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PROMOTING AND ENFORCING SUSTAINABILITY: THE DISPUTE SETTLEMENT PRACTICE IN THE NEW GENERATION OF EU TRADE AGREEMENTS*

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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

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[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*, *The Sustainable Development Goals – A Commentary*, edited by I. Bantekas, F. Seatzu, Oxford, 2023; W. Huck, *Sustainable Development Goals – Article-by-Article Commentary*, Baden-Baden, 2022.

[2] Cf. I. Damjanovic, N. de Sadeleer, *Labour Standards in International Trade Agreements: A Rule of Law Perspective*, in *European Journal of Risk Regulation*, 2024, pp. 551-557; *Enhancing the Rule of Law in the European*

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

Union's External Action, edited by L.M. Hinojosa-Martínez, C. Pérez-Bernárdez, Cheltenham-Northampton, 2023; *The EU and the Rule of Law in International Economic Relations - An Agenda for an Enhanced Dialogue*, edited by A. Biondi, G. Sangioulo, Cheltenham-Northampton, 2021.

[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*, W. Weiss, C. Furculita, *Open Strategic Autonomy in EU Trade Policy - Assessing the Turn to Stronger Enforcement and More Robust Interest Representation*, Cambridge, 2024; *Law and Practice of the Common Commercial Policy - The first 10 years after the Treaty of Lisbon*, edited by M. Hahn, G. Van der Loo, Leiden, 2021.

[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 P.-T. Stoll, J. Xu, *Conflict of Jurisdictions: WTO and PTAs*, in *Law of International Trade in the Region of the Caucasus, Central Asia and Russia – Public International Law, Private Law, Dispute Settlement*, edited by A. Trunk, M. Trunk-Fedorova, A. Aliyev, 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 October 2006.

[6] On the Lisbon Treaty cf. *The EU after Lisbon - Amending or Coping with the Existing Treaties*, edited by L.S. Rossi, F. Casolari, Heidelberg, 2014;

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 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 ap-

The Treaty of Lisbon and The Future of the European Union, edited by L. Rubini, M. Trybus, Cheltenham-Northampton, 2012.

[7] On the values of the EU international action see *Coherence of the European Union Trade Policy with its Non-Trade Objectives*, edited by M. Manchin, L. Puccio, A.B. Yildrim, Cambridge, 2024; E. Kassoti, R.A. Wessel, *The Normative Effect of Article 3(5) TEU: Observance and Development of International Law by the European Union*, in *Interacciones entre el Derecho de la Unión Europea y el Derecho Internacional Público*, edited by P. García Andrade, Valencia, 2023, pp. 19-46; Y. Kaspiarovich, R.A. Wessel, *The Role of Values in EU External Relations: A Legal Assessment of the EU as a Good Global Actor*, in *Understanding the EU as a Good Global Actor: Ambitions, Values and Metrics*, edited by E. Fahey, I. Mancini, Cheltenham-Northampton, 2022, pp. 92-106; F. Casolari, *I principi del diritto dell'Unione europea negli accordi commerciali: una visione di insieme*, in *Gli accordi preferenziali di nuova generazione dell'Unione europea*, edited by G. Adinolfi, Torino, 2021; *Structural Principles in EU External Relations Law*, edited by M. Cremona, Oxford-Portland, 2018.

[8] See S.E. Akdoğan, J. Péret Tasende Társia, J. Bergamaschine Mata Diz, R.A. Wessel, *Introduction: EU External Relations Law and Sustainability*, in *EU External Relations Law and Sustainability - The EU, Third States and International Organizations*, edited by R.A. Wessel, J. Bergamaschine Mata Diz, J. Péret Tasende Társia, S.E. Akdogan, Heidelberg, 2024, pp. 1-5; A. Bradford, *The Brussels Effect: How the European Union Rules the World*, Oxford, 2020.

