru were highlighted pertaining to indigenous and labour unions rights as regards the relaxing of environmental safeguards affecting the former and criminalization of social protests on the latter. It was highlighted that Art. 1 of Colombia, Peru FTA with the EU provides for adherence to democratic principles, human rights and rule of law as an essential element of the FTA. Further, it was requested that an inclusive, transparent and informed deliberation with larger society should reflect policy-making in Peru and Colombia, especially on environmental and social standards under the FTA. Generally, the discussions revolved around ratification and implementation of MEAs and core ILO (as well as up to date) conventions under the FTA.

## EU-Georgia AA

- CSP meetings
- In the Georgia AA's CSP meetings, the discussions revolved around the ratification and implementation of core ILO conventions and MEAs. Specially, the EU urged Georgia to swiftly implement the ILO's Tripartite Consultation Convention along with other conventions and Espoo Protocol for Environment. Georgia was asked to ratify the Paris Agreement as soon as possible. The EU DAG requested the Georgian Government to provide a regular channel of communication with the civil society organisations. Generally, a lot of information was exchanged between the parties on best practices, joint initiatives and cooperation under the FTA on environment and labour. Particular issue with media freedom as human rights was raised as a concern in Georgia where the media houses are owned by popular and rich political factions who distribute false narrative to the public. On humanitarian issues, the EU provided that Georgia should respect the Ceasefire Agreement 2008 as brokered by the EU to stop violence between forces from Georgia and its occupied territories and requested access to humanitarian aid to affected regions. Importantly, the EU provided for visa liberalization for Georgians travelling to the EU for a period of 90 days in any 180 days period to strengthen tourism and business ties followed by necessary reforms by Georgia on document security, border management, migration and asylum.

## EU-Moldova AA

- CSP Meetings
- In Moldova AA's CSP meetings, the members emphasized on the importance of efficient approximation and enforcement of Moldovan legislation and EU directives related to the commitments under the AA. Critically, all obstacles to a cogent partnership of Moldova with the EU should be systematically targeted, including needed structural reforms, enhancing transparency in decision-making at local, national and international level, sound institutional, technological upgradation in public and private sector, strengthening the capacity of civil society organisations, proper checks and balances in the Government vis-a-vis judiciary and administration etc. Mixed deliberation on all sides, environment, labour, human rights, good governance, rule of law and humanitarian were discussed.

## EU-Ukraine AA

- CSP meetings
- In Ukraine AA's CSP meetings, the EU similarly held dialogues on visa liberalization plans and ultimately the EU Council adopted regulation on visa liberalization for Ukrainian citizens travelling to the EU for a period of 90 days in any 180 days period. It was possible by reforms on Ukrainian migration, public order, security, external relations and fundamental rights. Increased EU assistance was requested for human rights protection in remote rural areas impacted by the annexation of Ukrainian's territory Crimea by Russia. Again, various cross-cutting issues inclusive of environmental, labour, human rights, humanitarian issues, good governance (specially corruption), rule of law and democracy concerns were discussed pertinent to the Ukraine's integration into the EU.

## EU-CARIFORUM EPA

- JCC meetings
- In the CARIFORUM-EU JCC meetings, main discussions revolved around enabling trade and investments, specially, SMEs in CARIFORUM states for economic development. Inclusion of indigenous peoples in compliance with the UN Declaration of the rights of indigenous peoples in the implementation of the EPA. Visa facilitation, affordable energy and access to finance to CARIFORUM states was discussed.

