The UN 2030 Agenda in the EU Trade Policy

Improving Global Governance for a Sustainable New World

Edited by
Elisa Baroncini, Ana Maria Daza Vargas, Filippo Fontanelli, Genia Kostka, Raquel Regueiro Dubra, Piotr Szwedo, Reetta Toivanen
with the collaboration of Klarissa Martins Sckayer Abicalam

una europa
SEED FUNDING

Una Europa Seed Funding

The UN 2030 Agenda in the EU Trade Policy: Improving Global Governance for a Sustainable New World

Edited by Elisa Baroncini, Ana Maria Daza Vargas, Filippo Fontanelli, Genia Kostka, Raquel Regueiro Dubra, Piotr Szwedo, Reetta Toivanen

with the collaboration of Klarissa Martins Sckayer Abicalam

Dipartimento di Scienze Giuridiche
Alma Mater Studiorum – Università di Bologna
2025

The UN 2030 Agenda in the EU Trade Policy – Improving Global Governance for a Sustainable New World / edited by Elisa Baroncini, Ana Maria Daza Vargas, Filippo Fontanelli, Genia Kostka, Raquel Regueiro Dubra, Piotr Szwedo, Reetta Toivanen, with the collaboration of Klarissa Martins Sckayer Abicalam – Bologna: *Alma Mater Studiorum* Università di Bologna, 2025.

This volume has been submitted to anonymous peer review of two referees.

Dipartimento di Scienze Giuridiche
Direttore Federico Casolari *Alma Mater Studiorum* Università di Bologna
Via Zamboni 27/29 40126 Bologna

ISBN 9788854971882
DOI https://doi.org/10.6092/unibo/amsacta/8260

Cover photo, back cover and ImprovEUorGlobe logos
Ufficio Graphic Design per la Comunicazione APPC-Settore
Comunicazione *Alma Mater Studiorum* - Università di Bologna

Editing of contributions, layout, cover, back cover and image's edition
Klarissa Martins Sckayer Abicalam

Edition: March 2025

This book is published as an implementing activity of the Una Europa Seed Funding 2022 **ImprovEUorGlobe - The UN 2030 Agenda in the EU Trade Policy - "Improving Global Governance for a Sustainable New World"** involving six Una Europa Universities: *Alma Mater Studiorum* – Università di Bologna, Freie Universität Berlin, Uniwersytet Jagielloński w Krakowie (Jagellonian University in Kraków), University of Edinburgh, Helsingin Yliopisto (The University of Helsinki) and Universidad Complutense de Madrid. The project is coordinated by Prof. Elisa Baroncini (Università di Bologna. The ImprovEUorGlobe Chair is Dr. Filippo Fontanelli (University of Edinburgh). The contents reflect the views of the authors. Una Europa cannot be held responsible for any use which may be made of the information contained therein.

INDEX

THE DISPUTE SETTLEMENT PRACTICE IN THE NEW GENERATION OF EU TRADE AGREEMENTS: LOOKING FOR SUSTAINABILITY

ELISA BARONCINI

TABLE OF CONTENTS: 1. Introduction. – 2. The dispute settlement mechanisms of the new EU TAs. – 3. The first three panel reports within the EU TAs dispute settlement mechanisms. – 4. Civil Society, non-trade values, scope and binding force of TSD provisions in the EU TAs case law. – 4.1. *Amicus curiae* and Domestic Advisory Groups. – 4.2. Scope and binding force of the TSD provisions. – 4.3. Emphasizing the sustainability nature of the EU TAs. – 5. The disputes with Algeria. 6. The Single Entry Point (SEP) and the *CNV Internationaal* complaint. 7. Conclusions.

ABSTRACT: *The EU trade policy has traditionally been major and prominent part of the international action of the Union. More and more characterized by the principle of sustainable development and considered a major driver for the achievement of the SDGs of the UN 2030 Agenda, the common commercial policy of the European Union also promotes a new generation of trade agreements (TAs). The EU TAs are highly innovative and rich instruments in fostering environmental and social standards, biodiversity and gender protection, and fighting climate change while pursuing economic integration between the EU and its trade partners. Recently, the EU has activated the bilateral dispute settlement mechanisms (DSMs) of the new TAs. The reports issued so far consistently emphasize issues related to sustainability. Notably, the Korea - Labour Commitments case specifically focuses on enforcing certain provisions of the TSD Chapter within the EU-South Korea Free Trade Agreement. The purpose of this chapter is to highlight those sustainability issues in the contentious proceedings triggered by the EU. In an effort to propose as complete a picture as possible for our analysis, attention will also be devoted to the practice of bilateral litigation that has not (yet) been settled (the complaint raised by the EU against Algeria) or is being resolved diplomatically (the initiative launched by the Dutch NGO CNV Internationaal).*

KEYWORDS: *EU trade policy, dispute settlement mechanism, sustainable development, EU trade agreements, civil society.*

1. Introduction

The EU trade policy is characterized by the constant effort to respect and promote sustainable development as significantly advanced and articulated in the sustainable development goals (SDGs) of the UN 2030

Agenda[1], with special attention to strengthening the international rule of law[2]. At the bilateral level, the EU pursues its trade agenda of openness, sustainability and assertiveness[3] through the new generation of trade agreements (TAs) - free trade agreements (FTAs) or preferential trade agreements (PTAs)-[4] furthered by the EU within the "Global Europe: Competing in the World" strategy[5], significantly enhanced and most authoritatively consolidated with the enter into force of the Lisbon Treaty[6]. The new EU TAs carry out the common commercial policy implementing the values of the EU international action codified in Articles 3, para. 5, and 21 of the TEU[7]. They are thus among the most innovative and relevant tools in the

[1] A/RES/70/1, *Transforming our World: the 2030 Agenda for Sustainable Development*, Resolution adopted by the General Assembly on 25 September 2015. On the 2030 Agenda see, *ex multis*, Ilias BANTEKAS, Francesco SEATZU (EDS.), *The Sustainable Development Goals – A Commentary*, Oxford, 2023; Winfried HUCK, *Sustainable Development Goals – Article-by-Article Commentary*, Baden-Baden, 2022.

[2] Cf. Luis M. HINOJOSA-MARTÍNEZ, Carmela PÉREZ-BERNÁRDEZ, (EDS.), *Enhancing the Rule of Law in the European Union's External Action*, Cheltenham – Northampton, 2023; Ivana DAMJANOVIC, Nicolas DE SADELEER, *Labour Standards in International Trade Agreements: A Rule of Law Perspective*, *European Journal of Risk Regulation*, 2024, pp. 551–557.

[3] See COM(2021), *Trade Policy Review - An Open, Sustainable and Assertive Trade Policy, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions,* Brussels, 18 February 2021. For an updated analysis of the EU trade policy see, *inter alia,* Michael HAHN, Guillaume VAN DER LOO (EDS.), *Law and Practice of the Common Commercial Policy - The first 10 years after the Treaty of Lisbon*, Leiden, 2021; Wolfang WEIß, Cornelia FURCULITA, *Open Strategic Autonomy in EU Trade Policy - Assessing the Turn to Stronger Enforcement and More Robust Interest Representation*, Cambridge, 2024.

[4] The International Economic Law (IEL) agreements concluded by the EU, in particular after the entry into force of the Lisbon Treaty, are often referred to as free trade agreements (FTAs). Technically, in IEL, an FTA is a treaty establishing a free trade area through the elimination of tariff and non-tariff trade barriers among the FTA contracting parties. When the agreement, to the elimination of internal trade barriers, adds the adoption of a common customs tariff vis-à-vis third countries, that agreement creates a customs union. The expression "preferential trade agreement" (PTA) includes both types of IEL agreements. Within the WTO system, PTAs are very commonly referred to also as "regional trade agreements" (RTAs), as preferential agreements were originally stipulated basically among countries belonging to the same region, to promote stability and economic integration within a specific geographical area. On these defining aspects see Peter-Tobias STOLL, Jia XU, *Conflict of Jurisdictions: WTO and PTAs*, in Alexander TRUNK, Marina TRUNK-FEDOROVA, Azar ALIYEV (EDS.*), Law of International Trade in the Region of the Caucasus, Central Asia and Russia – Public International Law, Private Law, Dispute Settlement*, Leiden – Boston, 2022, pp. 312-322.

[5] COM(2006) 567, *Global Europe: Competing in the World - A Contribution to the EU's Growth and Jobs Strategy, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions,* Brussels, 4.10.2006.

[6] On the Lisbon Treaty cf. Luca RUBINI, Martin TRYBUS (EDS.), *The Treaty of Lisbon and The Future of the European Union*, Cheltenham – Northampton, 2012.

[7] On the values of the EU international action see Federico CASOLARI, *I principi del diritto dell'Unione europea negli accordi commerciali: una visione di insieme*, in Giovanna ADINOLFI (ED.) *Gli accordi preferenziali di nuova generazione dell'Unione europea*, Torino, 2021; Marise CREMONA (ED.), *Structural Principles in EU External Relations Law*, Oxford – Portland, 2018; Eva KASSOTI, Ramses A. WESSEL, *The Normative Effect of Article 3(5) TEU: Observance and Development of International Law by the European Union*, in Paula GARCÍA ANDRADE (ED.), *Interacciones entre el Derecho de la Unión Europea y el Derecho*

field of International Economic Law and can be seen as a new "negotiated" component of the EU's unique ability to establish global standards for international markets -commonly referred to as the "Brussels effects"[8]. In this context, trade and investments are redefined as major drivers of sustainability[9], in line with the UN approach of the 2030 Agenda[10], recently reaffirmed in the Pact for the Future[11].

Internacional Público, Valencia, 2023, pp. 19-46; Yuliya KASPIAROVICH, Ramses A. WESSEL, *The Role of Values in EU External Relations: A Legal Assessment of the EU as a Good Global Actor*, in Elaine FAHEY, Isabella MANCINI (EDS.), *Understanding the EU as a Good Global Actor: Ambitions, Values and Metrics*, Cheltenham - Northampton, 2022, pp. 92-106; Miriam MANCHIN, Laura PUCCIO, Aydin B. YILDRIM (EDS.), *Coherence of the European Union Trade Policy with its Non-Trade Objectives*, Cambridge, 2024.

[8] See Anu BRADFORD, *The Brussels Effect: How the European Union Rules the World*, Oxford, 2020; Saide Esra AKDOĞAn, Júlia PÉRET TASENDE TÁRSIA, Jamile BERGAMASCHINE MATA DIZ, Ramses A. WESSEL, *Introduction: EU External Relations Law and Sustainability*, in Ramses A. WESSEL, Jamile BERGAMASCHINE MATA DIZ, Júlia PÉRET TASENDE TÁRSIA, Saide Esra AKDOGAN (EDS.), *EU External Relations Law and Sustainability - The EU, Third States and International Organizations*, Heidelberg, 2024, pp. 1-5.