[9] For an overview of the new EU TAs within a general analysis of PTAs see *The Concept Design of a Twenty-First Century Preferential Trade Agreement - Trends and Future Innovations*, edited by K. Claussen, M. Elsig, R. Polanco, Cambridge, 2025; *The Sustainability Revolution in International Trade Agreements*, edited by K. Claussen, G. Vidigal, Oxford, 2024; V. 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*, in *University of Bologna Law Review*, 2023, pp. 149-186; *Mega-Regional Trade Agreements: CETA, TTIP, and TiSA*, edited by S. Griller, W. Obwexer, E. Vranes, Oxford, 2017. On the EU competence in external relations and procedure for concluding international agreements see *Diritto dell'Unione*

proach of the 2030 Agenda[10], recently reaffirmed in the Pact for the Future[11].

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

Europea – Sistema istituzionale, ordinamento, tutela giurisdizionale, competenze, edited by L. Daniele, Milano 2024; *Le relazioni esterne dell'Unione europea nel nuovo millennio*, edited by L. Daniele, 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).

[12] On the EU TSD Chapters cf. T.T. Ngo, *Vietnam's Implementation of Labour Provisions in the European Union – Vietnam Free Trade Agreement: Recent Developments and Insights*, in *Legal Issues of Economic Integration*, 2025, pp. 67-88; G. Kübek, R.A. Wessel, *Governing Sustainability through*

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].

Trade in EU External Relations: The "New Approach" and its Challenges (January 11, 2023), in *Trade and Sustainable Development: The Foreign Relations of the European Union*, forthcoming, edited by J. Bergamaschine Mata Diz, available at SSRN: *http://dx.doi.org/10.2139/ssrn.4941502*; S. Kuang, *The European Commission's Discourses on Sustainable Development in 'Trade for All': An Argumentative Perspective*, in *European Foreign Affairs Review*, 2021, pp. 265-288; G. Marín Durán, *Sustainable Development Chapters in EU Free Trade Agreements: Emerging Compliance Issues*, in *Common Market Law Review*, 2020, pp. 1031-1068; K. Hradilová, O. Svoboda, *Sustainable Development Chapters in the EU Free Trade Agreements: Searching for Effectiveness*, in *Journal of World Trade*, 2018, pp. 1019-1042.

[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. D. Bodansky, *The United Nations Framework Convention on Climate Change: A Commentary*, in *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 *The Paris Agreement on Climate Change: A Commentary*, edited by G. Van Calster, L. Reins, 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 July 2024). On the Paris Agreement and EU PTAs see C. Bertram, H. Van Coppenolle, *Strengthening the Paris Agreement through Trade? The Potential and Limitations of EU Preferential Trade Agreements for Climate Governance*, in *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 man-

The EU TAs include articulated institutional mechanisms for 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 (CSR) found in the preambles and specific provisions of those treaty instruments[18] – an approach, that of including in the trade

ner 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, *OJEU* L, 2024/2953, 20 December 2024). On the EU approach to women's empowerment in the EU trade policy cf. R. Shreeves, *Accelerating Progress on Sustainable Development Goal 5 (SDG 5) - Achieving Gender Equality and Empowering Women and Girls*, in *EPRS | European Parliamentary Research Service*, PE 762.403, September 2024; K. Martins Sckayer Abicalam, *Women's Empowerment Through International Trade: Current Challenges and Perspectives*, in *Diritto comunitario e degli scambi internazionali*, 2022, pp. 323-363.

[17] See A. Mensi, *The Contribution of Civil Society in the Implementation of Sustainable Development Commitments in EU Preferential Trade Agreements*, in *Diritto del commercio internazionale*, 2023, pp. 903-935; D. Martens, D. Potjomkina, J. Orbie, *Domestic Advisory Groups on EU Trade Agreements - Stuck at the Bottom or Moving up the Ladder?*, Friedrich-Ebert-Stiftung, November 2020.

[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 pur-

agreements «effective [CSR clauses] … with concrete guidelines for investors»[19], sponsored by the European Parliament (EP)[20], in line with its traditional promotion of human rights and democracy in the EU treaty instruments[21].

Recently, the EU has activated the bilateral dispute settlement mechanisms (DSMs) of the new TAs. The reports issued so far[22] consistently emphasize issues related to sustainability.