## Annex 2: TPA, 2002 and 2015 compared

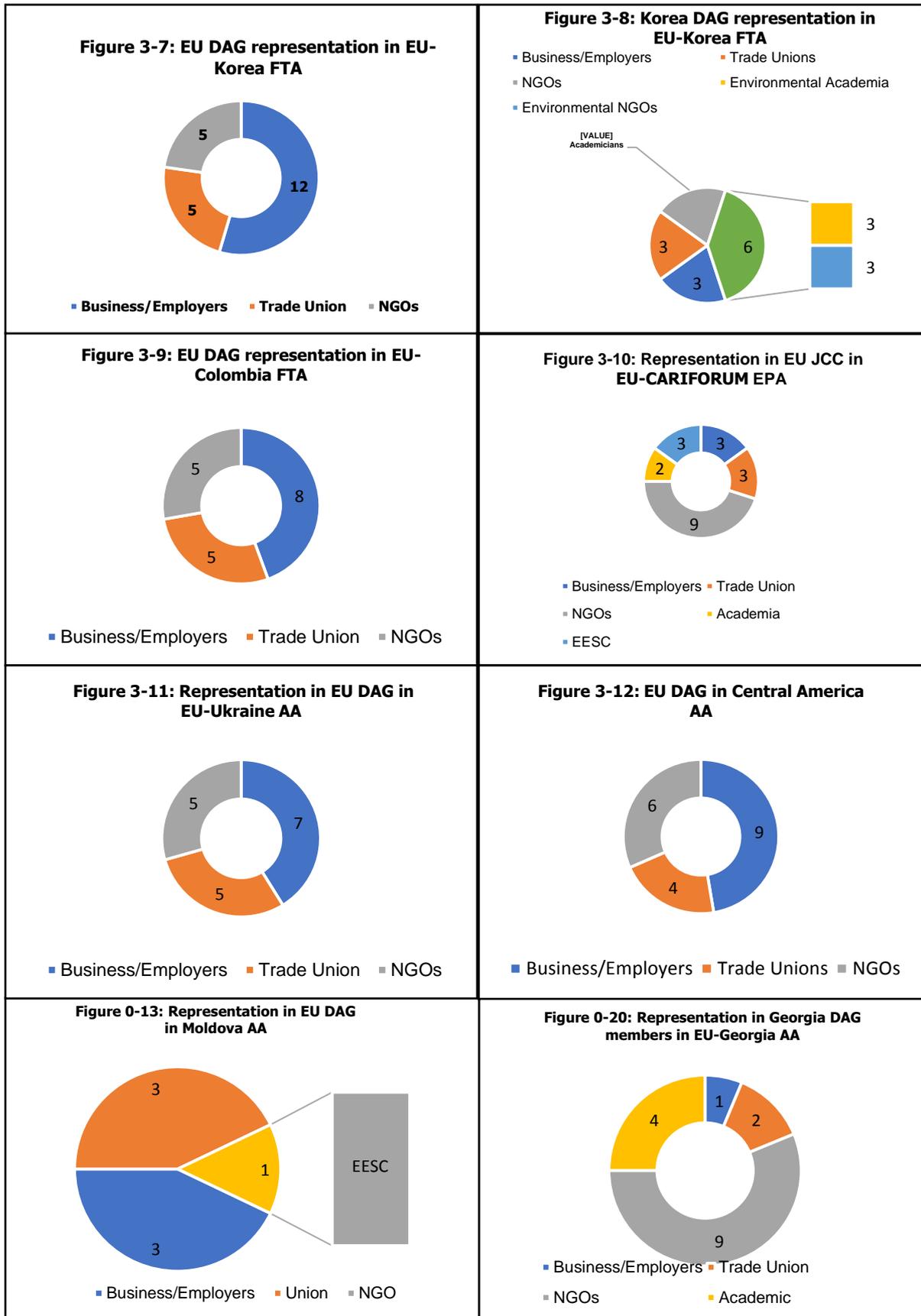
## 2002 TPA

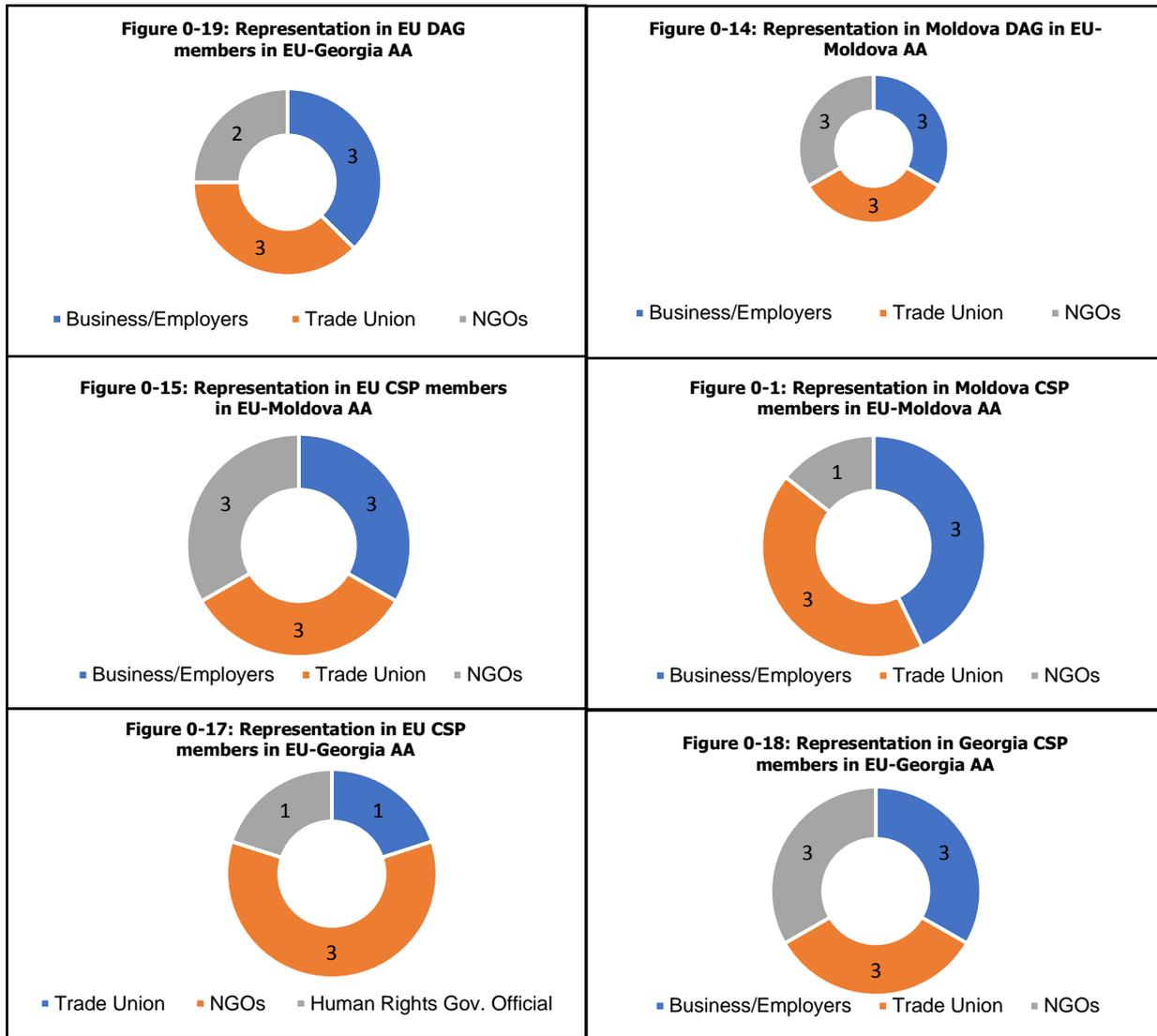
- ⑩ Ensure that a party to a trade agreement with the US does not fail to effectively enforce its environmental or labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the US and that party after entry into force of a trade agreement between the countries
- ⑩ To recognize that parties to a trade agreement retain the right to exercise discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters and to make decisions regarding the allocation of resources to enforcement with respect to other labor or environmental matters determined to have higher priorities, and to recognize that a country is effectively enforcing its laws if a course of action or inaction reflects a reasonable exercise of such discretion, or results from a bona fide decision of such discretion, or results from a bona fide decision regarding the allocation of resources, and no retaliation may be authorized based on the exercise of these rights or the right to establish domestic labor standards and levels of environments protection;
- ⑩ To strengthen the capacity of the US trading partners to promote respect for core labor standards
- ⑩ To strengthen the capacity of US trading partners to protect the environment through the promotions of sustainable development
- ⑩ To seek market access, through the elimination of tariffs and nontariff barriers, for US environmental technologies, goods, and services
- ⑩ To ensure that labour, environmental, health, or safety policies and practices of the parties to trade agreements with the US do not arbitrarily or unjustifiably discriminate against the US exports or serve as disguised barriers to trade.

