

# EU Imported Biodiversity Loss - The Gaps and Overlaps Between Trade Impact and Provisions on Biodiversity in EU Free Trade Agreements

Justine Müller

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## EU Imported Biodiversity Loss - the Gaps and Overlaps Between Trade Impact and Provisions on Biodiversity in EU Free Trade Agreements

### I. Introduction

'People assume that we can carry on destroying biodiversity without consequence. This is not the case. It's bad news for people, economies and business'.<sup>1</sup> Biological diversity encompasses the diversity within species (genetic), between species (variety) and of ecosystems<sup>2</sup> and it is currently experiencing a crisis.<sup>3</sup> Despite a growing awareness of the issue, biodiversity is widely misunderstood and negative impacts from human activities, including international trade, are often underestimated. For the last decade, mentions of the environment have been growing in Free Trade Agreements (FTAs) between the European Union (EU) and partner countries. Since the development of the so-called EU 'New Generation' FTAs, new EU trade agreements contain dedicated chapters on sustainable development that are more and more detailed and may include provisions on specific areas of environmental protection such as biodiversity. Much thought has been given to their enforceability but little to their content. Hence, many questions about their potential and actual effect remain. One of them asks whether the environmental provisions could mitigate the negative influence of the FTA itself on the environment.

Focusing on biodiversity, this chapter aims to answer this question by exposing the gaps and overlaps between the impact of trade on biodiversity and the core biodiversity-related provisions of EU trade agreements' Trade and Sustainable Development (TSD) chapters. It does so, firstly, by exposing the negative impacts of trade on biodiversity and presenting the rationale behind the inclusion of biodiversity-related provisions in EU trade agreements (Section II). Secondly, by presenting the main goals of the relevant environmental clause in EU FTAs (Section III). Taking archetypal examples from the EU's most recent FTAs, the chapter undertakes a textual analysis of clauses relevant to the protection of biodiversity. Thirdly, the

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<sup>1</sup> Ogwal (2020) , Speech at the Post-2020 Open-ended Working Group, UN Convention on Biodiversity Negotiations. Available at: <https://enb.iisd.org/events/2nd-meeting-open-ended-working-group-post-2020-global-biodiversity-framework/summary-report> (last accessed: 31 March 2023)

<sup>2</sup> Convention on Biological Diversity (CBD) (adopted 5 June 1992, entered into force 29 December 1993) 1760 U.N.T.S. 69.

<sup>3</sup> IUCN monitors (2022) Gland, Suisse. Available at: <https://www.iucn.org/our-work/biodiversity> A (last accessed: 20 January 2023).

chapter identifies the gaps and overlaps between these main goals and the negative impacts of, or enhanced by, trade on biodiversity (Section III). Gaps are identified when an EU FTA exerts or enhances a negative effect on biodiversity (directly or through embedded biodiversity loss) but no biodiversity-related provision in the FTA aims to mitigate this effect. On the contrary, overlaps are found when such provisions may be capable of countering this negative effect of the FTA on biodiversity.

## II. The rationale behind addressing the biodiversity crisis in EU Free Trade Agreements

### 1. The direct and indirect impacts of EU trade on biodiversity

#### *Direct impacts of trade*

International trade can have direct negative impacts on biodiversity mainly through trade in endangered or overexploited species, transportation, and the spreading of alien invasive species.<sup>4</sup> Firstly, illegal activities necessary for wildlife trafficking, such as poaching, threaten biodiversity directly.<sup>5</sup> In addition, trade in overexploited species is damaging despite being legal. It occurs when a species is not included by a CITES party in the relevant appendix despite scientific evidence that the species is overexploited. Trade in fish products from overfished species is a straightforward example of this.<sup>6</sup> Secondly, transportation linked to international trade is directly impacting biodiversity in two ways: the development of necessary infrastructures (e.g. roads and ports)<sup>7</sup> together with collisions during transport,<sup>8</sup> and the cumulated pollution (air, land, water and noise) from transport.<sup>9</sup> Thirdly, international trade increases the spread of alien species that often become invasive when introduced to their non-native habitat.<sup>10</sup> The cumulative damage of these direct impacts makes trade one of the drivers

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<sup>4</sup> Bellora et al (2020), pp 11-13.

<sup>5</sup> IPBES (2019), p.116.

<sup>6</sup> For example, EU import of overexploited fish and fish products see: Bureau (2012), pp. 171-176

<sup>7</sup> IPBES (2019), p. 113.

<sup>8</sup> Abdulla and Linden (2008), pp. 33-41.

<sup>9</sup> Bellora et al. (2020), p. 11.

<sup>10</sup> Ibid., p. 12 and IPBES (2019), p. XVII.

of change in nature identified by the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES).<sup>11</sup>

#### *Indirect impacts of trade*

Human, environmental, or resource footprint are all terms used to define the negative impact of anthropogenic activities on nature and the environment.<sup>12</sup> Using different indicators (e.g., extraction of raw material, water consumption or emissions of GHGs),<sup>13</sup> the aim of the environmental footprint is to reveal the pressure created by a country, a specific good or any human activity. This approach considers the assessment of a product's environmental impact throughout its 'life', including all the processes necessary for its production.<sup>14</sup> Hence, it incorporates the biodiversity loss embedded in a product.<sup>15</sup> Embedded, or embodied,<sup>16</sup> biodiversity loss means, for instance, the consequences of land-use changes from agriculture on mammals' habitat, and the diminution thereof of their population.<sup>17</sup> Hence, the impact on biodiversity does not come directly from the good but derives from its production.