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sue 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] See P7 TA(2013)0411, *European Parliament Resolution of 9 October 2013 on the EU-China Negotiations for a Bilateral Investment Agreement* (2013/2674(RSP)), para. 33.

[20] In the ad hoc 2010 Resolution, the European Parliament expressed «the view, in the light of the key role played by corporations, their subsidiaries and their supply chains in international trade, that corporate social and environmental responsibility must become an integral part of the European Union's trade agreements» (see P7_TA(2010)0446, *European Parliament Resolution of 25 November 2010 on Corporate Social Responsibility in International Trade Agreements* (2009/2201(INI)), para. 7.

[21] See e.g. P6_TA(2006)0056, *European Parliament Resolution on the Human Rights and Democracy Clause in European Union Agreements of 14 February 2006* (2005/2057(INI)), where the EP «emphasise[d] that it [was] no longer prepared to give its assent to new international agreements that [did] not contain a human rights and democracy clause» (at para. 10).

[22] They are the following three panel reports: *Ukraine - Wood Export Bans*, *Restrictions Applied by Ukraine on Exports of Certain Wood Products*

Notably, the *Korea - Labour Commitments* case specifically focuses on enforcing certain provisions of the TSD Chapter within the EU-South Korea Free Trade Agreement[23]. 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)[24] or is being resolved diplomatically (the initiative launched by the Dutch NGO CNV Internationaal)[25].

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[26], while the models of the new EU Trade Agreements (TAs) are significantly more structured[27]. The re-

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.

[23] 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.

[24] See below paragraph 5 of this chapter.

[25] Cf. *infra*, paragraph 6.

[26] See *infra*, in paragraph 5, the dispute settlement procedure of the EuroMediterranean Association Agreement between the EU and Algeria.

[27] For a complete overview of DSMs in EU trade agreements see I. Garcia Bercero, *Dispute Settlement in European Union Free Trade Agreements: Lessons Learned?*, in *Regional Trade Agreements and the WTO Legal System*, edited by L. Bartels, F. Ortino, Oxford, 2006, pp. 383-405.

cent 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[28].

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 the latter ones 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»[29]; 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»[30]. Should the panel report not be respected within a reasonable period of time, 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»[31]. 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 Par-

[28] For these aspects see I. Espa, *Enforcing Sustainability Obligations – Adjudication and Post-Adjudication Enforcement*, in *The Sustainability Revolution in International Trade Agreements*, cit., pp. 217-233; J.J. Nedumpara, *Dispute Settlement in International Trade Agreements: Prospective Pathways*, in *Global Trade and Customs Journal*, 2022, pp. 261-265.

[29] Article 14.16, Rules of interpretation, of the EU-Korea FTA.

[30] Article 15.6, Terms of Reference of the Arbitration Panel, of the EU-Vietnam FTA.

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

ties] to act in a manner inconsistent with their obligations under the WTO Agreement»[32]. 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]»[33]. 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»[34]. 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[35].

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

[32] 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.

[33] 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.

[34] Article 16.3, entitled «Evolving WTO Law», of the EU-Vietnam FTA.

[35] On the relation of PTAs with the WTO system see E. Baroncini, *The WTO Case-Law on the Relation Between the Marrakesh System and Regional Trade Agreements*, in *EuR Europarecht*, Beiheft 1 / 2017 - *Europa im Umbrucht*, edited by P. Hilpold, Nomos, 2017, pp. 57-75.

explicitly allowed[36]. 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»[37]. 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»[38]. Furthermore, the *amicus curiae* submissions «shall contain a 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»[39].

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»[40]. 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»[41]. 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 Adviso-

[36] Cf. T. Jürgensen, *Dispute Settlement Mechanisms in Free Trade Agreements with the European Union*, in *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.

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

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

[39] Paragraph 45 of Annex 29 A – Rules of Procedure for Arbitration, EU-Canada CETA.

[40] Article 13.12, para. 4 of the EU-Korea FTA.

