SEMINARIO GIURIDICO
DELLA UNIVERSITÀ DI BOLOGNA
CCCXLIII

# SUSTAINABLE DEVELOPMENT AS FUNDAMENTAL PILLAR OF ECONOMIC GOVERNANCE AND PUBLIC AFFAIRS

## The EU Approach and International and Domestic Perspectives

Edited by
ELISA BARONCINI, FEDERICO CASOLARI
PIETRO MANZINI, ATTILA MASSIMILIANO TANZI
GRETA TELLARINI

with the collaboration of ALESSANDRA QUARTA

Bologna
University Press

SEMINARIO GIURIDICO
DELLA UNIVERSITÀ DI BOLOGNA
CCCXLIII

# SUSTAINABLE DEVELOPMENT AS FUNDAMENTAL PILLAR OF ECONOMIC GOVERNANCE AND PUBLIC AFFAIRS

## The EU Approach and International and Domestic Perspectives

Edited by
ELISA BARONCINI, FEDERICO CASOLARI
PIETRO MANZINI, ATTILA MASSIMILIANO TANZI
GRETA TELLARINI

with the collaboration of ALESSANDRA QUARTA

Bologna
University Press

Il volume beneficia di un contributo per la pubblicazione da parte del Dipartimento di Scienze Giuridiche - Alma Mater Studiorum Università di Bologna.




This open-access book is published as an implementing activity of Jean Monnet Module (Program Erasmus+) "Re-Globe - Reforming the Global Economic Governance: The EU for SDGs in International Economic Law" with the support of the Erasmus+ Program of the European Union under the Jean Monnet Action (2022-2025) coordinated by Prof. Dr. Elisa Baroncini (project number Erasmus-JMO2021-module 101047917). The contents reflect the views only of the authors. The Commission cannot be held responsible for any use which may be made of the information contained therein.

Fondazione Bologna University Press
Via Saragozza 10, 40123 Bologna
tel. (+39) 051 232 882

www.buponline.com
e-mail: info@buponline.com



ISSN 2283-916X
ISBN 979-12-5477-597-4
ISBN online 979-12-5477-598-1
DOI 10.30682/sg343

Impaginazione: DoppioClickArt, San Lazzaro di Savena (Bologna)

Prima edizione: febbraio 2025

CONTENTS

## Session VI. Sustainable Development, FTAs and the EU

# FOREWORD

## THE RE-GLOBE JEAN MONNET MODULE PROJECT

After three years of very intense activity, I am proud to present this open-access book, the final representative publication gathering most of the results of the several initiatives proposed within the Jean Monnet Module "Re-Globe – Reforming the Global Economic Governance: The EU for SDGs in International Economic Law". Since its conception, the Re-Globe Project has been a fascinating and formative challenge, allowing me to work with a highly authoritative and very supportive Re-Globe Research Team, formed by distinguished and dedicated Colleagues – Professors Attila Tanzi, Alessandra Castellini, Gian Maria Farnelli, Ludovica Chiussi Curzi – and young scholars -Doctors Niccolò Lanzoni, Andrea Mensi and Ludovica Mulas; and Isola Clara Macchia, Alessandra Quarta, Klarissa Martins Sckayer Abicalam and Giulia Bortino.

With their encouragement, in a context of constant interaction of the academia with the institutional and business communities, I could realize five Re-Globe Conferences, several open-access articles, and many seminars attracting bright scholars from all over the world, who generously shared their research with the national and international Re-Globe students of the University of Bologna, and the Italian, European and international academic experts attending the Re-Globe events[1]. The new generation of EU Trade Agreements

[1] For a complete report of the Re-Globe activities see the dedicated Re-Globe website at the link https://site.unibo.it/reglobe/en.

has been analyzed in its many novel aspects, and compared with other major regional trade treaties; the EU approach to reforming the WTO and innovating international investment law has been among the topics of constant debate; sustainability in the international trade and investment case law has been thoroughly examined; international energy and climate law were observed through the EU contribution in those fields; while the EU policy for a net zero economy, the unilateral measures outlined in the EU Green Deal[2], the instruments of the EU Open Strategic Autonomy[3], such as the EU Anti-Coercion Instrument[4], have been closely examined through the lens of their compatibility with WTO law and international law more generally.

Many other key policies and topics related to the promotion of sustainability have been investigated within the increasingly rich and complex action of the EU in the global economy. This has been facilitated by the interdisciplinary approach of Professor Alessandra Castellini, who delivered important seminars on sustainability in the EU approach to international agricultural trade. Significant developments in climate change litigation and the responsibilities of the business community to achieve sustainability in their economic activities have also been researched and proposed to the Re-Globe students and the academic and institutional communities.

And yet, despite three years of humble -but always very intense and dedicated- work, the only certainty achieved is that our research commitment has to continue, and everything has to be reconsidered, because of the unprecedented challenges and changes brought by our current very demanding times. While exploring the new con-

---

[2] COM(2019) 640, *Communication from the Commission to the European Parliament, the European Council, the European Economic and Social Committee and the Committee of the Regions – The European Green Deal*, Brussels, 11.12.2019.

[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, 18.2.2021.

[4] *Regulation (EU) 2023/2675 of the European Parliament and of the Council of 22 November 2023 on the protection of the Union and its Member States from economic coercion by third countries*, in *OJEU* L, 2023/2675, 7.12.2023.

cepts and strategies of economic -and national- security[5] and economic foreign policy[6], it is important to consistently maintain a sustainable, cooperative, approach: it is in fact in the genetic code of the process of European integration to look for and promote a "high degree of cooperation in all fields of international relations", which is one of the values at the basis of the EU international action[7]. In addition to the pursuit of sustainability in establishing new substantive international rules, it is crucial to pay attention to pressing institutional issues. These include the importance of upholding the EU principle of representative democracy and respecting the EU institutional equilibrium considering the mounting tide of soft law[8] and the many emergencies invoked.

In my opinion, the Department of Legal Studies and the University of Bologna express the human capital to undertake this challenging endeavour. And here I would like to express my gratitude to Professor Michele Caianiello, who was the Director of the Department of Legal Studies when I started the Re-Globe Project, and Professor Federico Casolari, my current Director, under whose guide I am sure we may give our contribution in suggesting strategies and rules of sustainability for our difficult times.

---

[5] JOIN(2023) 20, *On "European Economic Security Strategy", Joint Communication to the European Parliament, the European Council and the Council*, Brussels, 20.6.2023.

[6] See *Europe's Choice – Political Guidelines for the Next European Commission 2024-2029, Ursula von der Leyen Candidate for the European Commission President*, Strasbourg, 18.7.2024, pp. 26-28.

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

[8] See the request by the European Parliament to "suspend" the Memorandum of Understanding on Sustainable Partnership on Sustainable Raw Materials Value Chains between the European Union Represented by the European Commission and the Republic of Rwanda signed on 19 February 2024, despite the expressly stated non-binding nature of the MoU in P10_TA(2025)0020, *Escalation of Violence in the Eastern Democratic Republic of the Congo*, European Parliament Resolution of 13 February 2025 on the Escalation of Violence in the Eastern Democratic Republic of the Congo (2025/2553(RSP)): the European Parliament "[u]rges the Commission and the Council to immediately suspend the EU-Rwanda MoU on sustainable raw materials value chains until Rwanda proves that it is ceasing its interference and its exportation of minerals mined from M23-controlled areas; calls on all actors to increase transparency and to effectively ban the entry of all blood minerals into the EU" (para. 11).

Beyond the already recalled cooperative Re-Globe Research Team, and my former and current authoritative Directors, I am also grateful to the Research Offices of the Department of Legal Studies and the University of Bologna, the UNIBO Graphic Design Office, that authored the remarkable Re-Globe logos, and the UNIBO Web-Desk, who featured the very useful Re-Globe website.

Without the continuous caring and kind presence of all the recalled people, the fascinating and demanding adventure of the Re-Globe Project would not have been possible.

*Elisa Baroncini, Re-Globe Coordinator*
*Bologna - Ravenna, February 2025*

# INTRODUCTION

In 1987, sustainable development was defined by the UN World Commission on Environment and Development as the development that "meets the needs of the present without compromising the ability of future generations to meet their own needs"[1]. It has subsequently been recalled in the preamble and the text of the major international agreements of global governance (e.g. the 1992 UN Framework Convention on Climate Change (UNFCCC)[2] and the 2015 Paris Agreement[3]; the WTO Agreement[4]; the most recent regional trade[5] and investment agreements[6]). In the UN 2030 Agenda entitled "Transforming our World", adopted in 2015, the principle of sustainable development has been articulated in the 17 Sustainable Development Goals (SDGs) to be realized with "the participa-

---

[1] United Nations, *Report of the World Commission on Environment and Development: Our Common Future*, 1987, para. 27.

[2] *United Nations Framework Convention on Climate Change*, New York, 9 May 1992, *United Nations Treaty Series*, vol. 1771, p. 107.

[3] UNFCCC, *Decision 1/CP.21 (2016), Adoption of the Paris Agreement (FCCC/CP/2015/10/Add.1)*.

[4] World Trade Organization, *The Legal Texts - The Results of the Uruguay Round of Multilateral Trade Negotiations*, Cambridge, 2011.

[5] See e.g. the *Free Trade Agreement between the European Union and New Zealand*, in *OJEU* L, 2024/229, 28.2.2024.

[6] See e.g. the *Sustainable Investment Investment Facilitation Agreement between the European Union and the Republic of Angola*, in *OJEU* L, 2024/830, 8.3.2024.

tion of all countries, all stakeholders, and all people"[7]. In July 2022, the UN General Assembly recognized "the right to a clean, healthy and sustainable environment as a human right"[8]. And, in September 2024, in the UN Pact for the Future "the Heads of State and Government, representing the peoples of the world"[9] declared to remain focused and committed to achieving the SDGs by 2030, considering sustainable development as a pillar of the United Nations: "sustainable development in all its three dimensions [economic development, environmental protection, social progress] is a central goal in itself and […] its achievement, leaving no one behind, is and always will be a central objective of multilateralism"[10].

Sustainable development is thus a pillar for the life of collectivities and the International Community: and the European Union is a major actor in promoting sustainability at every level – local, regional and international – as it has consistently considered sustainable development a core principle of the internal market and the EU's international action, becoming a virtuous model which is constantly referred to and inspires domestic and international institutions.

Our Department of Legal Studies hosts and supports also the Re-Globe Jean Monnet Module Project, which focuses on examining the European Union's role as a major promoter of sustainability in International Economic Law. It was thus only natural for us to join forces, share our knowledge and support a Re-Globe International Conference which welcomed major experts, civil servants, academics, and senior and junior scholars from around the world to present their research and engage in discussions about how relevant is the EU approach in promoting sustainability in every aspect of the public sphere and private activities, and how it can be further improved "in a balanced and integrated manner"[11].

---

[7] A/RES/70/1, *Transforming our World: the 2030 Agenda for Sustainable Development*, Resolution adopted by the General Assembly on 25 September 2015, p. 2.

[8] A/RES/76/300, *The Human Right to a Clean, Healthy and Sustainable Environment*, Resolution adopted by the General Assembly on 28 July 2022, p. 3.

[9] A/RES/79/1, *The Pact for the Future*, Resolution adopted by the General Assembly on 22 September 2024, para. 1.

[10] *Ibid.*, para. 10.

[11] *Ibid.*, para. 81.

The Ravenna Campus of the University of Bologna was selected as the venue for this high-level event, where we could also benefit from the generous support and hospitality of Fondazione Flaminia and its President Mirella Falconi and Director Antonio Penso, and of the Port System Authority of Ravenna and its President Daniele Rossi.

The result of our joint initiative is proposed in this open-access book, which also includes papers presented in other Re-Globe seminars: the EU approach to sustainability thus innervates the essays of the contributors in investment, trade, energy, finance and transport law.

We are grateful to Alessandra Quarta for her support in editing this publication, and we hope readers may appreciate it and that further research is attracted through it.

*Elisa Baroncini, Federico Casolari, Pietro Manzini,*
*Attila Massimiliano Tanzi, Greta Tellarini*
*Bologna - Ravenna, February 2025*

SESSION I

# THE PATH TOWARDS SUSTAINABILITY IN INTERNATIONAL INVESTMENT LAW

# COMPARING DIVERSE APPROACHES TO INTEGRATE SUSTAINABLE DEVELOPMENT PROVISIONS IN THE EU AND GLOBAL SOUTH INTERNATIONAL INVESTMENT AGREEMENTS

*Aditi Pandey*

## 1. *Introduction*

Foreign direct investment (FDI) has always been an important tool for financing development, and its significance and spill over effects are even more prominent in developing and least developed countries[1]. If managed properly, foreign investment can improve access to essential services such as water, education and health care, which, in turn, can contribute in achieving the United Nations Sustainable Development Goals (UNSDGs)[2]. Foreign investment can also facilitate in the generation and dissemination of knowledge and technology, support entrepreneurship, job creation and other multi-

[1] L. Alfaro, J. Chauvin, *Foreign Direct Investment, Finance, and Economic Development*, 2020, https://www.worldscientific.com/doi/abs/10.1142/9789811200595_0011 (accessed on 31 December 2023); *The Effect of Foreign Direct Investment on the Economic Growth of Sub-Saharan African Countries: An Empirical Approach*, https://www.tandfonline.com/doi/epdf/10.1080/23322039.2022.2038862?needAccess=true (accessed on 31 December 2023); W. Alschner, E. Tuerk, *The Role of International Investment Agreements in Fostering Sustainable Development*, in F. Baetens (ed.), *Investment Law within International Law*, 1st ed., Cambridge University Press, 2013, https://www.cambridge.org/core/product/identifier/9781139855921%23c03888-9-1/type/book_part (accessed on 31 December 2023).

[2] United Nations - Department of Economic and Social Affairs, *Transforming Our World: The 2030 Agenda for Sustainable Development*, https://sdgs.un.org/2030agenda (accessed on 15 August 2023).

tude of benefits. Through all of this, FDI can be a stepping-stone for long-term, sustainable, and inclusive growth. However, these benefits are not automatic. Achieving these benefits requires a robust and effective policy response both at the international and national level to make FDI conducive to sustainable development. One such policy tools primarily aimed at attracting FDI is negotiating and concluding international investment agreements (IIAs), bilateral investment treaties (BITs), free trade agreements (FTAs) and treaties with investment provisions (TIPs). As of December 2023, the IIA regime consisted of 2,828 BITs and 450 TIPs[3]. While IIAs primarily aim at promoting foreign investment through granting protection against host state conduct, they have been constantly facing severe criticism for affecting host states regulatory sovereignty to implement environmental, social, climate, public health and other policies aimed at achieving the SDGs[4]. Traditionally, developing countries often lacked the capacity or power to negotiate IIAs with their developed country counterparts. The older BIT models focused more on investment protection hoping that would attract investment. However, in practice even if these BITs were effective strategies to attract investment, there was no guarantee that investment would lead to development, much less development that is sustainable[5]. The role of IIAs was to ensure a stable regulatory environment for the foreign investors. However, eventually this led to unduly limiting the regulatory powers of host states to implement legitimate public policy objectives. The substantive standards of protection, e.g., rules on expropriation and fair and equitable treatment (FET), require host states to compensate foreign investors for dam-

[3] UNCTAD Investment Policy Hub, *International Investment Agreements Navigator*, https://investmentpolicy.unctad.org/international-investment-agreements (accessed on 31 December 2023).

[4] C. Baltag, R. Joshi, K. Duggal, *Recent Trends in Investment Arbitration on the Right to Regulate, Environment, Health and Corporate Social Responsibility: Too Much or Too Little?*, in *ICSID Review - Foreign Investment Law Journal*, 2023, 38, p. 381, https://doi.org/10.1093/icsidreview/siac031 (accessed on 5 January 2024).

[5] L. Johnson, L.E. Sachs, N. Lobel, *Briefing Note: Aligning International Investment Agreements with the Sustainable Development Goals*, 2020, available at: https://scholarship.law.columbia.edu/sustainable_investment_staffpubs/187.

age caused by sustainability measures[6]. Moreover, the investor state dispute settlement (ISDS) system allows foreign investors to enforce these claims against their host states and effectively authorizes arbitral tribunals to decide on the legitimacy of sustainable development policies. Even though the UN 2030 Agenda stresses that foreign investment can play a substantial role in achieving sustainable development[7], the current international legal framework governing foreign investment is frequently perceived to impede rather than encourage the UNSDGs. Additionally, ever since there has been an increase in the number of investors using ISDS to bring claims against developed countries, these countries have also started to reconsider whether ISDS ought to be preserved, revised, or replaced[8]. Infamous cases such as *European Solar Farms v Spain*[9], B*ayWa r.e. Renewable Energy GmbH and BayWare. v Spain*[10], *Philip Morris v Australia*[11], *Vattenfall v Germany*[12], *Rockhopper v Italy*[13], have given rise to concerns that IIAs and ISDS interfere with the environmental, public health or other sustainability measures required to implement the SDGs.

The current regime of international investment law has been the subject of increasing criticism from States, intergovernmental organizations, and civil society. This has triggered a global IIA crisis resulting in over-arching reform process to reconcile the dwin-

---

[6] G. Zagel, *Achieving Sustainable Development Objectives in International Investment Law*, in J. Chaisse, L. Choukroune, S. Jusoh (eds.), *Handbook of International Investment Law and Policy*, Springer, 2021, https://doi.org/10.1007/978-981-13-3615-7_57 (accessed on 13 December 2022).

[7] UN 2030 Agenda, para. 41; SDGs, paras. 1a and 1b.

[8] Z. Shafruddin, *Investor-State Dispute Settlement between Developed Countries: Why One Size Does Not Fit All*, in *ARIA*, 29(4), https://arbitrationlaw.com/library/investor-state-dispute-settlement-between-developed-countries-why-one-size-does-not-fit-all (accessed on 5 January 2024).

[9] *European Solar Farms A/S v Kingdom of Spain* (ICSID Case No. ARB/18/45).

[10] *BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH v Kingdom of Spain* (ICSID Case No. ARB/15/16).

[11] *Philip Morris Asia Limited v The Commonwealth of Australia* (PCA Case No. 2012-12).

[12] *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v Federal Republic of Germany (I)* (ICSID Case No. ARB/09/6).

[13] *Rockhopper Exploration Plc, Rockhopper Italia S.p.A. and Rockhopper Mediterranean Ltd v Italian Republic* (ICSID Case No. ARB/17/14).

dling relationship between investment flows and sustainable development. Challenges such as identifying the right type of foreign investment and introduction of sustainability requirements without discouraging foreign investment have led to the policymakers rethink the current investment regime. States and other institutions have grown to realize that not all investments contribute to development, and that policy interventions are often needed to ensure that the benefits of investment are captured, and the harms are avoided.

The European Union (EU) has been a front-runner in reforming their investment treaties and negotiating strategies. Other regions and countries have also developed strategies for the same[14]. The new age EU Trade and Investment Agreements (TIAs) refine the substantive protection standards, strengthen the host state regulatory sovereignty, and include a reformed ISDS system[15]. Reforms in other countries such as in the "Global South"[16] are happening at the same time. Notable examples are Brazil, India, and the African continent. These states have introduced innovative approaches to reconcile investment protection and sustainable development. The approaches employed both by the EU member states and the Global South States are different, but the broader agenda remains the same, i.e. to reconcile investment promotion and protection and sustainable development through effective and innovative policy making and implementation.

This paper compares the reform approaches of EU TIAs and selected Global South IIAs. The following sections provides an overview of the IIA regime both in EU and the Global South States and compares the substantive and procedural reforms employed to integrate sustainable development provisions in both regions with some notable examples. Finally, the paper provides possible recommendations and solutions to integrate more holistically sustainable development policy issues in the investment agreements.

---

[14] *RR2020-04_EU-Trade-and-Investment-Policy*, https://www.ceps.eu/wpcontent/uploads/2020/10/RR2020-04_EU-Trade-and-Investment-Policy.pdf (accessed on 5 January 2024).

[15] *RR2020-04_EU-Trade-and-Investment-Policy*, https://www.ceps.eu/wpcontent/uploads/2020/10/RR2020-04_EU-Trade-and-Investment-Policy.pdf.

[16] The phrase "Global South" refers broadly to the regions of Latin America, Asia, Africa, and Oceania. It is one of a family of terms, including "Third World" and "Periphery", that denote regions outside Europe and North America.

## 2. *The EU approach: introduction*

Until 2009, international investment policy was the exclusive competence of the EU member states. The Treaty of Lisbon entered into force on 1 December 2009, providing the EU with exclusive competence in "direct investment" as a part of common commercial policy[17]. This covers the conclusion of international investment agreements (IIAs) which typically aim to protect and liberalize FDI. Since then, the EU has ratified TIAs with Canada[18], Singapore[19], United Kingdom[20] among others. With the Lisbon Treaty coming into force, several other amendments were made in the Treaty on European Union TEU[21] and the Treaty on the Functioning of the European Union, TFEU[22] to reflect these new ideas and policy changes based on the furtherance of sustainable development objective. All external action objectives and goals were brought under the umbrella of Article 21 TEU to enhance the coherence and consistency of EU external relations.

Art. 21(2)(d) TEUs reads as follows: "the Union shall define and pursue common policies and actions in order to foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty". Similarly, Art. 21(2)(f) states that: "The Union shall […] help develop international measures to preserve and improve the quality of environment and the sustainable management of natural resources, in order to ensure sustainable development. These amendments show a will-

[17] Think Tank, European Parliament, *EU International Investment Policy: Looking Ahead*, https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2022)729276 (accessed on 5 January 2024).