[9] For an overview of the new EU TAs within a general analysis of PTAs see Kathleen CLAUSSEN, Geraldo VIDIGAL (EDS.), *The Sustainability Revolution in International Trade Agreements*, Oxford, 2024; Kathleen CLAUSSEN, Manfred ELSIG, Rodrigo POLANCO (EDS.), *The Concept Design of a Twenty-First Century Preferential Trade Agreement - Trends and Future Innovations*, Cambridge, 2025; Stefan GRILLER, Walter OBWEXER, Erich VRANES (EDS.), *Mega-Regional Trade Agreements: CETA, TTIP, and TiSA*, Oxford, 2017; Virginia REMONDINO, *New Generation Free Trade Agreements at a Crossroads. Assessing Environmental Enforcement of the E.U.'s Trade and Sustainable Development Chapters from Global Europe to the Power of Trade Partnerships Communication*, *University of Bologna Law Review*, 2023, pp. 149–186. On the EU competence in external relations and procedure for concluding international agreements see Luigi DANIELE (a cura di), *Diritto dell'Unione Europea – Sistema istituzionale, ordinamento, tutela giurisdizionale, competenze*, Milano 2024; Luigi DANIELE (a cura di), *Le relazioni esterne dell'Unione europea nel nuovo millennio*, Milano, 2001.

[10] See paragraph 67 ("[p]rivate business activity, investment and innovation are major drivers of productivity, inclusive economic growth and job creation … We will foster a dynamic and well-functioning business sector, while protecting labour rights and environmental and health standards in accordance with relevant international standards and agreements and other ongoing initiatives in this regard") and paragraph 68 ("[i]nternational trade is an engine for inclusive economic growth and poverty reduction, and contributes to the promotion of sustainable development. We will continue to promote a universal, rules-based, open, transparent, predictable, inclusive, non-discriminatory and equitable multilateral trading system under the World Trade Organization, as well as meaningful trade liberalization") of the UN 2030 Agenda.

[11] A/RES/79/1, *The Pact for the Future*, Resolution adopted by the General Assembly on 22 September 2024. On the relevance of trade see, in particular, Action 5 ("[w]e will ensure that the multilateral trading system continues to be an engine for sustainable development") and paragraph 24 ("[w]e are committed to a rules-based, non-discriminatory, open, fair, inclusive, equitable and transparent multilateral trading system, with the World Trade Organization at its core … [and] underscore the importance of the multilateral trading system contributing to the achievement of the Sustainable Development Goals") of the UN Pact for the Future. With reference to investments, the Pact for the Future is permeated by the multiple calls and commitments from UN Members urging both public and private investments for the realization of the SDGs: "[w]e recognize that sustainable development in all its three dimensions is a central goal in itself and that its achievement, leaving no one behind, is and always will be a central objective of multilateralism … We will urgently accelerate progress towards achieving the [Sustainable Development] Goals, including through concrete political steps and *mobilizing significant additional financing from all sources for sustainable development*" (paragraph 10 of the Pact for the Future, emphasis added).

In fact, beyond significantly extending and deepening economic integration among the contracting parties by comparison to the WTO system, the new EU TAs feature ambitious chapters focused on trade and sustainable development (TSD Chapters)[12], and the scope of these chapters is continually expanding. For instance, since 2019 TSD Chapters have included a provision specifically devoted to trade and climate change, where the Parties reaffirm their commitment to "effectively implement the UNFCCC [13] and the 2015 Paris Agreement [14] … includ[ing] the obligation to refrain from any action or omission which materially defeats the object and purpose of the Paris Agreement"[15]. The new EU TAs also generate additional sustainability sections, such as those on trade and gender equality and women's economic empowerment[16]. The EU TAs include articulated institutional mechanisms for

[12] On the EU TSD Chapters cf. Katerina HRADILOVÁ, Ondrej SVOBODA, *Sustainable Development Chapters in the EU Free Trade Agreements: Searching for Effectiveness*, *Journal of World Trade*, 2018, pp. 1019-1042; Shuxiao KUANG, *The European Commission's Discourses on Sustainable Development in 'Trade for All': An Argumentative Perspective*, *European Foreign Affairs Review*, 2021, pp. 265-288; Gesa KÜBEK, Ramses A. WESSEL, *Governing Sustainability through Trade in EU External Relations: The "New Approach" and its Challenges* (January 11, 2023), in Jamile BERGAMASCHINE MATA DIZ (ED.), *Trade and Sustainable Development: The Foreign Relations of the European Union*, Forthcoming, available at SSRN: http://dx.doi.org/10.2139/ssrn.4941502; Gracia MARÍN DURÁN, *Sustainable Development Chapters in EU Free Trade Agreements: Emerging Compliance Issues*, *Common Market Law Review*, 2020, pp. 1031-1068.

[13] *United Nations Framework Convention on Climate Change*, New York, 9 May 1992, *United Nations Treaty Series*, Vol. 1771, p. 107. On the UNFCCC cf. Daniel BODANSKY, *The United Nations Framework Convention on Climate Change: A Commentary*, *Yale Journal of International Law*, 1993, pp. 451-558.

[14] UNFCCC, Decision 1/CP.21 (2016), Adoption of the Paris Agreement (FCCC/CP/2015/10/Add.1). For an analysis of this Agreement see Geert VAN CALSTER, Leonie REINS (EDS.), *The Paris Agreement on Climate Change: A Commentary*, Cheltenham – Northampton, 2021.

[15] So reads Article 6, paras. 2 and 3 of Annex V of the EU-Kenya EPA (see Economic Partnership Agreement between the European Union, of the one part, and the Republic of Kenya, member of the East African Community, of the other part, *OJEU* L, 2024/1648, 1.7.2024). On the Paris Agreement and EU PTAs see Caroline BERTRAM, Hermine VAN COPPENOLLE, *Strengthening the Paris Agreement through Trade? The Potential and Limitations of EU Preferential Trade Agreements for Climate Governance*, *International Environmental Agreements: Politics, Law and Economics*, 2024, pp. 589-610.

[16] Cf. e.g. Article 19.4 of the EU-New Zealand FTA, pursuant to which the Parties *inter alia* "recognise the need to advance gender equality and women's economic empowerment and to promote a gender perspective in the Parties' trade and investment relationship … they acknowledge the important current and future contribution by women to economic growth through their participation in economic activity, including international trade" and "[a]ccordingly … [they] emphasise their intention to implement this Agreement in a manner that promotes and enhances gender equality". The EU and New Zealand have also highlighted "that inclusive trade policies can contribute to advancing women's economic empowerment and gender equality, in line with United Nations Sustainable Development Goals Target 5 and the objectives of the Joint Declaration on Trade and Women's Economic Empowerment adopted at the WTO Ministerial Conference in Buenos Aires on 12 December 2017" (see Free Trade Agreement between the European Union and New Zealand, *OJEU* L, 2024/229, 28.2.2024). Chapter 27, specifically devoted to "Trade and Gender Equality", of the EU-Chile ITA is a first in an EU trade agreement, where the Parties also "agree on the importance of … removing barriers to women's participation in the economy and international trade, including improving equal opportunities of access to work functions and sectors for men and women in the labour market" (Article 27.1, para. 1 of the EU-Chile ITA, see Interim Agreement on Trade between the European Union and the Republic of Chile,

their functioning, with several specialized intergovernmental bodies and arbitration panels/groups of experts to settle disputes. Moreover, civil society plays an important role in the monitoring and implementation of the EU TAs, as a result of the setting up of the domestic advisory groups (DAGs) and civil society dialogue mechanisms[17]. Private parties are also significantly empowered in the new EU PTAs through the increasing references to corporate social responsibility found in the preambles and specific provisions of those treaty instruments[18].

Recently, the EU has activated the bilateral dispute settlement mechanisms (DSMs) of the new TAs. The reports issued so far[19] consistently emphasize issues related to sustainability. Notably, the *Korea - Labour Commitments* case specifically focuses on enforcing certain provisions of the

OJEU L, 2024/2953, 20.12.2024). On the EU approach to women's empowerment in the EU trade policy cf. Rosamund SHREEVES, *Accelerating Progress on Sustainable Development Goal 5 (SDG 5) - Achieving Gender Equality and Empowering Women and Girls*, EPRS | European Parliamentary Research Service, PE 762.403, September 2024; Klarissa MARTINS SCKAYER ABICALAM, *Women's Empowerment Through International Trade: Current Challenges and Perspectives*, *Diritto comunitario e degli scambi internazionali*, 2022, pp. 323-363.

[17] See Deborah MARTENS, Diana POTJOMKINA, Jan ORBIE, *Domestic Advisory Groups on EU Trade Agreements - Stuck at the Bottom or Moving up the Ladder?*, Friedrich-Ebert-Stiftung, November 2020; Andrea MENSI, *The Contribution of Civil Society in the Implementation of Sustainable Development Commitments in EU Preferential Trade Agreements*, *Diritto del commercio internazionale*, 2023, pp. 903-935.

[18] See e.g. the Preamble of the EU-Canada Comprehensive Economic and Trade Agreement (CETA), where the Parties encourage "enterprises operating within their territory or subject to their jurisdiction to respect internationally recognised guidelines and principles of corporate social responsibility, including the OECD Guidelines for Multinational Enterprises, and to pursue best practices of responsible business conduct" (Council Decision (EU) 2017/37 of 28 October 2016 on the signing on behalf of the European Union of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, *OJEU* 2017, L11/1). See also Article 13.10, para. 2, lett. e) of EU-Vietnam FTA: "… the Parties … in accordance with their domestic laws or policies agree to promote corporate social responsibility, provided that measures related thereto are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between the Parties or a disguised restriction on trade; measures for the promotion of corporate social responsibility include, among others, exchange of information and best practices, education and training activities and technical advice; in this regard, each Party takes into account relevant internationally agreed instruments that have been endorsed or are supported by that Party, such as the Organisation for Economic Co-operation and Development Guidelines for Multinational Enterprises, the United Nations Global Compact and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy" (Council Decision (EU) 2019/753 of 30 March 2020 on the conclusion of the Free Trade Agreement between the European Union and the Socialist Republic of Viet Nam, *OJEU* 2020, L186/1).

[19] They are the following three panel reports: *Ukraine - Wood Export Bans*, *Restrictions Applied by Ukraine on Exports of Certain Wood Products to the European Union*, Final Report of the Arbitration Panel established pursuant to Article 307 of the Association Agreement between Ukraine, of the one part, and the European Union and its Member States, of the other part, 11 December 2020; *Korea - Labour Commitments*, Panel of Experts Proceeding Constituted under Article 13.15 of the EU-Korea Free Trade Agreement, Report of the Panel of Experts, 20 January 2021; *SACU - Poultry Safeguards*, *Southern African Customs Union – Safeguard Measure Imposed on Frozen Bone-In Chicken Cuts from the European Union*, Final Report of the Arbitration Panel, 3 August 2022.