[41] Article 13.12, para. 5 of the EU-Korea FTA.

ry Groups»[42], 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»[43]. 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]»[44]. Likewise, the intergovernmental body has to «endeavour to agree on a resolution of the matter»[45], 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[46]. 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[47]. 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»[48]. To achieve such coherence, both the Parties and the panel «can» or «should seek information and advice» from those organisations or bodies[49]. In the adju-

[42] Article 13.14, para. 1 of the EU-Korea FTA.
[43] Article 13.14, para. 2 of the EU-Korea FTA.
[44] Article 13.14, para. 3 of the EU-Korea FTA.
[45] *Ibidem*.
[46] See Article 13.14, para. 4 of the EU-Korea FTA.
[47] See e.g. Article 13.15 of the EU-Korea FTA.
[48] Article 13.14, para. 2 of the EU-Korea FTA.
[49] See Articles 13.14, para. 2, and 13.15, para. 1 of the EU-Korea FTA.

dicatory 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»[50]. 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[51]. The 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»[52]. It is nevertheless likely that sanctioning a country that struggles to respect core values might not improve the respect of those values in a timely manner. 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.

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[50] See Article 13.15, para. 2 of the EU-Korea FTA, emphasis added.

[51] 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 June 2022, pp. 11-12.

[52] COM(2022) 409, cit., p. 12. See Article 26.16, para. 2, let. b) of the EU-New Zealand FTA.

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"»[53]. By contrast, the 2005 export ban on ten rare and valuable wood species of low commercial use was justified under the plant life or 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»[54].

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 per-

[53] *Ukraine – Wood Export Bans* Panel Report, para. 507.

[54] *Ibidem*. See European Commission, *The History of the EU-Ukraine Dispute on Wood Export Bans – Memo*, 12 December 2020.

sons, 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»[55], the Panel considered that the Korean practice was lengthy, its efforts were «less than optimal», and that there was «still much to be done»[56]. Nevertheless, the group of experts overall concluded that Korea made «tangible, though slow, efforts»[57], and it was thus respecting the legal standard set out in the last sentence of Article 13.4.3 of the EU-Korea FTA.

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 Economic Partnership Agreement (EU-SADC EPA)[58] because «it was not related to a product that "is being imported" (given the time lapse between the determina-

[55] Article 13.4, para. 3, second sentence of the EU-Korea FTA.

[56] *Korea - Labour Commitments* Panel Report, para. 291. On this panel report see L. Boisson de Chazournes, J. Lee, *The European Union–Korea Free Trade Agreement Sustainable Development Proceeding: Reflections on a Ground-Breaking Dispute*, in *Journal of World Investment & Trade*, 2022, pp. 329-346; A. Nissen, *Not That Assertive: The EU's Take on Enforcement of Labour Obligations in Its Free Trade Agreement with South Korea*, in *European Journal of International Law*, 2022, pp. 607-630; T. Novitz, *Sustainable Labour Conditionality in EU Free Trade Agreements? Implications of the EU-Korea Expert Panel Report*, in *European Law Review*, 2022, pp. 3-23; C. Zhao, *Implementing and Enhancing Labour Standards Through FTAs? A Critical Analysis of the Panel Report in the EU-Korea Case*, in *Journal of World Trade*, 2022, pp. 939-962; J.S. Han, *The EU-Korea Labor Dispute: A Critical Analysis of the EU's Approach*, in *European Foreign Affairs Review*, 2021, pp. 531-552; L. Koen, D. Rammila, *The EU-Korea Panel Report: A Watershed Moment for the Trade-Labor Nexus or Mere Symbolic Victory?*, in *Journal of International Trade, Logistics and Law*, 2021, pp. 53-58.

[57] *Korea – Labour Commitments* Panel Report, para. 287.

[58] 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,

tion, provisional measure, and definitive measure); and … it exceeded "what is necessary to remedy or prevent the serious injury or disturbances"»[59].

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 our work, attention will be devoted to the contributions given within the panel proceedings to the «sustainability revolution»[60] 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*

of the one part, and the SADC EPA States, of the other part, *OJEU* 2016, L250/1.