[18] The EU-Canada Comprehensive Economic and Trade Agreement (CETA) is a progressive trade agreement between the EU and Canada. It entered into force provisionally in 2017, meaning that most of the agreement now applies.

[19] The European Union and Singapore have negotiated a Free Trade Agreement and an Investment Protection Agreement. It entered into force on 21 November 2019.

[20] The EU-UK Trade and Cooperation Agreement concluded between the EU and the UK was signed on 30 December 2020.

[21] Consolidated Version of the Treaty of European Union.

[22] Consolidated Version of the Treaty on the Functioning of the European Union.

ingness and commitment of EU member states towards integrating sustainable development objectives in their external trade relations be it at a bilateral or multilateral level. Today, all EU TIAs with developed and developing countries alike contain distinct chapters addressing sustainable development and refine their investment chapters to include effective and stricter provisions on implementing and interpreting sustainable development policies"[23].

### 2.1. *Substantive provisions*

At the international level, the EU strives to promote and integrate sustainable development concerns through its external trade policies. All EU TIAs concluded since the Lisbon Treaty contain a separate "trade and sustainable development chapters"[24]. The chapters are mostly uniform regarding their substantive content, implementation standards and monitoring mechanisms. These trade and sustainable development (TSD) chapters mostly address sustainable development in its economic, social and environmental dimensions[25]. They also refer to relevant international environmental and labour agreements that the contracting parties should ratify and implement[26]. The TSD chapters implement the relevant international agreements through national measures, cooperation in relevant international organisations and consultation and cooperation on labour and social standards and environmental protection.

It is important to note that, though EU trade agreements have a vast reference to sustainable development when it comes to international trade, however, if one looks at the investment chapter, there is no exclusive mention of sustainable development goals or a specific dedicated chapter on investment and sustainable development.

---

[23] European Commission, *Sustainable Development in EU Trade Agreements*, 5 December 2023, https://policy.trade.ec.europa.eu/development-and-sustainability/sustainable-development/sustainable-development-eu-trade-agreements_en (accessed on 5 January 2024).

[24] Think Tank, European Parliament, *EU International Investment Policy: Looking Ahead*, https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2022)729276 (accessed on 5 January 2024).

[25] Art. 12.1.2 EU-Singapore FTA; art. 22.1 CETA.

[26] Art. 23.3 and 24.4 CETA.

For instance: In the EU-Canada CETA, under Art.8.9, it is mentioned that "the parties have a right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, environment"[27], however, there is no specific mention of sustainable development as an objective or any means to realise them in the investment chapter.

The chapter on investment also doesn't mention labour standards. Even though there is a dedicated chapter on Trade and Labour under the TSD chapter, reference to labour standards under the investment chapter is missing[28].

Since, the new age EU TIAs have a separate TSD chapter, these chapters exclude the general dispute settlement mechanism and ISDS[29]. Instead, they create a treaty body to conduct consultations, monitoring and dispute settlement on disputes arising specifically under the TSD chapter. An important point to consider here is that though the preamble of these TIAs mention that foreign investment should promote sustainable development, there is no clear link between the TSD chapters and investment chapters. For instance, the CETA TSD chapter have few references to investment, but the CETA investment chapter doesn't refer to the standards established in the TSD chapters[30]. These provisions make it quite uncertain to determine whether the clarifications cover the full range of host states' public policy measures or just environment, health and safety and if these measures alone are enough to implement all aspects of UN-SDGs.

Moving ahead in refining the substantive provisions of the BITs, the EU-Canada CETA contains some innovations and a departure from the traditional BITs. For instance, a combined reading of Art. 8.12 and Annex 8-A CETA explicitly defines the rules on expropriation and lists the "non-discriminatory measures that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment […]". These measures are excluded from the definition of expropriation unless the "impact ap-

[27] Art. 8.9 CETA.
[28] Chapter 8 and Chapter 23 CETA.
[29] Art. 23.11 and 24.16 CETA.
[30] Chapter 8 CETA.

pears manifestly excessive"[31]. Having said that, an over-arching reference to sustainable development goals is missing.

Further, Art. 8.9.2 CETA clearly states that the fact a Party regulates, through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor's expectations, does not amount to a breach of an obligation[32]. Art. 8.10.2 CETA clearly defines the contours of FET standard and provides a list of measures including denial of justice, breach of due process, or abuse of investors which constitute its violation[33].

A similar example is the EU-UK Trade and Cooperation Agreement, EU-UK TCA where there are dedicated separate chapters on environment and climate[34], labour[35] and carbon pricing[36] however they are not a part of the investment chapter. The preamble of the EU-UK TCA "recognises the Parties' respective autonomy and rights to regulate within their territories in order to achieve legitimate public policy objectives such as the protection and promotion of public health, environment including climate change, public morals, social or consumer protection, animal welfare, privacy and data protection"[37]. Under Art.123(2) EU-UK TCA, "the parties reaffirm the right to regulate within their territories to achieve legitimate policy objectives […]"[38]. The EU-UK TCA focuses more on investment liberalisation than on investment protection per se. There are no specific definitions of the FET standard or expropriation. The EU-UK TCA overall puts a lot more emphasis on the comprehensive objective of achieving the sustainable development goals through pursuing legitimate public policy goals and giving states the right to define or regulate its own levels of protection[39]. However, the agreement in principle fails to integrate the sustainable development provisions

[31] Art. 8.12 and Annex 8-A CETA.
[32] Art. 8.9.2 CETA.
[33] Art. 8.10.2.
[34] Chapter 7 EU-UK TCA.
[35] Chapter 6 EU-UK TCA.
[36] Art. 392 EU-UK TCA.
[37] Para. 7, Preamble, EU-UK TCA.
[38] Art. 123, Title II, Services and Investment, EU-UK TCA.
[39] Art. 340, Title X, Good Regulatory Practices and Regulatory Cooperation, EU-UK TCA.

specifically in the investment chapter. The linkages between many chapters such as environment and climate[40], labour[41] and carbon pricing[42] and the investment chapter is opaque to say the least.

Another important concern with the new-age EU TIAs is that they do not clarify how the substantive standards in the TSD chapters affect the investment chapter obligations. Although Art. 31(1) VCLT[43] require the interpretation of the investment chapters in their context, and the TSD chapters contain rules on sustainability measures affecting foreign investment, the lack of "express reference" in the IIA chapters creates uncertainty whether and how arbitral tribunals will draw on these sustainability standards as relevant when interpretating investment protection rules. Moreover, the implementation and monitoring mechanism of the TSD chapters are entirely separate from the investment chapter. The investment chapter usually has a separate dispute settlement mechanism i.e. ISDS, which provide for enforcement and adoption of sanctions for breaches of investment obligations whereas the TSD monitoring process is entirely different and not applicable for the IIA chapter. This raises an important question that whether the EU has the intention solely to integrate sustainable development concerns in their international trade policies and leave the interpretation of the international investment policies concerning sustainable development and public policy issues entirely to the arbitral tribunals.

Apart from the EU's approach of negotiating TSD chapters, a bilateral investment agreement worth mentioning is the EU-China Comprehensive Agreement on Investment (CAI). After 35 rounds of negotiation, on 30 December 2020, China and the EU announced that they concluded in principle the negotiations for a Comprehensive Agreement on Investment[44].

This agreement is an ambitious bilateral investment agreement covering areas such as market access, level playing field and sustain-

[40] Chapter 7 EU-UK TCA.

[41] Chapter 6 EU-UK TCA.

[42] Art. 392 EU-UK TCA.

[43] Vienna Convention on the Law of Treaties (1969).

[44] EU-China CAI. See: https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/china/eu-china-agreement/eu-china-agreement-principle_en.

able development objectives. The agreement contains commitments on market access and disciplines including clear rules on state-owned enterprises, transparency obligations for subsidies, and rules prohibiting forced technology transfers[45]. The CAI has an entire section[46] dedicated on investment and sustainable focussing on investment favouring green growth[47], investment and climate change[48] and corporate social responsibility[49].

Art 1 of Section IV, categorically "mentions the many commitments made under relevant international documents with regards to sustainable development and reaffirm their commitment to promote the development of investment in such a way as to contribute to the objective of sustainable development, for the welfare of present and future generations"[50].

Art.6, mandates the parties to "effectively implement the UNFCCC and the Paris Agreement adopted thereunder, including its commitments with regard to its Nationally Determined Contributions, promote and facilitate investment of relevance for climate change mitigation and adaptation; including investment concerning climate friendly goods and services, such as renewable energy, low-carbon technologies and energy efficient products and services"[51].

The Chapter also has specific commitments on ratifying fundamental International Labor Organization (ILO), Conventions No 29 and 105, if it has not yet ratified them and other Conventions that are classified as "up to date" by the ILO[52].

However, after seven years of negotiations, European Parliament voted to freeze its ratification in May 2021[53]. Even though this

[45] EU-China: The Agreement Explained, https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/china/eu-china-agreement/agreement-explained_en (accessed on 5 January 2024).

[46] Section IV, Investment and Sustainable Development, EU-China CAI.

[47] Art. 5, Section IV, EU-China CAI.

[48] Art. 6, Section IV, EU-China CAI.

[49] Art. 2, Section IV, EU-China CAI.

[50] Art. 1, Section IV, EU-China CAI.

[51] Art. 6, Section IV, EU-China CAI.

[52] Art. 4, Section IV, EU-China CAI.

[53] L. McElwee, *The Rise and Demise of the EU-China Investment Agreement: Takeaways for the Future of German Debate on China*, available at: https://www.csis.org/analysis/rise-and-demise-eu-china-investment-agreement-takeaways-future-german-debate-china (accessed on 5 January 2024).

agreement was short lived, it could be used a good starting point for the EU negotiators to incorporate other diverse approaches to integrate sustainable development provisions in its TIAs.

Some other EU member states have also designed their Model BITs in recent times that have provisions integrating sustainable development policies and investment promotion and facilitation. For instance, the Model Italy-BIT has specific provisions on investment and environment, investment and labour and also encourages dialogues and cooperation on investment related sustainable development issues. The preamble of the BIT also mentions the importance of "strengthening investment relations, in accordance with the objective of sustainable development in the economic, social and environmental dimensions"[54]. Similar provisions could also be found in the Netherlands Model BIT[55] and the Model Belgium- Luxembourg BIT[56].

Overall, after an analysis of these latest agreements, it could be said that the implementation of sustainable development into EU investment provisions through TSD chapters seems to be a bit inadequate and unclear. These improvements in the treaty making language could be at best noted as a best endeavour language to possibly make way for better and fruitful negotiations in the future, However, a lot more has to be done to ensure that investment protection and promotion are not a hindrance but a facilitator in achieving the UN Sustainable Development Goals.

### 2.2. *Dispute settlement procedure*

The investor state dispute settlement system of international investment law has been facing criticism for its systemic deficiencies such as lack of consistency and for being contradictory[57]. A good example is the widely different interpretations of the fair and equitable treatment standard and lack of uniform standards for awarding damages. Other issues such as lengthy duration and costs of arbitral

[54] Model Italy BIT 2022.
[55] Netherlands Model BIT 2019.
[56] BLEU Model BIT 2019.
[57] G.M. Alvarez *et al.*, *A Response to the Criticism against ISDS by EFILA*.

proceedings, lack of transparency and independence and impartiality of arbitrators.

The EU has introduced many new elements to improve these weaknesses and the arbitration procedure in general. For instance, under CETA, the Committee on Services and Investment[58] strengthens the contracting parties' role in dispute settlement by providing a forum for addressing issues arising out of the investment chapter. Further, under Arts.8.32 and 8.33 CETA, claims can be dismissed if they are without any legal merits or unfounded as a matter of law[59]. The Committee on Services and Investment may also adopt and amend rules supplementing the applicable dispute settlement rules, and amend the applicable rules on transparency. These rules and amendments will be binding on the Tribunal and also make recommendations to the CETA joint committee on the functioning of the Appellate Tribunal and adoption of interpretations of the agreement. Under CETA, the agreement stresses on the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes[60].

Under the EU-China CAI and EU-UK TCA, the parties decided to forgo the traditional ISDS mechanism and instead opt for state-state arbitration[61]. Under EU-China CAI, the parties also have an option to opt for mediation or a mutually agreed solution without going into arbitration[62]. This approach provides some flexibility to the parties and also gives an assurance to the host state that they won't be dragged into lengthy and ardours litigation under the ISDS.

In principle, EU reforms are a step in the right direction and have the potential to remedy many concerns against the traditional ISDS system. In sum, they do try enhance legitimacy, transparency and consistency of arbitral decisions at least on the paper. However, the cost of the large institutional setting such as the CETA Joint Committee or Committee on Services and Investment may be feasi-

---

[58] Art. 8.44 CETA.

[59] Art. 8.32 and 8.33 CETA.

[60] Article 8.29 CETA.

[61] Section V Dispute Settlement, CAI.

[62] J. Schwarzer, *Investor-State Dispute Settlement: An Anachronism Whose Time Has Gone*.

ble for developed countries, it would be a challenge when it comes to negotiating similar contracts with developing countries due to lack of infrastructure and finances. These procedural reforms have been introduced to remedy the ill effects of ISDS mechanism in general and not really to enforce sustainable development objectives through FDI. They don't *per se* prevent any adverse effects on sustainability policies. However, much is left to be seen since so far no contracting party has invoked the dispute settlement mechanism under these agreements. Until, the arbitral tribunals don't interpret these provisions, it is difficult to anticipate to what extent these elements improve the effect of ISDS on sustainable development.

### 3. *Global South approach: introduction*

Global South States have mostly been the capital-importing countries when it came to negotiating the older generation BITs. They also have been the primary respondents of investment claims, which frequently resulted in awards in millions of dollars in favor of investors. The negotiation of old generation BITs was a means for poorer countries to desperately attract investment and also those agreements were negotiated between parties of unequal bargaining power. But now, in the 21st century the world is witnessing a power shift and even the developing countries are becoming capital exporting states, and unlike the 20th century the countries in Asia, Africa and South America are also able to influence the development of international investment law regime.

The reform approaches employed by the Global South or developing countries to integrate sustainable development provisions are unique and substantially different from the EU TIAs. Since, different countries have different geographical, economic, and political landscape there isn't a "one size fit all" kind of a reform but some of the Global South countries have managed to integrate sustainable development provisions holistically in their agreements. Some examples include: Draft Pan-African Investment Code (PAIC)[63] and

[63] Draft Pan African Investment Code 2016.

the Morocco-Nigeria BIT[64], Brazil-Model BIT[65], India Model BIT[66] and Brazil-India Investment Cooperation and Facilitation Treaty[67]. These treaties focus not just on integrating sustainable development provisions in their texts but also clarifying hosts states' right to regulate, balancing host states' and investors' rights and obligation, moving away from ISDS and focussing on dispute prevention rather than dispute settlement.

### 3.1. *Substantive provisions*

Just like the EU new age investment treaties, many developing countries have also started re-drafting and negotiating their BITs to include concrete and binding provisions relating to sustainable development in their investment treaties. Most of these treaties expressly mention this objective in their preambles. Many of the Global South IIAs even integrate extensive references to sustainable development in the substantive provisions of IIA themselves. They follow a broader and comprehensive reform approach to ensure the effective implementation of sustainable development through FDI.

One such example is the Draft Pan African Code (PAIC) which has been drafted from the perspective of developing and least-developed countries with a view to promote sustainable development[68]. Art 1 and art 4 PAIC clearly state that members must "facilitate and protect investments that foster sustainable development" and in order to "qualify as an investment it must provide significant contribution to the host State's economic development"[69].

The Morocco Nigeria BIT is one of the most innovative examples of a BIT where the states have pursued a broad sustainable de-

---

[64] Morocco-Nigeria BIT 2016.

[65] K. Duggal, S. Rais, *The Evolution of Brazilian CFIAs from 2015 to 2020: Like Wine, Does It Get Better with Time?*, in *Journal of International Arbitration*, 2021, 38, https://kluwerlawonline.com/api/Product/CitationPDFURL?file=Journals\JOIA\JOIA2021012.pdf (accessed on 5 January 2024).

[66] India Model BIT 2015.

[67] Brazil-India Investment Cooperation and Facilitation Treaty 2020.

[68] Draft PAIC, 2016.

[69] Art. 1 and art. PAIC.

velopment concept exceeding the regular environmental and social standards[70]. The Morocco Nigeria BIT includes relevant international agreements to establish environment, labour and human rights obligations[71]. The BIT also provides for post establishment obligations where companies are obliged to maintain an environmental management system[72]. Companies in areas of resource exploitation and high-risk industrial enterprises shall maintain a current certification to ISO 14001 or an equivalent environmental management standard[73].

Further, many of these Global South IIAs refine expropriation and fair and equitable treatment standards to increase host states' regulatory power. The Brazil Model BIT exempts indirect expropriation completely from its scope[74]. India Model BIT exempts public policy measures from the scope of expropriation if they are non-discriminatory[75]. The Brazil-India Investment Cooperation and Facilitation Treaty excludes FET and Most Favoured Nation (MFN) treatment entirely from the scope of the treaty[76]. Even, PAIC has excluded fair and equitable treatment from its text[77].

Many of these Global South IIAs establish not only a right but also detailed obligations of host states to regulate all elements of sustainable development. Art, 13, 15 and 23 of the Morocco Nigeria BIT makes it an obligation for the host states to adopt environmental, social and human right measures. The provisions also include broader objectives of sustainable development such as measures against corruption[78]. Investor obligations are also a regular occurrence in the global south IIAs as a strategy to achieve sustainable development goals. For instance, Brazil Model BIT only contains general investor obligations to comply with host state's corporate social responsibility whereas the PAIC has a full-fledged chapter on

[70] Morocco-Nigeria BIT.
[71] Art. 13, 14 and 15. Morocco-Nigeria BIT.
[72] Art. 18 Morocco-Nigeria BIT.
[73] Art. 18 Morocco-Nigeria BIT.
[74] Art. 7 Brazil Model BIT.
[75] Art. 5.5 India Model BIT.
[76] The Brazil-India Investment Cooperation and Facilitation Treaty (2020).
[77] Draft PAIC.
[78] Art. 17 Morocco-Nigeria BIT.

investor obligations including Obligations as to the use of Natural Resources, Business Ethics and Human rights and Socio-political Obligations[79].

The Morocco Nigeria BIT also includes a comprehensive set of investor obligations, such as codification of investor obligations on environment, social and labor standards, wide ranging pre and post establishment impact assessment and corporate governance obligations[80]. The BIT also provides for remedies against breach of investor obligations before the host state's national courts[81].

Investor obligations shift the traditional IIA objective from investment protection to a fair balance between host states' and investors' rights and obligations. This more comprehensive approach of including both comprehensive sustainable development provisions and also related to investor obligations seems to be missing from the EU TIAs. Overall, the Global South IIAs so far have focused more on integrating investment and sustainable development provisions together and not merely including under a separate chapter like the EU trade and sustainable development strategy.

### 3.2. *Dispute settlement*

Similarly, to the EU approach, the global south procedural IIA reforms weren't typically aimed at addressing sustainable development issues, rather to mitigate the effects caused by the ISDS in general. Some of these IIAs have replaced the traditional ISDS model with a comprehensive dispute management system. The focus is more on dispute prevention and dialogue rather than dispute settlement. The Brazil Model BIT[82] and Morocco Nigeria BIT[83] establish a "joint committee" that seek to resolve any issues or disputes concerning Parties' investment in an amicable manner. The joint committee also hold the power to monitor the IIAs implementation and

[79] Chapter 4, Draft PAIC.
[80] Art. 18 Morocco-Nigeria BIT.
[81] Art. 20 Morocco-Nigeria BIT.
[82] Art. 17 Brazil Model BIT.
[83] Art. 4 Morocco Nigeria BIT.

execution. Moreover, before initiating an eventual arbitration procedure, any dispute between the Parties shall be assessed through consultations and negotiations by the Joint Committee. The investor is also invited to participate in these consultations. Through this mechanism, a platform is provided to discuss the purpose of the regulatory measures and negotiate solutions without resorting to arbitral tribunals.

Many of these Global South IIAs have discarded the ISDS system and instead opted for state-to-state dispute settlement mechanism. Some other innovative ways where the adverse effects of arbitral proceedings could be mitigated are: India Model BIT makes a claim inadmissible if the investment "has been made through fraudulent misrepresentation, concealment, corruption, money laundering or conduct amounting to an abuse of process or similar illegal mechanisms"[84]. These provisions prevent abuse of the system in general and also save costs and resources.

Therefore, in contrast to the European reforms, the above mentioned Global South IIAs include several novel elements to reduce the adverse effects of lengthy litigation on sustainable development policies of host states. The inclusion of provisions such as prevention of disputes, exchange of dialogues between the parties give host states a more influential role in addressing their concerns, allowing them to shape their sustainable policies in dialogue with all relevant parties and investors.

## 4. *Conclusion*

The pitfalls of traditional IIAs affecting sustainable development are manifold, since the primary objective of negotiating these agreements was not to address sustainable development issues but rather to protect foreign investors and provide a predictable environment for their investments. Consequently, these instruments don't effectively address the implementation of sustainability policies in the host states. Traditional IIAs do not even mention the term of sus-

[84] Art. 13.4 India Model BIT.

tainable development and only contain lean provisions on substantive standards of treatment giving arbitral tribunals much leeway in their decision-making power.

Modern IIAs have adopted several diverging approaches to prevent the adverse impact of IIAs on sustainable development policies of host states. Many states have been involved in the process of reforming or re-negotiating their existing IIAs. The European Union and several other countries have taken many different steps in this direction to ensure that the notion of sustainable development is enshrined not only in the preamble but also in the substantive and procedural aspects of IIAs as well. These reforms reach from merely inserting sustainable development as a treaty objective in the preamble of an IIA to including a comprehensive set of sustainable development obligations of host states and investors and specifying how these obligations impact the application and interpretation of substantive and procedural IIA obligations.