The environmental impact due to the production of goods can be domestic when the product is consumed in the same country where it was produced. Due to the telecoupling effect of international trade, however, the impact can also occur in another country.<sup>18</sup> The increase in international trade in commodities leads to a shift in the environmental burden.<sup>19</sup> This shift creates a situation of inequality in which one country (the producing/exporting country), often a low-income country, will bear the environmental burden of the other one (consuming/importing country), often a high-income country.<sup>20</sup>

As Dittrich et al. put it, some countries, including the EU Member States, "enjoy the consumption of imported goods, while the exporting countries carry the environmental burden

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<sup>11</sup> IPBES (2019), p. XVI.

<sup>12</sup> Weinzettel et al. (2013), p. 433.

<sup>13</sup> Giljum et al. (2018), pp. 94-99

<sup>14</sup> Finnveden et al. (2009), p. 1

<sup>15</sup> Wiedmann and Lenzen (2018), p. 314.

<sup>16</sup> Scott J (2020), p. 66.

<sup>17</sup> de Baan et al (2015), p. 2237.

<sup>18</sup> IPBES (2019), p. 87 but also many scientific sources such as Yu et al (2013), p. 1178.

<sup>19</sup> Ibid.

<sup>20</sup> Ibid.

caused by the production of those goods”.<sup>21</sup> This is confirmed by Europe’s resource deficit.<sup>22</sup> The EU has a negative import/export balance when considering all embedded resources needed to produce its imported commodities.<sup>23</sup> This means that it has an important ecological footprint on the biodiversity of countries outside its territory. It is paramount for the EU to reframe biodiversity protection as a trade policy objective and aim to reduce its footprint on partner countries through its FTAs. Each good imported into the EU has its own impact on biodiversity across the value chain.

For clarity, this chapter uses two examples of commodities imported to the EU that have embedded biodiversity loss. The first example is the import of bananas (fresh or dried) which are among the most imported agricultural products in the EU.<sup>24</sup> The leading cause of impacts on biodiversity from banana production is its reliance on agrochemicals which deteriorate the quality of water and soil.<sup>25</sup> Pesticides and fungicides are used in every step of the production phases in large quantities.<sup>26</sup> Another source of negative environmental impact on water and soil quality is the large production of waste that is often left in open dumps.<sup>27</sup> In addition, despite not being limited to banana plantations, the expansion of the fruits and vegetables sector is causing a critical land conversion from natural ecosystems to agricultural ones, often leading to deforestation.<sup>28</sup> The second example is the import of hake. Hake is among the most consumed wild fish species in the EU.<sup>29</sup> In addition to overfishing, the fishing of hake can damage biodiversity in two main ways. First, the technique of bottom trawling is destroying benthic habitats,<sup>30</sup> notably by causing high mortality of non-targeted species which changes

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<sup>21</sup> Dittrich and Bringezu (2010), p. 1838.

<sup>22</sup> Wood et al (2018), p. 553. Also Tukker et al (2016), p. 171. And Scott (2020), p.67

<sup>23</sup> Ibid.

<sup>24</sup> Resource Trade.Earth (2020) Chatham house, The Royal Institute of International Affairs. Available at: <https://resourcetrade.earth/?year=2020&importer=euu&units=value&autozoom=1> (last accessed: 4 May 2022)

<sup>25</sup> For example, Barraza et al. estimate that the use of pesticides by Costa Rican banana plantations in 2019 represented 22% of all pesticide usage in Costa Rica. Barraza et al (2020), p.52.

<sup>26</sup> Ibid., p. 52.

<sup>27</sup> BKP Economic Advisors (2022) Ex-post evaluation of the implementation of part IV of the Association Agreement (Trade Pillar) between the EU and its Member States and Centra America – Draft Interim Report, Annexes G-H, p. 54.

<sup>28</sup> Ibid., Annex D2, pp. 207-225.

<sup>29</sup> EUMOFA (2015) The EU Fish Market, p.16. Available at: <https://www.eumofa.eu/home> (last accessed: 23 January 2023).

<sup>30</sup> Farriols et al (2015), p. 245.

ecosystems' structure.<sup>31</sup> Second, the long lines used in bottom trawling are the cause of seabird mortality.<sup>32</sup>

It is the production of bananas or the fishing of hake and not their international trade *per se* that impacts biodiversity, but these impacts are embedded in the product. Indirect impacts of trade might be more challenging to define and especially the causal link between the damage and trade. However, this link has been identified by the scientific community<sup>33</sup> and recognised to some extent by the EU in some of the most recent impact assessments.<sup>34</sup>

## 2. Putting biodiversity protection and conservation in EU free trade agreements

Since the Treaty of Lisbon, the promotion of sustainable development has been included in the EU's external trade policy.<sup>35</sup> This promotional approach<sup>36</sup> is at the heart of the EU's 'value-based' trade policy<sup>37</sup> and has been opposed to the USA's more sanction-based approach.<sup>38</sup> In its latest communication the European Commission states that

'The EU is strongly committed to ensuring that its trade agreements foster sustainability, so that economic growth goes together with the protection of human rights, decent work, the climate and the environment, in full adherence with the Union's values and priorities.'<sup>39</sup>

At the bilateral level,<sup>40</sup> the promotion, or fostering, of sustainability is essentially realised in trade and sustainable development chapters (TSD chapters). These TSD chapters have two

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<sup>31</sup> Antsygina (2021), p. 311.