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

[60] This expression is borrowed from *The Sustainability Revolution in International Trade Agreements*, cit.

submissions in the proceedings[61]. 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»[62] 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[63], and presenting the *amici*, their interest in participating to the complaint, and their source of financing.

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»[64]. Instead, in *Korea - Labour Commitments*, six institutions and 22 individuals presented *amicus curiae* briefs[65]. Even if the Group of experts did not summarize the content of each submission, they considered them with «full regard»[66] and underlined their relevance, in particular of the *amicus* briefs filed by trade unions, to assess the scope and ap-

[61] 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.

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

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

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

[65] See Appendix, let. b) of the *Korea - Labour Commitments* Panel Report.

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

plication of some parts of the contested Korean legislation[67]. 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[68]. 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»[69], 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»[70], 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

[67] 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"».

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

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

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

trade unions «be referred to [the] consultative bodies established under Article 13.12 of the EU-Korea FTA for *continued consultations*»[71]. 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 …"»[72]. 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[73]: the duty

[71] *Korea - Labour Commitments* Panel Report, para. 258, emphasis added.

[72] *Korea - Labour Commitments* Panel Report, para. 56.

[73] 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

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»[74]. 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»[75]. The Group of Experts further reinforced this relevant finding highlighting that the new structure of the EU TAs clearly makes sustainable development measures «a constitutive element»[76] of those agreements, thus promoting a new evolving concept of trade:

(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».

[74] *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).

[75] *Korea - Labour Commitments* Panel Report, paras. 67-68, emphasis added.

[76] This is how the *Korea - Labour Commitments* Panel Report is commented by G. Vidigal, *Regional Trade Adjudication and the Rise of Sustainability Disputes:* Korea - Labor Commitments *and* Ukraine - Wood Export Bans, in *American Journal of International Law*, 2022, pp. 567-578. See also A. Borowicx, R. Daugeliene, *The Role of EU Trade Agreements in Light of the Sustainable Development Goals*, in *Global Public Goods and Sustainable Development in the Practice of International Organizations - Responding to Challenges of Today's World*, edited by E. Latoszek, A. Kłos, Leiden-Boston, 2023, pp. 172-191.

> «… 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*»[77].

Korea also contended that the TSD Chapter was not legally binding[78], the 1998 ILO Declaration recalled in Article 13.4.3 «may not, as a matter of law, impose any binding obligations on ILO members»[79], and «the term "will" in the last sentence of Article 13.4.3 … is "more akin to a declaration of intent than an obligation"»[80]. 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[81]. 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[82] generates «an obligation of "best endeavours"», which means that «the standard against

[77] *Korea - Labour Commitments* Panel Report, para. 95, emphasis added.
[78] See *Korea - Labour Commitments* Panel Report, para. 49.
[79] *Korea - Labour Commitments* Panel Report, para. 120.
[80] *Korea - Labour Commitments* Panel Report, para. 262.
[81] *Korea - Labour Commitments* Panel Report, para. 107.
[82] See *supra* the text of Article 13.4, para. 3 of the EU-Korea FTA reported in footnote 58.

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»[83].

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»[84].

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"»[85]. The adjudicators also remarked that EU «agreed … that the preservation from extinction of any wood species

[83] *Korea - Labour Commitments* Panel Report, para. 277.
[84] *Korea - Labour Commitments* Panel Report, para. 95.
[85] *Ukraine - Wood Export Bans* Panel Report, para. 308.

is a legitimate interest of high importance»[86]. Furthermore, the Arbitration Panel qualified the TSD Chapter of the EU-Ukraine AA, i.e. Chapter 13, as «relevant context»[87] 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 high 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[88] and Article 294 on trade in forest products[[89]]) *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 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»[90].

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

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[86] *Ibidem*.

[87] *Ukraine - Wood Export Bans* Panel Report, para. 253.

[88] 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».

[89] According to Article 294, headed «Trade in forest products», of the EU-Ukraine AA, «[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».

[90] *Ukraine – Wood Export Bans* Panel Report, para. 332, emphasis added.

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[91]. 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»[92].

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»[93].