## 2007-2015 TPA

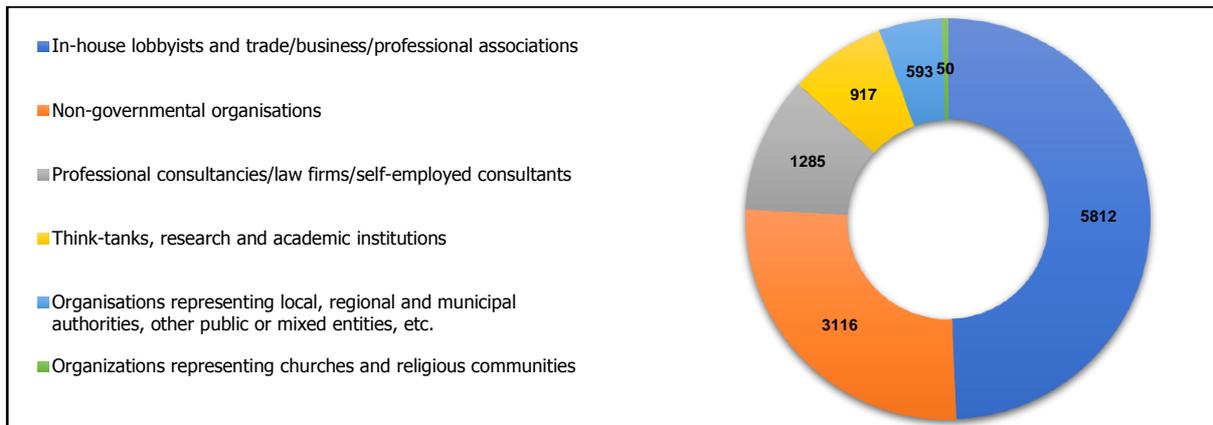
- ⑩ Adopts and maintains measures implementing internationally recognized core labor standards and its obligations under common multilateral environmental agreement
  - ⑩ does not waive or otherwise derogate from, or offer to waive or otherwise derogate from
  - ⑩ its statutes or regulations implementing internationally recognized core labor standards in a manner affecting trade or investment between the US and that party, where the waiver or derogation would be inconsistent with one or more such standards, or
  - ⑩ its environmental laws in a manner that weakens or reduces the protections afforded in those laws and in a manner affecting trade or investment between the US and that party, except as provided in its law and provided not inconsistent with its obligations under common multilateral environmental agreements or other provisions of the trade agreement specifically agreed upon, and does not fail to effectively enforce its environmental or labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade or investment between the US and that party after the entry into force of a trade agreement between those countries;
- to recognize that
    - ⑩ with respect to environment, parties to a trade agreement retain the right to exercise prosecutorial discretion and to make decisions regarding to other environmental laws determined to have higher priorities, and a party is effectively enforcing its laws, if a course of action or inaction reflects a reasonable bone fide exercise of such discretion, or results from a reasonable, bone fide decision regarding the allocation of resources; and
    - ⑩ with respect to labor, decisions regarding the distribution of enforcement resources are not a reason for not complying with a party's labor obligations; a party to a trade agreement retains the right to reasonable exercise of discretion and to make bone fide decisions regarding the allocation of resources between labor enforcement activities among core labor standards, provided the exercise of such discretion and such decisions are not inconsistent with its obligations;
    - ⑩ to strengthen the capacity of US trading partners to promote respect for core labor standards;
    - ⑩ to strengthen the capacity of US trading partners to protect the environment through the promotion of sustainable development
    - ⑩ to reduce or eliminate government practices or policies that unduly threaten sustainable development
  - to ensure that a trade agreement is not construed to empower a party's authorities to undertake labor or environmental law enforcement in the territory of the US.