TSD Chapter within the EU-South Korea Free Trade Agreement[20]. The purpose of this work is to highlight those sustainability issues in the contentious proceedings triggered by the EU after a brief presentation of the key aspects of the TAs procedures dealing with the complaints raised by the contracting parties. In an effort to propose as complete a picture as possible for our analysis, attention will also be devoted to the practice of bilateral litigation that has not (yet) been settled (the complaint raised by the EU against Algeria[21]) or is being resolved diplomatically (the initiative launched by the Dutch NGO CNV Internaational[22]).

2. The dispute settlement mechanisms of the new EU TAs

The trade agreements of the EU have always included dispute settlement mechanisms (DSMs). They initially featured very basic procedures[23], while the models of the new EU Trade Agreements (TAs) are significantly more structured[24]. The recent DSMs vary depending on the type of obligations they address. If the disputes involve trade liberalization rules, the dispute settlement mechanism tends to be more assertive while constantly looking for a diplomatic solution to the case. When dealing with complaints related to the TSD chapters, most trade agreements advance an inclusive and informed process. Such a promotional approach also contemplates an adjudicatory phase, nevertheless privileging dialogue and cooperation for the capacity building of the defending party on environmental and social standards[25].

The DSM handling grievances concerning free trade rules for goods and services is similar to the WTO proceedings. Hence, the disputants have first to enter into good faith consultations, and if those fail, the complaining party may ask for the establishment of an arbitration panel of independent experts. The adjudicators have to interpret the TAs provisions "in accordance with customary rules of interpretation of public international law, including those codified in the Vienna Convention on the Law of Treaties"[26]; and the final panel report has to outline "findings of fact, the applicability of the relevant provisions and the basic rationale for any findings and recommendations"[27]. Should the panel report not be respected within a reasonable period of time,

[20] Council Decision 2011/265/EU of 16 September 2010 on the signing, on behalf of the European Union, and provisional application of the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, *OJEU* 2011, L127/1.
[21] See below paragraph 5 of this chapter.
[22] Cf. *infra* paragraph 6.
[23] See *infra*, in paragraph 5, the dispute settlement procedure of the EuroMediterranean Association Agreement between the EU and Algeria.
[24] For a complete overview of DSMs in EU trade agreements see Ignacio GARCIA BERCERO, *Dispute Settlement in European Union Free Trade Agreements: Lessons Learned?*, in Lorand BARTELS, Federico ORTINO (EDS.), *Regional Trade Agreements and the WTO Legal System*, Oxford, 2006, pp. 383-405.
[25] For these aspects see Ilaria ESPA, *Enforcing Sustainability Obligations – Adjudication and Post-Adjudication Enforcement*, in Kathleen CLAUSSEN, Geraldo VIDIGAL (EDS.), *The Sustainability Revolution in International Trade Agreements*, cit., pp. 217-233; James J. NEDUMPARA, *Dispute Settlement in International Trade Agreements: Prospective Pathways*, *Global Trade and Customs Journal*, 2022, pp. 261-265.
[26] Article 14.16, Rules of interpretation, of the EU-Korea FTA.
[27] Article 15.6, Terms of Reference of the Arbitration Panel, of the EU-Vietnam FTA.

and a compensation arrangement not be reached, the aggrieved party is entitled to suspend TA's obligations "at a level equivalent to the nullification or impairment caused by the violation"[28]. It is also important to emphasize that WTO rules take precedence over the EU TAs' obligations. The bilateral trade agreements, in fact, state that "nothing in [the TAs] require … [the Parties] to act in a manner inconsistent with their obligations under the WTO Agreement"[29]. Additionally, an arbitration panel has also to "take into account relevant interpretations in panel and Appellate Body reports adopted by the [WTO Dispute Settlement Body]"[30]. To ensure consistency between the bilateral treaty regime and the WTO system in the event of amendment of any multilateral rule incorporated by the Parties in their trade agreement, the EU and its partner are also required to engage in consultations. Following such a review, "the Parties may, by decision in the Trade Committee, amend this Agreement accordingly"[31]. It is thus clear that the EU TAs have not been conceived as a tool to depart from the legal framework of the WTO system. Both contracting parties and panelists are, in fact, demanded to ensure that the bilateral framework remains coherent with and supportive of the multilateral one, being the GATT/WTO system a traditional and very strong priority of the EU external policies[32].

There are three primary differences between the EU TAs dispute settlement rules and the multilateral trading system, designed to enhance the efficacy and efficiency of the bilateral mechanisms: there is no appellate stage; panel reports are immediately binding, being absent a political-institutional route, similar to the approval by the WTO Dispute Settlement Body, for their formal adoption; and the possibility of submitting *amicus curiae* briefs to the arbitration panel is explicitly allowed[33]. In fact, interested natural or legal persons, established in the territory of a Party and independent from the governments of the Parties, are "authorized to submit *amicus curiae* briefs to the arbitration panel"[34]. Pursuant to the Rules of Procedure annexed to the new TAs, the *amicus curiae* briefs have to be filed within a short time after the establishment of the arbitration panel, "concise and … directly relevant to a factual or a legal issue under consideration by the arbitration panel"[35]. Furthermore, the *amicus curiae* submissions "shall contain a

[28] Article 29.14, Temporary remedies in case of non-compliance, para. 13 of the EU-Canada CETA.

[29] Article 16.18, para. 2 of the EU-Singapore FTA. See Council Decision (EU) 2018/1599 of 15 October 2018 on the signing, on behalf of the European Union, of the Free Trade Agreement between the European Union and the Republic of Singapore, *OJEU* 2018, L267/1.

[30] Article 21.16 of the EU-Japan Economic Partnership Agreement (EPA). See Council Decision (EU) 2018/1907 of 20 December 2018 on the conclusion of the Agreement between the European Union and Japan for an Economic Partnership, *OJEU* 2018, L330/1.

[31] Article 16.3, entitled "Evolving WTO Law", of the EU-Vietnam FTA.

[32] On the relation of PTAs with the WTO system see Elisa BARONCINI, *The WTO Case-Law on the Relation Between the Marrakesh System and Regional Trade Agreements*, *EuR Europarecht*, Beiheft 1 / 2017 - *Europa im Umbrucht*, Peter Hilpold (Hrsg.), Nomos, 2017, pp. 57-75.

[33] Cf. Thomas JÜRGENSEN, *Dispute Settlement Mechanisms in Free Trade Agreements with the European Union*, in Alexander TRUNK, Marina TRUNK-FEDOROVA, Azar ALIYEV (EDS.), *Law of International Trade in the Region of the Caucasus, Central Asia and Russia – Public International Law, Private Law, Dispute Settlement*, cit., pp. 323-335.

[34] Article 14.15 of the EU-Korea FTA.

[35] Paragraph 40 of Annex 15 A – Rules of Procedure, EU-Vietnam FTA.

description of the person making the submission, whether natural or legal, including its nationality or place of establishment, the nature of its activities, its legal status, general objectives and the source of its financing, and specify the nature of the interest that the person has in the arbitration proceedings"[36].

The rules of the dispute settlement mechanism of the TSD Chapters provide for a significantly greater engagement of civil society. The chapters on trade and sustainable development set up, in fact, the "Domestic Advisory Group(s) on sustainable development (environment and labour) with the task of advising on the implementation of [the TSD] Chapter"[37]. DAGs are formed by various representatives of civil society, including "independent representative organisations … in a balanced representation of environment, labour and business organisations as well as other relevant stakeholders"[38]. The first step of the TSD proceedings is the request for consultations by a contracting party. The object of such a request may be "any matter of mutual interest arising under [the TSD] Chapter, *including* the communications of the Domestic Advisory Groups"[39], which have, in fact, to advise the Committee on Trade and Sustainable Development (CTSD, or TSD Committee), on a regular basis, on the implementation of the new EU TAs, also highlighting their difficult aspects so that a contracting party may consider the DAGs analysis as a valid basis to lodge a complaint. The soft approach of TSD proceedings implies, of course, that "[t]he Parties shall make every attempt to arrive at a mutually satisfactory resolution of the matter"[40]. If direct consultations cannot settle the case diplomatically, and "a Party considers that the matter needs further discussion, that Party may request that the Committee on Trade and Sustainable Development be convened to consider the [issue]"[41]. Likewise, the intergovernmental body has to "endeavour to agree on a resolution of the matter"[42], and the TSD Committee, as well as each contracting party, may seek the advice of the DAGs, which "may also submit communications on [their] own initiative" to the Parties or the Committee[43]. Should the impossibility of satisfactorily addressing the matter through government consultations persist, a party may move onto the next stage of the special TSD dispute settlement mechanism, that of convening a panel of experts[44]. As the TSD environmental and social standards are those expressed by the ILO and the relevant multilateral environmental organisations or bodies, collaboration and coherence with those international fora are looked after and guaranteed by the duty of the contracting parties to "ensure that the resolution [of the matter] reflects the activities of the ILO or relevant multilateral environmental organisations or bodies"[45]. To achieve such coherence, both the Parties and the panel "can" or "should seek information and advice" from those organisations or bodies[46].

[36] Paragraph 45 of Annex 29 A – Rules of Procedure for Arbitration, EU-Canada CETA.
[37] Article 13.12, para. 4 of the EU-Korea FTA.
[38] Article 13.12, para. 5 of the EU-Korea FTA.
[39] Article 13.14, para. 1 of the EU-Korea FTA.
[40] Article 13.14, para. 2 of the EU-Korea FTA.
[41] Article 13.14, para. 3 of the EU-Korea FTA.
[42] *Ibid*.
[43] See Article 13.14, para. 4 of the EU-Korea FTA.
[44] See e.g. Article 13.15 of the EU-Korea FTA.
[45] Article 13.14, para. 2 of the EU-Korea FTA.
[46] See Articles 13.14, para. 2, and 13.15, para. 1 of the EU-Korea FTA.

In the adjudicatory phase, information and advice from the DAGs remain relevant, as the group of experts has to look for the position of civil society on the dispute it has to consider. Once the report is issued by the panel, "[t]he Parties shall make their *best efforts* to accommodate advice or recommendations of the Panel of Experts on the implementation of this Chapter", while "[t]he implementation of the recommendations of the Panel of Experts shall be monitored by the Committee on Trade and Sustainable Development"[47].

The promotional approach of TSD proceedings described here is thus evident, as the defending party has an obligation of best efforts, not of result, to implement the recommendations of the panel report, and the lack of implementation is not sanctioned by any penalty or suspensions of bilateral obligations.

In 2022, the Commission proposed that the enforcement proceedings for the TSD rules be strengthened[48]. The very recent EU-New Zealand FTA thus extends the possibility to apply trade sanctions if a contracting party does not adhere to a panel report finding it has a) seriously infringed the ILO fundamental principles and rights at work, or b) failed "to comply with obligations that materially defeat the object and purpose of the Paris Agreement on Climate Change"[49]. Of course, sanctioning a country that struggles to respect core values may predictably not improve the respect of those values. Therefore, constant dialogue in common bodies and with all the interested actors should be maintained in the daily management of the EU TAs, making all the required efforts to avoid complaints, or, when engaged in a dispute, observe a constructive approach to achieve a fair solution. The option to suspend concessions in TSD complaints should be considered as an *extrema ratio* looming at the horizon.