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, and perhaps also inspired the debate which led to the 2022 Commission's communication «to further enhance the contribution of trade agreements to sustainable development»[94]. This policy document advocates for the «mainstreaming [of] TSD objectives

[91] See *SACU – Poultry Safeguards* Panel Report, para. 89, emphasis added.

[92] *SACU – Poultry Safeguards* Panel Report, para. 167, emphasis added.

[93] *SACU – Poultry Safeguards* Panel Report, para. 324, emphasis added.

[94] COM(2022) 409, cit., p. 1.

throughout trade agreements»[95], 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 entered into force on 1 September 2005[96]. 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[97]. 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»[98].

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[95] COM(2022) 409, cit., p. 7.

[96] 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.

[97] 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.

[98] A. van der Meulen, A. Grimm, R. Apalara, *EU initiates second dispute settlement procedure with Algeria over trade restrictions – with implications for potential investment arbitrations*, Freshfield, 1 July 2024.

As Algeria is not yet a Member of the WTO, although having started negotiations for accession to the multilateral trade system in 1987[99], 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»[100]. 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»[101]. «The other Party must then appoint a second arbitrator within two months»[102]; afterwards, the Association Council selects a third arbitrator, forming an adjudicatory body of three members whose decisions «shall be taken by majority vote»[103].

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[104]. 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 des efforts politiques ciblés de la part de l'Union européenne»[105], 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

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

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

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

[102] *Ibidem*.

[103] *Ibidem*.

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

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

products, including cars and private vehicles, significantly increased the customs duties of many goods, covering also «telecommunications components, modems, cables and electrical appliances»[106], and introduced a very complex system for granting import or export licences, all measures considered as incompatible with Article 17 of the AA[107]. 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»[108], 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»[109], 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

[106] 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 May 2021, p. 2.

[107] 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».

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

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

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) [110] of the 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»[111]. 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[112], a move that luckily «intensified technical consultations for agreeing on an amicable solution»[113]. In

[110] 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 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».

[111] 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 May 2021.

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

[113] SWD(2021) 297*, Commission Staff Working Document - Individual information sheets on implementation of EU Trade Agreements*, Brussels, 27

fact, some of the challenged measures were removed. But Algeria nonetheless introduced new barriers, maintaining trade flow disruptions and foreign investment reduction[114].

Hence, in June 2024, the EU presented a new *note verbale* to the EU-Algeria Association Council[115]. 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 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»[116]. 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 Alge-

October 2021, p. 43.

[114] 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 November 2023, p. 48.

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

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

ria 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 Agreement[117]. 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»[118], 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»[119]. 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, 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[120].

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[121], and the current economic reality is very distant from the one existing at the beginning of the new

[117] *Note Verbale Launching a Dispute Settlement Case against Algeria to Address Several Restrictions Imposed on EU Exports and Investments*, cit. pp. 2-3.

[118] European Commission, *EU Begins Dispute Settlement Proceedings against Algeria to Defend European Companies*, Brussels, 14 June 2024.

[119] 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.

[120] *Note Verbale Launching a Dispute Settlement Case against Algeria to Address Several Restrictions Imposed on EU Exports and Investments*, cit., p. 4.

[121] Cf. D. Ghanem, *Rocky Road Ahead: The Challenges of Eu-Algeria Relations*, in *ISPI*, 23 July 2024.

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»[122]. It is also important to underline that, despite the economic tensions, which are accompanied by the sensitive dossier on migration[123], the EU constantly engages with Algeria through its several financing cooperation programmes, especially on energy transition and climate action, beyond local sustainable development[124]. The EU approach through its financing regulations on development is fully coherent 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»[125].

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

[122] Le Monde, *L'Algérie veut renégocier l'accord avec l'Union européenne selon un "principe gagnant-gagnant"*, 27 January 2025.

[123] See T. Abderrahim, *Maghreb Migrations: How North Africa and Europe Can Work Together on Sub-Saharan Migration*, in *Policy Brief, European Council on Foreign Relations*, 5 September 2024; F. Zardo, C. Loschi, *EU-Algeria (Non)Cooperation on Migration: A Tale of Two Fortress*, in *Mediterranean Politics*, 2022, pp. 148-169.