<sup>32</sup> Barnes et al. (1997), p. 227.

<sup>33</sup> See, for example, Chaudhary and Brooks (2019), pp. 178-187; Hong et al (2022), 597.; Wood et al and Tukker et al. (2018)

<sup>34</sup> BKP Economic Advisors (2022) Annex D2 pp. 207-225 and Bureau JC et al (2012) p. 171-176

<sup>35</sup> Articles 3(5) and 21 TEU; Article 207(1) TFEU

<sup>36</sup> Bronckers and Gruni (2021), p. 1.

<sup>37</sup> Commission Communication (2015) Trade for all – Towards a more responsible trade and investment policy. COM(2015)497 final, p. 15

<sup>38</sup> Bronckers and Gruni (2021).

<sup>39</sup> Commission Communication (2022) The power of trade partnerships: together for green and just economic growth. COM(2022) 409 final, p. 1.

<sup>40</sup> As opposed to the multilateral level the bilateral level includes trade agreements between the EU and a limited number of partners.

main purposes. A commercial purpose to ensure a level-playing for EU companies<sup>41</sup> by providing for consistency with international environmental and labour standards, a high level of environmental protection and labour standards as well as the prohibition to lower the level of protection.<sup>42</sup> TSD chapters also have a political purpose to enhance the enforcement of non-trade rules and objectives. TSD chapters are distinct from the rest of the FTA as the obligations contained within are considered to be non-trade policy objectives.<sup>43</sup> As such, in case of conflicts regarding the provisions in the TSD chapters, a special dispute settlement procedure is established to resolve the matter.<sup>44</sup> As detailed below, the promotion of sustainability by the EU principally pushes the international environmental agenda and only a few provisions are evoking any link to trade.

The protection of biodiversity is amongst the prominent environmental issues on the international scene.<sup>45</sup> Biodiversity is also one of the environmental topics included by the EU in the TSD chapters of its most recent free trade agreements. As described further below, the EU and its partners have incorporated biodiversity protection and conservation, either broadly or specific to certain ecosystems, in their FTAs. They have done so chiefly by referring to two multilateral agreements: the CBD and the CITES. Notwithstanding the various level of details and of protection afforded in those provisions they mostly follow the political purpose of enhancing the enforcement of multilateral environmental agreements. The direct and indirect impacts of trade on biodiversity described above prompt, however, to question whether this boost of the parties' international commitments is enough. Products imported in the EU generate direct and indirect impacts on biodiversity outside of its borders. Hence, this biodiversity loss is generated by EU's international trade and consumption. Because this loss is linked to trade it could justify the introduction of further biodiversity provisions aiming more precisely at mitigating the impact of trade. The following section describes in detail the core

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<sup>41</sup> Commission Communication (2015) p. 10.

<sup>42</sup> For a discussion of these three obligations in EU TSD chapters see Marín Durán (2020).

<sup>43</sup> Borchert et al (2021) p. 1.

<sup>44</sup> Bartels (2013), p. 297.

<sup>45</sup> Several multilateral environmental agreements focus on the protection and conservation of biodiversity. Some are generalists, such as the Convention on Biological Diversity (CBD) while others focus only of certain species or ecosystem, for example the Convention on the Conservation of Migratory Species of Wild Animals (CMS) or the Convention on Wetlands of International Importance Especially as Waterfowl Habitat (Ramsar Convention).

provisions related to biodiversity and assess whether they have the potential to alleviate trade-related biodiversity loss.

### III. The main goals of biodiversity-related clauses in EU FTAs' TSD chapters

Since the conclusion of the EU-South Korea Free Trade Agreement (FTA) in 2011,<sup>46</sup> the EU has been shaping its model of TSD chapter. Despite evolutions and differences amongst the EU FTAs signed since then there are several archetypal clauses which can be connected, with varying proximity, to biodiversity. This section teases out the core obligations found in three types of clauses that are the most closely related to biodiversity issues: the Biological Diversity clauses (1), the Trade in Forest Products (2) and the Trade in Fish Products clauses (3). Nine of the eighteen FTAs the EU signed since 2011 contain a Biological Diversity clause,<sup>47</sup> while almost all FTAs (13/18) since then have enshrined the two ecosystem-specific clauses.<sup>48</sup> Clauses on Trade in Forest Products and Trade in Fish Products have a limited scope as they lay down goals

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<sup>46</sup> Free trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part [2011] OJ L 127, 14.5.2011, pp. 1–1426.