3. The first three panel reports within the EU TAs dispute settlement mechanisms

To date, three reports have been delivered regarding complaints filed within the EU TAs dispute settlement mechanisms. On 11 December 2020, the Arbitration Panel notified the Parties and the EU/Ukraine Trade Committee of its final report on the *Ukraine - Wood Export Bans* case. The Panel determined that the two challenged Ukrainian laws were incompatible with Article 35 of the EU-Ukraine Association Agreement (AA). However, the 2015 total ban on exports of all unprocessed wood, could not be "justified under Article XX(g) of the GATT 1994, as made applicable to the Association Agreement by Article 36 of the AA (General Exceptions) … [since] that export ban … [was] not 'relating to the conservation of exhaustible resources … made effective in conjunction with restrictions on domestic production or consumption'"[50]. By contrast, the 2005 export ban on ten rare and valuable wood species of low commercial use was justified under the plant life or

[47] See Article 13.15, para. 2 of the EU-Korea FTA, emphasis added.
[48] COM(2022) 409, *The Power of Trade Partnerships: Together for Green and Just Economic Growth, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions,* Brussels, 22.6.2022, pp. 11-12.
[49] COM(2022) 409, cit., p. 12. See Article 26.16, para. 2, let. b) of the EU-New Zealand FTA.
[50] *Ukraine – Wood Export Bans* Panel Report, para. 507.

health protection exception of Article XX(b) of the GATT 1994 "as made applicable to the Association Agreement by Article 36 of the AA … as a measure 'necessary to protect….plant life', taking also into account relevant provisions of Chapter 13 of the AA on trade and sustainable development"[51].

A few weeks later, on 20 January 2021, the group of experts appointed in the *Korea - Labour Commitments* case gave its decision recommending Korea to bring its *Trade Union and Labour Relations Adjustment Act* (TULRAA) into conformity with the principles of freedom of association enshrined in the 1998 ILO Declaration on Fundamental Principles and Rights at Work, recalled in Article 13.4, para. 3 of the EU-Korea FTA and expressly reformulated therein. Korea had, therefore, to revise the TULRAA to a) expand the definition of worker to self-employed, dismissed and unemployed persons, b) recognize trade unions also having independent or not working people among their members, and c) allow non-members of a trade union to be elected as union officials. With reference to the obligation to make "continued and sustained efforts towards ratifying the fundamental ILO Conventions"[52], the Panel considered that the Korean practice was lengthy, its efforts were "less than optimal", and that there was "still much to be done"[53]. Nevertheless, the group of experts overall concluded that Korea made "tangible, though slow, efforts"[54], and it was thus respecting the legal standard set out in the last sentence of Article 13.4.3 of the EU-Korea FTA.

Korea needed to revise the TULRAA to expand the definition of a worker to include self-employed individuals, those who have been dismissed, and unemployed persons. Additionally, the revised law recognized that trade unions may have independent members or individuals who are not currently employed. It also allowed non-members of a trade union to be elected as union officials.

The panel report in the *SACU - Poultry Safeguards* dispute was the last one to be delivered, on 3 August 2022. It concerned a safeguard measure imposed by the Southern African Customs Union (SACU) on EU imports of frozen chicken cuts. The Arbitration Panel found that the safeguard measure breached Article 34 of the EU-Southern African Development Community

[51] *Ibid*. See European Commission, *The History of the EU-Ukraine Dispute on Wood Export Bans – Memo*, 12 December 2020.
[52] Article 13.4, para. 3, second sentence of the EU-Korea FTA.
[53] *Korea - Labour Commitments* Panel Report, para. 291. On this panel report see Laurence BOISSON DE CHAZOURNES, Jaemin LEE, *The European Union–Korea Free Trade Agreement Sustainable Development Proceeding: Reflections on a Ground-Breaking Dispute, Journal of World Investment & Trade*, 2022, pp. 329-346; Ji Sun HAN, *The EU-Korea Labor Dispute: A Critical Analysis of the EU's Approach*, *European Foreign Affairs Review*, 2021, pp. 531-552; Louis KOEN, Davy RAMMILA, *The EU-Korea Panel Report: A Watershed Moment for the Trade-Labor Nexus or Mere Symbolic Victory?*, *Journal of International Trade, Logistics and Law*, 2021, pp. 53-58; Aledys NISSEN, *Not That Assertive: The EU's Take on Enforcement of Labour Obligations in Its Free Trade Agreement with South Korea*, *European Journal of International Law*, 2022, pp. 607-630; Tonia NOVITZ, *Sustainable Labour Conditionality in EU Free Trade Agreements? Implications of the EU-Korea Expert Panel Report*, *European Law Review*, 2022, pp. 3-23; Chunlei ZHAO, *Implementing and Enhancing Labour Standards Through FTAs? A Critical Analysis of the Panel Report in the EU-Korea Case*, *Journal of World Trade*, pp. 939-962.
[54] *Korea - Labour Commitments* Panel Report, para. 287.

Economic Partnership Agreement (EU-SADC EPA)[55] because "it was not related to a product that 'is being imported' (given the time lapse between the determination, provisional measure, and definitive measure); and … it exceeded 'what is necessary to remedy or prevent the serious injury or disturbances'"[56].

4. Civil Society, non-trade values, scope and binding force of TSD provisions in the EU TAs case law

The case law developed thus far in the bilateral dispute settlement mechanisms of the new EU TAs is already expressing some relevant sustainability features in the interpretation and application of the trade agreements. The EU litigation strategy reflects the targets indicated in the reviews proposed for the EU trade policy, promoting the EU TAs' enforcement to give credibility to the new ambitious tools in the context of constant cooperation and involvement of stakeholders and civil society in their implementation. In the present section of the chapter, attention will be devoted to the contributions given within the panel proceedings to the "sustainability revolution"[57] of the new EU TAs.

4.1 Amicus curiae and domestic advisory groups

As already reported, the importance of the contribution of stakeholders, more generally of any interested subject, has been expressly highlighted and acknowledged in the text of the new EU TAs. The practice of the three panels established thus far is aligned with this clear institutional policy choice on the participation of civil society through *amicus curiae* submissions in the proceedings[58]. The working procedures of the adjudicating bodies were closely similar: they foresaw the right of "[a]ny natural person of a party or a legal person established in the territory of a party that is independent from the governments of the parties"[59] to file their *amicus curiae* submissions before the groups of experts within a short period of time from their establishment -around 20 days- and they asked for terse documents addressing legal or factual aspects of the dispute[60], and presenting the *amici*, their interest in participating to the complaint, and their source of financing.

---

[55] See Council Decision (EU) 2016/1623 of 1 June 2016 on the signing, on behalf of the European Union and provisional application of the Economic Partnership Agreement between the European Union and its Member States, of the one part, and the SADC EPA States, of the other part, *OJEU* 2016, L250/1.

[56] *SACU – Poultry Safeguards* Panel Report, para. 371.

[57] This expression is borrowed from Kathleen CLAUSSEN, Geraldo VIDIGAL (EDS.), *The Sustainability Revolution in International Trade Agreements*, cit.

[58] See European Commission, *Procedural information related to EU-Korea dispute settlement on Labour*, 19 December 2019; European Commission, *Arbitration Panel Established on Ukraine's Wood Export Ban – Deadline for Submissions*, 4 February 2020; European Commission, *Arbitration Panel Established in the Dispute Concerning the Safeguard Measure Imposed by SACU on Imports of Poultry from the EU*, 8 December 2021.

[59] See European Commission, *Arbitration Panel Established in the Dispute Concerning the Safeguard Measure Imposed by SACU,* cit., at p. 1.

[60] The Working Procedures of the *Korea – Labour Standards* case indicated that the amicus curiae submissions had not to be "longer than 15 pages including any annexes". See European

The concrete use by stakeholders of the *amicus curiae* tool became more and more relevant as each panel proceedings progressed. It had a marginal role in the *Ukraine – Wood Export Bans* case: the arbitration body received only one *amicus curiae* submission "by the non-governmental organization 'Ukrainian Association of the Club of Rome' … in Ukrainian language … [that] was informally translated into English by the Arbitration Panel" and included in the record of the proceedings, while "neither of the Parties referred to it in their submissions"[61]. Instead, in *Korea - Labour Commitments*, six institutions and 22 individuals presented *amicus curiae* briefs[62]. Even if the Group of experts did not summarize the content of each submission, they considered them with "full regard"[63] and underlined their relevance, in particular of the *amicus* briefs filed by trade unions, to assess the scope and application of some parts of the contested Korean legislation[64]. The Arbitration Panel of the *SACU – Poultry Safeguards* case recorded three *amicus curiae* submissions and decided to reserve an *ad hoc* space in its report to present the main points raised in the *amicus* briefs -all put forward by meat producers and traders' associations- and the comments by the disputants on them[65]. Through this drafting technique, clear emphasis was placed on the role that *amici curiae* can play in enabling a solution to the complaint which is taken in the most informed setting.

In *Korea - Labour Commitments*, the Group of Experts also enhanced the DAGs' role in implementing and upholding workers' fundamental rights under the TSD Chapter. Considering the evidence brought by the disputants as "competing"[66], and thus not adequate to find the Korean certification procedure for the establishment of trade unions as incompatible with the obligations to "respect …, promote … and realise …, in their laws and practice, the principles concerning freedom of association"[67], the Panel urged both disputants to clarify this particular EU claim following up on the obligations they have under Article 13.12 of the EU-Korea FTA to designate domestic "contact point[s] with the other Party for the purpose of implementing this Chapter" and establish the DAGs "with the task of advising on the implementation" of TSD provisions. The Group of Experts thus recommended that the question on the Korean discipline for setting up trade unions "be referred to [the] consultative bodies established under Article

Commission, *Procedural information related to EU-Korea dispute settlement on Labour*, cit., at p. 2.

[61] *Ukraine – Wood Export Bans* Panel Report, para. 10.

[62] See Appendix, lett. B) of the *Korea - Labour Commitments* Panel Report.

[63] *Korea - Labour Commitments* Panel Report, para. 99.

[64] See *Korea - Labour Commitments* Panel Report, paras. 160 and 236, and, in particular, para. 204, where the group of experts reported the testimony of the Korean Teachers and Education Workers' Union, "demonstrat[ing] … the seriousness of the practical impact of [the Korean legislation pursuant to which] … an already registered trade union can lose its legal status under the TULRAA if it permits dismissed or unemployed workers to be or remain members of the union: '[t]he Korean Teachers and Education Workers' Union (KTU) was informed of its decertification … because nine out of its 60 000 members were dismissed workers'".

[65] *SACU – Poultry Safeguards* Panel Report, Section III, *Amicus Curiae* Submissions, paras. 72-87.

[66] *Korea - Labour Commitments* Panel Report, para. 255.