[124] 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*.

[125] 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.

agreements, as highlighted earlier when discussing dispute settlement mechanisms in the new EU TAs. In this context, the Single Entry Point (SEP)[126] 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[127], 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[128]. 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[129]. To date, this is the only EU administrative avenue available to private parties, who are not

[126] 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*.

[127] Cf. E. Baroncini, *L'approccio al contenzioso internazionale per il libero scambio dell'Unione europea*, in *Enforcement & Law-Making of the EU Trade Policy*, edited by E. Baroncini, I. Espa, M.L. Marceddu, L. Mulas, S. Saluzzo, AMS Acta – AlmaDL, Università di Bologna, Bologna, 2022, pp. 1-40, at p. 30 ff.

[128] 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 October 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 November 2023.

[129] 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.

economic operators or association of economic operators, «to flag to the Commission situations of alleged non-compliance of [sustainability] obligations» by third States[130]. Unlike the EU Trade Barriers Regulation[131], 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»[132].

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[133]. The case is of great interest because CNV Internationaal filed the complaint in support of three Latin

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[130] G. Gruni, *Labour Standards in EU Free Trade Agreements - Substantive Issues and Recent Developments Concerning Their Enforcement*, in *The Sustainability Revolution in International Trade Agreements*, cit., pp. 89-105, at p. 99.

[131] 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 October 2015.

[132] 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.

[133] Cf. CNV Internationaal, *Our Work*, available at the link *www.cnvinternationaal.nl/en/our-work*.

American trade unions – two from Colombia and one from Peru[134], arguing that Colombia and Peru did not respect the TSD Chapter of the Multi-Party Trade Agreement with the European Union[135]. The complaint cites several legal grounds, including the responsible exercise of economic activities by entrepreneurs and private companies, and, therefore, the compliance of the latter with the standard of *due diligence* with reference to fundamental rights[136].

Warmly welcomed by the CTEO[137], 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 work-

[134] 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 *www.cnvinternationaal.nl/en/our-work/news/2022/may/subcontracting-a-major-breach-of-labour-rights-in-eu-trade-agreements*.

[135] 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 December 2012. Ecuador later joined the Multi-Party Trade Agreement: 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 December 2016.

[136] Cf. CNV Internationaal, *Subcontracting: A Major Breach of Labour Rights in EU Trade Agreements*, 16 May 2022. On *due diligence* in international law see, *inter alia, Due Diligence in the International Legal Order*, edited by J. Krieger, A. Peters, L. Kreuzer, Oxford, 2020; A. Ollino, *Due Diligence Obligations in International Law*, Cambridge, 2002.

[137] D. Redonnet, *First Formal Complaint on Trade and Sustainable Development Received*, tweet of 19 May 2022.

force 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[138].

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

[138] 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 *www.cnvinternationaal.nl*, 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*.

standards as contained in the fundamental Conventions of the International Labour Organisation»[139], in particular «the freedom of association and the effective recognition of the right to collective bargaining … and the elimination of discrimination in respect of employment and occupation»[140]. 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»[141]; 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»[142]. 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»[143].

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

[140] *Ibidem*.

[141] Article 277, para. 1 of the EU-Colombia-Peru-Ecuador Trade Agreement.

[142] Article 277, para. 2 of the EU-Colombia-Peru-Ecuador Trade Agreement.

[143] See Articles 267, para. 2, let. b), 269 and 270 of the EU-Colombia-Peru-Ecuador Trade Agreement.

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»[144]. Thus, the commitment to «human rights due diligence»[145] referable to «best business practices related to corporate social responsibility»[146], 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»[147]. Subsequently, CNV Internationaal informed that the European 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

[144] 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.

[145] *Ibidem*.

[146] Article 271, para. 3 of the EU-Colombia-Peru-Ecuador Trade Agreement.

[147] See CNV Internationaal, *New Colombian Government Listens to Miners*, 25 August 2022.

energy supply»[148]. 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»[149]. 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[150].

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[151].