Some noteworthy reforms incorporated by many states are stressing and clarifying the notion and scope of sustainable development by defining relevant policy areas such as environment protection, labour standards, human rights ectara. Some also refer to the relevant international standards to clarify the substantive content.

It is important to note that even though EU has always been a pioneer in sustainability policies both domestically and internationally, however, when it comes to international investment, EU's focus is more on comprehensive trade and investment agreements, rather than just traditional investment agreements. It is suggested that the EU could introduce further positive commitments specifically in investment chapters.

On the other hand, though the Global South IIAs have come a lot ahead and have included sustainable development provisions throughout their agreements, they could even go a step further and could include commitments under Paris Agreement and NDCs in their future IIAs. Moving further in these reforms, a shift may be important to move from traditional ISDS to dispute prevention and management system. This will ensure the trust of the state parties who might have been previously subjected to lengthy arbitration and are now wary of negotiating and signing any new investment agreement.

While various reform approaches have been employed, even the reformed IIAs still contain gaps and do not address all the relevant questions. For example, many IIAs introduce the objective of sustainable development but do not specify how it impacts the application and interpretation of the substantive and procedural IIA obligations. Additionally, these reformed IIAs and their approaches to reconcile investment with development haven't been tested in arbitral practice. Most instruments are not yet in force, and it usually takes years from the conclusion of an IIA to the first dispute and the resulting award. But only when the reformed IIAs will be ratified and subsequently applied in any case-law, it could be determined if a balance can be achieved between investment protection and sustainable development.

Having said that, moving forward a holistic and comprehensive approach towards sustainable investment must be adopted. It is suggested that transparency in treaty making, release of draft texts, public hearings and consultations could be an important step in this regard to ensure all stakeholders can take part in the treaty making process. Consultations between national trade, investment, environment, labor authorities would ensure that the governmental policies and foreign investment policies are in line with the sustainable development objectives of the States. It is also important to end the one-sidedness of IIAs which could be potentially achieved by investor obligations, however, it is difficult to anticipate if a level-playing field can be achieved.

In the end, integrating sustainable development provisions in either trade or investment agreements is not a one-time process. Although, predicting how international investment law will develop in the coming years is not an easy task, however, at best, negotiators and policy makers could continue re-evaluating and re-assessing their strategies to ensure foreign investment remains a key element of a successful development strategy.

# FAIR AND EQUITABLE TREATMENT AND THE RENEWABLE ENERGY DISPUTES

*Maria Laura Marceddu**

## 1. *Introduction*

The UN 2030 Agenda includes a dedicated and stand-alone goal on energy. Specifically, SDG n. 7 calls to "ensure access to affordable, reliable, sustainable and modern energy for all". It then indicates an ambitious path to reach this goal:

> By 2030, enhance international cooperation to facilitate access to clean energy research and technology, including renewable energy, energy efficiency and advanced and cleaner fossil-fuel technology, and promote investment in energy infrastructure and clean energy technology[1].

Renewable energy plays a pivotal role in the advancement of cleaner technologies and, more broadly, in decarbonizing fossil fuel-based energy production. It ensures source diversification and reliance on low-emission fuels which are among the conditions necessary for a transition towards green energy. Both the 2030 Agenda for Sus-

* I am most grateful to Prof. Elisa Baroncini and the participants to the Conference on *Sustainable Development as Fundamental Pillar of Economic Governance and Public Affairs* in Ravenna for their very helpful comments and exchanges. All opinions and errors remain mine.

[1] UNGA, *Transforming our world: the 2030 Agenda for Sustainable Development A/RES/70/1*, 25 September 2015, Goal n. 7, para. 7.a.

tainable Development and the Paris Agreement on Climate Change display a significant commitment towards the green energy transition as part of a broader response to the global needs for better health conditions, more sustainable, equitable and inclusive communities; and greater protections from, and resilience to, climate change.

Global events such as the 2008 financial crisis, the 2020 COVID-19 pandemic and the 2022 Ukraine war's impact on energy supplies have amplified the magnitude of these objectives and pressured states to supply sustainable and reliable energy services. This pressure has substantially materialized in embracing renewable energies and increasing their share in the global energy mix. While FDIs are deemed to help induce the transfer of knowledge and technology necessary to produce renewable energy, the high costs for investors have somewhat slowed the injection of foreign capital in these sectors. To accelerate the transition away from fossil fuels (particularly coal) to renewables, states have thus intervened to attract investments and support the need for large capital investments required for renewables. These incentive schemes mostly took the forms of subsidies, incentive tariffs, and feed-in tariffs, which helped attract the capital necessary to increase the amount of electricity generated through renewable resources, principally wind and solar, and gradually phased out certain types of fossil fuels. Simply put, subsidies played a decisive economic role in shifting private capital from fossil fuels to renewable energy investments[2].

In Europe, following a series of EU proposals to reduce greenhouse gas emissions and facilitate the transition towards decarbonization, many Member States put in place incentive schemes to attract capital for renewables. Starting in the mid-2000s, the majority of these incentive programmes subsidized the tariffs to be paid to the energy producers, among which the one introduced by Spain was particularly successful in attracting foreign investments[3].

---

[2] J. Tropper, K. Wagner, *The European Union Proposal for the Modernisation of the Energy Charter Treaty – A Model for Climate-Friendly Investment Treaties?*, in *Journal of World Investment & Trade*, 2023, 23, p. 813.

[3] Spanish Promotion Plan for Renewable Energy, originally promulgated in 2000 and revised in 2005: Plan de Fomento de las Energías Renovables en España 2000-2010 (30 December 1999); Plan de Energías Renovables en España (PER) 2005-2010 (26 August 2005).

Investments in the renewable sector are rather peculiar in nature. They tend to involve long-term agreements and display a significant level of potential state interference, given their long-time exposure to political risk and uncertainty about the risk-return imbalance. As such, any unexpected change in the support scheme risks altering the lengthy return on infrastructure development projects and, more broadly, the profitability of the entire investment. As a result, besides adequate instruments in support of these investments, the promotion of renewables requires adequate mechanisms to mitigate the risks of states' regulatory changes. Differently put, to stimulate investments in renewables, states must ensure regulatory stability, predictability, and protection[4]. One way to diminish uncertainty is to commit to international investment treaties that help reduce regulatory risks and boost investors' confidence. A particularly appealing feature of IIAs is the possibility to access efficient dispute resolution mechanisms that would not jeopardize the political relations between the state parties and would provide for legal and political stability, as well as stability of the energy market, which are considered critical of very important in investment decisions[5]. Albeit investment arbitration provides an adequate framework to enhance the regulatory stability necessary for investments in renewables, problems persist as to how to balance the investor's need for stability and the state's right to regulate and attaint to the SDGs.

In the context of a profound financial crisis in 2008, the uncertainty that permeates changing market dynamics and the huge costs of renewables projects soon put these agreements to the test. Many European countries were unable to maintain their renewable ener-

---

[4] European Commission, *Energy 2020: A Strategy for Competitive, Sustainable and Secure Energy*, Brussels, 2010, 639 final. The relationship between legal certainty and renewable energy policies has long been established in the literature. See among others: R. Dolzer, C. Schreuer, *Principles of International Investment Law*, Oxford, 2012, pp. 145-149; N. Gatzert, T. Kosub, *Determinants of Policy Risks of Renewable Energy Investments*, in *Department of Insurance Economics and Risk Management, Friedrich-Alexander University Erlangen-Nürnberg (FAU) Working Paper*, 2015.

[5] L. Mehranvar, S. Sasmal, *The Role of Investment Treaties and Investor-State Dispute Settlement in Renewable Energy Investments*, in *Columbia Center on Sustainable Investment*, New York, 2022.

gy support policies and their incentive schemes rapidly became economically unsustainable.

The crisis plainly revealed the uncertainty underpinning investments in renewables. What happened is that higher construction costs, e.g. for the construction of a solar plant, required financial support that renders the investment heavily reliant on supporting schemes and, therefore, more vulnerable to regulatory changes than other investments receiving less financial support, like those in natural gas and nuclear power. Aggravated by the 2008 financial crisis, the incentive schemes quickly became unsustainable and left governments with onerous debts. For instance, Spain's tariff deficit was more than € 29 billion (3% of its GDP)[6].

To respond to this unforeseen situation, states wound back the incentive schemes to prevent the tariff deficit from growing further[7]. Once the price of renewable energy proved to be unable to compete with electricity generated from coal or natural sources, states began to amend and derogate from the legislation underpinning the subsidy schemes until their eventual termination. These interventions affected the profitability of the investments and sparked dozens of claims[8] from investors, particularly against Spain. The influx of cases against Spain amounts to more than 50 claims (as of December 2023) filed at the ICSID, the Stockholm Chamber of Commerce (SCC) or before UNCITRAL tribunals. A similar fate, albeit with less intensity, was suffered by other EU countries, including Italy, Romania, and the Czech Republic, which introduced measures that progressively retract the financial incentives of the original subsidies scheme, up to a complete overhaul of the scheme. As a consequence of this change, investors could no longer benefit from the subsidies scheme and decided to initiate multiple investment arbitrations challenging host states' changes to the incentive regimes.

This line of arbitrations well illustrates the tensions underpinning the path of energy transition towards renewables. The tensions

---

[6] *Ibid*.

[7] E. Michalena, J.M. Hills (eds.), *Renewable Energy Governance: Complexities and Challenges*, London-Heidelberg-New York-Dordrecht, Springer, 2013.

[8] V. Vadi, *Beyond Known Worlds: Climate Change Governance by Arbitral Tribunals?*, in *Vanderbilt Journal of Transnational Law*, 2015, 48, p. 1285.

between states' flexibility and legitimate expectations of the investors are particularly revealing of investors and states' competing interests, with the former seeking a predictable investment environment, and the latter sufficient regulatory autonomy to safeguard national interests[9], such as energy policies, and to enhance the pursuit of SDGs. As states regulate to address the climate crisis, the ensuing regulatory changes can collide with investor protections under investment treaties. To corroborate this point, this contribution will focus on the wave of investment treaty claims that have predominantly hit Spain (Section 1), before dealing with the most prominent effects at sustainable development level (Section 3). Lasty, some concluding remarks wrap up the contribution (Section 4).

## 2. *Renewable energies project and investment arbitrations against Spain*

The Spanish incentive scheme is articulated in several phases. The first attempts to liberalize the Spanish energy market date back to 1997. Law 54/1997 guaranteed that renewable energy producers would receive a "reasonable rate of return"[10]. In 2007, the Spanish government offered further incentives to renewable energy producers. Royal Decree 661/2007[11] provided two options: 1) a subsidised feed-in tariff for all electricity produced; 2) sell electricity and receive a premium payment according to certain conditions. Under the feed-in tariff scheme, the government commits to paying producers a fixed price for the electricity they produce in order to stimulate solar photovoltaic investments. The price is subject to annual adjustments depending on inflation rates (Artículo 44)

---

[9] E. Cima, *Investment Arbitration in the Energy Sector: Past, present, and future*, in T. Schultz, F. Ortino (eds.), *The Oxford Handbook of International Arbitration*, Oxford, 2020, p. 816.

[10] J. Biggs, *The Scope of Investors' Legitimate Expectations under the FET Standard in the European Renewable Energy Cases*, in *ICSID Review*, 2021, 36, p. 104.

[11] Real Decreto 661/2007, de 25 de mayo, por el que se regula la actividad de producción de energía eléctrica en régimen especial; BOE n. 126 (26 May 2007).

and would be paid for 25 years (Artículo 36). Between 2008 and 2010, the Spanish government scaled back the incentives regimes, and in the following years further altered RD 661/2007, until its repeal in 2013 by RDL 9/2013, which introduced a new regulatory regime[12].

These changes were introduced by Spain to face the budget deficit and resulted in reductions to the subsidy schemes originally forged to attract foreign capital. In response, aggrieved investors sought to rely on the investment treaty protections accorded to investments in renewables, which were made in reliance on subsidies schemes, and other investment incentive schemes that have been subsequently amended or wound back by the hosting states experiencing economic troubles. They commenced over 50 arbitrations against Spain, basing their claim on the Fair and Equitable Treatment (FET) obligation contained in the Energy Charter Treaty (ECT). More specifically, investors contented Spain violated the FET obligation by frustrating their legitimate expectations. They argued that many of the investments were made in reliance on the subsidies scheme and that they reasonably relied on Spain's representations that the regulatory regime would be stable. In response, Spain maintained that the subsidy scheme only entitled investors to a "reasonable" rate of return. Spain rebutted these charges and argued that in the absence of specific promises from the host state, it would have been unreasonable for the investors to expect an excessive limitation on the Spain government's power to regulate the economy in accordance with the public interest.

These cases primarily rely upon the FET obligation (Art. 10(1)), enshrined in the ECT, which reads in the relevant part as follows:

> Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times

[12] Real Decreto-ley 9/2013, de 12 de julio, por el que se adoptan medidas urgentes para garantizar la estabilidad financiera del sistema eléctrico; BOE n. 167 (13 July 2013).

> to Investments of Investors of other Contracting Parties *fair and equitable treatment*. […] No Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal.

While the ECT encourages stable and favourable conditions it does not differentiate about the nature of the protected investment – i.e. whether a protected investment is fossil fuel or clean[13].

The arbitral tribunals varied in the way they resolved the disputes, and used different analyses when reviewing the reasonableness of Spain's policy changes. As the remainder of this section will show, each tribunal assigned a different weight often to the same factors, including the justifications behind the change to the regulations, the extent to which investor's expectations could have been violated, the expected return to investors as compared to a reasonable return benchmark, and the allocation of costs and risks.

When applying the FET provision to the specific circumstances at hand, some tribunals rejected the investors' claims based on legitimate expectations and regulatory stability principally because the claimants had not received any specific promises or commitments from respondents[14]. In their view, a commitment to a group of investors did not amount to a commitment to an individual investor, and to find otherwise would amount to an excessive limitation on the power of the state to regulate the economy following the public interest. Certain tribunals corroborate this view by positing that legitimate expectations at the regulatory level originate from specific *individualized* representations made to induce investors to invest in renewables[15]. In the absence of such a specific commitment, investors cannot form a legitimate expectation that the regulatory frame-

---

[13] From this standpoint, it should not come as a surprise that in investment treaty cases such as *Rockhopper v Italy* the investor was awarded substantial damages after Italy banned coastal oil exploration. C. Chance, *Energy Arbitration Trends 2023*, p. 3, available at: https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2023/02/energy-arbitration-trends-2023.pdf.

[14] *Stadtwerke München and others v Spain* (Award, 2 December 2019), paras. 198, 308.

[15] *Philip Morris v Uruguay* (Award 8 July 2016), para. 426; *Hortel v Poland* (Award, 16 February 2017) para. 238; *Isolux v Spain* (Dissenting Opinion of Prof. Dr. Guido Santiago Tawil, 12 July 2017) para. 4.

work would not be modified[16]. According to other tribunals, there does not have to be a specific representation for a legitimate expectation to arise: a state's acts or conduct, acts of general legislation together with the general market condition at the time the investment was made create a legitimate expectation of *relative stability*[17]. Moving from this perspective, those tribunals conclude that the FET standard carries with it an implicit expectation of protection of investors' basic and fair expectations[18]. Put differently, FET under Art. 10(1) ECT accords investors a legitimate expectation of relative stability of the regulatory regime against radical or fundamental changes[19], although no state could reasonably be expected to freeze its laws[20].

The tribunals that have found a breach of the FET standard considered that ECT Article 10(1) entitled investors that Spain would not drastically and totally change the regulatory regime on which the investment depends when pursuing a legitimate policy objective. For the tribunals embracing this vision, the measures adopted by Spain were not a *normal* exercise of its regulatory powers. While investors could not expect absolute regulatory stability, according to these tribunals the legislative changes introduced by Spain were so drastic and fundamental that violated the legitimate expectations of investors to obtain stable returns on their investments. In *Novenergia v Spain*, for example, the Tribunal agreed that the subsidies offered by Spain were "bait" which led the investor to believe that there would be no radical change in the regulatory regime. Various remuneration models in the subsidies (specifically Renewable Energy Plan 2005-

[16] *RREEF v Spain* (Decision on Responsibility and on the Principles of Quantum (30 November 2018) para. 245.

[17] *Novenergia II v Spain* (Final Award, 15 February 2018), para. 651; *Cube Infrastructure v Spain* (Decision on Jurisdiction, Liability, and Partial Decision on Quantum, 19 February 2019) para. 245; *Micula v Romania* (Award, 5 March 2020), para. 362; *SunReserve v Italy* (Award 25 March 2020) para. 817; *Renergy v Spain* (Award, 6 May 2022) para. 639-642.

[18] According to Tecmed, the FET obligation entails a protection of investor's basic and fair expectations. *Tecmed v Mexico* (Award, 29 May 2003) para. 154.

[19] *Eiser Infrastructure v Spain* (Award, 4 May 2017) para. 363; *Novenergia II v Spain*, para. 654; *SolEs Badajoz v Spain* (Award, 31 July 2019) para. 308; *Operafund and Schwab v Spain* (Award, 6 September 2019) para. 508.

[20] *Renergy v Spain*, para. 639.

2010 and RD 61/2007) strengthened investor expectations of a stable subsidy scheme. Despite Spain's arguments that some changes were foreseeable, the tribunal found that Spain had violated the investors' legitimate expectations and violated its obligations under the ECT[21].

The tribunals that found a breach of the FET standard relied upon the existence of an expectation of stability[22] that somehow has become a binding component of the FET. From this standpoint, the line between the point up to where the expectation of stability extends and the point from where the obligation of stability begins remains blurred. Sornarajah is not wrong in arguing that it is as if a stabilization clause is read into every contract, although the parties did not make the treaty to provide for contractual protection[23].

On the other side of the spectrum, some tribunals have rejected the allegation of a breach of the FET standard. Those tribunals have been more lenient in reviewing the balancing exercise carried out by Spain when pursuing a rational policy of protecting consumers[24] from a tariff increase without incurring violations of the ECT Article 10(1). In their view, the reduction of public expenditure with no excessive burdens on consumers of electricity has been balanced against the need of encouraging environmental protection and renewables and, at the same time, of protecting the legal rights of existing investors[25]. In *Eurus Energy v Spain*, for instance, the tribunal noted that Spain had not made any specific commitments "as to the immutability of the FIT regime". and confirmed that oral statements on "promotional occasions" were insufficient to constitute a "specific commitment". The majority of the Tribunal also found that legiti-

---

[21] K. Chung, E. Low, V. Huang, *Public policy conflicts in investor-state energy arbitrations*, in *International arbitration report*, Norton Rose Fulbright, May 2023, 20, p. 18, available at: https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/publications/international-arbitration-report-issue-20.pdf?revision=1eb03007-24d5-4d37-a854-db4991a7840d&revision=5249886851577387904.

[22] *Hydro Energy and Hydroxana v Spain* (Decision on Jurisdiction, 9 March 2020) para. 673.

[23] M. Sornarajah, *The International Law on Foreign Investment*, Cambridge, 2017, 420.

[24] *Isolux v Spain* (Award, 12 July 2016) para. 823.

[25] *Renergy v Spain* (Dissenting Opinion of Prof. Philippe Sands KC, 6 May 2022).

mate expectations related to "circumstances in existence at the time the investment [was] made". As most of Eurus' investments predated the FIT, Eurus's claim failed[26].

To sum up, two main positions emerge. First, the legitimate expectation of stability has been interpreted as an obligation to protect investors under the broader FET umbrella. Second, the legitimate expectation of stability has been interpreted in terms of systemic proportionality. Where would these conflicting result point to?

### 3. *Sustainable development protection presents public policy conflicts*

These conflicting outcomes indicate that the road towards the accomplishment of sustainable development, and more broadly public policy, goals is fraught with uncertainty. States taking regulatory actions to comply with international obligations, like the Paris Agreement, or to transition toward renewables, may still find themselves in breach of other treaty obligations, e.g. the ECT if the measure in question discriminates against foreign investors.

The lack of legal instruments that live up to the expectations of sustainable development is likely to exacerbate the conflict and amplify the magnitude of claims. While the ongoing processes of reform are steering towards more sustainable-oriented choices, aligning with modern energy and climate goals is likely to require a profound, if not radical, systemic rethinking. That is why even after a modernization process that took about three years and 15 rounds of multilateral negotiations, the ECT dismantlement appears nonetheless inevitable, at least among EU countries. This is attested by the position endorsed in the Commission's Non-Paper by the Commission, albeit unofficially. The intention is of a coordinated withdrawal from the ECT of the EU, Euratom and Member States, as reiterated in the recommendations for a Council decision to jointly quit the

[26] K. Chung, E. Low, V. Huang, *Public policy conflicts in investor-state energy arbitrations*, in *International arbitration report*, Norton Rose Fulbright, May 2023, 20, p. 18.

ECT[27] following the pledge of some governments (France, Germany, Italy, Poland, Portugal Slovenia) to leave the treaty over climate concerns.

The modernized ECT (Art. 19) contains a comprehensive provision on sustainable development and environmental protection requiring contracting parties to comply with their human rights obligations and commitments under the UNFCCC and Paris Agreement. The modernized version protects clean energy by incorporating a particular dispute settlement mechanism for sustainable development disputes, thus bringing the ECT very much in line with the self-contained system of dispute settlement that largely characterizes the Trade and Sustainable chapter in comprehensive FTAs. Despite the attempts to meet climate change concerns, one particularly crucial point of the modernized ECT is the "flexibility mechanism", which allows the contracting parties to exclude the protection of fossil fuels within their territories. Regrettably, the mechanism is only optional, and existing investments will continue to benefit from the protection of the treaty for 10 years from entry into force of the new provisions.