<sup>47</sup> Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part (EU-CPE FTA) [2012] OJ L 354, 21.12.2012, pp. 3–2607; 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 (EU-Georgia FTA) [2014] OJ L 261 30.8.2014, pp. 4; 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 (EU-Moldova FTA) [2014] OJ L 260 30.8.2014, p. 4; Comprehensive and enhanced Partnership Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Armenia, of the other part (EU-Armenia FTA) [2017] OJ L 23, 26.1.2018, pp. 4–466; Economic Partnership Agreement between the European Union and Japan (EU-Japan FTA) [2018] OJ L 330, 27.12.2018, pp. 3–899; EU-Mexico trade agreement - agreement in principle (EU-Mexico FTA) [2018] provisional text available at: [https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/mexico/eu-mexico-agreement\\_en](https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/mexico/eu-mexico-agreement_en) (last accessed: 31 March 2023).; EU-MERCOSUR trade agreement - agreement in principle (EU-MERCOSUR FTA) [2019] provisional text available at: [https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/mercosur/eu-mercosur-agreement/text-agreement\\_en](https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/mercosur/eu-mercosur-agreement/text-agreement_en) (last accessed: 31 March 2023).; Free Trade Agreement between the European Union and the Socialist Republic of Viet Nam (EU-Viet Nam) [2019] OJ L 186, 12.6.2020, pp. 3–1400; EU-Chile Advanced Framework Agreement– agreement in principle (EU-Chile FTA) [2022] provisional text available at: [https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/chile/eu-chile-agreement/text-agreement\\_en](https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/chile/eu-chile-agreement/text-agreement_en) (last accessed: 31 March 2023).

<sup>48</sup> Ibid. and Agreement establishing an Association between the European Union and its Member States, on the one hand, and Central America on the other (EU - Central America FTA) [2012] OJ L 346, 15.12.2012, pp. 3–2621; Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part (EU-Ukraine FTA) [2014] OJ L 161, 29.5.2014, pp. 3–2137; Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part (CETA) [2017] OJ L 11, 14.1.2017, pp. 23–1079; Free Trade Agreement between the European Union and the Republic of Singapore (EU-Singapore FTA) [2019] OJ L 294, 14.11.2019, pp. 3–755.



of conservation and sustainable use of specific biological resources but incorporate obligations that are often stronger upon the parties than in biodiversity clause. They are, in addition, paramount to the present analysis considering they are the main doorway for biodiversity protection in the no less than the thirteen agreements without a biodiversity clause.

### 1. Biological Diversity clauses

The first occurrence of a Biological Diversity, or Biodiversity, clause is found in the EU-Colombia, Ecuador, and Peru (EU-CPE) FTAs. It was not followed by a constant inclusion in EU trade agreements. The EU FTAs that include a Biodiversity clause have been signed with dissimilar countries, both geographically and economically. Despite this heterogeneity of partners, there are some core features in the biodiversity clauses that can be found in each occurrence.<sup>49</sup> As shown in Table 1, most of these features relate to Multilateral Environmental Agreements (MEAs). The parties restate their commitment to protect biodiversity 'in accordance'<sup>50</sup> with the CBD<sup>51</sup> and other biodiversity-relevant MEAs. They also 'commit to'<sup>52</sup> cooperating in other fora to promote the 'conservation and sustainable use of biological diversity'.<sup>53</sup> Such acknowledgement of obligations under biodiversity-relevant MEAs in EU FTAs is seen by optimistic authors as a way to mutate international environmental rules into a stronger and more enforceable law.<sup>54</sup> This idea is mainly based on the fact that respect for MEAs' obligations, or provisions restating them, could now be enforced under the TSD chapter's dispute settlement mechanism. All EU FTAs with a TSD chapter exclude conflicts regarding the TSD provisions from the general FTA dispute settlement mechanism and include instead a three-steps resolution process which include, as a last resort, recommendations from a Group of Experts.<sup>55</sup>

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<sup>49</sup> The present paper focuses only on common elements and will not discuss the differences.

<sup>50</sup> For example, in EU-Moldova FTA, article 368.1.

<sup>51</sup> CBD (1993).

<sup>52</sup> For example, in EU-Georgia FTA, article 232.2(d).

<sup>53</sup> Ibid.

<sup>54</sup> See for example: Stockhaus (2017), pp. 208–22 ; Jinnah and Morgera (2013) pp. 324–39.

<sup>55</sup> The FTA between the EU and the CARIFORUM is the only EU bilateral trade agreement that include biodiversity provisions falling under the jurisdiction of the general FTA dispute mechanism and thus could be sanctioned with trade remedies. Environmental provisions of this FTA are not however in a TSD chapter and it this hence outside of the scope of this chapter. See Economic Partnership Agreement between the CARIFORUM

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Provision	language	EU partner
Importance of conservation and sustainable use of biodiversity	Acknowledgement	All
Conserve and sustainably use biodiversity in accordance with MEAs	Acknowledgement	All
Promote the inclusion of species in CITES' appendices	Hortatory	Georgia, Moldova, Vietnam, Mexico, MERCOSUR, Armenia, Chile
Adopt and implement effective measures to reduce illegal trade in wildlife	Mandatory	Japan, Vietnam, Mexico, MERCOSUR, Armenia, Chile
Encourage trade in natural resource-based products obtained through a sustainable use of biodiversity	Hortatory	Georgia, Moldova, Japan, Vietnam, Mexico, MERCOSUR, Chile
Promote access to genetic resources and the fair and equitable sharing of benefits arising from their utilisation	Hortatory	CPE, Japan, Vietnam, Mexico, MERCOSUR, Armenia, Chile
Exchange information and cooperate at bilateral, (regional) and multilateral levels on matters of relevance to the biodiversity clause	Hortatory	All (except CPE)

Table 1: Core provisions found in Biological Diversity Clauses of EU FTAs

Two provisions reiterate already existing obligations from the CBD and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).<sup>56</sup> For the CBD, the obligation echoes its article 15 only. The provision is formulated using hortatory language<sup>57</sup> to exhort the parties to 'promote'<sup>58</sup> access to genetic resources and the fair and equitable sharing of benefits arising from their utilisation. This provision and its implementation remain rather vague. Reiteration of the existing obligation found in the CITES is more precise. The parties are urged to 'promote the listing of species'<sup>59</sup> under the CITES appendices. The CITES aims at controlling the international trade of selected species notably by pressing its parties to designate species in different appendices, namely lists, depending on the level of protection

States, of the one part, and the European Community and its Member States, of the other part [2008] OJ L 289, 30.10.2008, pp. 3–1955.