A first interim officially announced result, even if partial, was presented in March 2024. The Commission 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»[152]. 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

[148] Cf. CNV Internationaal, *Addressing Breaches of Labour Rights in EU Trade Agreements*, 1 November 2022.

[149] See the press release *CNV Internationaal Presents Complaint in EU Parliament*, 30 March 2023.

[150] A recording of the audition is available at *https://multimedia.europarl.europa.eu/en/webstreaming/inta-committee-meeting_20230321-1500-COMMITTEE-INTA*.

[151] COM(2023) 740, cit., p. 24.

[152] European Commission, *EU and Peru Agree on Cooperation Activities to Ensure Respect of Labour Rights*, 20 March 2024.

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»[153]. In fact, the established EU-Peru cooperation activities «will be supported by an extensive EU technical and financial programme»[154]. In the 2024 Enforcement Report, it is also stated that the EU has defined also with Colombia a group of priority areas «to work on with a view to establishing a technical cooperation programme»[155].

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»[156].

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 when pursuing trade liberalization. The EU approach is in line with

[153] European Commission, *EU and Peru Agree on Cooperation Activities to Ensure Respect of Labour Rights*, cit.

[154] 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.

[155] *Ibidem*.

[156] CNV Internationaal, *Response to the SEP: A Road under Construction for Miners' Rights*, 26 March 2024.

the sustainability nature also of the WTO[157], 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 soci-

[157] 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* X. Zhao, *Integrating the UN SDGs into WTO Law*, Heidelberg, 2025.

ety should always prefer a 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[158].

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.

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

Abstract

Elisa Baroncini, Promoting and Enforcing Sustainability: The Dispute Settlement Practice in the New Generation of EU Trade Agreements

The EU trade policy is characterized by the constant effort to respect and promote sustainable development. At the bilateral level, the EU pursues its political agenda through the new generation of trade agreements (TAs) which also feature ambitious chapters focused on trade and sustainable development (TSD Chapters). The EU has recently 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 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 is also devoted to the practice of bilateral litigation that has not (yet) been settled (a complaint raised by the EU against Algeria) or is being resolved diplomatically (the initiative launched by the Dutch NGO CNV Internationaal).

Key words: EU trade policy, EU trade agreements, sustainable development, dispute settlement mechanisms, civil society.

Elisa Baroncini, Promozione ed *enforcement* della sostenibilità: la prassi di risoluzione delle controversie nella nuova generazione di accordi commerciali dell'Unione europea

La politica commerciale dell'Unione europea è caratterizzata dal costante impegno a rispettare e promuovere lo sviluppo sostenibile. A livello bilaterale, l'UE persegue la sua agenda politica attraverso una nuova generazione di accordi commerciali, caratterizzati anche da ambiziosi capitoli dedicati a commercio e sviluppo sostenibile (*Trade and Sustainable Development Chapters*, TSD Chapters). L'UE ha recentemente attivato i meccanismi bilaterali di risoluzione delle controversie dei nuovi accordi commerciali, e i report sinora adottati sottolineano costantemente le questioni legate alla sostenibilità. In particolare, il caso *Korea - Labour Commitments* riguarda

proprio l'applicazione di alcune disposizioni del *TSD Chapter* dell'Accordo di libero scambio UE-Corea del Sud. L'obiettivo del presente lavoro è quello di evidenziare le questioni relative alla sostenibilità nei contenziosi avviati dall'UE, dopo una breve presentazione degli aspetti chiave dei meccanismi di risoluzione delle controversie che possono essere utilizzati dalle Parti contraenti dei nuovi accordi UE. Nel tentativo di proporre un quadro il più possibile completo per la nostra analisi, verranno anche considerati i reclami non ancora risolti (si tratta di una controversia tra l'Unione europea e l'Algeria) o che sono in via di risoluzione diplomatica (l'iniziativa lanciata dall'ONG olandese CNV Internationaal).

Parole chiave: politica commerciale dell'Unione europea, accordi commerciali dell'UE, sviluppo sostenibile, meccanismi di risoluzione delle controversie, società civile.