One problem that is likely to persist in the realm of renewable energies and, therefore, hinder their contribution to sustainable development, is the flexibility accorded to this type of investment. As Helmut Scholz explains:

If circumstances change, governments should be able to adjust their policies without being haunted by the threat of investors' lawsuits. Spain's experience is a painful reminder of how foreign investors have used investment protection treaties to sue governments for billions of euros in international arbitration tribunals when changes to renewable energy policies affected their profits. In 2008, Spain started to change its generous renewable energy incentives after they became untenable. As a result, the country has so far been attacked in 51 lawsuits undertaken by investors that used the Energy Charter Treaty (one among more than 2,500 investment protection trea-

[27] European Commission, *Recommendation for a Council Decision on the approval of the withdrawal of the European Atomic Energy Community from the Energy Charter Treaty*, COM(2023) 446 final (7 July 2023).

ties in force today) amounting to a total of at least €8 billion. It is worth noting that the majority of investors that sued Spain were investment funds or letterbox companies that had made speculative investments. At the time of their investment, they had been aware of the government's plans to change its energy regulation. Spain's experience demonstrates that investment agreements can create a regulatory chill and could disincentivize support schemes for renewable energy. This can lead to an increase in the cost of the energy transition. Governments will be hesitant to incentivize renewables, unless they are able to withdraw or reduce support without the threat of being sued for billions of euros[28].

As long as a balance between flexibility and stability remains unsatisfactory, states will continue to struggle to match their energy policies to the pace of climate change and technological development, and conflicting international obligations may see an increase in energy-related investor-state arbitrations shortly.

## 4. *Concluding remarks*

Globally defined goals such as the SDGs can serve as a powerful governance tool with a significant impact on the behaviour of governments, international organizations, and non-state actors. The UN 2030 Agenda has generated horizontal effects within international law (e.g. on trade and investment agreements), and vertical effects (e.g. national approach towards SDGs). While their incorporation in trade and investment treaties is likely to further the content of the UN Resolution, the interaction with the investment arbitration system might hinder the process.

The energy crisis related to the Russia-Ukraine conflict has accelerated the need for clean and reliable energy, which remains a key issue of strategic and defence autonomy of the EU. Several states finds itself at a crossroads between the need to attract and protect

[28] Columbia Center on Sustainable Development, *Scaling Renewables: Helmut Scholz on Regulatory Frameworks and Investment Treaties* (July 2023), available at: https://ccsi.columbia.edu/news/scaling-renewables-helmut-scholz-regulatory-frameworks-and-investment-treaties.

investment or pursue economic development, like the transition towards clean energy. While one does not necessarily have to exclude the other, without a clear purpose the interpretative activity of arbitral tribunals has often shown inconsistency or even reluctance to accept the relevance of SDGs in investment arbitration. Some corrective mechanisms to mitigate these effects have been envisaged by certain investment agreements, like language clarification, and the inclusion of right-to-regulate provisions. It remains questionable that this will suffice to address the inherent limits arbitral tribunal might impose on the path towards renewables. Two risks flow from this orientation. First, investors complying with obligations, like the incentive schemes for investments in the renewable, may still find themselves in breach of domestic law obligations. Second, there is a risk that the corrective mechanisms put great emphasis on the regulative role of States, thus excluding other contributions to the enactment and enforcement of energy policies.

Attention to these interactions is much needed and timely. This article hoped to make a modest scientific contribution to help involved actors navigate some of the difficult interactions involved in the energy transition.

# THE ENERGY CHARTER TREATY 2.0: TRUE, UNTRUE, AND UNINTENDED CONSEQUENCES IN THE PURSUIT OF A GREENER, MORE SUSTAINABLE WORLD ORDER

*Ylli Dautaj*

## 1. *Introduction*

The energy sector, as well as the overall economy, must become greener. Such statement can no longer be treated as a mere contemporary policy objective or political concern. It should manifest as an unequivocal fact rooted in the environmental crisis and climate change.

Thus, there is an imminent need for reforming the economy in a holistic, overreaching, and ground-breaking manner. Such sudden structural reform includes reforming the energy architecture, i.e., facilitating the green transition in order to adapt to a sustainable development era. This is not a unique view, but rather a mainstream international consensus. The Paris Agreement leaves little (if any) room for debate and clearly articulates that finance flows should be consistent with a pathway to low greenhouse gas emissions. The Paris Agreement makes it clear that we need a climate-resilient development in order to limit the rise in global average temperature to 1.5°C pre-industrial levels[1].

[1] Paris Agreement to the United Nations Framework Convention on Climate Change, December 12, 2015, T.I.A.S. No. 16-1104, II (17) available at: https://digitallibrary.un.org/record/831039 (accessed on 31 July 2023).

To achieve the green transition, foreign direct investments (FDI) is crucial, vital, and instrumental. Moreover, apart private finance and States' commitment to adaptation and mitigation, powerful global governance actors' voices are important. Such external stakeholder voices have since relatively recently been emphatically loud and clear. For example, the G-20 concluded that the international energy architecture needs to better reflect the changing realities of the world energy landscape[2]. On the same lines, the International Energy Agency (IEA) rightly noted that "[c]urrent global trends in energy supply and consumption are patently unsustainable" and that "[w]hat is needed is nothing short of an energy revolution"[3]. These are just examples. Undoubtedly, many aspects of energy architecture need to be worked on in order to put the sustainable ducks in row.

In this chapter we focus on investment promotion and protection, in general, and in the energy sector, in particular. We focus on what international investment agreements (IIA) with investor-state dispute settlement (ISDS) clauses (i.e., what we call "investment treaty arbitration" or "ITA" in short) can contribute as it currently stands (if at all), and what it may offer international energy architecture in addition subsequent to sustainable development reforms. In one word: is ITA an effective global governance tool for the promotion and protection of energy investments, on the one hand, and for the transitioning to greener energy, on the other hand? Today, some important actors believe that ITA is working contrary to climate change. For example, the International Panel on Climate Change argues that IIAs stand in the way of climate change[4]. They are not alone[5]. We strong-

[2] C. Downie, *Global Energy Governance in the G-20: States, Coalitions, and Crisis*, in *Global Governance*, 2015, 21(3).

[3] International Energy Agency (IEA), *World Energy Outlook 2008*, 2008, 37, available at: https://iea.blob.core.windows.net/assets/89d1f68c-f4bf-4597-805f-901cfa6ce889/weo2008.pdf (accessed on 31 July 2023).

[4] Corporate Europe Observatory, *Busting the myths around the Energy Charter Treaty – A guide for concerned citizens, activists, journalists and policymakers*, 2020, 29-30, available at: https://www.tni.org/files/publication-downloads/busting_the_myths_around_the_energy_charter_treaty-web.pdf (accessed on 31 July 2010).

[5] See e.g. O.D. Akinkugbe, A. Majekolagbe, *International investment law and climate justice: the search for just green investment order*, in *Fordham International Law Journal*, 2023, 46(2), and M. Dietrich Brauch, *The Agreement in Principle on*

ly disagree with such thesis. To the contrary, our position is that ITA can indeed facilitate the green transition by promoting and protecting FDI in the renewable energy sector. We agree with the then President of the International Bar Association (IBA), David W. Rivkin in that "international arbitration should play a critical role in developing the legal framework of the post [Paris Agreement] world" and that "it is vital that a neutral, effective mechanism exist for resolving disputes between investors and states, particularly in order to incentivize foreign investment in renewable energy"[6]. However, this should in no way be understood as a blind endorsement for *status quo*. It is not. More to the opposite, actually. We advocate in favor of a modernized IIA and ISDS landscape; one that is structurally designed to accommodate sustainable development. However, while we advocate substantial reconsiderations of international energy architecture, we do advocate for incremental change in certain respects by learning from our past and maintaining what is good while reforming what is not good. To make this ambivalent message clear to the reader: while we need transformation or near complete revolution in our sustainable development efforts, we do not need the same level of transformation or near complete revolution in ITA. ITA is an effective global governance tool for energy promotion and protection already. With moderate reforms, that role can be heightened and strengthened. Because we focus on ITA and the Energy Charter Treaty (ECT) in this paper, we deal with more moderate reform proposals. Our task is limited to explain why ITA and ECT are important global governance tools in the international energy market and what could be done to improve the regime to better align with a green transition.

---

*ECT 'Modernization': A Botched Reform Attempt that Undermines Climate Action*, in *Kluwer Arbitration Blog*, 17 October 2022, available at: https://arbitrationblog.kluwerarbitration.com/2022/10/17/the-agreement-in-principle-on-ect-modernization-a-botched-reform-attempt-that-undermines-climate-action/ (accessed on 31 July 2023).

[6] See now deleted speech D. Rivkin, *COP2 1: Climate Change Related Disputes: A Role for International Arbitration and ADR*, 7 December 2015 (can no longer be found online), and Debevoise & Plimpton, *David W. Rivkin Asserts Arbitration and ADR will Play a Critical Role in Climate Change and Sustainability at COP 21* (2 December 2015), available at: https://www.debevoise.com/news/2015/12/david-w-rivkin-asserts_sustainability-cop-21 (accessed on 31 July 2023).

To illustrate the balancing between energy needs, economic growth, and climate change mitigation and adaptation, this paper focuses on the modernization of the ECT– a multilateral IIA focused on energy. More specifically, we look at whether the ECT can achieve the purported goals and strike the right balance. In doing so, we must also analyze the various positions for or against ITA by assessing the regime's legitimacy concerns, the backlash movement, and the possible and proposed solutions to the perceived issues. The crux of the matter is whether the modernized ECT (ECT 2.0) could facilitate investments in the energy sector in a sustainable manner. Corollary, does the ECT 2.0 reflect climate change concerns and clean energy transition goals by aligning with the objectives of the Paris Agreement[7]?

Finally, and most importantly perhaps, this paper is an urgent call for not withdrawing from ECT and instead endorsing the ECT 2.0. This has an increased urgency to it given that some influential European states (France, Italy, the Netherlands[8], Poland, and Spain) have withdrawn from the ECT, making it impossible for the European Commission (EC) to do much else than to propose a withdrawal for the entire EU[9]. Ancillary to that, this paper conveys a strong and

---

[7] Energy Charter Secretariat, *Decision of the Energy Charter Conference, Adoption by Correspondence – Policy Options for Modernisation of the ECT*, 6 October 2019, pp. 2-3, available at: https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2019/CCDEC201908.pdf (accessed on 31 July 2023).

[8] Ironically it was the then Prime Minister of the Netherlands, Mr. Ruud Lubbers, that took the initiative steps with respect to the signing of the ECT. See T.W. Wälde, *Introductory Note by Thomas W. Wälde*, in *International Legal Materials*, 1995, 362.

[9] European Commission, *European Commission proposes a coordinated EU withdrawal from the Energy Charter Treaty*, press release (7 July 2023), available at: https://energy-ec-europa-eu.ezproxy.is.ed.ac.uk/news/european-commission-proposes-coordinated-eu-withdrawal-energy-charter-treaty-2023-07-07_en (accessed on 31 July 2023) and L. Bohmer, *European Commission submits formal proposals for the EU and Euratom to withdraw from the ECT; Commission opines that sunset clause never applied to intra-EU disputes, but it nevertheless proposes the adoption of a subsequent agreement on this issue*, in *IAreporter*, 7 July 2023, available at: https://www.iareporter.com/articles/european-commission-submits-formal-proposals-for-the-eu-and-euratom-to-withdraw-from-the-ect-commission-opines-that-sunset-clause-never-applied-to-intra-eu-disputes-but-it-nevertheless-proposes-the/ (accessed on 31 July 2023). The European Commission had been handed the mandate to represent all EU member states in the modernization

unequivocal disavowal of the European Commission's decision to withdraw from the ECT. Thus, this is definitely one of those "alarmist papers", calling in an unwavering manner for the firefighters and night watchers to come to rescue. With this firm message, we also hope to revive the idea of multilateral global governance in the energy sector through the increased use of ITA landscape, in general, and the ECT, in particular. More States should join the ECT, and not the opposite. Perhaps, the U.S. could revitalize the global multilateral landscape, taking on its global leadership role through soft powers by entering the ECT modernization talks and eventually become a signatory to the treaty. Some observer States – e.g., US, China, and UAE – could work together with Japan (that is in strong favor of the ECT) to not only keep the treaty alive, but to rejuvenate it and breath additional prominence into the document[10]. Our position is that the:

A. ECT 2.0 would be an effective international legal instrument to govern energy investments and work as a global governance tool that facilitates a green economy transition, and

B. ECT 2.0 coordinates and strikes a balance between the purposes and objectives articulated by various stakeholders, including States, corporations, international organizations, and international energy and climate change organizations in the Paris Agreement.

## 2. *Background: purpose and objectives*

Through multilateral efforts we have witnessed a push for a greener, more sustainable transition and world order. Such purpose and objectives are clearly articulated in the United Nations Sustainable Development Goals (UNSDG), the European Green Deal, the Paris Agreement, the United Nations Framework Convention on Climate Change (UNFCCC), etc.

---

negotiations. Council of the European Union, *Negotiating Directives for the Modernisation of the Energy Charter Treaty*, 2 July 2019, available at: https://data-consilium-europa-eu.ezproxy.is.ed.ac.uk/doc/document/ST-10745-2019-ADD-1/en/pdf (accessed on 31 July 2023).

[10] This is mere wishful thinking, but perhaps "manifesting". We hope for the latter.

In light of the important and applaudable move towards a greener, more sustainable world-order, there are primarily three competing positions on the currency of the ECT. Ultimately, it is the siding with one or the other of the said positions that will affect – positively or negatively – the standing (or falling) of the ECT. The positions are:

- Position 1: ECT already facilitates a green transition by promoting and protecting investments in the energy sector (including renewable energy investments). ECT 2.0 does so even more.
- Position 2: ECT is an obstacle to a green transition (primarily by protecting fossil fuel investments). However, ECT 2.0 remedies major concerns and facilitates a green transition (including by elevating the role of renewable energy, but not necessarily excluding fossil fuels).
- Position 3: ECT is an obstacle to a green transition (primarily by protecting fossil fuel investments). ECT 2.0 does not remedy major concerns.

Indeed, we can treat the three positions as different mental representations of ITA and ECT as an effective global governance tool in the scheme of international energy architecture. We would tend to agree with Position 1. We do not think that promoting and protecting fossil fuel investments is mutually exclusive with a green transition, especially where robust compliance mechanisms are put in place as well as environmental protocols. Furthermore, we believe that more energy investments, technological enhancements, and competition will eventually and inevitably put renewable energy at the forefront. We need to unleash the market forces and innovation, do away with monopolies, and incentivize small- and medium sized investors. However, we also subscribe to a policy-based coordinated and well-organized phase-out, while never allowing such efforts to undercut the global souths and the developing world's access to reliable quantity and quality energy. If simply pushing an extreme Western agenda as advocated primarily by green activists, no matter how well intended, the unintended consequences may be that (a) those most in need are not lifted out of poverty in line with the UNSDG, (b) Western states cement and entrench unfair dominance through their own energy sovereignty (an extension of colonialism through "environmental imperialism"), (c) the global south

and developing world are stuck in the dependency quagmire (again, an extension of colonialism and environmental imperialism), and as a result that (d) many States simply refuse to work towards climate change adaptation and mitigation, on the one hand, and in multilateral constellations, on the other. Put very simply, unless we are pragmatic with incremental and tailored reforms, we may harm those already suffering even further. In that light, we believe that withdrawing from ECT (or other IIAs) simply leads to less overall change in the greener and more sustainable direction. Position 2 is not different in effect from Position 1. However, both positions 1 and 2 are at odds with Position 3. The latter would dramatically change the international energy architecture and the unintended consequences will make the world a much worse place for a large number of people. Today, it seems that Position 3 has the smallest but loudest following.

ECT is arguably the most important IIA in existence[11]. Thus, for any advocate of ITA the faith of the ECT should be treated with highest alertness. This is especially true given that much of the contemporary criticism is accurate, even were taken out of context and used to suggest misdirected and radical proposals. Some parts of the ECT are outdated. It is an undeniable fact. The ECT is a so-called "old generation" IIA. The question is whether ITA, including the ECT, is in need of radical transformation or more moderate reforms that do not undercut the fundamental elements of international arbitration and international investment law (IIL). We argue for the latter and hope that this paper can prove to be an important contribution to revive the optimism in global energy governance through ITA and the ECT.

Scholars have rightly noted that too "little attention has been given to the capacity of the existing institutional architecture to promote investment in clean energy technologies"[12]. It is indeed impor-

---

[11] C. Verburg, *Modernising the Energy Charter Treaty: An Opportunity to Enhance Legal Certainty in Investor-State Dispute Settlement*, in *Journal of World Investment & Trade*, 2019, 20.

[12] K. Tienhaara, C. Downie, *Risky Business: The Energy Charter Treaty, Renewable Energy, and Investor-State Disputes*, in *Global Governance*, 2018, 24, pp. 451-452.

tant that IIAs – such as the ECT (which has received increased importance due to its multilateral character and subject-matter uniqueness) – and ISDS also play an important role in this scheme of global energy governance[13].

We will *argue* that the ECT is the single most important piece in the existing institutional architecture on international energy investment promotion and protection. We will *explain* why we believe that the ECT 2.0 complements the Paris Agreement by providing adequate policy space to states to meet their broader obligations while protecting energy investments, including (mostly) green investments. Furthermore, we will *argue* that ECT 2.0 with its ISDS mechanism entrenches a crucial architectural framework that assists in expediting the transition to clean energy by facilitating, promoting and protecting the flow of investment into the renewable energy sector. We will *argue* that this greener, more sustainable development largely benefits small- and medium sized (SME) investors and external stakeholders (e.g., the civil society). Conversely, we will *explain* why a withdrawal from the ECT simply means that ECT 1.0 and/or IIA 1.0 (i.e., old-generation IIAs) will reign supreme for quite some time, after which the SMEs will largely take the long-term hit. On the last point, we will *explain* why a refusal to recognize the importance of ITA simply means more non-transparent, contractual ISDS (which could even include various freezing clauses, waivers of sovereign immunity from execution, and so on) between States and multinational corporations (MNC). Thus, we will *explain* why advocating against ITA equals arguing in favor of contractual ISDS. Thus, we will *highlight* that advocating against ECT 2.0 equals (even if unintentionally so) arguing in favor of MNC fossil fuel promotion and protection and against SME renewable promotion and protection. Conclusively: advocating against moderate ITA reform results in the use of old generation IIAs (at least for the foreseeable future).

[13] See V. Korzun, *Enforcing Soft Law in International Investment Arbitration*, *Vanderbilt Journal of Transitional Law*, 2023, 56(1), pp. 64-65.

## 3. *The Energy Charter Treaty: facilitating, promoting, and protecting energy investments*

### 3.1. *ECT: an introduction*

The ECT was signed in 1994 and entered into force in 1998. It has fifty articles and fourteen annexes. Adding to this patchwork, there are also several understandings, declarations and interpretations that have been made part of the overall ECT regime. "The ECT covers promotion and protection of investments, trade in energy, transit in the energy sector, environmental aspects as well as the settlement of disputes under the Treaty"[14]. Thus, the ECT provides for a reliable legal framework for energy investments and transit. It facilitates energy cooperation by promoting and protecting energy investments. The ECT makes possible and protects long-term energy investments by protecting against political risk.

ECT has 52 member states + EU, including states as diverse as Afghanistan, Albania, Georgia, Kyrgyzstan, Mongolia, Turkey, Turkmenistan, Ukraine, and Uzbekistan. Additionally, the ECT has 38 observer member states (signatories to the energy charter) + various organizations, cooperations, etc., including states as diverse as Pakistan, Syria, US, China, Colombia, Iran, Iraq, Sierra Leone, Tanzania, UAE, etc. Even though the EU bloc is likely to withdraw, the impact of ECT as a global instrument for energy cooperation may live on. We hope that the U.S., China, UAE, Japan, and other influential energy States could take a leadership role in reviving the ECT by entering the modernization process, culminating in signing and ratifying the ECT 2.0.

### 3.2. *Energy investments and typical interfering State measures*

It is important to have some (albeit brief) understanding about (1) the nature of energy investments, (2) the category of energy investments, and (3) the measures that could interfere with such investments.

---

[14] K. Hobér, *The Energy Charter Treaty – A Commentary*, Oxford, Oxford University Press, 2020, p. 1.

First, energy investments tend to be long-term; prone to political risk; capital intensive; and subject to quite substantial sunk costs in order to even get the operation going[15]. Second, energy investments are typically made in oil and gas; power generation, transmission, and supply; offshore renewables; onshore renewables; nuclear; hydrogen/storage; etc. Finally, typical measures that interfere with energy investments include denials or revocations of permits for exploration or extraction activities; phase-out of fossil fuel-based energy sources; and removal of incentives (e.g., feed-in-tariffs).

### 3.3. *Promoting energy investments: remembering the past, appreciating today, and improving the future*

We tend to forget that policy objectives and political concerns swing like a pendulum. We forget that policy objectives and political concerns of the past are cyclically revisited, sometimes with great newfound passion. What is more important to remember is that the better idea tends to prevail at the end. This lesson on human endeavor and behavior is not insignificant in the debate on the ECT.