<sup>56</sup> Convention on International Trade in Endangered Species of Wild Fauna and Flora (adopted Washington, DC, 3 March 1973, entered into force 1st July 1975).

<sup>57</sup> Rajamani (2016), pp. 337–358.

<sup>58</sup> For example, in EU-MERCOSUR FTA, article 7.2(d) of the TSD chapter.

<sup>59</sup> For example, in EU-Moldova FTA, article 368.2(c).

they require.<sup>60</sup> Precise or not both provisions do nothing more than encouraging the FTAs' parties to act accordingly to their international obligations.

Another core provision is the obligation to 'adopt and implement appropriate effective measures [...] leading to a reduction of illegal trade in wildlife'.<sup>61</sup> This provision is often linked to the CITES but is formulated in a stronger language than other provisions referring to international environmental agreements. The trade agreements that include this obligation provide that 'each party shall' followed by several provisions on biodiversity issues that may change depending on the FTA. All these provisions use hortatory words such as 'encourage' or 'promote'<sup>62</sup> while the obligation to take and implement measures against illegal trade in wildlife is formulated with a mandatory language.<sup>63</sup> This type of language makes the obligation stand out in the Biodiversity clauses. Moreover, the obligation goes beyond the implementation of the CITES, and may also affect 'other endangered species'<sup>64</sup> as mentioned in the EU-Japan FTA. In other FTAs, such as the EU-Mexico agreement in principle, the CITES is not even mentioned in the provision.<sup>65</sup> This thus creates a new, independent, obligation on the parties to combat illegal trade in wildlife even when species are not listed under the CITES.

Among the core obligations found in EU FTAs' Biological Diversity clauses, there is another provision that is not connected to any MEAs. The parties 'commit to'<sup>66</sup> the promotion of the 'trade in natural resource-based products obtained through a sustainable use of biological resources and contributing to the conservation of biodiversity'.<sup>67</sup> The EU FTAs themselves do not favour trade in products based on their process and production methods by, for example, reducing tariffs further for goods that were produced through sustainable use of biodiversity or contributed to its conservation.<sup>68</sup> Instead, the provision found in the Biodiversity clauses

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<sup>60</sup> CITES (2015) How CITES work. Available at: <https://cites.org/eng/disc/how.php>. (last accessed: 26 April 2022)

<sup>61</sup> EU-Viet Nam FTA, article 13.7.3(d).

<sup>62</sup> Rajamani (2016).

<sup>63</sup> Ibid.

<sup>64</sup> EU-Japan FTA, article 16.6.2(b).

<sup>65</sup> EU-Mexico FTA article 6.3(a) of the TSD chapter provides that 'each party shall [...] implement effective measures to combat wildlife trade, including through cooperative activities with third countries, as appropriate'

<sup>66</sup> For example, EU-Moldova FTA, article 368.2.

<sup>67</sup> Ibid., article 368.2(a).

<sup>68</sup> This has been done in the EFTA-Indonesian trade agreement, see Bürgi Bonanomi E and Tribaldos (2022) pp. 359-385.

exhorts parties to bolster trade in such products without specifying how this is to be achieved.<sup>69</sup> Such a vague obligation does not warrant much. It is unfortunate that a trade agreement would not deal itself with such a trade matter with provisions such as tariffs or quotas.

## 2. Trade in Forest Products clauses

Since the EU-Colombia-Peru-Ecuador trade agreement, all EU FTAs that have a TSD chapter have enshrined a clause on Trade in Forest Products. The length and content of these Trade in Forest Products clauses differ but five core provisions can be extracted (see table 2).

Provision	Language	EU Partner
Recognition of importance of and cooperation on the conservation of forests	Acknowledgement/ Hortatory	All
Improve forest law and governance	Hortatory	CPE, Central America, Georgia, Moldova, Ukraine, Armenia, Singapore, Mexico, Vietnam, MERCOSUR
Combat illegal logging and trade in illegal forest products	Mandatory	All (except Central America)
Effective implementation of CITES	Hortatory	CPE, CA, Georgia, Moldova, CETA, Armenia, Singapore
Promote and exchange information on trade in timber and timber products from sustainably managed forests	Hortatory	All (except Central America)

Table 2: Core provisions found in Trade in Forest Products clauses of EU FTAs

Using the language of acknowledgement, the EU FTAs' parties recognise the importance of the conservation and sustainable management of forests which are the two key concepts throughout the Trade in Forest Products clauses. They are linked to all the other core provisions. In addition, the parties are exhorted to cooperate 'at the regional and global level with the aim of promoting the conservation of forest cover'.<sup>70</sup> There is no agreement at the international level focusing on forests only, the conditions of this cooperation are thus not explicit. Moreover, the parties 'shall' 'exchange information to improve'<sup>71</sup> or 'promote'<sup>72</sup> forest

<sup>69</sup> Only the EU-Japan FTA lays out an example of how to encourage the use and not the trade of such products. Its article 16.6.2(a) provides that such encouragement can be done through 'labelling schemes.'