[67] *Korea - Labour Commitments* Panel Report, para. 256. See also Article 13.4, para. 3 of the EU-Korea FTA.

13.12 of the EU-Korea FTA for *continued consultations*"[68]. While the EU allegations were not sufficient to condemn Korea on that particular claim, the Panel wisely chose not to consider the issue settled but left it open by charging also the DAGs to continue discussing whether the Korean procedures regarding the establishment of trade unions respected, in law and practice, the principles on freedom of association for workers. The central role of civil society and the cooperation of the contracting parties with it -fundamental features of the institutional structure of the new EU TAs and pillar on which the full and appropriate implementation of the treaty rules is based- are therefore presented by the Group of Experts as a core element to be enacted and respected by the EU and its partner.

4.2 Scope and binding force of the TSD provisions

In *Korea - Labour Commitments*, the defendant argued that the Panel did not have jurisdiction as the EU complaint "raised 'aspects relating to labour … as such, without any established connection with trade between the EU and Korea…'"[69]. This claim by Korea allowed the Group of Experts to clarify an essential aspect of the scope of the TSD obligations enshrined in Article 13.4.3 of the EU-Korea FTA[70]: the duty to respect the fundamental rights and principles at work recalled by the 1998 ILO Declaration and its Follow-up, along with the commitment to ratify the fundamental ILO Conventions extend beyond any potential trade impact on the EU-Korea relationship. The Panel considered that Article 13.4.3 "falls within the '(e)xcept as otherwise provided' clause of Article 13.2.1"[71]. In fact, "it is not legally possible for a Party to aim to ratify ILO Conventions only for a segment of their workers: the ILO does not permit ratification subject to reservations … *It defies the clear logic* of Article 13.4.3 to state otherwise … [Therefore i]t is not appropriate, or even possible, to apply the limited scope bounded by 'trade-related labour' to the terms of Article 13.4.3, as proposed by Korea"[72]. The Group of Experts further reinforced this relevant finding highlighting that the new structure of the EU TAs clearly makes sustainable

---

[68] *Korea - Labour Commitments* Panel Report, para. 258, emphasis added.
[69] *Korea - Labour Commitments* Panel Report, para. 56.
[70] According to this provision: "[t]he Parties, in accordance with the obligations deriving from membership of the ILO and the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, adopted by the International Labour Conference at its 86th Session in 1998, commit to respecting, promoting and realising, in their laws and practices, the principles concerning the fundamental rights, namely:

(a) freedom of association and the effective recognition of the right to collective bargaining;

(b) the elimination of all forms of forced or compulsory labour;

(c) the effective abolition of child labour; and

(d) the elimination of discrimination in respect of employment and occupation.

The Parties reaffirm the commitment to effectively implementing the ILO Conventions that Korea and the Member States of the European Union have ratified respectively. The Parties will make continued and sustained efforts towards ratifying the fundamental ILO Conventions as well as the other Conventions that are classified as 'up-to-date' by the ILO".
[71] *Korea - Labour Commitments* Panel Report, para. 68. Article 13.2.1 of the EU-Korea FTA says that *"[e]xcept as otherwise provided in this Chapter*, this Chapter applies to measures adopted or maintained by the Parties *affecting trade-related aspects of labour ... and environmental issues* in the context of Articles 13.1.1 and 13.1.2" (emphasis added).
[72] *Korea - Labour Commitments* Panel Report, paras. 67-68, emphasis added.

development measures "a constitutive element"[73] of those agreements, thus promoting a new evolving concept of trade:

> … the Parties have drafted the Agreement in such a way as to create a strong connection between the promotion and attainment of fundamental labour principles and rights and trade. The various international declarations and statements referred to in the EU-Korea FTA … have been referenced by the Parties to show that decent work is at the heart of their aspirations for trade and sustainable development, with the 'floor' of labour rights an integral component of the system they commit to maintaining and developing. In the Panel's view, *national measures implementing such rights are therefore inherently related to trade as it is conceived in the EU-Korea FTA* [74].

Korea also contended that the TSD Chapter was not legally binding[75], the 1998 ILO Declaration recalled in Article 13.4.3 "may not, as a matter of law, impose any binding obligations on ILO members"[76], and "the term 'will' in the last sentence of Article 13.4.3 … is 'more akin to a declaration of intent than an obligation'"[77]. The Group of Experts unequivocally stated that the recalled TSD provision has a legally binding nature. Article 13.4, para. 3, concluded the Panel, produces "a … commitment on both Parties in relation to respecting, promoting and realising the principles of freedom of association as they are understood in the context of the ILO Constitution" by reaffirming "the existing obligations of the Parties under the ILO Constitution" which also creates "separate and independent obligations under Chapter 13 of the Agreement" through the incorporation of the ILO obligations[78]. Furthermore, with reference to the ratification of the fundamental ILO Conventions, the Panel found that the wording of the last sentence of Article 13.4, para. 3[79] generates "an obligation of 'best endeavours'", which means that "the standard against which the Parties are to be measured is higher than undertaking merely minimal steps or none at all, and lower than a requirement to explore and mobilise all measures available at all times"[80].

---

[73] This is how the *Korea - Labour Commitments* Panel Report is commented by Geraldo VIDIGAL, *Regional Trade Adjudication and the Rise of Sustainability Disputes:* Korea-Labor Commitments *and* Ukraine- Wood Export Bans, *American Journal of International Law*, 2022, pp. 567-578. See also Aleksandra BOROWICX, Rasa DAUGELIENE, *The Role of EU Trade Agreements in Light of the Sustainable Development Goals*, in Ewa LATOSZEK, Agnieszka KŁOS (EDS.*), Global Public Goods and Sustainable Development in the Practice of International Organizations - Responding to Challenges of Today's World*, Leiden – Boston, 2023, pp. 172-191.

[74] *Korea - Labour Commitments* Panel Report, para. 95, emphasis added.

[75] See *Korea - Labour Commitments* Panel Report, para. 49.

[76] *Korea - Labour Commitments* Panel Report, para. 120.

[77] *Korea - Labour Commitments* Panel Report, para. 262.

[78] *Korea - Labour Commitments* Panel Report, para. 107.

[79] See *supra* the text of Article 13.4, para. 3 of the EU-Korea FTA reported in footnote 58.

[80] *Korea - Labour Commitments* Panel Report, para. 277.

4.3 Emphasizing the sustainability nature of the EU TAs

The *Ukraine – Wood Export Bans* and *SACU – Poultry Safeguards* cases were about the interpretation of traditional trade rules. However, in both cases, the panelists notably and correctly emphasized the sustainability context and purpose that now define the new EU TAs. This aligns with the findings of the Group of Experts in *Korea – Labour Commitments*, which identified the domestic sustainability measures related to environmental and social standards "inherently related to trade"[81].

In *Ukraine – Wood Export Bans,* the central question addressed by the Arbitration Panel was whether the measures attacked by the European Union were protectionist measures in favour of the Ukrainian woodworking and furniture industry, or could be justified as necessary for or related to the sustainable management of Ukrainian forests, and useful to curb intensive deforestation, which is likely to have serious consequences for the ecosystem. In its legal reasoning, the Arbitration Panel emphasized that the disputants agreed on the non-trade values claimed with reference to the attacked Ukrainian measures: "it is undisputed by the Parties that the interests protected by the 2005 export ban, that is, the restoration of forests (reforestation and afforestation) more generally and the preservation of rare and valuable species more specifically, … are 'fundamental, vital and important in the highest degree'"[82]. The adjudicators also remarked that EU "agreed … that the preservation from extinction of any wood species is a legitimate interest of high importance"[83]. Furthermore, the Arbitration Panel qualified the TSD Chapter of the EU-Ukraine AA, i.e. Chapter 13, as "relevant context"[84] to interpret the provisions of Title IV of the AA on trade and trade-related matters, thus concluding that *the requirement to interpret Article 36 of the AA harmoniously with the provisions of Chapter 13* comports with admitting that a highly trade restrictive measure such as an export ban may still be found necessary within the meaning of Article XX(b) of the GATT 1994, as incorporated into Article 36 of the AA. The Arbitration Panel considers that *the provisions of Chapter 13* (*in casu*, Article 290 on the right to regulate[85] and Article 294 on trade in forest products[86]) *serve as relevant context* for the purposes of 'weighing and balancing' with *more flexibility* any of the individual variables of the necessity test, considered individually and in relation to each other. *In casu*, as a consequence, the high trade restrictive

[81] *Korea - Labour Commitments* Panel Report, para. 95.
[82] *Ukraine – Wood Export Bans* Panel Report, para. 308.
[83] *Ibid*.
[84] *Ukraine – Wood Export Bans* Panel Report, para. 253.
[85] Pursuant to Article 290, para. 1, of the EU-Ukraine AA, headed as "Right to regulate", "[r]ecognising the right of the Parties to establish and regulate their own levels of domestic environmental and labour protection and sustainable development policies and priorities, in line with relevant internationally recognised principles and agreements, and to adopt or modify their legislation accordingly, the Parties shall ensure that their legislation provides for high levels of environmental and labour protection and shall strive to continue to improve that legislation".
[86] According to Article 294, headed "Trade in forest products", of the EU-Ukraine AA, 2[i]n order to promote the sustainable management of forest resources, Parties commit to work together to improve forest law enforcement and governance and promote trade in legal and sustainable forest products".

effect inherent to an export ban cannot be considered to automatically outweigh the other elements to be taken into account in weighing and balancing the factors relevant to an assessment of the "necessity" of the measure [87].

Likewise, in *SACU – Poultry Safeguards*, which was about the compatibility of some safeguard measures with the EU-SADC EPA, the Arbitration Panel clarified at the beginning of its findings that it "ha[d] taken note of the *objectives* of [the Economic Partnership Agreement] … *in terms of sustainable development*", further spelling out that those purposes "ha[d] informed its analysis" of the complaint[88]. It thus reconstructed the EPA mission as

> aim[ing] not only at freer trade and greater economic relations between the EPA parties … [considering these goals as] means to achieve *a broader objective of encouraging sustainable development* in the SADC region. … Article 1 EPA (entitled 'Objectives') focuses on the development of SADC States, be it in view of the eradication of poverty (Article 1(a)), improved state capacity (Article 1(d)), or stronger economic growth (Article 1(e)). The expected mutually beneficial relationship between trade and development is further expressed in Chapter II of the EPA, entitled 'Trade and sustainable objectives', and operationalised through a repeated commitment to 'cooperation' between the EPA parties [89].

The Arbitration Panel consequently interpreted the EU-SADC EPA trade rules without "falling into *excessive formalism* … in view of *the EPA's developmental nature*" as "excessive formalism is not in keeping with the object and purpose of the EPA, its developmental character, and the nature of trade remedies as, ultimately, enhancing free trade"[90].