Looking back then, we must never forget the times in which the ECT was drafted and signed and what it was aiming at and what it did indeed achieve. We will spare the reader of a broader revisiting of the World Wars, the establishing of UN/ICJ/GATS, the Bretton Woods regime, the Cold War, and the prevailing of liberal capitalism with increased multilateral trade. We will not say much about how successful this project has been in lifting millions and millions out of poverty. We will take it for granted that the reader is well aware and we will instead focus more narrowly on the ECT. The ECT was entered into with the objective to establish a legal framework in order to promote long-term cooperation in the energy field[16]. More specifically, the ECT was signed largely to serve as a post-Cold War

[15] See e.g. J. Tropper, K. Wagner, *The European Union Proposal for the Modernisation of the Energy Charter Treaty – A Model for Climate-Friendly Investment Treaties?*, in *Journal of World Investment & Trade*, 2022, pp. 817-818.

[16] K. Hobér, *The Energy Charter Treaty – A Commentary*, Oxford, Oxford University Press, 2020, p. 1.

bridge between East-West following years of geopolitical and ideological divide[17]. ECT achieved its purported objectives by supporting a transition in the East to market economy; East was to provide energy security to West and in turn receive much needed capital (FDI) and technology transfer[18]. Moreover, it was also aimed at offering protection to a larger audience of investors, enhance competition, and invite technological enhancements. At the time of signing the ECT, Professor Thomas W. Wälde wrote that:

> The major international oil companies seem to have considered – in the early stages – that they had sufficient leverage to do without the Charter. The industry was concerned over the "sovereignty" references in the Treaty and the potential interventionist-oriented institutional arrangements implicit in some proposals. The possibility of a hard-law environmental article worried the industry as well as some governments (e.g. the UK concern over the use of EC environmental law to challenge national planning decisions). Several European countries – and energy industries – felt threatened by the liberal, competitive and anti-monopolistic approach of the Charter to controversial issues such as pipeline access and reciprocal free trade – which means access to European markets of cheap goods from the CIS[19].

It was true then, and it is true now. Major oil and gas corporations will do just fine without the ECT. They would even do fine without IIAs. They have the necessary leverage; and if not in the West and North, they will have it in the East and South. And even if the energy sources are extracted in the East or South, it will be imported to the West. Moreover, back then – as now – the issue of adequate policy space for states, including for environmental purposes, was considered carefully. MNC wanted less, and states wanted more. That is effectively what led to old generation IIAs. The MNCs

---

[17] Energy Charter Secretariat, *The Energy Charter Treaty, Trade Amendment and Related Documents*, 24 April 1998, pp. 8-9, available at: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2427/download (accessed on 31 July 2023).

[18] T.W. Wälde, *Introductory Note by Thomas W. Wälde*, in *International Legal Materials*, 1995, 361.

[19] *Ibid.*

had more leverage then because competition was lacking, the demand was high, and consumption crucial. States now have more leverage and the opportunity to remedy that wrong by including environmental obligations and ensuring adequate policy space to states, including in order to comply with the Paris Agreement and the UNFCCC. Much of the leverage is a result of capitalism, i.e., more investors, enhanced competition (including many SMEs operating in a transborder setting), and therefore technological enhancements.

Finally, as it was back then when the ECT was signed – as is the case now – it is the States as well as SMEs that will take the biggest hit if IIAs (including ECT) with ISDS clauses are terminated. In other words, if the ECT is terminated, the most significant and adverse impact will be had on energy investments by SMEs in the renewable energy sector and developing States that will be forced to comply with the demands of MNCs (which may include freezing clauses, non-transparent ISDS, waivers of immunity from execution, etc.).

In light of Professor Wälde's spot-on observation from 1995, we will briefly cover two important rationales in favor of the ECT; that is, (A) the economic (sustainable development) rationale, and (B) the policy rationale.

### *A. Economic (sustainable development) rationale*

One of the main purposes of ITA is economic development[20]. Surely the idea – i.e., that investment promotion and protection lead to increased investment – has been challenged. We will not delve in-

[20] C. Schreuer, *Investment Protection: Original Purpose and Features*, in C. Baltag, A. Stanic (eds.), *The Future of Investment Treaty Arbitration in the EU: Intra-EU BITs, the Energy Charter Treaty, and The Multilateral Investment*, 5, 2020; Corporate Counsel International Arbitration Group, *Investor-State Dispute Settlement (ISDS) Reform. Submission to UNCITRAL Working Group III*, 1-2, 18 December 2019, available at: https://uncitral.un.org/sites/uncitral.un.org/files/cciag_isds_reform.pdf (accessed on 31 July 2023); and *Kingdom of Spain v. Infrastructure Services Luxembourg S.á.r.l.* [2021] FCAFC 112, para. 2 (Stating that the ICSID Convention is an important international convention underpinning and supporting the flow of investment capital around the world). For a contrary position, see Corporate Europe Observatory, *Busting the myths around the Energy Charter Treaty – A guide for concerned citizens, activists, journalists and policymakers*, 2020, p. 10, available at: https://www.tni.org/files/publication-downloads/busting_the_myths_around_the_energy_charter_treaty-web.pdf (accessed on 31 July 2023).

to that debate here, but will rather treat the three pillars of ITA – (i) economic development, (ii) neutrality, and (iii) de-politicization – as axioms. Just briefly, though, we want to say from our practical experience, that when consulting with clients in transborder bargains – whether commerce, trade, or investment – we do not necessarily mention things such as "you could benefit from fair and equitable treatment" or "you may consider relying on an ISDS clause in another IIA through the most favored nation standard". Such is not the name of the game at the pre-establishment, planning phase. However, significant due diligence goes into analyzing and assessing legal stability and the overall investor landscape in the host state. If the state (directly or through representation) makes additional commitments or assurances, the better it is for the investor. If the state has taken certain measures to promote investments in a particular sector (e.g., through incentive structures), the better it is for the investor. Thus, the theory that investment protection does not lead to economic development because it is not one of the key factors for determining where to invest is utter nonsense to someone that is actually dealing with these matters. Ultimately then, if the ITA system is undercut, this will be evident, but the price for the lesson will be too high. We will take no joy nor pride in travelling conferences saying "we told you so".

The crux of the matter is quite straightforward and should be simple to digest for any reader despite background, namely, we are dependent on reliable energy and we need FDI. On this premise or presumption, it will be rather easy to conclude that we, therefore, need investor/investment protection for energy investments. IIAs and ISDS facilitate and promote investment by protecting it. The regime manifests as a political risk insurance mechanism.

In addition, and to be utterly frank, we could not even meet our global challenges without sufficient investments in the energy sector. Let us start with an easy point to make: there is no way to ensure access to affordable, reliable, sustainable and modern energy for all (UNSDG 7) without sufficient FDI in the sector[21]. The fact

[21] United Nations, *Sustainable Development Goals. Goal 7. Ensure access to affordable, reliable, sustainable and modern energy for all*, available at: https://sdgs.un.org/goals/goal7 (accessed on 31 July 2023).

of the matter is that 670 million individuals live without electricity; there has been a sharp increase in energy prices; electrification has slowed; and investments in renewable energies have declined (e.g., due to lack of incentives)[22]. Even so, that is hardly the entire picture of energy-importance. For example, how can we ensure decent work and economic growth (UNSDG 8) without access to affordable and reliable energy? How can we promote industry, innovation, and infrastructure (UNSDG 9) without affordable and reliable energy? How can we offer sustainable cities and communities (UNSDG 11) without sustainable and modern energy for all? How can we combat climate change (UNSDG 13) without investing in sustainable energy? We can go on and on, but the key message is clear, and the very bottom line is that not a single sustainable development goal can be achieved without sufficient investments in the energy sector.

Serious actors, such as leading financial institutions and government officials, understand this. It is an easy observation to make, but nevertheless a point that may sound bold in present times, and especially in light of the nonsensical theses loudly presented by various NGOs and other so-called interest groups[23]. More energy investments, regulated through ITA, should not be treated as a back-handed endorsement for fossil fuel, high-carbon based investments. It should rather be seen as a pursuit for a greener, more sustainable world order. For example, the World Bank has rightly noted the need for FDI in the extractive industries, but also explained that its work in the extractive sector focuses on:

- Maximizing benefits in a way that contributes to sustainable and inclusive development, including minimizing negative impacts on people and the environment.

---

[22] *Ibid*.

[23] See e.g. Corporate Europe Observatory, *Busting the myths around the Energy Charter Treaty – A guide for concerned citizens, activists, journalists and policymakers*, 2020, pp. 29-30, available at: https://www.tni.org/files/publication-downloads/busting_the_myths_around_the_energy_charter_treaty-web.pdf (accessed on 31 July 2010), IISDS, *What Is the Energy Charter Treaty and What Does it Mean for Sustainable Development?*, YouTube, 26 April 2022, available at: https://www.youtube.com/watch?v=Hbku_wACwfM (accessed on 31 July 2023), and *Corporate Europe Observatory*, *The fossil fuel industry's secret weapon: the Energy Charter Treaty*, YouTube, 13 June 2018, available at: https://www.youtube.com/watch?v=lLVvwOrk91Q&t=10s (accessed on 31 July 2023).

- Accelerating the energy transition and climate action by reducing emissions from the extractive sector[24].

Serious actors are not "dropping the ball" on adaptation and mitigation. Quite the opposite is true. We need to make sure that energy (and incidental mining necessary for renewable energy production) investments align best as possible with sustainable development – i.e., contribute to economic development and growth while also protecting and enforcing global liberal values (e.g., combating climate change and protecting human rights). To achieve such aim, we must move beyond IIA and ISDS 1.0, including ECT 1.0. We need to be better; we need to be greener and more sustainable. ECT 2.0, like other new generation IIAs, is a clear step in that globally conscious direction. There is a strong economic development argument to make in favor of ECT, especially ECT 2.0. Over time, the concept of economic development has come to be part of what has been coined "sustainable development", which is an applaudable direction and trajectory. Sustainable development has three dimensions: social, economic and environmental[25].

*B. Policy rationale*

Now to the often underarticulated policy rationale. The policy rationale in favor of, *inter alia*, "Bretton Woods" and international economic law broadly, and IIAs and ISDS more specifically, was more fashionable post-World War II and post-Cold War. Today, polarization is growing wide and the idea of interdependence and interconnectivity through transborder commerce, trade, and investment is spoken of in distaste. The idea of national sovereignty as presented by populist, nationalist leaders have gained traction once more. The global governance efforts of mutual, multilateral intercourse between sovereign states seem to have halted with instead blocs of "friendly" sovereigns emerging and competing with other blocs of "unfriendly" States.

---

[24] The World Bank, *Extractive Industries*, available at: https://www.worldbank.org/en/topic/extractiveindustries/overview#1 (accessed on 31 July 2023).

[25] G.A. Res. 70/1, 2030 Agenda for Sustainable Development, at 3 (Sept. 25, 2015). Arguably, "sustainability" have four pillars, adding also "human".

Historically, an investor could not sue a host-State for interfering with his investment, nor could he claim investor protection under customary international law against a State. Instead, the aggrieved investor had to turn to its home State for protection through the venue of diplomatic protection. Sometimes, the home State went as far as to engage in so-called "gunboat diplomacy". The period of the end of the 1800's and until the end of World War II saw a regressive era with respect to enforcing private economic rights against States. In 1889, an Argentinian jurist and diplomat elaborated the now infamous "Calvo doctrine", which restricted the protections offered to foreign investors (both substantively and procedurally). The essence of the Calvo doctrine was that foreign investors should be strictly subjected to the exclusive jurisdiction of national courts and offered the same treatment as domestic investors[26]. This idea became unsustainable.

The move away from the Calvo era slowly picked-up pace with the Second International Peace Conference of the Hague in 1907. However, it was not until the beginning of the 1960's (i.e., post-World War II) that the de-politicization of investment disputes started taking shape effectively[27]. It was then that the ICSID Convention came about. It was the attracting of FDI and the de-politicization of investment disputes that was said to be the main purpose with – and consequently the greatest accomplishments of – ITA[28].

Furthermore, globalization led to the increased use and need for ITA. It is our position that in a global economy that transcends borders, domestic dispute resolution mechanisms cannot sufficiently facilitate the enforcement of a global rule of law. Furthermore, we believe that international arbitration "made global business possible between Western parties and emerging States and countries that

---

[26] N. Blackaby *et al.*, *Redfern and Hunter on International Arbitration*, 441, 2015.

[27] See e.g. *Eiser Infrastructure Ltd v. Kingdom of Spain* [2020] FCA 157, para. 69 ("By providing [for ICSID arbitration], the Centre aims to improve the international investment climate and stimulate a larger flow of private international investment").

[28] See E. Gaillard, I. Mitrev Penusliski, *State Compliance with Investment Awards*, in *ICSID Rev.*, 2021, 52(2).

embrace different ideological and legal traditions"[29]. As a result, ITA have helped facilitate an increasingly global, interconnected, and interdependent economy – including in the energy sector through the ECT.

We wish to remind the reader that the ECT was signed in 1994 to promote, facilitate, and protect energy cooperation and energy security in a post-World War II and post-Cold War era and hence was designed specifically to overcome political division. One of its main aims was to establish a common energy governance that promotes interdependence through a move to market economy[30].

Again, the idea of "sovereignty" with capital S is not new. The aggressive idea of nation States presented by populists and nationalists have been around for a long time. Also, the more moderate (and at times applaudable but competing) idea of "mixed economies" (i.e., state capitalism) is not new. The frequent (and often vicious) challenges to liberal capitalism (including a rules-based order, democracy, and human rights as understood by Western States) is also not new. However, it is our duty as international lawyers to engage in the discourse wide-awake and attentive to systemic and structural attacks on the foundations carefully and informatively designed in the aftermath of total chaos and tweaked into workability in a post-conflict era of relative peace and prosperity. Because, when walls fall, instruments for mutual intercourse replace the polarization and division. Such interaction can lead to peace and prosperity through interdependence and interconnectivity. Such interdependence and interconnectivity is furthered by transborder commerce, trade, and investment. However, such efforts are only available if facilitated, promoted, and protected through a rule of law and effective adjudicatory machinery. The ECT is one such legacy-instrument incidental to walls falling. It is a masterpiece of global governance in the international energy architecture scenery.

---

[29] T.E. Carbonneau, *The Law and Practice of Arbitration*, 108, 2020.

[30] See T.W. Wälde, *Introductory Note by Thomas W. Wälde*, in *International Legal Materials*, 1995, 362.

3.3.1. *Protecting energy investments*

There has been a drastic growth of promoting and attracting foreign investment by offering investors protection through IIAs since the 1980's[31]. The investment protection found in these documents contains the IIL. Thus, IIL applies to the substantive matter that is to be adjudicated through ISDS (together, the ITA regime). Redfern and Hunter summarized the typical protections found in these IIAs as follows:

- the protection against expropriation or measures equivalent to expropriation without compensation;
- the right to be treated fairly and equitably;
- the right to full protection and security;
- the protection against arbitrary or discriminatory treatment;
- the right to national and MFN treatment;
- the right to the free transfer of funds and assets; and
- the protection against a state's breaches of its investment obligations and undertakings[32].

Such substantive protection standards protect against undue state measures. As mentioned, the ECT covers primarily five broad areas, one being investment protection[33]. It is indeed an integral part of the treaty. The ECT offers the substantive protections set out above[34].

In order to avail of arbitration (ISDS) for hearing any investor/investment grievances, the arbitral tribunal must have jurisdiction. For this purpose, a potential investor claimant must show that *(i)* she is an investor as defined in the treaty (*ratione personae*), *(ii)* she has made an investment in the host State as defined in the treaty (*ratione materiae*), *(iii)* the treaty applies from a temporal standpoint

[31] N. Blackaby *et al.*, *Redfern and Hunter on International Arbitration*, 2015, pp. 444-445.

[32] *Ibid*., p. 470. More generally on international investment law, see R. Dolzer, U. Kriebaum, C. Schreuer, *Principles of International Investment Law*, 2022.

[33] K. Hobér, *The Energy Charter Treaty – A Commentary*, Oxford, Oxford University Press, 2020, p. 1.

[34] Articles 10 (Promotion, Protection and Treatment of Investments), 13 (Expropriation), and 14 (Transfers Related to Investments) of the ECT.

(*ratione temporis*), and *(iv)* the State has given its consent to arbitration (*ratione voluntatis*).

Following the jurisdictional decision, we come to the merits phase (dealing with liability and hence the substantive protection standards). Finally, we deal with the quantum phase (i.e., typically damages). In addition, during the ISDS process, there are many procedural intricacies unique to ITA compared to international commercial arbitration (ICA).

The most frequently used ITA/ISDS regime is ICSID. Other frequently chosen alternatives include the International Chamber of Commerce (ICC), the Stockholm Chamber of Commerce (SCC), or *ad hoc* arbitration pursuant to the UNCITRAL Arbitration Rules[35]. Awards rendered pursuant to the ICSID regime are enforced under the ICSID Convention, while arbitral awards rendered pursuant to the other regimes are enforced pursuant to the New York Convention[36]. The ECT offers ISDS through: ICSID Arbitration rules (if the investor's home state and host state are members of the convention) or ICSID Additional Facility Rules (if either investor's home state or host state are not members to the ICSID convention); Ad Hoc Arbitration pursuant to the UNCITRAL Arbitration Rules; or SCC Arbitration rules[37].

## 4. *The Energy Charter Treaty 2.0: facilitating, promoting, and protecting energy investments in an Era of sustainable development*

In order to assess whether the ECT 2.0 is good or bad, or whether it goes far enough, we need to determine for ourselves (A) whether we believe that we need IIAs? If the answer is "yes" or "maybe", (A.1) do we need it in the current shape (IIA 1.0) or reformed (IIA 2.0)? Having made up our minds on that, we must determine for ourselves (B) whether we need the ECT? If the answer is "yes" or

[35] See e.g. K. Hobér, J. Dahlquist, *Investment Treaty Arbitration – Problems and Exercises*, 2018, p. 10.

[36] *Ibid.*, p. 11.

[37] Article 26 (Settlement of Disputes between an Investor and a Contracting Party) of the ECT.

"maybe", (B.1) do we need it in the current shape (ECT 1.0) or reformed (ECT 2.0)? Finally, even if we make up our minds on the IIL aspect of IIAs, generally, and the ECT, more particularly, (C) do we need ISDS (procedurally)? If the answer is "yes" or "maybe", (C.1) do we need it in the current shape (ISDS 1.0) or reformed (ISDS 2.0)? We will cover (A) and (C) together under the first sub-heading below. We will cover (B) separately.

*A. Legitimacy Concerns with ITA 1.0 and ITA 2.0*

The basic premise is that we need IIAs and ISDS, but (emphasis added) not necessarily in the current way, shape and form (i.e., IIA and ISDS 1.0 or simply ITA 1.0). The structural design may need to be reformed, while not (emphasis added) undercutting the fundamental elements of IIL nor international arbitration (i.e., ITA 2.0)[38].

Serious challenges have been made against ITA. These challenges and the overall backlash are both directed at substance and legal standards, i.e., with respect to IIL as found in IIAs, and procedurally, i.e., with respect to ISDS. Moreover, a third area of more recent criticism that merits to look at in its own light and not as part of substantive or procedural criticism *per se*, is that the ITA regime fails to align with 21st century global concerns as manifested primarily in the UNSDG (e.g., environmental challenges, climate change challenges, public health concerns, human rights violations, and so on). As a result of the broader spectrum of legitimacy concerns and the backlash movement, several reform proposals have been made – ranging from more moderate reforms (e.g., increasing transparency, including a stand-alone right to regulate clause, clarify exceptions, etc.) to more transformational reforms (e.g., removing protection for legitimate expectations, establishing a multilateral investment court, etc.)[39].

[38] Some argue that the ITA design should undergo fundamental shifts due to three main challenges; that is, (i) climate change, (ii) national security, and (iii) investor obligations. See A. VAN AAKEN, *Investment Law in the Twenty-First Century: Things Will Have to Change in Order to Remain the Same*, in *Journal of International Economic Law*, 2023, 26, p. 166.

[39] For more on this, search and read more on the rather intensive discussion on the "legitimacy crisis" of ITA/ISDS and the "backlash" against the regime. For one major reform proposals, see in particular the European Union's proposal to elaborate a multilateral investment court (MIC). See e.g. *Comprehensive Trade and Economic*

Thus, even though IIL has been relatively well-received as an auspice of international economic law, and despite the fact that the interpretation and application by international arbitrators have generally been approved (albeit with one of the main concern being inconsistency), the decision-making process, on the one hand, and the content of IIAs, on the other, have not gone unchallenged. And while the number of ITA matters increase, the concerns over the regime are more frequently expressed[40].

The criticism has to be taken seriously. In fact, as we have stated, it is of acute concern, and this is indeed an alarming paper. The legitimacy crisis and backlash movement go to the core of ITA; for example, claiming that the regime:

- is inconsistent;
- lacks in transparency;
- suffers in neutrality due to party-appointed arbitrators;
- suffers in neutrality and independence due to double-hatting;
- is investor-friendly;

---

*Agreement between Canada and the European Union, Can.-E.U.* (signed Oct. 30, 2016, not yet entered into force). For criticism of the EU proposal and its underpinnings, see e.g. European Federation for Investment Law and Arbitration (EFILA), *A Response to the Criticism Against ISDS*, 4-42 (2015) and Y. Dautaj, *Between Backlash and the Re-Emerging "Calvo Doctrine": Investor State Dispute Settlement in an Era of Socialism, Protectionism, and Nationalism*, in *Northwestern. J. Int'l L. & Bus.*, 2021, 41. For good discussions on legitimacy of ITA and the backlash movement, see e.g. J.H. Carter, *The Culture of Arbitration and the Defense of Arbitral Legitimacy*, in D.D. Caron *et al.* (eds.), *Practising Virtue: Inside International Arbitration*, 2016, pp. 97-105; S.W. Schill, *Conceptions of Legitimacy of International Arbitration*, in D.D. Caron *et al.* (eds.), *Practising Virtue: Inside International Arbitration*, 2016, pp. 106-124; C.N. Brower, S. Blanchard, *From "Dealing in Virtue" to "Profiting from Injustice": The Case Against "ReStatification" of Investment Dispute Settlement*, in *Harv. Int'l L. J.*, 2014, 55, 45; C. Brown, K. Miles, *Introduction: Evolution in Investment Treaty Law and Arbitration*, in C. Brown, K. Miles (eds.), *Evolution in Investment Treaty Law and Arbitration*, 2011, 3, 3-4; C. Schreuer, *Investment Protection: Original Purpose and Features*, in C. Baltag, A. Stanic (eds.), *The Future of Investment Treaty Arbitration in the Eu: Intra-Eu Bits, the Energy Charter Treaty, and the Multilateral Investment*, 2020 1, 5. For a strong assertion on "regulatory chill" in the climate change context, see K. Tienhaara, *Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement*, in *Transnational Environmental Law*, 2018, 7(2).