<sup>70</sup> For example, EU-Armenia FTA, article 278.2(f).

<sup>71</sup> For example, EU-Vietnam FTA, article 13.8.2(d).

<sup>72</sup> For example, EU-Singapore FTA, article 12.7(b).

laws and governance. While this obligation is sometimes limited to ‘global’ governance this is not always the case. In the absence of any specific geographical scope, the parties are arguably encouraged to discuss how to improve national forest law and governance as well.

Two other core provisions of the Trade in Forest Products clauses are connected to the legality of timber. Firstly, in provisions similar to those found in the Biodiversity clause, the parties are encouraged to ‘promote the effective use of’<sup>73</sup> CITES and promote the ‘listing of timber species’.<sup>74</sup> This ensures that the trade of timber species that are endangered is illegal. Secondly, the parties commit to ‘adopting measures to [...] combat illegal logging and related trade’.<sup>75</sup> This mandatory obligation is sometimes followed by an encouragement to exchange information on policies to exclude illegal timber from trade flows.<sup>76</sup>

Lastly, the promotion of trade in ‘timber and timber products derived from sustainably managed forests’<sup>77</sup> is enshrined in a similar fashion as natural resource-based products in Biodiversity clauses. Likewise, there is no further tariff reduction for timber and products coming from sustainably managed forests and the circumstances of this promotion are not described.

### 3. Trade in Fish Products clauses

All EU FTAs that have a TSD chapter since the EU-CPE trade agreement (2012) have enshrined a clause on the Trade in Fish Products. The length and content of these Trade in Fish Products clauses differ but four (4) core provisions can be extracted (see table 3).

Provision	Language	EU Partner
Recognition of the importance of conserving and sustainably managing marine resources	Acknowledgement	All
Cooperate in context of RFMOs and promote good governance	Hortatory	CPE, Georgia, Moldova, Ukraine, CETA, Japan, Mexico, Vietnam, MERCOSUR, Chile

<sup>73</sup> For example, EU-Singapore, article 12.7(d).

<sup>74</sup> For example, EU-Georgia, article 233.2(e).

<sup>75</sup> For example, EU-Georgia FTA, article 233.2(c).

<sup>76</sup> For example, EU-Armenia FTA, article 278.2(d).

<sup>77</sup> For example, EU-Mexico FTA, article 7.2(a) of the TSD chapter.

Combat IUU fishing and exclude its products from trade	Hortatory/ Mandatory	All
Take effective measure to monitor and control fishing activities	Mandatory	All

Table 3: Core provisions found in Trade in Fish Products clauses of EU FTAs

The Trade in Fish Products clauses all include recognition by the parties of the ‘importance of ensuring the conservation and sustainable management of living marine resources’<sup>78</sup> or ‘the conservation and sustainable management of fish stock’.<sup>79</sup> As for the Trade in Forest Products clauses, the Trade in Fish Products clauses are more centred on sustainable management than conservation. While this was done by introducing an obligation to combat illegal trade and promoting products from sustainable forests in the Trade in Forest Products clauses, the Trade in Fish Products clauses only focus on controlling fishing activities.

The conditions under which the fishing activities would be considered sustainable are not explicit in the FTAs texts but are not left entirely to the parties’ domestic laws either. In almost all EU FTAs with a TSD chapter,<sup>80</sup> the parties commit to cooperate ‘as widely as possible’<sup>81</sup> in the context of Regional Fisheries Management Organisations (RFMOs). RFMOs play a key role in the regulation of fishing activities on the high seas<sup>82</sup> by, for example, setting catch limits.<sup>83</sup> The parties are thus strongly encouraged to cooperate at the regional level to determine what sustainable fishery entails. In some EU FTAs, the parties also commit to ensuring ‘full compliance’ with the measures adopted by RFMOs.<sup>84</sup>

RFMOs are also central to addressing illegal, unreported, and unregulated (IUU) fishing activities. The obligation upon the EU FTAs’ parties to take and ‘implement policies and measures’<sup>85</sup> to exclude from trade products originating from IUU fishing is another core obligation of the Trade in Fish Products clauses. There are two main criteria to determine if a

<sup>78</sup> For example, EU-Vietnam FTA, article 13.9.1.

<sup>79</sup> For example, EU-Singapore FTA, article 12.8.

<sup>80</sup> See Table 3.

<sup>81</sup> For example, EU-Moldova FTA, article 370 (c).

<sup>82</sup> European Commission (2021), Regional fisheries management organisations (RFMOs). Available at: [https://ec.europa.eu/oceans-and-fisheries/fisheries/international-agreements/regional-fisheries-management-organisations-rfmos\\_en](https://ec.europa.eu/oceans-and-fisheries/fisheries/international-agreements/regional-fisheries-management-organisations-rfmos_en). (Last accessed 21 March 2022)

<sup>83</sup> Ibid.

<sup>84</sup> For example, EU-Moldova FTA, article 370 (c).