The highlighted sustainability approach in the two reports discussed above - formally developed under the standard dispute settlement mechanism for the trade pillar of the new EU TAs- anticipated, was encouraged by, or perhaps inspired the debate which led to the 2022 Commission's communication "to further enhance the contribution of trade agreements to sustainable development"[91]. This policy document advocates for the "mainstreaming [of] TSD objectives throughout trade agreements"[92], rejecting an interpretation of the EU TAs that limits the consideration of non-trade values solely to the chapters dedicated to trade and sustainable development.

5. The disputes with Algeria

The European Commission has formally raised two disputes with Algeria, the North African country which concluded a Euro-Mediterranean Agreement establishing an Association with the EU and its Member States

[87] *Ukraine – Wood Export Bans* Panel Report, para. 332, emphasis added.
[88] See *SACU – Poultry Safeguards* Panel Report, para. 89, emphasis added.
[89] *SACU – Poultry Safeguards* Panel Report, para. 167, emphasis added.
[90] *SACU – Poultry Safeguards* Panel Report, para. 324, emphasis added.
[91] COM(2022) 409, cit., p. 1.
[92] COM(2022) 409, cit., p. 7.

entered into force on 1 September 2005[93]. Such Agreement conferred Algeria many favourable elements of asymmetry before the establishment of a reciprocal free trade regime with the EU, such as "a selective liberalisation on agriculture" and "a 12-year transitional period for dismantling tariffs for industrial goods", which was further extended to 15 years[94]. In spite of these generous concessions, not only did the developing country not manage to eliminate many obstacles to trade with the EU after the exemptions phase expired, but it also adopted various new economic barriers. Consequently, EU exports to Algeria dropped "from €22.3 billion in 2015 to €14.9 billion in 2023"[95].

As Algeria is not yet a Member of the WTO, although having started negotiations for its accession to the multilateral trade system in 1987[96], the only path to be pursued by the EU to enforce its rights remains the recourse to the very simple dispute settlement mechanism set up by the EU-Algeria Association Agreement. In fact, formal consultations and the arbitration stage are disciplined by Article 100 of the AA, with a central role for the Association Council. First, there is the diplomatic phase, under the guidance and control of the common intergovernmental body. The Association Council "may settle the dispute by means of a decision"[97]. In case a mutually agreed solution is not achieved, any disputant may start arbitration proceedings by "notify[ing] the other of the appointment of an arbitrator"[98]. "The other Party must then appoint a second arbitrator within two months"[99]; afterwards, the Association Council selects a third arbitrator, forming an adjudicatory body of three members whose decisions "shall be taken by majority vote"[100].

In June 2020, in accordance with the recalled Article 100 of the AA, a first complaint was referred by the EU to the EU-Algeria Association Council[101]. Trade frictions started to appear in 2015, and in 2018 the intergovernmental body adopted a decision inviting the parties to find a solution in a tight timeframe. Despite the setting up of a high-level working group, that met four times, and "des interventions répétées à haut niveau et

[93] Council Decision of 18 July 2005 no. 2005/690/EC on the conclusion of the Euro-Mediterranean Agreement establishing an Association between the European Community and its Member States, of the one part, and the People's Democratic Republic of Algeria, of the other part, *OJEU* L265/1, 10 October 2005.
Euro-Mediterranean Agreement establishing an Association between the European Community and its Member States, of the one part, and the People's Democratic Republic of Algeria, of the other part

[94] SWD(2023) 740, *Commission Staff Working Document - Individual information sheets on implementation of EU Trade Agreements Accompanying the document "Report from the Commission to the European Parliament, the Council, the European Economic and Sociale Committee and the Committee of the Regions on the Implementation and Enforcement of EU Trade Policy*", 15 November 2023, p. 57.

[95] Alexandra VAN DER MEULEN, Alexander GRIMM, Rahman APALARA, *EU initiates second dispute settlement procedure with Algeria over trade restrictions – with implications for potential investment arbitrations*, Freshfield, 1 July 2024.

[96] See WTO, Accessions – Algeria, at the link https://www.wto.org/english/thewto_e/acc_e/a1_algerie_e.htm#status.

[97] Article 100, para. 2 of the EU/Algeria AA.

[98] Article 100, para. 4 of the EU/Algeria AA.

[99] *Ibid.*

[100] *Ibid.*

[101] *Note Verbale referring the matter to the EU-Algeria Association Council*, 24 June 2020.

des efforts politiques ciblés de la part de l'Union européenne"[102], no positive outcomes were achieved. The Commission then formally raised several issues to the Association Council. In fact, Algeria adopted a ban on a number of products, including cars and private vehicles, significantly increased the customs duties of many goods, covering also "telecommunications components, modems, cables and electrical appliances"[103], and introduced a very complex system for granting import or export licences, all measures considered as incompatible with Article 17 of the AA[104]. Furthermore, the North African country introduced an additional provisional safeguard duty, amounting to "between 30% and 200% of the value of the goods … covering agricultural products, processed agricultural products and numerous consumer goods"[105], believed to infringe also Articles 9 and 14 of the AA, provisions devoted to the gradual abolition of tariff barriers for special products and *ad hoc* arrangements for agricultural, fishery and processed agricultural goods. Last but not least, some measures were introduced concerning imported electronic devices, scheduling a compulsory deferral period of several months for their payment, and requesting "operators … to prioritise the use of national maritime transport capacities whenever such a choice [was] possible"[106], a regime hard to reconcile with the EU-Algeria AA provisions on services, transports, current payments and movement of capital, further than the wide-ranging Article 17.

Subsequent to the formal complaint, in the last quarter of 2020 bilateral consultations were held in the Association Council and the Sub-Committee on industry, trade and investment of the EU-Algeria AA. In December 2020, the European Union submitted to the Algiers authorities a preliminary draft decision to be adopted by the Association Council to settle the dispute. According to that text, Algeria had to amend or completely overcome the domestic regulations deemed by the EU to be incompatible with the Euro-Mediterranean Agreement, while the EU already requested, in case of non-compliance by Algeria, to be authorized "to suspend the concessions or any other obligation of the Agreement pursuant to Article 104(2)[107] of the

[102] *Note Verbale referring the matter to the EU-Algeria Association Council*, 24 June 2020, p. 1.

[103] See COM(2021) 230, *Annex, Proposal for a Council Decision on the position to be taken on behalf of the European Union within the Association Council established by the Euro-Mediterranean Agreement of 22 April 2002 establishing an Association between the European Community and its Member States, of the one part, and the People's Democratic Republic of Algeria, of the other part*, Brussels, 10.5.2021, p. 2.

[104] According to this provision of the EU-Algeria AA, "[n]o new customs duties on imports or exports or charges having equivalent effect shall be introduced in trade between the Community and Algeria, nor shall those already applied upon entry into force of this Agreement be increased"; likewise, "[n]o new quantitative restriction on imports or exports or measure having equivalent effect shall be introduced in trade between the Community and Algeria", while those already present had to "be abolished upon the entry into force of this Agreement".

[105] COM(2021) 230, cit., p. 2.

[106] COM(2021) 230, cit., pp. 2-3.

[107] Pursuant to Article 104 of the EU-Algeria AA, "1. The Parties shall take any general or specific measures required to fulfil their obligations under this Agreement. They shall see to it that the objectives set out in the Agreement are attained. 2. If either Party considers that the other Party has failed to fulfil an obligation under the Agreement, it may take appropriate measures. Before so doing, except in cases of special urgency, it shall supply the Association

Agreement, given that the Association Council has received all relevant information necessary for a thorough examination of the situation with a view to seeking a solution acceptable to the parties"[108]. However, Algeria did not react to the draft decision, and therefore, in March 2021, the EU decided to escalate the proceedings to the arbitration phase, appointing an arbitrator[109], a move that luckily "intensified technical consultations for agreeing on an amicable solution"[110]. In fact, some of the challenged measures were removed. But Algeria nonetheless introduced new barriers, maintaining trade flow disruptions and foreign investment reduction[111].

Hence, in June 2024, the EU presented a new *note verbale* to the EU-Algeria Association Council[112]. In that document, the Commission first noted that the EU Delegation in Algiers had already sent several reports to the Algerian Ministry of Trade addressing the many trade irritants generated by the new domestic rules imposing barriers on EU exports and investments in the North African country, reports which did not produce the desired positive effects. Then, the European institution listed the Algerian measures considered incompatible with the AA. *Inter alia*, the Commission underlined the prohibition for Algerian banks to accept direct debit requests for imports of marble and ceramic products. Such a discipline, in fact, results in a ban on imports of those products, as economic operators are no longer able to receive or make payments relating to those imports. As a consequence "[e]n imposant ces restrictions quantitatives ou de nouvelles mesures d'effet équivalent, cette mesure semble incompatible avec l'article 17(2) de l'accord d'association"[113]. Furthermore, Algeria requires foreign companies based in its territory to use an increasing percentage of local products in the manufacture of vehicles. This local content requirement increases each year, and only companies complying with it may have access to preferential tax arrangements. Such a regime seems not to observe also Article 3, para. 1, let. b) of the WTO Agreement on Subsidies and Countervailing Measures, which Algeria has to respect -even if it is not a WTO Member- because the multilateral rules on subsidies are recalled by Article 23 of the Association

---

Council with all the relevant information required for a thorough examination of the situation with a view to seeking a solution acceptable to the Parties. In the selection of measures, priority must be given to those which least disturb the functioning of the Agreement. These measures shall be notified immediately to the Association Council and shall be the subject of consultations within the Association Council if the other Party so requests".

[108] See Article 7 of the Draft Decision of the EU-Algeria Association Council, COM(2021) 230, *Annex, Proposal for a Council Decision on the position to be taken on behalf of the European Union within the Association Council established by the Euro-Mediterranean Agreement of 22 April 2002 establishing an Association between the European Community and its Member States, of the one part, and the People's Democratic Republic of Algeria, of the other part*, Brussels, 10.5.2021.

[109] *Note Verbale initiating arbitration under Article 100 of the EU-Algeria Association* Agreement, 19 March 2021.

[110] SWD(2021) 297*, Commission Staff Working Document - Individual information sheets on implementation of EU Trade Agreements*, Brussels, 27.10.2021, p. 43.

[111] Cf. COM(2023) 740 final, *Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions, on the Implementation and Enforcement of EU Trade Policy*, Brussels, 15.11.2023, p. 48.

[112] *Note Verbale Launching a Dispute Settlement Case against Algeria to Address Several Restrictions Imposed on EU Exports and Investments*, 14 June 2024.

[113] *Note Verbale Launching a Dispute Settlement Case against Algeria to Address Several Restrictions Imposed on EU Exports and Investments*, cit., p. 2.

Agreement[114]. Similar to the domestic executive orders on local content is the national Ordinance setting "a cap on foreign ownership for companies importing goods in Algeria"[115], i.e. that resident shareholding of those companies must hold 51% of the enterprise's capital. This discipline seems in conflict with the obligation outlined in Article 37, para. 1 of the Association Agreement, as it imposes more restrictive conditions on the establishment of European companies in Algeria than those "existing on the day preceding the date of signature of this Agreement"[116]. Another set of problematic measures is that freezing the use of Algerian banks to buy or sell products from and to Spain, thus blocking trade with that EU Member State and presenting elements of incompatibility with Article 17(2), Article 38 of the Association Agreement, which requires the Parties to authorize all current payments relating to current transactions, and Article 102 of the Association Agreement, that prohibits discrimination between Member States, their nationals or their companies[117].