## Annex 3. Civil society representation in the EU and US advisory bodies



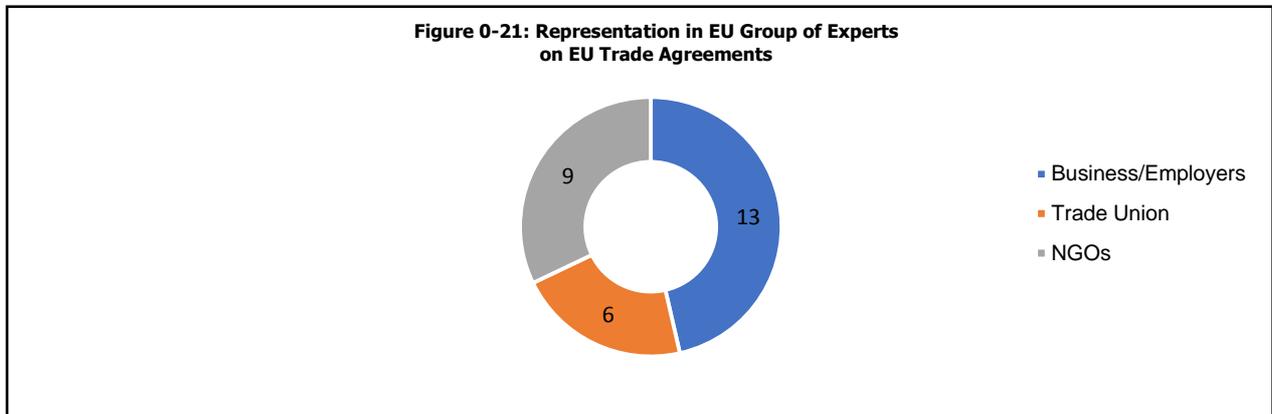


**Registrants in Transparency Register**

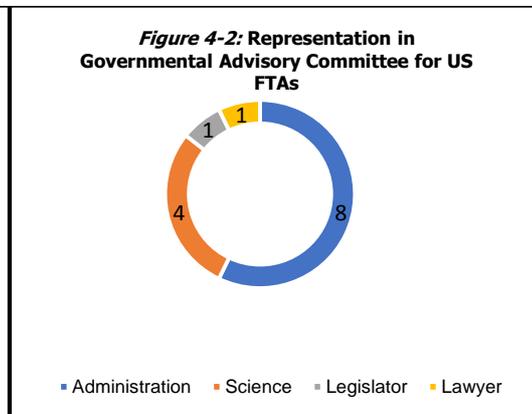
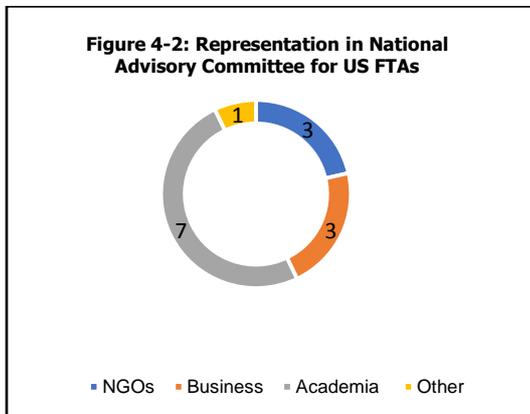
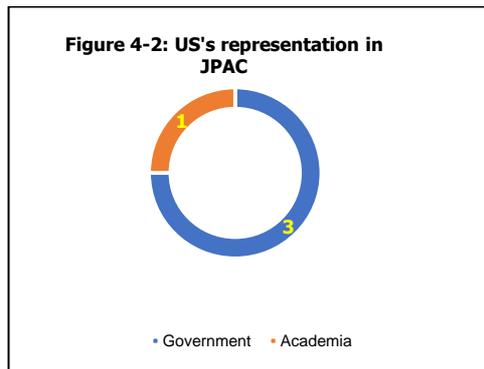
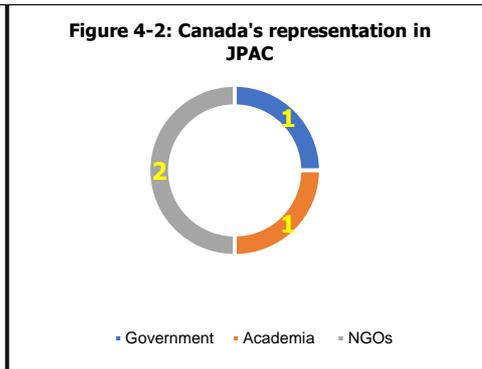
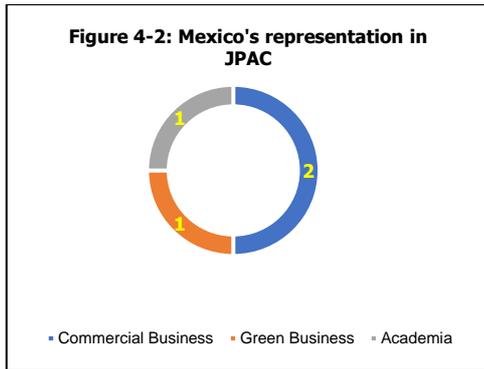
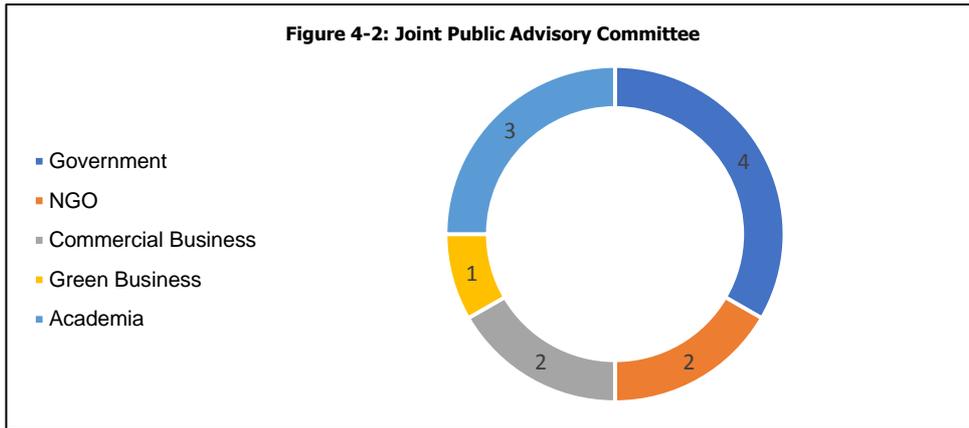