<sup>85</sup> For example, EU-Armenia FTA, article 279 (e).

product comes from an IUU fishing activity.<sup>86</sup> The first relates to domestic and international law. It can be illegal if the fishing activity is contrary to the law, or unreported if the activity did not respect legal reporting duties.<sup>87</sup> The second is linked to the RFMOs directly. Fishing activities are considered unregulated if they do not follow the rules set out in the relevant RFMO.<sup>88</sup> RFMOs are science-based<sup>89</sup> and their mandate is to reach sustainability.<sup>90</sup> Thus, excluding products from IUU fishing activities from trade goes beyond simply promoting trade in sustainably fished products. In fact, the parties are under the obligation to only authorize the export of fish products that have been caught following domestic, regional, and international rules. This differs from the provisions in the Trade in Forest Products clauses which only banned illegal timber and aimed, somehow loosely, at favouring trade in products from sustainably managed forests.

The last core provision of the Trade in Fish Product clauses is a general obligation to monitor and control fishing activities, but it can also be linked to RFMOs rules in some cases.<sup>91</sup> Some EU FTAs do not give details on how this monitoring and controlling should take place while others provide examples. These examples mostly concern vessel monitoring.<sup>92</sup> This last core provision is linked to the obligation to exclude IUU fish products from trade. Only through such monitoring and control can the parties make sure that they do not allow such products to enter the market.

#### **IV. The gaps and overlaps in the response to direct and indirect impacts of trade in EU free trade agreements' trade and sustainable development chapters**

In face of the different negative impacts of trade on biodiversity, what are the responses provided in the EU FTAs TSD chapters core provision described above? Table 4 summarises the direct and indirect impacts of the trade of the two examples, banana and hake, on biodiversity

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<sup>86</sup> Rosello (2020) pp. 33-47.

<sup>87</sup> FAO (2001) International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing. Para. 3, pp. 2-3. Available at : [https://www.wto.org/english/tratop\\_e/rulesneg\\_e/fish\\_e/2001\\_ipoa\\_iuu.pdf](https://www.wto.org/english/tratop_e/rulesneg_e/fish_e/2001_ipoa_iuu.pdf). (last accessed 31 March 2023)

<sup>88</sup> Rosello (2020), p. 34.

<sup>89</sup> European Commission (2021).

<sup>90</sup> Haas et al (2021), p. 133.

<sup>91</sup> For example, EU-Ukraine FTA, article 295(b).

<sup>92</sup> For example, EU-Vietnam FTA, article 13.9.2(b) or CETA, article 24.11.2(a).

in its left column.<sup>93</sup> In the right column, core provisions from the three clauses described above which could answer, or mitigate, these impacts are proposed. Only clear and direct answers to biodiversity issues are considered here. Core provisions that are acknowledgements of broad commitment such as the recognition of the importance of conservation and sustainable use of biodiversity are regarded as too general to be responses to trade impacts. Gaps are identified between an EU FTA's negative effect on biodiversity (direct or indirect, produced or enhanced) but no biodiversity-related provision in the FTA aims to mitigate this effect. These gaps are represented by the ∅ sign in the right column of table 4. Inversely, overlaps are identified when biodiversity-related provisions can theoretically lessen this negative effect of the FTA on biodiversity.

Deleted: ¶

Negative impact on biodiversity	Related core provision in selected clauses
	Direct impacts
Trade in endangered or overexploited species	<ul style="list-style-type: none"> <li>• Biological Diversity clauses                             <ul style="list-style-type: none"> <li>- Promote the inclusion of species in CITES' appendices</li> <li>- Adopt and implement effective measures to reduce illegal trade in wildlife</li> </ul> </li> <li>• Trade in Forest Products clause                             <ul style="list-style-type: none"> <li>- Combat illegal logging and trade in illegal forest products</li> <li>- Effective implementation of CITES</li> </ul> </li> <li>• Trade in Fish Products clause                             <ul style="list-style-type: none"> <li>- Combat IUU fishing and exclude its products from trade</li> </ul> </li> </ul>

<sup>93</sup> For the indirect impacts only the impacts from the example provided are used.



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	<ul style="list-style-type: none"> <li>- Take effective measure to monitor and control fishing activities</li> </ul>
Transportation	<ul style="list-style-type: none"> <li>• Biological Diversity clauses</li> <li>∅</li> <li>• Trade in Forest Products clause</li> <li>∅</li> <li>• Trade in Fish Products clause</li> <li>- Take effective measures to monitor and control fishing activities</li> </ul>
Alien invasive species	<ul style="list-style-type: none"> <li>• Biological Diversity clauses</li> <li>∅</li> <li>• Trade in Forest Products clause</li> <li>∅</li> <li>• Trade in Fish Products clause</li> <li>∅</li> </ul>

Indirect impacts (from banana production and hake fishing)	
Pollution of soil	<ul style="list-style-type: none"> <li>• Biological Diversity clauses</li> <li>∅</li> <li>• Trade in Forest Products clause</li> <li>∅</li> <li>• Trade in Fish Products clause</li> <li>∅</li> </ul>
Pollution of water	<ul style="list-style-type: none"> <li>• Biological Diversity clauses</li> <li>∅</li> <li>• Trade in Forest Products clause</li> <li>∅</li> </ul>