[40] K. Hobér, J. Dahlquist, *Investment Treaty Arbitration – Problems and Exercises*, 2018, *supra* note 16, at 9 ("During the last 15-20 years there has been a virtual explosion of investment arbitrations").

- provides for investor rights but not obligations;
- downgrades the right to regulate;
- has a too broad fair and equitable treatment coverage;
- has a too broad investor and investment scope;
- includes umbrella clauses;
- does not align with 21st century global concerns;
- does not provide adequate policy space to regulate;
- lacks CSR obligations;
- fails to take account of other public international law regimes;
- does not allow for amici participation to the extent it should; and most importantly,
- leads to "regulatory chill", i.e. that host states are afraid to regulate to combat global issues, such as environmental, climate change, and human rights.

However, raising issues (true, untrue, or partly true in scope, nuance and degree) does not mean that there we are left with a binary choice of either sanctioning the regime as is or withdrawing from it. We are of the opinion that ISDS and IIAs could be reformed to better respond to the criticism (much of which, to be very clear, has great merit). For example, reforms could include:

- narrower definitions of investor and investment;
- investor obligations;
- outlining measures under the FET clause;
- clarifying the MFN clause;
- broader global policy objectives in the preambular language;
- an explicit right to regulate (tied to sustainable development and the Paris Agreement);
- pre-establishment assessments;
- increased transparency;
- increased amici participation;
- establishing an appeals mechanism;
- establishing an investment court system;
- allowing for regime interaction;
- allowing for counterclaims (including for environmental and human rights violations); and
- CSR obligations.

To put this broader systemic discussion in perspective, we focus in this paper on the modernization talks in in the Energy Charter Conference *vis-à-vis* the ECT. We believe that the modernization work perfectly encapsulates the crux of the matter. More importantly, it underscores how untrue perceptions could lead to unintended consequences in the pursuit of a greener, more sustainable world. We believe that accepting the modernized ECT achieves those goals best possible, while withdrawing from it does the opposite. We will explain why.

### *B. ECT Modernization*

The ECT's standing and legitimacy was questioned when Russia left the treaty in 2009. Russia's pulling-out goes to the very root of the ECT, which was to bridge East-West in the aftermath of the Cold War. Understandingly, the proponents of global energy governance through the ECT were worried. The Energy Charter Conference had to adapt to the new reality and amend its practices quickly. From 2010 the Energy Charter Conference adopted the road map for modernization and the "geographical expansion"[41]. In 2015 the new International Energy Charter was adopted as a "further political declaration aimed at updating the European Energy Charter"[42]. Professor Hobér has rightly noted:

> The International Energy Charter reflects global modern energy challenges and identifies common principles as well as areas of international co-operation in the energy field for the twenty-first century. The growing interest in, and importance of, international energy issues is reflected in the fact that more than ninety States are now involved in the so-called Energy Charter Process[43].

---

[41] Energy Charter Secretariat, *Decision of the Energy Charter Conference, Road Map for the Modernisation of the Energy Charter Process*, 24 November 2017, available at: https://www.energycharter.org/fileadmin/DocumentsMedia/News/20101124-Energy_Charter_Process_Modernisation_Road_Map.pdf (accessed on 31 July 2010).

[42] K. Hobér, *The Energy Charter Treaty – A Commentary*, Oxford, Oxford University Press, 2020, p. 5.

[43] *Ibid.*

Some years later, in 2017, the decision to modernize the ECT was made[44]. In 2018 a list of topics (25 in total) was approved for modernization discussions[45]. In November 2019, the Energy Charter Conference established the Modernization Group to negotiate the modernization[46].

In the Modernization Group, 15 negotiation rounds took place between July 2020 and June 2022. EC had the strongest call for reform and made it clear early on that "[o]ne of the objectives of this reform is to align the ECT with the Paris Agreement and the objectives of the Green Deal"[47]. An agreement in principle (AIP) was presented on 24 June 2022[48]. However, the voting was postponed[49]. At that time, the EC was in favor of the AIP[50].

---

[44] Energy Charter Secretariat, *Decision of the Energy Charter Conference, Modernisation of the Energy Charter Treaty*, 28 November 2017, available at: https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2017/CCDEC201723.pdf (accessed on 31 July 2023). For a good overview of the ECT Modernization perspectives, see the Kluwer Arbitration Blog's *ECT Modernisation Perspectives* work, available at: https://arbitrationblog.kluwerarbitration.com/category/ect-modernisation/ (accessed on 31 July 2023). See e.g. E. Shirlow, L. Abrahams, *ECT Modernisation Perspectives: An Introduction*, in *Kluwer Arbitration Blog*, 20 July 2020. Available here: https://arbitrationblog.kluwerarbitration.com/2020/07/20/ect-modernisation-perspectives-an-introduction/ (accessed on 31 July 2023).

[45] Energy Charter Secretariat, *Approved Topics for the Modernisation of the Energy Charter Treaty*, 29 November 2018, available at: https://www.energycharter.org/media/news/article/approved-topics-for-the-modernisation-of-the-energy-charter-treaty/ (accessed on 31 July 2023).

[46] Energy Charter Secretariat, *Decision of the Energy Charter Conference, Modernisation of the Energy Charter Treaty*, 6 November 2019, available at: https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2019/CCDEC201910.pdf (accessed on 31 July 2023).

[47] https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2019/CCDEC201908.pdf, see also https://www.europarl.europa.eu/doceo/document/P-9-2020-005555-ASW_EN.pdf.

[48] Energy Charter Secretariat, *Agreement in Principle on the Modernisation of the Energy Charter Treaty*, 24 June 2022, available at: https://www.bilaterals.org/IMG/pdf/reformed_ect_text.pdf (accessed on 31 July 2023).

[49] See L. Bohmer, *European Commission to present concrete legal proposals for a coordinated withdrawal from the Energy Charter Treaty in the coming days*, in *IAreporter*, 5 July 2023, available at: https://www.iareporter.com/articles/european-commission-to-present-concrete-legal-proposals-for-a-coordinated-withdrawal-from-the-energy-charter-treaty-in-the-coming-days/ (accessed on 31 July 2023).

[50] See L. Bohmer, *European Commission Seeks Postponement of Tomorrow's Vote on Modernised Ect, as Eu Member States Disagree on Proper Approach*, in *IAreporter*, 21 November 2023, available at: https://www-iareporter-com.ezproxy.

That being so, France, Germany, Poland, Italy and the Netherlands withdrew from the ECT despite EC advocating in favor of adopting the modernized ECT. One year later, on 7 July 2023, the EC announced its decision on proposing the withdrawal of the EU and Euratom from the ECT[51]. This was a result of the withdrawing states blocking the vote in favor of ECT 2.0. During the withdrawal phase, the EC suggests entering into an *inter se* agreement between EU member states on ISDS and with respect to the sunset clause[52]. More recently, the UK government confirmed that it will review the ECT membership and considering withdrawal if modernization is not agreed[53].

---

is.ed.ac.uk/articles/european-commission-seeks-postponement-of-tomorrows-vote-on-modernised-ect-as-eu-member-states-disagree-on-proper-approach/ (accessed on 31 July 2023).

[51] European Commission, *European Commission proposes a coordinated EU withdrawal from the Energy Charter Treaty*, press release (7 July 2023), available at: https://energy-ec-europa-eu.ezproxy.is.ed.ac.uk/news/european-commission-proposes-coordinated-eu-withdrawal-energy-charter-treaty-2023-07-07_en and file:///C:/Users/Jonat/Downloads/Decision+on+Withdrawal+of+proposal+for+EU+vote+in+favour+of+ECT.pdf (accessed on 31 July 2023) and L. Bohmer, *European Commission submits formal proposals for the EU and Euratom to withdraw from the ECT; Commission opines that sunset clause never applied to intra-EU disputes, but it nevertheless proposes the adoption of a subsequent agreement on this issue*, in *IAreporter*, 7 July 2023, available at: https://www.iareporter.com/articles/european-commission-submits-formal-proposals-for-the-eu-and-euratom-to-withdraw-from-the-ect-commission-opines-that-sunset-clause-never-applied-to-intra-eu-disputes-but-it-nevertheless-proposes-the/ (accessed on 31 July 2023).

[52] See J. Tropper, *Withdrawing from the Energy Charter Treaty: The End is (not) Near*, in *Kluwer Arbitration Blog* (4 November 2022), available at: https://arbitrationblog.kluwerarbitration.com/2022/11/04/withdrawing-from-the-energy-charter-treaty-the-end-is-not-near/ (accessed on 31 July 2023) and L. Bohmer, *European Commission submits formal proposals for the EU and Euratom to withdraw from the ECT; Commission opines that sunset clause never applied to intra-EU disputes, but it nevertheless proposes the adoption of a subsequent agreement on this issue*, in *IAreporter*,7 July 2023, available at: https://www.iareporter.com/articles/european-commission-submits-formal-proposals-for-the-eu-and-euratom-to-withdraw-from-the-ect-commission-opines-that-sunset-clause-never-applied-to-intra-eu-disputes-but-it-nevertheless-proposes-the/ (accessed on 31 July 2023) and J. Tropper, *An inter se Modification of the ECT to Exclude Intra-EU Arbitration – How Can It Work?*, in *Kluwer Arbitration Blog*, 19 June 2023, available at: [https://www.euractiv.com/section/energy/news/brussels-calls-for-pause-in-ect-reform-talks-after-losing-key-eu-vote/] (accessed on 31 July 2023).

[53] https://www.gov.uk/government/news/uk-reviewing-membership-of-energy-treaty.

On 11 July 2023, the ECT Secretary-General, Guy Lentz, urged EU Member States to vote in favor of the ECT 2.0 on 11 July 2023[54]. In a press release he stated, among other things:

> A solid and reliable legal environment is a prerequisite for mobilising much-needed private sector investments in clean energy sources. In this context, adopting the modernised ECT text could play a pivotal role in de-risking EU investments while allowing countries to reach their energy transition objectives. In particular, small and medium-sized enterprises in renewable electricity generation and the energy efficiency sector would have gained the most since they are key to achieving the energy transition and rely on the investment protection the ECT offers[55].

We echo that message loud and clear – a rather alarming fashion. It should also be remembered that the EC has claimed that ECT 1.0 is incompatible with EU environmental objectives. Other old generation IIAs may have the same issues. If the modernization is not agreed to, we will live through a sunset period of old-generation IIAs and contract-based arbitrations for MNCs (including fossil fuel giants).

### *C. ECT Statistics*

Before embarking on questions to consider in the reform work, and before outlining the reform proposals, it will be worth the readers' while to consider some actual empirical data. This is especially important considering the massive backlash, which is often rooted less in data and more in subjective feelings and mere speculations.

There are 158 known ISDS cases under the ECT regime (2023). We have often heard from certain external stakeholders that the

---

[54] G. Lentz, *Statement by the Secretary General of the Energy Charter Secretariat on the draft Council Decision proposing the withdrawal of the European Union from the Energy Charter Treaty*, 11 July 2023, available at: https://www.energycharter.org/media/news/article/statement-by-the-secretary-general-of-the-energy-charter-secretariat-on-the-draft-council-decision-p/?tx_news_pi1%5Bcontroller%5D=News&tx_news_pi1%5Baction%5D=detail&cHash=44c59eb08571a57c64875f5eb94512d2 (accessed on 31 July 2023).

[55] *Ibid*.

"ECT protects the fossil fuel industry" or that the ECT is "incompatible with climate change"[56]. In that light, let us actually see what types of energy investments that are mostly arbitrated[57]:

- 59 % renewable energy
- 34 % fossil fuels (with most investment disputes dealing with infrastructure, second comes exploitation, and thirdly comes exploration)
- 4 % N/A
- 3 % nuclear

Similarly, we have often heard that the "ECT protects multinational corporations". In that light, let us actually see what types of claimants mostly pursue ISDS under the ECT regime[58]:

- SME (387)
- Holdings (223)
- Individual investors (60)
- Investment funds (21)
- Large corporations (10)
- Banks (6)

Finally, we have often heard that investors win against states and that there is a form of "investor bias" embedded in the ITA regime. In that light, let us see who is actually mostly successful by looking at the statistics on the outcome[59]:

- In 40 out of 87 final awards the claimants were awarded damages (breach in 45)
- 11 out of 158 cases were settled
- 8 out of 158 cases were discontinued
- 3 out of 158 cases were annulled

---

[56] IISDS, *What Is the Energy Charter Treaty and What Does it Mean for Sustainable Development?*, *YouTube* (26 April 2022), available at: https://www.youtube.com/watch?v=Hbku_wACwfM (accessed on 31 July 2023) and Corporate Europe Observatory, *The fossil fuel industry's secret weapon: the Energy Charter Treaty*, YouTube, 13 June 2018, available at: https://www.youtube.com/watch?v=lLVvwOrk91Q&t=10s (accessed on 31 July 2023).

[57] Statistics of ECT Cases, 1 May 2023, available at: https://www.energycharter.org/fileadmin/DocumentsMedia/Disputes/20230501_-_Statistics_-_Cases_under_the_Energy_Charter_Treaty.pdf (accessed on 31 July 2023).

[58] *Ibid*.

[59] *Ibid*.

We think that it is fair to say that neither ITA as a regime nor ECT as a part of that regime is rigged in anyone's favor, nor does it protect one type of investor over another. A more accurate description is that there is a level playing field between states and investors and that the biggest beneficiaries of the system are SMEs, particularly in the renewable energy sector. There is a virtue in facts and truth. Somewhere along the line we forgot to be data-driven in scientific studies. One has to be really careful with unintended consequences when rooting structural reform arguments in beliefs, no matter how virtuous they may sound on their own.

*D. Questions to Consider when Reforming the ECT*

When discussing reforming the ECT, there are a handful of questions that need to be consulted. These questions go to the heart of any reform, which is according to us whether the ECT aligns with the era of sustainable development. The questions to consider before we proceed to highlight the amendments in the ECT 2.0 are:

- Does the ECT 1.0 restrict a country's ability to regulate in order to speed up the green transition in the energy sector?
- Does the ECT 1.0 privilege and protect the fossil fuel industry?
- Does the ECT 2.0 restrict a country's ability to regulate in order to speed up the green transition in the energy sector?
- Does the ECT 2.0 privilege and protect the fossil fuel industry?

Essentially the questions ask whether the ECT 2.0 is apt for the task to facilitate a green transition. Put differently: will the ECT 2.0 assist in the pursuit of a greener, more sustainable world order? And if it does indeed deliver, how much? And finally, should we go ahead with the ECT 2.0? Why or why not?

*E. ECT 2.0*

The ECT 2.0 has led to four major reforms; that is, (1) jurisdictional amendments, (2) investment protection amendments, (3)

sustainable development amendments, and (4) procedural amendments[60].

First, the jurisdictional amendments have, *inter alia*, seen a narrowing of the definition of investor and investment. Most notably, (a) there is a requirement on the investor of "substantial business activities" and "physical presence, employment, turnover generation or payment of taxes" in the host state; (b) with respect to investment, the "Salini test" is endorsed and there is an explicit exclusion of judicial and administrative decisions; and (c) the "economic activity in energy sector" now covers hydrogen, anhydrous ammonia, biomass, biogas, and synthetic fuels (in an attempt to incentivize a green transition through promoting and protecting low-carbon investments)[61].

Second, the investment protection standards have seen a narrowing, too, as well as some additions and alterations. Most notably, (a) an explicit right to regulate has been inserted; (b) the fair and equitable treatment standard now lists the measures and clarifies the concept of legitimate expectations (but does not remove it); (c) the most favored nation treatment is clarified, i.e., it does not extend procedurally and does not work to include substantive treatment in comparator treaties; (d) the scope of indirect expropriation has been limited (focusing on measures being "manifestly excessive"); and (e) the denial of benefits clause has been amended so that it can be invoked after arbitration has been requested[62].

Third, several sustainability amendments have been inserted explicitly to reflect the sustainable development era and a push to new generation IIAs. Moreover, such language reaffirms the right to regulate in order to achieve legitimate policy objectives. Most notably, (a) the preambular language has been edited; (b) the right to regu-

---

[60] See Energy Charter Secretariat, *Agreement in Principle on the Modernisation of the Energy Charter Treaty*, 24 June 2022, available at: https://www.bilaterals.org/IMG/pdf/reformed_ect_text.pdf (accessed on 31 July 2023). For a good take on the reforms, see M.J. Alarcon, *ECT Reform: The Final Countdown*, in *Kluwer Arbitration Blog*, 3 August 2022, available at: https://arbitrationblog.kluwerarbitration.com/2022/08/03/ect-reform-the-final-countdown/ (accessed on 31 July 2023).

[61] Energy Charter Secretariat, *Agreement in Principle on the Modernisation of the Energy Charter Treaty*, 24 June 2022, pp. 6-11.

[62] *Ibid.*, pp. 31-36 and 39-40.

late has been inserted explicitly; (c) a non-regression clause has been inserted (to make sure investments are not induced by lowering environmental standards); (d) language imposing climate change obligations have been inserted explicitly (e.g., referring to states' obligations *vis-à-vis* the implementation of the Paris Agreement and UNFCCC); (e) language on corporate social responsibility (CSR) has been inserted explicitly (as an obligation on the state, however, and not the investor); (f) a requirement to implement domestic laws for environmental impact assessment (EIA) in the pre-establishment phase has been inserted; (g) several exceptions to the investment protection standards have been made clearer; (h) a flexibility mechanism has been inserted so that states can unilaterally exclude protection of fossil fuel from the scope of the treaty (with the treaty being applicable to current investments for a ten-years phase-out period while excluding new investments); (i) language offering protection for investments also in the economic sector of hydrogen, anhydrous ammonia, biogas, and synthetic fuels (green or at least greener sources of energy); and (j) an obligation to carry out impact assessments of new energy investments carried out and making such public (e.g., on the effects on population, human health, biodiversity, environment and climate, and cultural heritage)[63].

Finally, there have been several crucial procedural amendments. Most notably, (a) ECT 2.0 excludes ISDS between states in a regional economic integration organization (REIO), i.e., excluding intra-EU disputes (albeit some tribunals may nevertheless refuse this for pre-existing investments); (b) language increasing transparency in ISDS; and (c) conciliation and diplomacy between states for their failure to adhere to and comply with the sustainable development aspects of the treaty. In fact, the initial proposal included state-to-state arbitration between states for their failure to comply with the sustainable development obligations. Sadly enough, this was eventually rejected[64].

The ultimate question is whether such amendments as mentioned above balance investment promotion and protection with

[63] *Ibid.*, pp. 3-4, 30, 31, 51-55, 122-124.
[64] *Ibid.*, pp. 67-81.

broader environmental goals (most notably climate change adaptation and mitigation efforts). We are of the unequivocal view that it does, and that a treaty of this sort would not only be the greenest IIA, but indeed the greenest treaty world-wide given its practical utility[65]. Had the state-to-state arbitration been included, such development would have indeed been yet another ground-breaking achievement.

## 4. *ECT 2.0: if it enters into force versus if it does not*

The ECT 1.0 does not necessarily restrict a country's ability to regulate in order to speed up the green transition in the energy sector. There are far more cases where the ECT has actually been brought against interferences with renewable energy investments than for the protection of fossil fuels[66]. That being so, the ECT 1.0 does indeed protect the fossil fuel industry – it does so by design[67]. It was one of its major aims when entering into the treaty. If the architects desire otherwise, they can agree to that respect; for example, under the ECT 2.0 a member State can utilize the so-called flexibility mechanism in order to no longer offer special protection for high-carbon fossil fuel investments.

The ECT 2.0 does not restrict a country's ability to regulate in order to speed up the green transition in the energy sector. Quite the opposite, it facilitates such transition, especially where the flexibility mechanism is adopted and due to increased policy space to regulate within. More importantly, the modernized treaty includes

---

[65] See J. Kunstyr, O. Svoboda, *ECT Modernisation Perspectives: 'Can the EU Make the ECT the Greenest Investment Treaty of them All?'*, in *Kluwer Arbitration Blog*, 25 July 2020, available at: https://arbitrationblog.kluwerarbitration.com/2020/07/25/ect-modernisation-perspectives-can-the-eu-make-the-ect-the-greenest-investment-treaty-of-them-all/ (accessed on 31 July 2023).

[66] Se empirical data above.