It will be interesting to see how this new complaint will be managed, also in light of the fact that Algeria is looking for a revision of the Association Agreement, as it considers that the AA has not generated sufficient economic growth for the North African country[118], and the current economic reality is very distant from the one existing at the beginning of the new millennium: as recently declared by the Algerian President, when the Euro-Mediterranean Agreement entered into force, "en 2005, les exportations de l'Algérie étaient basées principalement sur les hydrocarbures … [a]ujourd'hui, nos exportations hors hydrocarbures se sont diversifiées et étendues à d'autres domaines, notamment la production agricole, les minerais, le ciment et les produits alimentaires et autres"[119]. It is also important to underline that, despite the economic tensions, which are accompanied by the sensitive dossier on migration[120], the EU constantly engages with Algeria through its several financing cooperation programmes, especially on energy transition and climate action, beyond local sustainable development[121]. The EU approach through its financing regulations on development is fully coherent

[114] *Note Verbale Launching a Dispute Settlement Case against Algeria to Address Several Restrictions Imposed on EU Exports and Investments*, cit. pp. 2-3.
[115] European Commission, *EU Begins Dispute Settlement Proceedings against Algeria to Defend European Companies*, Brussels, 14 June 2024.
[116] Article 37, para. 1 of the EU-Algeria AA. See also *Note Verbale Launching a Dispute Settlement Case against Algeria to Address Several Restrictions Imposed on EU Exports and Investments*, cit., p.3.
[117] *Note Verbale Launching a Dispute Settlement Case against Algeria to Address Several Restrictions Imposed on EU Exports and Investments*, cit., p. 4.
[118] Cf. Dalia GHANEM, *Rocky Road Ahead: The Challenges of Eu-Algeria Relations*, ISPI, 23 July 2024.
[119] Le Monde, *L'Algérie veut renégocier l'accord avec l'Union européenne selon un "principe gagnant-gagnant",* 27 January 2025.
[120] See Tasnim ABDERRAHIM, *Maghreb Migrations: How North Africa and Europe Can Work Together on Sub-Saharan Migration*, Policy Brief, European Council on Foreign Relations, 5 September 2024; Federica ZARDO, Chiara LOSCHI, *EU-Algeria (Non)Cooperation on Migration: A Tale of Two Fortress*, *Mediterranean Politics*, 2022, pp. 148-169.
[121] For a complete overview of the bilateral financial cooperation between the European Union and Algeria, see European Commission, *Algeria*, at the link https://enlargement.ec.europa.eu/european-neighbourhood-policy/countries-region/algeria_en (accessed June 2024).

with the purpose of the bilateral economic cooperation as stated in the Association Agreement, pursuant to which Algeria has to be supported in its "own efforts to achieve sustainable economic and social development"[122].

6. The Single Entry Point (SEP) and the CNV Internationaal *complaint*

The European Union places great importance on the support of civil society in promoting, monitoring, and enforcing trade agreements, as highlighted earlier when discussing dispute settlement mechanisms in the new EU TAs. In this context, the Single Entry Point (SEP)[123] may serve as a crucial tool that enhances civil society participation in ensuring respect for the sustainability obligations, and character, of the EU PTAs. The SEP was set up in November 2020 to assist the Chief Trade Enforcement Officer (CTEO), a new senior official appointed for the first time by the Commission in July of the same year[124], with the task of monitoring and ensuring the full and proper implementation of international economic law agreements concluded by the European Union, and the sustainability elements distinguishing the EU Generalised Scheme of Preferences (GSP)+, the special regime reserved by the EU to developing countries accepting all the Conventions on core human and labour rights and related to the environment and to governance principles listed in Annex VIII of the EU GSP Regulation[125]. According to the SEP Operating Guidelines, "domestic advisory groups …, NGOs formed in accordance with the laws of any EU Member State [and c]itizens or permanent residents of an EU Member State" may lodge TSD complaints also representing "similar entities or organisations located in the partner country" of the EU[126]. To date, this is the only EU administrative avenue available to private parties, who are not economic operators or association of economic operators, "to flag to the Commission situations of alleged non-compliance of [sustainability] obligations" by third

[122] Article 47, para. 2 of the EU-Algeria AA. See also Article 52 on environmental cooperation, and Article 62 on "the smooth and sustainable development of tourism", of the EU-Algeria AA.

[123] See the official website of the European Commission at the link https://trade.ec.europa.eu/access-to-markets/en/content/single-entry-point-0

3[124] Cf. Elisa BARONCINI, *L'approccio al contenzioso internazionale per il libero scambio dell'Unione europea*, in Elisa BARONCINI, Ilaria ESPA, Maria Laura MARCEDDU, Ludovica MULAS, Stefano SALUZZO (EDS.), *Enforcement & Law-Making of the EU Trade Policy*, AMS Acta – AlmaDL, Università di Bologna, Bologna, 2022, pp. 1-40, at p. 30 ff.

[125] Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008, *OJEU* L 303/1, 31.10.2012. The EU GSP regime has been extended until 2027 by Regulation (EU) 2023/2663 of the European Parliament and of the Council of 22 November 2023 amending Regulation (EU) No 978/2012 applying a scheme of generalised tariff preferences, *OJEU* L 2023/2663, 27.11.2023.

[126] See European Commission, *Operating Guidelines for the Single Entry Point and Complaints Mechanism for the Enforcement of EU Trade Agreements and Arrangements*, December 2023, p. 2.

States[127]. Unlike the EU Trade Barriers Regulation[128], the Single Entry Point procedure is not based on secondary legislation adopted by the EU Council and the European Parliament. The Commission has thus more discretionary power, both in the timing and the substance of its conduct, as the private parties filing a SEP complaint cannot appeal the determinations of the European institution to the Court of Justice of the European Union (CJEU). Nevertheless, in the Operating Guidelines, the Commission has designated "[i]ndicative timelines for handling of TSD complaints", i.e. 10 working days for acknowledging receipt of the complaint by the Single Entry Point, 20 working days from the receipt of complaint to "ensure a first follow up with the complainant"; and 120 working days from the receipt of the complaint to "make a first assessment of the case to establish whether there appears to be a violation of the TSD commitments … also identify[ing] the appropriate next steps"[129].

To date, the formal SEP complaint on which more information is available is the first one, submitted by CNV Internationaal, the Dutch NGO dedicated to the protection of workers' rights worldwide[130]. The case is of great interest because CNV Internationaal filed the complaint in support of three Latin American trade unions -two from Colombia and one from Peru[131], arguing that Colombia and Peru did not respect the TSD Chapter of the Trade Agreement with the European Union[132]. The complaint cites several legal grounds, including the responsible exercise of economic activities by entrepreneurs and private companies, and, therefore, the compliance of the

[127] Giovanni GRUNI, *Labour Standards in EU Free Trade Agreements - Substantive Issues and Recent Developments Concerning Their Enforcement*, in Kathleen CLAUSSEN, Geraldo VIDIGAL (EDS.), *The Sustainability Revolution in International Trade Agreements*, cit., pp. 89-105, at p. 99.

[128] Regulation (EU) 2015/1843 of the European Parliament and of the Council of 6 October 2015 laying down Union procedures in the field of the common commercial policy in order to ensure the exercise of the Union's rights under international trade rules, in particular those established under the auspices of the World Trade Organization, *OJEU* L272/1, 16.10.2015.

[129] See Annex 2: Practical Guide to filling out the TSD/GSP complaint form, Section 5, of the *Operating Guidelines for the Single Entry Point and Complaints Mechanism for the Enforcement of EU Trade Agreements and Arrangements*, cit.

[130] Cf. CNV Internationaal, *Our Work*, available at the link https://www.cnvinternationaal.nl/en/our-work (accessed on December 2023).

[131] Complaint - Single Entry Point, *On Non-Compliance by the Colombian and Peruvian Governments of Chapter IX, on Sustainable Development, of the Trade Agreement with the European Union*, Submitted by: CNV Internationaal, in support of the Trade Unions: Sintracarbon, Sintracerrejón and Union of Metallurgical Mining Workers of Andaychagua Volcan Mining Company and of the Specialised Companies, Contractors and Intermediary Companies that provide services to Volcan Mining Company – Andaychagua; Submitted to: Chief Trade Enforcement Officer CTEO, 17 May 2022, available at the link https://www.cnvinternationaal.nl/en/our-work/news/2022/may/subcontracting-a-major-breach-of-labour-rights-in-eu-trade-agreements (accessed on May 2022)

[132] See Council Decision (EU) 2012/735 of 31 May 2012 on the signing, on behalf of the Union, and provisional application of the Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part, *OJEU* L 354/1, 21.12.2012. The Trilateral Agreement was subsequently joined by Ecuador: see Council Decision (EU) 2016/2369 of 11 November 2016 on the signing, on behalf of the Union, and provisional application of the Protocol of Accession to the Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part, to take account of the accession of Ecuador, *OJEU* L 356/1, 24.12.2016.

latter with the standard of *due diligence* with reference to fundamental rights[133].

Warmly welcomed by the CTEO[134], this first TSD complaint highlighted the concerns of the trade unions of Colombia and Peru about the prevalent practice of subcontracting workers in the mining sector. According to CNV Internationaal and the Latin American trade unions, outsourced labour for the extraction of coal in Colombia, and zinc, copper, tin, silver and lead in Peru represented 70% of the total workforce employed in the mining activities of some foreign-owned mining companies in those countries. Such outsourced workforce was considered to be underpaid compared to the salaries of employees hired on a permanent basis by the local mining companies: in the view of the complainants, subcontracted miners had to work longer hours, without actually being able to exercise their rights of free association and collective bargaining, but, on the contrary, finding themselves suffering almost twice as many accidents, even fatal ones, at work. Although the outsourcing of labour was motivated by local companies with the need to hire specialised personnel, needed for a shorter period of time, in the view of the Dutch NGO and the Latin American trade unions short contracts ranging from three months to a maximum duration of one year were the modality to considerably reduce labour costs. Subcontracted workers performed the same tasks as employees of local companies but were paid, on average, 30% less, and were therefore subject to blatant discriminatory treatment. Moreover, when they declared their intention to exercise their right to join or establish a trade union, outsourced workers were under very strong pressure to abandon their intention, with the threat of non-renewal of their contracts from the employment agencies[135].