	<ul style="list-style-type: none"> <li>• Trade in Fish Products clause</li> </ul> <p>∅</p>
Land-use changes / deforestation	<ul style="list-style-type: none"> <li>• Biological Diversity clauses</li> </ul> <p>∅</p> <ul style="list-style-type: none"> <li>• Trade in Forest Products clause                             <ul style="list-style-type: none"> <li>- Improve forest law and governance</li> </ul> </li> <li>• Trade in Fish Products clause</li> </ul> <p>∅</p>
Destruction/modification of habitats	<ul style="list-style-type: none"> <li>• Biological Diversity clauses</li> </ul> <p>∅</p> <ul style="list-style-type: none"> <li>• Trade in Forest Products clause</li> </ul> <p>∅</p> <ul style="list-style-type: none"> <li>• Trade in Fish Products clause                             <ul style="list-style-type: none"> <li>- Cooperate in context of RFMOs and promote good governance</li> <li>- Take effective measure to monitor and control fishing activities</li> </ul> </li> </ul>
Bycatch mortality	<ul style="list-style-type: none"> <li>• Biological Diversity clauses</li> </ul> <p>∅</p> <ul style="list-style-type: none"> <li>• Trade in Forest Products clause</li> </ul> <p>∅</p> <ul style="list-style-type: none"> <li>• Trade in Fish Products clause                             <ul style="list-style-type: none"> <li>- Cooperate in context of RFMOs and promote good governance</li> <li>- Take effective measure to monitor and control fishing activities</li> </ul> </li> </ul>

Table 4: Direct and indirect impacts of trade on biodiversity and corresponding core provisions from Biological Diversity, Trade in Forest Products, and Trade in Fish products clauses.

Table 4 shows clearly that there are more gaps than overlaps between the negative impact of trade and the core provisions of the Biological Diversity, the Trade in Forest Products, and the Trade in Fish Products provisions. The direct impact of trade in endangered or overexploited species is the issue that has the highest number of provisions connected to it. In all three clauses analysed there are provisions that exhort the parties to combat illegal trade and to promote the implementation of CITES. If the trade in endangered or overexploited species is causing, without any doubt, considerable damage to biodiversity, it remains nevertheless an issue related to global illegal trade. This means that, overall, EU FTAs are not adding any new obligations for the parties and are not mitigating impacts caused or enhanced by the FTAs themselves.<sup>94</sup>

<sup>94</sup> The only exception to this would be that arguably the interdiction to put fish products from IUU fishing activities goes beyond the question of legality.

Three other provisions can be identified as responding to a trade-related biodiversity issue. First, the obligation to take effective measures to monitor and control fishing activities from the Trade in Fish Products clauses can arguably help reduce impacts from transportation by, for example, checking that the vessels are following rules regarding emissions levels. This provision could also answer some of the indirect impacts of the trade in hake. Control and monitoring of vessel nets and the content of their catch could reduce bycatch for example. The second and third provisions deal with good governance. The obligation to improve forest law and governance may alleviate deforestation from land-use change by, for example, creating protected areas or limiting zones that can be deforested for agricultural uses. In the same way, the obligation to cooperate in the context of RFMOs and promote good governance could mitigate the impact of fishing on ecosystems by, for instance, taking technical measures on vessels' nets or setting catch limits on overfished species.

Answers to trade-related impacts in EU FTAs have hence been stealth. For most of the direct and indirect impacts of trade, there is no real answer in the core biodiversity-related provisions of the EU FTAs. This is due to the broadness of the provisions enshrined. The core biodiversity-related provisions, as identified, largely reiterate international obligations and/or promote cooperation.

## V. Conclusion

The core provisions found in biodiversity-related clauses among the Trade and Sustainable Chapters of recent EU trade agreements strongly emphasize already existing international obligations. By referring to or repeating provisions found in multilateral environmental agreements the TSD chapters do not do much more than create a tactical linkage<sup>95</sup> between the trade and biodiversity regimes. This might foster political gain and answer some of the dissident voices against free trade agreements, but it will unlikely mitigate the negative impacts trade can have on biodiversity. The big gaps and little overlaps between the most salient direct and indirect impacts of trade and the relevant core biodiversity provisions enshrined in EU FTAs demonstrate that mitigation is indeed not the goal of the TSD chapters.

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<sup>95</sup> Laurens and Morin (2019), p. 533.

However, there is reason to believe that it should be their goal. Biodiversity, as for the rest of the environmental issues in the TSD provisions, is considered a non-trade policy objective. Non-trade policy objectives seem to be add-ons to an otherwise pure trade agreement. Yet, there are biodiversity impacts that are caused or enhanced by trade, and this could justify that relevant biodiversity loss be approached as a trade issue. How else should one endeavour to prevent damage if not by looking at its cause? Answers to this trade issue should hence be dealt with by trade law. One solution would be to have provisions tailor-made for the mitigation of the negative impacts of trade, enhanced by these FTAs, on biodiversity. The European Commission's 15-Point Action Plan puts forward a new approach for the TSD chapters that will be 'more tailored and targeted' to countries' specific situations.<sup>96</sup> The objective of this country-specific approach would be to strengthen the implementation of specific field where needed. This is paramount for biodiversity loss. Indirect impacts from trade are diversified depending on the types of products imported by the EU. Beyond the examples set in this piece, bananas and hake, other commodities such as ores or manufactured products can have dire effect on ecosystems. Ecosystem-specific or activity-specific provisions have however been limited to forest (or forestry) and marine (or fishing) thus far. Hopefully, this new tailor-made approach by the European Commission can foster new types of biodiversity-related clause that aim at mitigating the direct and indirect impacts of trade.

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<sup>96</sup> Commission Communication (2015), p. 6.

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