[67] See e.g. U. Rusnák, *ECT Modernisation Perspectives Modernisation of the Energy Charter: The Long Story Told Short*, in *Kluwer Arbitration Blog*, 21 July 2020, available at: https://arbitrationblog.kluwerarbitration.com/2020/07/21/ect-modernisation-perspectives-modernisation-of-the-energy-charter-the-long-story-told-short/ (accessed on 31 July 2023).

specific references to environmental obligations. Notwithstanding this, the ECT 2.0, again by design, does also offer protection for fossil fuel investments. There is nothing inherently wrong with that (from a legal standpoint), it is a sovereign undertaking that can be sanctioned by a rules-based system. Sovereign States are free to determine what types of investments they seek to promote, facilitate, and therefore protect. What we think about that is completely irrelevant, it is a sovereign policy choice and objective, often rooted in political concerns (e.g., energy sovereignty with all incidental concerns).

All in all, the ECT 2.0 is indeed apt for the task to facilitate a green transition. It does deliver and may be considered not only the greenest IIA, but the greenest treaty there is[68]. Our take is that we should not only be in favor of ECT 2.0 but that we should advocate loudly for it. It can achieve all the original goals of the ECT 1.0 (including the object and purpose with ITA) with the additional benefit of adding as its main objective sustainable development. A remarkable achievement indeed!

## 5. *Concluding remarks*

ITA is a good global governance tool in the international energy architecture. The ECT, in particular, can be highly effective – especially in its modernized form – as a tool to tackle the challenges of energy transition head-on while still promoting and protecting much needed FDI. In this light, and in order to make the ITA regime compatible with the environmental crisis and climate change, while also redressing other legitimacy concerns of the regime, the current ITA landscape must be reformed in three structurally important ways: (1) materially (i.e., the IIAs), procedurally (i.e., the ISDS mechanism), and (3) sustainably. Such structural reforms are acute for the survival of the ECT.

[68] See J. Kunstyr, O. Svoboda, *ECT Modernisation Perspectives: 'Can the EU Make the ECT the Greenest Investment Treaty of them All?'*, in *Kluwer Arbitration Blog*, 25 July 2020.

If the ECT 2.0 enters into force, the treaty will: (i) Provide for sufficient policy space for states to meet their environmental (and human rights) obligations; (ii) offer more robust jurisdictional requirements; (iii) tighten the substantive protection standards; (iv) offer no intra-EU ISDS; (v) make ISDS even more transparent (outside intra-EU context of course); and most importantly (vi) offer a flexibility regime potentially excluding fossil fuel after 10 years. ECT 2.0 paves the way for a greener, more sustainable world. ECT 2.0 will facilitate a green transition by promoting, attracting, facilitating, and protecting energy investments (mostly green) while working in tandem with sustainable development goals[69]. This is what a 21st century citizenry expects and demands in an era of sustainable development[70].

Meanwhile, if the ECT 2.0 does not enter into force, the treaty will: (i) protect fossil fuel investments for the duration of the sunset clause (20 years); (ii) offer protection under the ECT 1.0 provisions for the duration of the sunset; and (iii) see an *inter se* agreement being entered into between EU member states to exclude both intra-EU Arbitration and the sunset clause (if at all possible, which itself will invite years of litigation and arbitration)[71]. The alternative to ECT and ISDS is not that compelling, it means revisiting inadequate do-

---

[69] K. Beckman, *Interview: A new Energy Charter Treaty as a complement to the Paris Agreement*, available at: https://borderlex.net/2020/06/18/interview-a-new-energy-charter-treaty-as-a-complement-to-the-paris-agreement-on-climate-change/ (accessed on 31 July 2023).

[70] See Y. Dautaj, E. Shirlow, *ECT Modernisation Perspectives: An Update*, *Kluwer Arbitration Blog*, 9 August 2021, available at: https://arbitrationblog.kluwerarbitration.com/2021/08/05/ect-modernisation-perspectives-an-update/ (accessed on 31 July 2023). See also U. Rusnák, *Comment: Quo Vadis Energy Charter Treaty?*, 12 April 2021, available at: https://www.energycharter.org/media/news/article/comment-quo-vadis-energy-charter-treaty/?tx_news_pi1%5Bcontroller%5D=News&tx_news_pi1%255%E2%80%A6%201/3%20Comment:%20Quo%20Vadis%20Energy%20Charter%20Treaty? (accessed on 31 July 2023) and U. Rusnák, *ECT Modernisation Perspectives Modernisation of the Energy Charter: The Long Story Told Short*, in *Kluwer Arbitration Blog*, 21 July 2020, available at: https://arbitrationblog.kluwerarbitration.com/2020/07/21/ect-modernisation-perspectives-modernisation-of-the-energy-charter-the-long-story-told-short/ (accessed on 31 July 2023).

[71] See J. Tropper, *Withdrawing from the Energy Charter Treaty: The End is (not) Near*, in *Kluwer Arbitration Blog*, 4 November 2022, available at: https://arbitrationblog.kluwerarbitration.com/2022/11/04/withdrawing-from-the-energy-charter-treaty-the-end-is-not-near/ (accessed on 31 July 2023).

mestic legal frameworks and local courts[72]. Meanwhile, multinational corporations will simply proceed with contractual ISDS but with even more leverage at hand, including freezing clauses and waivers of all sort (including from execution immunity). SMEs will take the hit for undercutting ITA. We agree with Charles H. Brower (when discussing EU's investment court proposal) in that:

Large multinational investors may not like the EU's vision, but seem unlikely to oppose it, in part because investment treaties do not rank high on their list of institutional concerns, and in part because multinational enterprises have other options in managing disputes with host states. Small- and medium-size investors might oppose the EU's proposal for an investment court, but lack the political capital to influence treaty negotiations[73].

In addition, the sudden withdrawing from ECT can have unintended consequences for the Global South and developing world[74]. They may be stuck with only large multinational investors with increased leverage. We cannot allow the green transition to benefit only the Western, already developed, hemisphere.

Ironically the alternative to ECT 2.0 is *status quo*, i.e., (i) ECT 1.0, (ii) other old generation treaties, and (iii) contractual (often non-transparent) arbitration[75]. That can hardly be satisfactory in an era of sustainable development. One must be careful with unintended consequences. Withdrawal from the ECT kicks-in the sunset clause (i.e., ECT 1.0) and *status quo* IIA 1.0 for an additional

---

[72] See e.g. J. McGlaughlin, *ECT Modernisation Perspectives: Big Shoes to Fill? Governing Foreign Energy Investments in an Energy Charter Treaty Lacuna*, in *Kluwer Arbitration Blog*, 9 May 2023, available at: https://arbitrationblog.kluwerarbitration.com/2023/05/09/ect-modernisation-perspectives-big-shoes-to-fill-governing-foreign-energy-investments-in-an-energy-charter-treaty-lacuna/ (accessed on 31 July 2023).

[73] C.H. Brower, *Politics, Reason, and the Trajectory of Investor-State Dispute Settlement*, in *Loy U. Chi. L. J.*, 2017, 49, pp. 271, 295.

[74] See O.D. Akinkugbe, A. Majekolagbe, *International investment law and climate justice: the search for just green investment order*, in *Fordham International Law Journal*, 2023, 46(2), and U. Natarajan, *Climate Justice*, in M. Valverde, K. Clarke, E. Darian-Smith, P. Kotiswaran (eds.), *The Routledge Handbook of Law and Society*, 2021.

[75] See A. van Aaken, *Investment Law in the Twenty-First Century: Things Will Have to Change in Order to Remain the Same*, in *Journal of International Economic Law*, 2023, 26, pp. 166, 171.

21 years in total. There is approximately 2.15 trillion euros in fossil fuel assets that can be stranded by 2050 if not phased-out properly and approximately 345 billion euros protected by the ECT[76]. Sure, there will likely be an *inter se* agreement to avoid the sunset clause between agreeing states, but it is not clear how effective that will be (i.e., how many participants it will have and whether ISDS tribunals would accept the agreement pursuant to article 31 VCLT)[77].

Finally, since 2015 the ECT has seen a substantial interest in facing global modern energy challenges through cooperation in the energy field[78]. And while EU member states may leave, other states may join. Thus, "[w]ith countries from Africa and Asia joining, the ECT is turning into a global charter"[79]. Resultingly, the EU bloc may be an isolated and non-influential stakeholder in global energy diplomacy and governance. What a total and unintended disaster that would be. We hope that the U.S., China, UAE, and other observatory States may consider joining the modernized ECT and that they can join more optimistic States such as Japan in reviving the treaty into a success story.

---

[76] See *Ibid.*, and B.-J. Verbeek, *The Modernization of the Energy Charter Treaty: Fulfilled or Broken Promises?*, in *Business and Human Rights Journal*, 2023, 8.

[77] J. Tropper, *Withdrawing from the Energy Charter Treaty: The End is (not) Near*, in *Kluwer Arbitration Blog*, 4 November 2022, available at: https://arbitrationblog.kluwerarbitration.com/2022/11/04/withdrawing-from-the-energy-charter-treaty-the-end-is-not-near/ (accessed on 31 July 2023).

[78] K. Hobér, *The Energy Charter Treaty – A Commentary*, Oxford, Oxford University Press, 2020, p. 5.

[79] M.J. Alarcon, *ECT Reform: The Final Countdown*, in *Kluwer Arbitration Blog*, 3 August 2022, available at: https://arbitrationblog.kluwerarbitration.com/2022/08/03/ect-reform-the-final-countdown/ (accessed on 31 July 2023).

# INNOVATIVE ENERGY INVESTMENTS IN PUBLIC INTEREST UNDER INTERNATIONAL INVESTMENT LAW: THE CASE OF NUCLEAR FUSION

*Marcin J. Menkes*

## 1. *Introduction*

The global energy sector stands at a crossroads, navigating from fossil fuels dependence to clean energy. The article chapter discusses the massive investments required (part 2), particularly in innovative technologies, and the legal challenges (part 3). Using nuclear fusion as an example (part 4), it highlights the need for nuanced considerations in balancing diverse interests (part 5).

## 2. *Balancing energy growth, security and sustainable development*

Energy sector is a condition and threat to sustainable growth. The decline of civilisation is sometimes explained by an insufficient return on invested energy (EROI); our own requires ever more energy[1]. Modern civilization has relied on a rapidly growing energy supply since the 20th century (see Fig. 1)[2]. In order to meet growing energy demand, we have transitioned from traditional biomass, as the primary energy source, to fossil fuels: coal, oil, and natural gas (see Fig. 2)[3].

---

[1] M. Rowlands, *The Fire: Energy, Civilization, and Collapse*, in M. Rowlands (ed.), *World on Fire: Humans, Animals, and the Future of the Planet*, Oxford University Press, 2021.

[2] V. Smil, *Energy and Civilization A History/anglais*, Reprint édition, MIT Press, 2018.

[3] N. Jelley, *Renewable Energy: A Very Short Introduction - Paperback*, Oxford University Press, 2020.

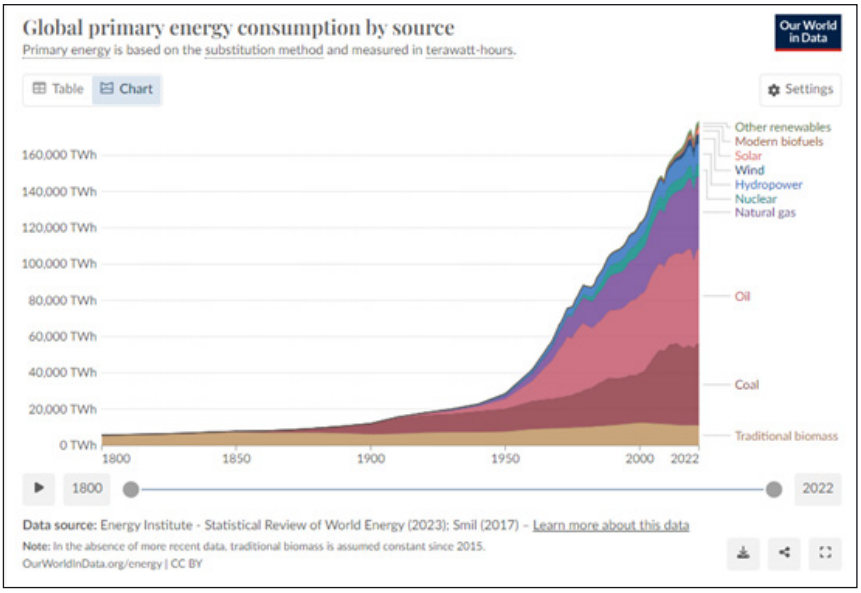



Fig. 1. Data source: Energy Institute – Statistical Review of World Energy (2023); Smil (2017), https://ourworldindata.org/energy-production-consumption.

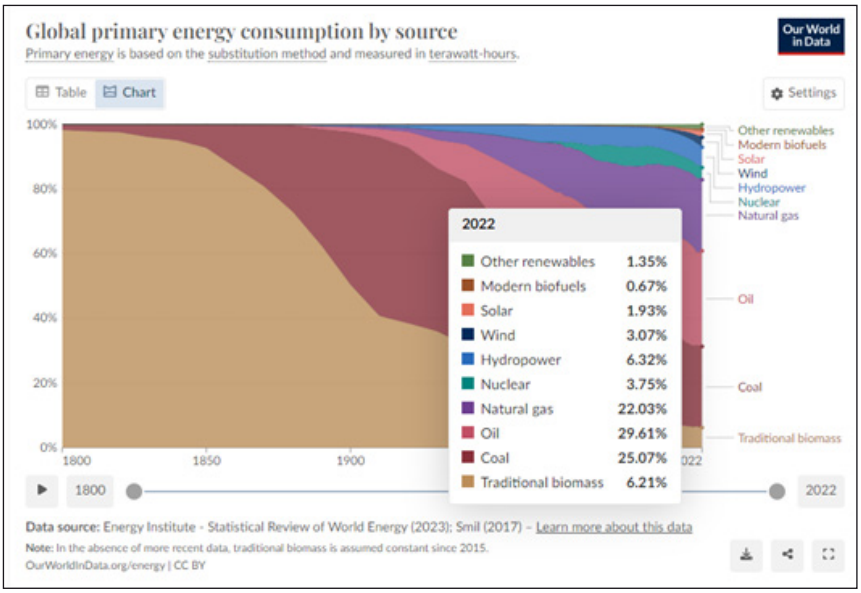



Fig. 2. Data source: Energy Institute – Statistical Review of World Energy (2023); Smil (2017), https://ourworldindata.org/energy-production-consumption.

At the same time, the energy sector, and fossil fuels in particular, pose an existential threat. Energy accounts for more than three-quarters of global greenhouse gas (GHG) emissions (Figs. 3, 4)[4]. Fossil fuels are responsible for some 98% of the energy sector's GHG emissions, while providing 60.3% to the total energy mix (9.5% energy supply from biofuels, 5% from nuclear and 5.2% from other sources)[5].

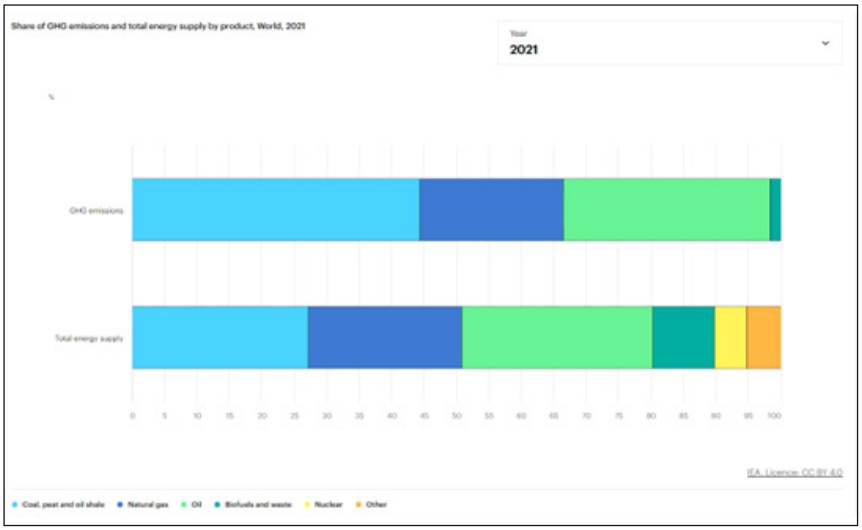



Fig. 3. IEA. Share of GHG emissions and total energy supply by product, World, 2021, https://www.iea.org/data-and-statistics/data-tools/greenhouse-gas-emissions-from-energy-data-explorer.

[4] IEA, *Greenhouse Gas Emissions from Energy Data Explorer – Data Tools*, https://www.iea.org/data-and-statistics/data-tools/greenhouse-gas-emissions-from-energy-data-explorer (accessed on 17 January 2024).

[5] *Ibid.*

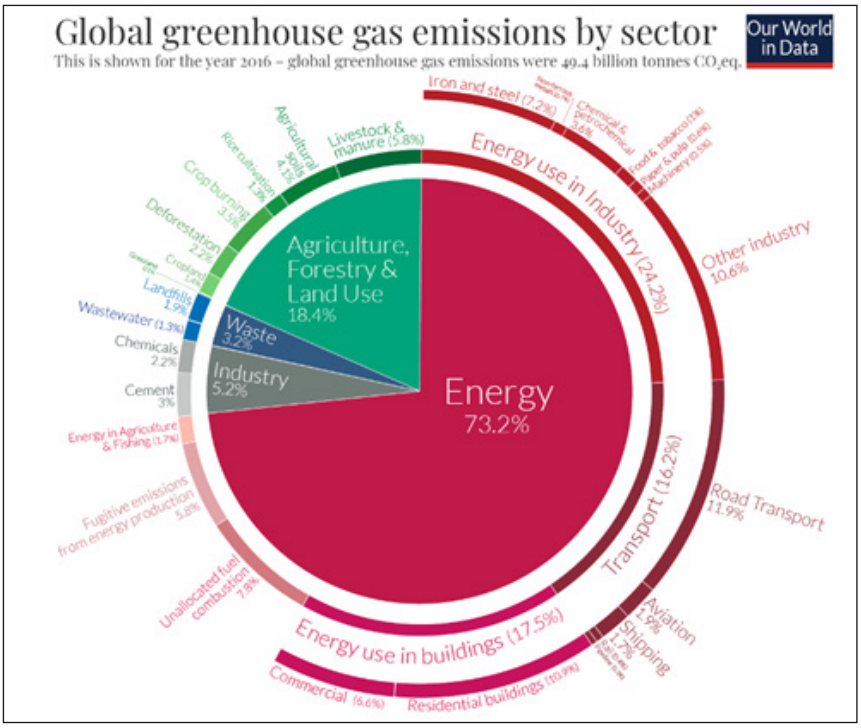



Fig. 4. Hannah Ritchie (2020), *Sector by sector: where do global greenhouse gas emissions come from?*, published online at OurWorldInData.org. Retrieved from: https://ourworldindata.org/ghg-emissions-by-sector [Online Resource].

Meeting our energy demands massive investments[6]. In 2022, $1.3 trillion has been invested in energy transition technologies (though fossil fuel capital investments were almost twice those of renewable energy investments)[7]. In the first half of 2023 a record $358 billion was invested in RES, up 22% on the previous year[8].

[6] O. Ellabban, H. Abu-Rub, F. Blaabjerg, *Renewable Energy Resources: Current Status, Future Prospects and Their Enabling Technology*, in *Renewable and Sustainable Energy Reviews*, 2014 , 39, pp. 748, 758.

[7] IRENA, *World Energy Transitions Outlook 2023: 1.5°C Pathway*, Vol. 1, 2023.

[8] *Renewable Energy Investment Hits Record-Breaking $358 Billion in 1H 2023*, in *BloombergNEF*, 21 August 2023, https://about.bnef.com/blog/renewable-energy-investment-hits-record-breaking-358-billion-in-1h-2023/ (accessed on 17 January 2024).

Yet to stay on the 1.5°C track the number must quadruple. According to the International Renewable Energy Agency (IRENA), a successful energy transition requires cumulative investments of USD 44 trillion by 2030, 80% of which, channelled to transition technologies: efficiency, electrification, grid expansion and flexibility projects[9]. In the energy sector, the share of RES must quadruple until 2050, and unabated coal needs to be phased out at a six-fold faster rate[10].

It is precisely input issues that are a key obstacle to the Net Zero goal. Traditionally, emissions mitigation was seen as a trade-off with economic growth: future benefits were weighed against immediate economic costs. This entails technological, socio-economic and normative challenges[11]. The energy debate is sometimes framed in terms of an energy trilemma between competition, decarbonization and security challenges[12].

The new approach consists of smart actions increasing efficiency and lowering risks. Innovation is a key element here, especially as we move closer to 2050. According to the IEA "almost 50% of the emissions reductions needed in 2050 in the [Net Zero Emission] depend on technologies that are at the prototype or demonstration stage, i.e. are not yet available on the market"[13]. So far energy innovation has taken place mostly in the electricity sector (e.g. electrolysis for green hydrogen), but new energy technologies are deployed in other areas from transport (electric vehicles), industry and buildings (heat pumps), digitalization, as well as energy distribution and storage (e.g. direct air capture and storage). R&D is particularly impor-

---

[9] IRENA, *Investment Needs of USD 35 Trillion by 2030 for Successful Energy Transition*, 28 March 2023, https://www.irena.org/News/pressreleases/2023/Mar/Investment-Needs-of-USD-35-trillion-by-2030-for-Successful-Energy-Transition (accessed on 17 January 2024).

[10] IMF, *Fighting Climate Change with Innovation*, https://www.imf.org/en/Publications/fandd/issues/2021/09/bezos-earth-fund-climate-change-innovation-levin (accessed on 17 January 2024).

[11] O. Hailes, J.E. Viñuales, *The Energy Transition at a Critical Juncture*, in *Journal of International Economic Law*, 2023, 26, p. 627.

[12] A.-A. Marhold, *Towards a "Security-Centred" Energy Transition: Balancing the European Union's Ambitions and Geopolitical Realities*, in *Journal of International Economic Law*, 2023, 26, p. 756.