Source: Transparency Register, <http://ec.europa.eu/transparencyregister/public/consultation/statistics.do?locale=en&action=prepareView>

**Figure 0-21: Representation in EU Group of Experts on EU Trade Agreements**



Source: EU Transparency Register, <http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail>.



**Annex 4. International Commitments in the EU TAs**

	Human Rights	Good Governance	Humanitarian	Labour	Environment
			EU		
International Agreements	UN Charter	OECD Guidelines for Multinational Enterprises	Comprehensive Convention on International Terrorism (prospective)	ILO Declaration on Fundamental Principles and Rights at Work, 1998	UNFCCC
	EU Convention for the Protection of Human Rights and Fundamental Freedoms, 1950	UN Convention Against Corruption, 2003	Helsinki Act, 1975 of the Conference on Security and Cooperation in Europe	Ministerial Declaration of the UN Economic and Social Council on Generating Full and Productive Employment and Decent Work for All, 2006	Agenda 21 of the UN Conference on Environment and Development, 1992
	UN Convention on the Rights of Chile, 1989	Geneva Convention relating to the Status of Refugees, 1951 and Protocol relating to the Status of Refugees, 1967	Rome Statute of the International Criminal Court (ICC)	ILO Declaration on Social Justice for a Fair Globalization, 2008	CITES
	Convention concerning Indigenous and Tribal Peoples in Independent Countries	Council of Europe Instruments on preventing and combating Corruption	UN Global Compact	ILO Tripartite Declaration of Principles concerning Multinational Enterprises	Johannesburg Plan of Implementation on Sustainable Development, 2002
	Convention on the Elimination of All Forms of Discrimination against Women	EU Drug Strategy 2013-20	UN Convention against Transnational Organised Crime (UNTOC), 2000	ILO Convention 138 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor	Rio Declaration on Environment and Development, 1992
	International Convention on the Elimination of all forms of Racial Discrimination	Political Declaration on the Guiding Principles of Drugs, 1998	Convention on Certain Conventional Weapons (CCW)	ILO Convention 105 concerning the Abolition of Forced Labour	Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal
	UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions	World Health Organization Framework Convention on Tobacco Control, 2003		ILO Convention 100 concerning Equal Remuneration for Men and Women Workers for Work of Equal Value	Stockholm Convention on Persistent Organic Pollutants
		Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Antipersonnel Mines and their Destruction		ILO Convention 111 concerning Discrimination in Respect of Employment and Occupation	Cartagena Protocol on Biosafety to the Convention on Biological Diversity
		Three main UN drug control conventions of 1961, 1971 and 1988		ILO Convention 87 concerning Freedom of Association and Protection of the Right to Organize	Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade
		Conventions of the Hague Conference on Private International Law in the field of International Legal Cooperation and		ILO Convention 98 concerning the Application of the Principles of the Right to Organize and to Bargain Collectively	UN Convention on the Law of Sea