In their complaint, CNV Internationaal and the Latin American trade unions claimed that Colombia and Peru did not respect Articles 267, 269, 271 and 277 of the TSD Chapter of the Trade Agreement with the European Union. In fact, each contracting party has committed itself "to the promotion and effective implementation in its laws and practice and in its whole territory of internationally recognised core labour standards as contained in the fundamental Conventions of the International Labour Organisation"[136], in particular "the freedom of association and the effective recognition of the right to collective bargaining … and the elimination of discrimination in

[133] Cf. CNV Internationaal, *Subcontracting: A Major Breach of Labour Rights in EU Trade Agreements*, 16.05.2022. On *due diligence* in international law see, *inter alia,* Heike KRIEGER, Anne PETERS, Leonhard KREUZER (EDS.), *Due Diligence in the International Legal Order*, Oxford, 2020; Alice OLLINO, *Due Diligence Obligations in International Law*, Cambridge, 2002.

[134] Denis Redonnet, *First Formal Complaint on Trade and Sustainable Development Received*, tweet of 19.05.2022.

[135] The reconstruction of the facts denounced by the *TSD complaint* on precarious mine workers in Colombia and Peru is taken from CNV Internationaal, *The Unequal Treatment of Sub-contracted Workers in the Mining Sector,* 2022, available at https://www.cnvinternationaal.nl (accessed 20 July 2022) and European Commission, *Ex Post Evaluation of the Implementation of the Trade Agreement between the EU and its Member States and Colombia, Peru and Ecuador*, Final Report - Volumes I, II and III, January 2022, available at https://policy.trade.ec.europa.eu/analysis-and-assessment/ex-post-evaluations_en (accessed 20 July 2022).

[136] Article 269, para. 3 of the EU-Colombia-Peru-Ecuador Trade Agreement.

respect of employment and occupation"[137]. However, the practice of subcontracting workers, although formally prohibited and sanctioned by the domestic legislation of Colombia and Peru, showed that both national jurisdictions were unable to fully implement their respective disciplines. This situation negatively impacts vulnerable workers, infringing the core labour standards of freedom of association and collective bargaining and the prohibition of discrimination.

The situation described also conflicted with Article 277 of the FTA between the Union, Colombia, Peru and Ecuador, pursuant to which "[n]o Party shall encourage trade or investment by reducing the levels of protection afforded in its environmental and labour laws. Accordingly, no Party shall waive or otherwise derogate from its environmental and labour laws in a manner that reduces the protection afforded in those laws, to encourage trade or investment"[138]; furthermore, under the same provision, "[a] Party shall not fail to effectively enforce its environmental and labour laws through a sustained or recurring course of action or inaction, in a manner affecting trade or investment between the Parties"[139]. The described context inevitably implied incompatibility also with Article 267, which requires, *inter alia*, the ratification, and thus compliance, with the ILO Conventions qualified as fundamental, the priority ILO Conventions "as well as other conventions that are classified as up-to-date by the ILO"[140].

The complainants additionally emphasised the illegitimacy of the conduct of local companies that systematically impose precarious work in mining plants. In doing so, in fact, these economic operators violate "the obligation of companies to minimise human rights risks, since failure to reduce precarious work would mean complicity in rights violations ... [i]n short, the use of precarious work beyond the necessary limits violates human rights as well as trade union rights and the right to equality"[141]. Thus, the commitment to "human rights due diligence"[142] referable to "best business practices related to corporate social responsibility"[143] which the contracting parties undertook to promote, appeared not to have been respected.

As easily predictable, adherence to the indicative timeline for considering the *CNV Internationaal* complaint could only be disregarded by the Commission: this first TSD case has, in fact, an extremely complex and sensitive content, moreover to be dealt with in a procedural context never addressed before. The Dutch NGO reported on its website that in August 2022, the Colombian company Carbones del Cerrejón continued to refuse to participate in the dialogue with the government "which is crucial to improve conditions in the region and also to manage the energy transition in the mining region"[144]. Subsequently, CNV Internationaal informed that the European

[137] *Ibid*.
[138] Article 277, para. 1 of the EU-Colombia-Peru-Ecuador Trade Agreement.
[139] Article 277, para. 2 of the EU-Colombia-Peru-Ecuador Trade Agreement.
[140] See Articles 267, para. 2, let. b), 269 and 270 of the EU-Colombia-Peru-Ecuador Trade Agreement.
[141] Complaint - Single Entry Point, *On Non-Compliance by the Colombian and Peruvian Governments of Chapter IX, on Sustainable Development, of the Trade Agreement with the European Union,* cit. p. 31.
[142] *Ibid*.
[143] Article 271, para. 3 of the EU-Colombia-Peru-Ecuador Trade Agreement.
[144] See CNV Internationaal, *New Colombian Government Listens to Miners*, 25.08.2022.

DAG of the EU FTA with Colombia, Ecuador and Peru met in October 2022 to give its input into the handling of the complaint by the Committee on Trade and Development of the Quadrilateral EU TA, underlining that the targeted mines in Latin America are those "producing the coal and metals that play such a crucial role in the European Union's energy supply"[145]. On 21 March 2023, an expert of the Dutch NGO presented the complaint at the Committee on International Trade (INTA) of the European Parliament. It was declared, with reference to the state of the art of the pending case, that "the issues persist", as both the governments of Colombia and Peru "are [still] failing, both in terms of legislative frameworks as well as implementation"[146]. CNV Internationaal shared with the Commission the purpose of working to engage with the governments of the two countries by developing the instrument of a clear, complete and feasible road map[147].

In its 2023 Enforcement Report, the Commission stated to have made full use of the dialogue and cooperation mechanisms established by the EU-Colombia-Peru-Ecuador Trade Agreement. The Commission emphasized the need to continue discussing the issues raised in the *CNV Internationaal* complaint at a bilateral level. Additionally, it highlighted the importance of engaging in dialogue with the International Labour Organization to ensure that the application of the TSD Chapter of the EU TA in question is fully consistent with the rules and principles of the UN specialized agency[148].

A first interim officially announced result, even if partial, was presented in March 2024. The Commission and Peru published "a list of cooperation activities agreed with Peru to ensure the respect and implementation of labour rights in the country, according to six priorities defined jointly"[149]. The six priority topics are the fight against labour informality, the strengthening of the labour inspection system, child labour, forced labour, freedom of association, and social dialogue. Each topic is defined and accompanied by a set of activities to be implemented and targets to be achieved. The overall purpose of "the agreed list is broad and ambitious", according to the statement of the Commission, as "it aims at strengthening the implementation of the labour system in Peru as a whole"[150]. In fact, the established EU-Peru cooperation activities "will be supported by an extensive EU technical and financial programme"[151]. In the 2024 Enforcement Report, it is also stated that the EU has defined also with

[145] Cf. CNV Internationaal, *Addressing Breaches of Labour Rights in EU Trade Agreements*, 1.11.2022.
[146] See the press release *CNV Internationaal Presents Complaint in EU Parliament*, 30.3.2023.
[147] A recording of the audition is available at https://multimedia.europarl.europa.eu/en/webstreaming/inta-committee-meeting_20230321-1500-COMMITTEE-INTA (accessed in March 2023).
[148] COM(2023) 740, cit., p. 24.
[149] European Commission, *EU and Peru Agree on Cooperation Activities to Ensure Respect of Labour Rights*, 20 March 2024.
[150] European Commission, *EU and Peru Agree on Cooperation Activities to Ensure Respect of Labour Rights*, cit.
[151] COM(2024) 385, *Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Implementation and Enforcement of EU Trade Policy*, at p. 4.

Colombia a group of priority areas "to work on with a view to establishing a technical cooperation programme"[152].

The EU-Peru list of cooperation activities was not fully welcomed by CNV Internationaal. The latter regretted "that neither the local unions nor CNV Internationaal have been formally consulted on the substance of the actions", hoping to be fully involved "in the development of the actions with the Government of Colombia" and remaining, together with the domestic trade unions, "available to work constructively together with the European Commission, the government of Peru and the government of Colombia, while developing and implementing a final roadmap"[153].

7. Conclusions

Our analysis reveals the very complex and challenging structure set up by the EU to reconceive trade agreements as a driver for sustainability, thus enhancing fairness and equilibrium, environmental protection and social progress while pursuing trade liberalization. The EU approach is in line with the sustainability nature also of the WTO[154], and it has been mirrored in the initial case law of the new EU TAs as the panels have correctly interpreted both trade and TSD rules. Also the novel dispute diplomatic practice concerning previous treaties, like the EU-Algeria Euro-Mediterranean Association Agreement, is consistent with the diplomatic and promotional approach of the new EU TAs, contributing to a model of sustainable economic development and relations. The same can be said for the careful and cautious practice observed in the handling of the *CNV Internationaal* case, the TSD complaint raised by private parties through the Single Entry Point, where the Commission preferred a step-by-step solution, albeit time-consuming, to promote respect for workers in two Latin American countries.

Together with the traditional institutional actors in the governance of the global economy, stakeholders and civil society should always prefer a

[152] *Ibid.*

[153] CNV Internationaal, *Response to the SEP: A Road under Construction for Miners' Rights*, 26.03.2024.

[154] In fact, as it clearly emerges from the Preamble of the WTO Agreement, the mission of the multilateral trading system is to promote a model of *sustainable* economic development: trade liberalization is the means to "raising standards of living", so that free trade has to be pursued "while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment … enhance[ing] the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development". The case law of the WTO Appellate Body has constantly underlined this distinctive feature: "[t]he words of Article XX(g), 'exhaustible natural resources' … must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment. While Article XX was not modified in the Uruguay Round, the preamble attached to the WTO Agreement shows that the signatories to that Agreement were, in 1994, fully aware of the importance and legitimacy of environmental protection as a goal of national and international policy. The preamble of the WTO Agreement -which informs not only the GATT 1994, but also the other covered agreements- explicitly acknowledges 'the objective of sustainable development' … This concept [Sustainable Development] has been generally accepted as integrating economic and social development and environmental protection" (Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products (US-Shrimps)*, WT/DS58/AB/R, adopted 6 November 1998, para. 129 and footnote 107). On the relation between sustainable development and the WTO system see *inter alia* Xinyan ZHAO, *Integrating the UN SDGs into WTO Law*, Heidelberg, 2025.

collaborative approach when deciding to file a complaint, although now it is emerging also for the EU TAs the possibility of sanctioning serious violations within TSD proceedings. Sanctions have to remain an *extrema ratio*, while the EU should engage on the international scene to reach that "high degree of cooperation in all fields of international relations" which is one of the values at the basis of its international action[155].

The wise strategy prudently chosen by the EU in the first dispute settlement practice of the new EU TAs needs to be preserved and supported - while, of course, constantly widened and fine-tuned- as it contributed to achieving fair panel reports and constructive interim results. Together with private parties, the EU should continue to promote sustainability in the global economy with a positive dialogue aiming at encouraging shared prosperity in general, and, for developing countries, the most fruitful capacity building for the respect of universal values. All these efforts have also to be constantly implemented in a context of full transparency. In this way, other actors may be inspired by the EU's good practice; and, in case of questionable approaches, informed discussion will take place, that may lead to fair solutions.

[155] See Article 21, para. 2 of the TEU.

ImprovEUorGlobe Official Website: https://site.unibo.it/improveuorglobe/en