		Litigation as well as the Protection of Children			
		Convention on the Organisation for Economic Cooperation and Development			Espoo Convention on Environmental Impact Assessment
Areas of Cooperation	Illicit Drugs	Money laundering	Weapons of Mass Destruction	Employment conditions	Fisheries
	Rights of Minorities and Indigenous People	Corruption		Migratory pressures	Desertification
	Gender Equality	Corporate Social Responsibility		Social Security	Climate Change: Mitigation and Adaptation
		Migration, Asylum and Border Management		Education and training	Water quality, prevention of marine pollution
		Security		Gender equality	Green technology
		Terrorist Financing		Promotion of social dialogue	Green economy
		Public Administration		Promotion of core labour standards	Biodiversity
		Rule of Law		Social exclusion	Forests conservation
		Media Freedom			Renewable Energy
		Independence of Judiciary			Sea Pollution
		Organized Crime			Nuclear Safety and Environment
		Cyber Crime			Land use management
		Combating Racism and Xenophobia			Poverty and Environment
					Energy management
					Waste management
					Environmental management of sensitive coastal areas
					Environmental education and awareness
					Use of advanced tools of environmental management, environmental monitoring methods and surveillance, including the use of environmental information system (EIS) and environmental impact assessment
US					
International Agreements				ILO and their commitments under the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up (1998) (ILO Declaration)	Convention on International Trade in Endangered Species of Wild Fauna and Flora, 1973
				ILO Convention No. 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (1999)	Montreal Protocol on Substances that Deplete the Ozone Layer, 1987
				Internationally recognized labour principles and rights means: the right of association; the right to organize and bargain collectively; a prohibition on the use of any form of forced or compulsory labour; labour protections for children and young people, including a minimum age for the employment of children and the prohibition and elimination of the worst forms of child labour, and acceptable conditions of work with respect to minimum wages, hours of work and occupational safety and health. Elimination of discrimination in respect of employment and occupation.	Protocol of 1978 Relating to the International Convention for the Prevention of pollution from Ships, 1973
				ILO Convention No. 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (1999) (ILO Convention 182)	Convention on Wetlands of International Importance Especially as Waterfowl Habitat, 1971
					Convention on the Conservation of Antarctic Marine Living Resources, 1980
					International Convention for the Regulation of Whaling, 1946
					Convention for the Establishment of an Inter-American Tropical Tuna Commission, 1949
Areas of				Worker's rights	Protection of the Ozone

## Soft vs Hard Governance for Labour and Environmental Commitments in Trade Agreements

Cooperation					
				Rights of children	Layer Protection of the Marine Environment from Ship Pollution
				Fundamental rights and their effective application	Voluntary Mechanisms to enhance environmental performance
				Worst forms of child labor	Trade and Biodiversity
				Labor administration	Invasive Alien Species
				Labor inspectorates and inspection systems	Transition to a Low Emissions and Resilient Economy
				Alternative dispute resolution	Marine Capture Fisheries
				Labor relations	Conservation and Trade
				Working conditions	Environmental Goods and Services
				Migrant workers	Corporate Stewardship
				Social assistance programs	Forest Sector Governance
				Labor statistics	Developing a Pollutant Release and Transfer Register
				Employment opportunities	Reducing Mining Pollution
				Gender	Improving Environmental Enforcement and Compliance Assurance
				Technical issues	Sharing Private Sector Expertise
				Issues related to small and medium enterprises	Improving Agricultural Practices
				Social protections	Reducing Methyl Bromide Emissions
				Technical issues and information exchange	Improving Wildlife Protection and Management
				Social safety net programs	Improving Wildlife Protection and Management
				Unemployment insurance and worker adjustment programs	Increasing the use of cleaner fuels
				Working conditions: hours of work, minimum wages, and overtime; occupational safety and health; and prevention of and compensation for work related injuries and illnesses;	Strengthening environmental management systems
				Labor management relations: forms of cooperation among workers, management, and government to ensure productive labor relations and contribute to efficiency and productivity in the workplace	Developing and promoting incentives and other flexible and voluntary mechanisms in order to encourage environmental protection
				Labor statistics	Personnel training and capacity building
				Human resources development and life-long learning	Conserving and managing shared, migratory and endangered species in international trade and management of marine parks and other protected areas
				Job creation and the promotion of productive, quality employment, including policies to generate job-rich growth and promote sustainable enterprises and entrepreneurship	Facilitating technology transfer and development
				Creation of productive, quality employment linked to sustained growth and skills development for jobs in emerging industries, including environmental industries	Developing and promoting environmentally beneficial goods and services
				Innovative workplace practices to enhance workers' well-being and business and economic competitiveness	Building capacity to promote participation in the process of environmental decision-making
				Human capital development and the enhancement of employability, including through lifelong learning, continuous education, training and the development and upgrading of skills	Exchanging information and experience between Parties within to perform environmental reviews
				Remuneration systems	
				ILO Global Jobs Pact	

Source: Author's compilation.