[13] International Energy Agency, *Net Zero by 2050. A Roadmap for the Global Energy Sector*, 2021.

tant in sectors with limited abating possibilities, like long-distance transportation or heavy industry. At the same time, RES innovation will also have profound geopolitical implications[14], which brings us to the overlap between energy and security.

In the neoliberal paradigm, states assumed that energy cooperation would bring them closer together and that the resulting economic interdependence would promote peace. Russian invasion on Ukraine of 2022 disproved these assumptions, accelerated the process of energy weaponization and highlighted the important public interest in developing independent energy[15].

Given the significance of energy transformation and of Foreign Direct Investments (FDIs) – as a source of both capital and know-how – it is necessary to consider the legal framework that will foster innovation. The recent report by the UN special rapporteur on human rights and the environment *Paying polluters: the catastrophic consequences of investor-State dispute settlement for climate and environment action and human rights* is a telling warning[16]. The author uncritically repeats cliches about investment arbitration to ultimately call for its total dismantlement.

However, as money pours into RES, disputes are also on the rise. The rise of "environmental arbitration" has already functioned as a catalyst for IIL change through normative recognition of environmental goals and obligations[17]. ICSID statistics show that the extractive and energy sectors consistently account for the largest share

[14] IRENA, *A New World. The Geopolitics of the Energy Transformation*, 2019.

[15] A.-A. Marhold, *Towards a "Security-Centred" Energy Transition: Balancing the European Union's Ambitions and Geopolitical Realities*, in *Journal of International Economic Law*, 2023, 26, p. 756; A. Boute, *Weaponizing Energy: Energy, Trade, and Investment Law in the New Geopolitical Reality*, in *American Journal of International Law*, 2022, 116, p. 740.

[16] D.R. Boyd, *Paying Polluters: The Catastrophic Consequences of Investor-State Dispute Settlement for Climate and Environment Action and Human Rights*, UNHCHR 2023, A/78/168, https://www.ohchr.org/en/documents/thematic-reports/a78168-paying-polluters-catastrophic-consequences-investor-state-dispute (accessed on 22 January 2024).

[17] A. Asteriti, *Climate Change Policies and Foreign Investment: Some Salient Legal Issues*, in Y. Levashova, T.E. Lambooy, I. Dekker (eds.), *Bridging the Gap between International Investment Law and the Environment*, Eleven international publishing, 2015.

of cases: in 2023 respectively 27% and 15% of new cases[18]. According to the SCC Green Technology Disputes report, the RES sector was the most commonly identified for the parties appearing in Green Technology Commercial Disputes[19].

Legal and political stability in the energy sectors, alongside fiscal stability, macroeconomic profile and corruption constitute top-five drivers for foreign investments in renewables[20]. OECD identified the following legal drivers of energy transition[21]: a) long-term sound regulatory framework removing barriers to green investments; b) regulating environmentally harmful practices; c) aligning regulatory regimes to foster green economic activity; d) possible transitional support for immature technologies that is performance based and time-bound (i.e. with sunset clauses); e) strengthening international governance in areas that regulate economic activity, e.g. trade and investment laws and multilateral environment agreements.

Protection of innovative RES investments cannot be equated with "regular" FDIs. However, despite IIL's potential to stimulate energy innovation, attention has so far focused on the conflict between environmental and business objectives[22]. This is why it is so important to protect "black swan" energy investments. In the business world, black swans refer to unexpected events with significant consequences[23]. The proverbial black swan is the first black specimen the

---

[18] ICSID, *Annual Report 2023*, 2023, https://icsid.worldbank.org/sites/default/files/publications/ICSID_AR2023_ENGLISH_web_spread.pdf (accessed on 24 January 2024).

[19] SCC Arbitration Institute, *Green Technology Disputes at the SCC Arbitration Institute*, 2022, https://sccarbitrationinstitute.se/sites/default/files/2022-12/report_green_technology_disputes.pdf (accessed on 25 January 2024).

[20] L. Mehranvar, S. Sasmal, *The Role of Investment Treaties and Investor–State Dispute Settlement (ISDS) in Renewable Energy Investments*, Columbia Center on Sustainable Investment, 2023, https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=1004&context=sustainable_investment (accessed on 19 January 2024).

[21] OECD (ed.), *Energy* (OECD 2012), 36.

[22] For a nuanced approach see, for instance: A.D. Mitchell, E. Sheargold, T. Voon, *Regulatory Autonomy in International Economic Law: The Evolution of Australian Policy on Trade and Investment*, Edward Elgar Publishing, 2017, ch. 6.

[23] N.N. Taleb, *The Black Swan: Second Edition: The Impact of the Highly Improbable: With a New Section: 'On Robustness and Fragility'*, 2nd ed., Random House Trade Paperbacks, 2010.

sight of which destroys conceptions of swans. Inherent in the search for "black swans" is the low probability of success. Hence, most such projects receive limited public support, discoveries tend to be private initiatives and this is only the first step in the long-term investment cycle (with a typical lifetime for wind farms of 20-30 years).

The chapter also does not analyse nuclear energy carveouts *per se* in international investment and nuclear treaties[24], nor does it discuss application of security exceptions/non-precluded measures[25] or necessity carveouts for implementing SDG-driven policies[26].

## 3. *Hedging against risks: does international investment law measure up?*

Before exploring the legal environment of black swans, let's map the recurring risk leading to energy arbitration.

Starting with the environmental awareness, in 2019 the Netherlands prohibited the use of coal for electricity generation as of 2030. The law wiped out investments by RWE and UNIPER, among others. Despite reaching a settlement with the governments, both companies filed arbitral claims in claims *RWE v. the Netherlands*[27] and *UNIPER v. the Netherlands*[28]. The investors claimed violation of the ECT, as the investments were made in good faith, after receiving the necessary governmental permits, and have been made – to

[24] J. Fry, O. Repousis, *Investment Arbitration in the Nuclear Energy Sector: Environmental Protection versus Investor Protection*, in Y. Levashova, T.E. Lamboy, I. Dekker (eds.), *Bridging the Gap between International Investment Law and the Environment*, Eleven international publishing, 2015.

[25] Note that the "traditional" nuclear security considerations do not apply to nuclear fusion, as explained in part 3. W. Burke-White, A. von Staden, *Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties*, in *Virginia Journal of International Law*, 2008, 48, p. 307.

[26] A. Bjorklund, *The Necessity of Sustainable Development?*, in M.-C. Cordonier Segger, A. Newcombe, M.W. Gehring (eds.), *Sustainable Development in World Investment Law*, Vol. 30, Kluwer Law International, 2011.

[27] *RWE AG and RWE Eemshaven Holding II BV v Kingdom of the Netherlands* ICSID ICSID Case No. ARB/21/4.

[28] *Uniper SE, Uniper Benelux Holding BV and Uniper Benelux NV v Kingdom of the Netherlands* ICSID ICSID Case No. ARB/21/22.

some extent – at the request of the Netherlands[29]. On September 1, 2022 the Higher Regional Court of Cologne (Germany) found both ICSID arbitral claims inadmissible due to the incompatibility of the ECT clause with EU law; eventually the claims were withdrawn[30].

Although the investments received all regulatory clearings, the new regulation not only implemented the Netherlands' commitments under the Paris Agreement, but also reflected changing social environmental awareness. In this sense, disputes to coal phase-out cases can be classified as arising from technological risk (better understanding of the consequences and access to alternative solutions).

Technological progress may also affect market equilibrium. On the one hand, investors risk not achieving the expected rate of return. On the other hand, market dynamics may surprise host governments. Consider the disputes over early termination of renewable subsidies in Czechia, Italy or Spain. The 2007 withdrawal of feed-in tariffs (FIT) providing a premium price above the wholesale market value resulted in a decade of "Spanish saga" arbitration in the field of photovoltaics and wind energy. The FIT became a victim of its own success. Deployment of solar photovoltaic (PV) modules increased in 2008 nearly 400% on a year-to-year basis. By 2009 solar PV subsidies consumed 50% of Spain's renewable energy expenditures (for merely 12% of energy generated). Recent estimates indicate 50 claims for a total of 8 billion euros[31]. Soaring costs com-

[29] At the same time it must be acknowledged that B.-J. Verbeek, *Energy Giant RWE Withdraws Billion-Euro Claim against the Netherlands*, in *SOMO*, 1 November 2023, https://www.somo.nl/energy-giant-rwe-withdraws-billion-euro-claim-against-the-netherlands/ (accessed on 22 January 2024).

[30] In November of the same year both companies lost their cases filed before the District Court of The Hague. The German admissibility judgment was confirmed in appeal on 27 July 2023 by the Federal Court of Justice in Karlsruhe. Ultimately both UNIEPER and RWE declared withdrawal of their claims in March and November 2023 (J. Ballantyne, *Uniper Withdraws ECT Claim*, in *Global Arbitration Review*, 21 March 2023, https://globalarbitrationreview.com/article/uniper-withdraws-ect-claim, accessed on 22 January 2024; B.-J. Verbeek, *Energy Giant RWE Withdraws Billion-Euro Claim against the Netherlands*, in *SOMO*, 1 November 2023, https://www.somo.nl/energy-giant-rwe-withdraws-billion-euro-claim-against-the-netherlands/, accessed on 22 January 2024).

[31] A. Prahbu, *Spain's Renewable Energy Disputes: Renewable Energy Needs Reliable Arbitration*, *The Arbitration Brief*, 15 February 2023, https://thearbitrationbrief.com/2023/02/15/spains-renewable-energy-disputes-renewable-energy-needs-reliable-arbitration/ (accessed on 23 January 2024).

bined with the financial crisis forced the government to end the program early. While volatile economic conditions are part of business risk, the Spanish case is special because the government has made a clear commitment to insulate renewable energy investors from price volatility. Neither environmental reasons *per se*, nor technological arguments justified those actions.

This brings us to the broader issue of political risks associated with energy investments. The prime example here is the 2011 Bundestag decision to phase out German nuclear power plants by 2023. The decision was a reaction to the Fukushima nuclear disaster on 11 March 2011. The amendment to the Atomic Energy Act accelerated deadlines for terminating the operation of nuclear power plants without compensation, adopted in 2010. One result was the withdrawal of Swedish state-owned Vattenfall's license to operate power plants in Krümmel and Brunsbüttel. Vattenfall filed a complaint to the Federal Constitutional Court (BVerfG) and instituted ECT arbitration.

The BVerfG ruled in favour of Vattenfall in 2016[32] and 2020[33]. Even though the BVerfG recognized the state's regulatory freedom, in particular the right to act in the public interest, it also ruled that it was not absolute. In particular, the Bundestag violated the investor's legal expectations by encouraging the investment only a few months earlier and then halting the nuclear program without compensation. Following the BVerfG judgment, Vattenfall and the German government settled the pending ICSID case[34]. The government also granted compensations also to German companies (e.g., RWE).

The case is interesting not only because the nuclear power plants were commissioned in good faith and accordance with industry standards, but also the public interest in phase out is questionable. While the German society has changed its risk preferences, the

[32] BVerfG, Judgment of the First Senate of 6 December 2016, 1 BvR 2821/11, paras. 1-407, https://www.bverfg.de/e/rs20161206_1bvr282111en.html (accessed on 23 January 2024).

[33] BVerfG, Order of the First Senate of 29 September 2020, 1 BvR 1550/19, paras. 1-86, https://www.bverfg.de/e/rs20200929_1bvr155019en.html (accessed on 23 January 2024).

[34] *Vattenfall v Germany (II)* [2021] Investment Dispute Settlement Navigator ICSID Case No. ARB/12/12.

neighbouring France is committed to developing nuclear energy at full speed. Therefore, the argument not only for environmental protection but even for safety is difficult to sustain.

An unjustified political risk materialized in Poland under the "10H" Rule. The 2016 law prohibited building onshore wind turbines within the distance of 10 times its height from residential buildings. The law: a) effectively prohibited inland wind investments on 99.7% of the Polish land territory; b) deteriorated the competitiveness of the economy (because of energy costs and indirectly due to business carbon footprint); c) became an obstacle in meeting climate action obligations; d) ultimately became a stumbling block to accessing the EU Recovery Fund[35]. It also froze investments dynamically rising until its adoption[36].

The "10H" Rule did not serve any public interest, but was a political favour to the coal mining constituency. Despite wiping out numerous investments, hardly investor dared to initiate arbitration proceedings. In opposition to the widely discussed phenomenon of the ISDS chilling effect, the Polish government (2015-2023) consistently contested multilateralism, international arbitration and foreign capital. Initiating arbitration proceedings would therefore burn bridges in Poland until the change of the ruling majority, which seemed a very vague prospect. It is paradoxical that, of all the examples discussed here, arbitration proceedings were not initiated for the most blatant violation of investors' legal expectations. The legal environment started to change in 2023 with the decision to diversify energy sources in the wake of Russian aggression against Ukraine.

Russian aggression is linked to energy security dispute. The case of the German economy becoming dependent on Russian gas is noteworthy. Just three days after the Russian invasion, Chancellor Scholz declared that this dependence was coming to an end, which

[35] *Polish Parliament Votes 700 Metre Rule for Wind Turbines*, in *Euractiv.com*, 10 March 2023, available at: https://www.euractiv.com/section/energy-environment/news/polish-parliament-votes-700-metre-rule-for-wind-turbines/ (accessed on 23 January 2024).

[36] A. Ptak, *Polish Parliament Approves Law to Unblock Building of Onshore Wind Farms*, in *Notes From Poland*, 9 February 2023, https://notesfrompoland.com/2023/02/09/polish-parliament-approves-law-to-unblock-building-of-onshore-wind-farms/ (accessed on 23 January 2024).

created a two-fold problem: finding an alternative supplier, but also Russian ownership of the gas infrastructure. Part of the pipelines belonged to Gazprom Germania ("Gazprom Germania"), RN Refining & Marketing ("Rosneft Marketing") and Rosneft Deutschland ("Rosneft DE"). Gazprom Germania was a German subsidiary PJSC Gazprom PAO ("Gazprom") and the other two are owned by PJSC Rosneft Oil Company ("Rosneft"). Fearing energy blackmail, the government imposed trusteeship on companies. The Gazprom Germania trusteeship later transformed into ownership[37], *de facto* expropriating the Russian owner[38]. Rosneft challenged the measure before administrative (without success) and constitutional courts[39].

Regardless of the discussion on gas as a transition fuel on the way to the Net Zero economy, the government's actions were dictated by the securitization and politicization of the energy sector[40].

It can be argued that, in fact, all of the above examples are manifestations of the single, political risk, which all investors must take into embrace. Therefore, the only legal certainty an investor can count on is provided by the contract. Or indeed?

---

[37] M. Jarrett, *Germany's Trusteeship over Gazprom Germania: A Brewing Expropriation Claim?*, in *EJIL: Talk!*, 6 June 2022, https://www.ejiltalk.org/germanys-trusteeship-over-gazprom-germania-a-brewing-expropriation-claim/ (accessed on 23 January 2024); Federal Government, *Rosneft Deutschland Placed under Trust Management*, in *Bundesregierung.de*, 16 September 2022, https://www.bundesregierung.de/breg-en/news/trust-management-rosneft-2127254 (accessed on 23 January 2024).

[38] *Germany Nationalises Sefe to Oust Gazprom, Secure Gas Supply*, in *Reuters.com*, 14 November 2022, https://www.reuters.com/business/energy/germany-nationalises-gas-importer-sefe-formerly-gazprom-germania-2022-11-14/ (accessed on 23 January 2024).

[39] *New Twist in the Legal Dispute over Rosneft Germany*, in *Energate Messenger.com*, https://www.energate-messenger.com/news/235630/new-twist-in-the-legal-dispute-over-rosneft-germany (accessed on 23 January 2024); *Rosneft Germany Remains under the Care of the Federal Government*, in *Energate Messenger.com*, https://www.energate-messenger.com/news/236331/rosneft-germany-remains-under-the-care-of-the-federal-government (accessed on 23 January 2024).

[40] In is interesting to note, however, that the economic sanctions imposed on Russia resulted in several, sometimes surprising arbitration proceedings including RWE and UNIPER claims against Gazprom, but also India's Gail against SEFE (formerly Gazprom Germania) for non-supply, "Costly Sanction Battles" (11 December 2023), https://www.german-foreign-policy.com/en/news/detail/9432 (accessed on 23 January 2024).

Recently, France forced the EU to allow subsidies for its nuclear power plants through contracts for difference ("CfDs")[41] as the price for the European electricity market reform[42]. In parallel, Belgium subsidizes its gas-power plants and battery farms through the Capacity Remuneration Mechanism due to nuclear phase-out, although the politically sensitive phase-out has been postponed[43]. Governments enjoy greater freedom to provide than to withdraw support. However, it is crucial to recognize that subsidies have various secondary effects including market distortions[44], which may hinder development of more sustainable alternatives. As the German-French stalemate over the energy market reform showed, subsidies also have spill over effects to other economy sectors and foreign jurisdictions.

Even where an investor successfully navigated through all the risks, a commercial success may become an attractive political target for windfall taxes, as in case of the EU energy revenue cap[45]. The regulation was adopted as a part of REPowerEU initiative aimed at finishing energy dependence on Russian fossil fuels[46]. It introduced

---

[41] *Franco-German Power Grab Finally Ends in Compromise*, in *Politico.eu*, 17 October 2023, https://www.politico.eu/article/energy-franco-german-power-grab-finally-ends-in-compromise/ (accessed on 23 January 2024).

[42] *Electricity Market Reform*, 21 December 2023, https://www.consilium.europa.eu/en/policies/electricity-market-reform/ (accessed on 23 January 2024.

[43] *Belgium Approves Auction of Two to Three Gas-Fired Power Plants*, in *The Brussels Times*, 30 April 2021, https://www.brusselstimes.com/167347/belgium-council-of-ministers-approves-auction-of-two-to-three-gas-fired-power-plants-tinne-van-der-straeten-crm-bill-nuclear-phaseout (accessed on 23 January 2024); O. Whitehead, *Battery Farms, Nuclear and Gas: Belgium's Energy Strategy for Future Winters*, in *The Brussels Times*, 2 November 2023, https://www.brusselstimes.com/777492/battery-farms-nuclear-and-gas-belgiums-energy-strategy-for-future-winters (accessed on 23 January 2024).

[44] *OECD Companion to the Inventory of Support Measures for Fossil Fuels 2021*, Organisation for Economic Co-operation and Development, 2021, https://www.oecd-ilibrary.org/environment/oecd-companion-to-the-inventory-of-support-measures-for-fossil-fuels-2021_e670c620-en (accessed on 23 January 2024).

[45] Council Regulation (EU) 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices 2022.

[46] Communication From the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, *REPowerEU: Joint European Action for more affordable, secure and sustainable energy 2022*. The communication was endorsed by the European Council in its Versailles Declaration and followed in May 2021

temporary revenue caps on electricity producers using technologies with lower marginal costs including renewables and nuclear.

The political argument for taxing the windfall profits resulting from the war-crisis at the expense of the difficulties of a large part of the population in meeting their basic needs is clear. At the same time regulatory intervention must be done with due recognition of fairness and the incentives structure. If investors bear the above-mentioned political risk in addition to the business risk, the reward for undertaking innovative activities with a low probability of success must be the prospect of an above-average return on investment. A regulator transferring risk to the investor and then imposing a profit cap destroys the expected value of such investments.

## 4. *Nuclear fusion: a strategic gamble*

Let's now briefly characterise a quintessential black swan energy investment: the nuclear fusion. Nuclear fusion, the process naturally occurring on the sun, stands in stark contrast to nuclear fission currently used in nuclear power plants (and nuclear bombs). During nuclear fission a heavy atomic nucleus splits into lighter fragments. Through nuclear fusion lighter atomic nuclei form a heavier nucleus. Both processes release huge amount of energy. Fusing atoms together releases nearly four million times more energy than a chemical reaction such as the burning of fossil and four times as much as nuclear fission (at equal mass). The key advantages of nuclear fusion over fission are: (i) non-radioactive nuclear fuel, (ii) a fully controllable reaction, and (iii) the absence of hazardous waste. In other words, an unlimited supply of clean and safe energy.

Since 2022 the Lawrence Livermore National Laboratory first confirmed the feasibility of electricity generation through fusion (first fusion ignition) and then achieved the first net energy gain in

by the REPower EU Plan. The actions introduce significant exceptions from the market mechanisms, including joint purchasing of gas, energy price intervention mechanisms and the market correction mechanism.

nuclear fusion[47]. In February 2023 Wendelstein 7-X power plasma was maintained for 8 minutes[48]. In October 2023, ENG8 claimed a net fivefold energy return in the fusion process using water as nuclear fuel, sparking optimism for the eventual commercialization of technology[49].

However, the road to these miles stones started in 1951 and the R&D costs are staggering: $1 bn for Wendelstein 7-X stellarator, $7 bn for the National Ignition Facility at the Lawrence Livermore National Laboratory, $12.8 bn and counting for the ITER Fusion Energy Advanced Tokomak[50].

Limited public funding is understandable given the other pressing needs, low probability of success and alternative R&D projects that could lead to significant advancements in sustainability, spanning from new-generation batteries, through decentralized power grids and (traditional) Modular Nuclear Reactors, to solar-pumped lasers. Nevertheless the legal and political environment cannot kill potentially life-saving black swans.

### 5. *IIL consequences*

Above, I have mapped the risk may trigger investment arbitration. It is now time to examine the consequences that should result from the interplay between the unique aspects of innovative RES investments and violations of investors' legal expectations.

Sustainable development goals were long regarded as aspiration ideals rather than political or legal duties. According to Viñuales

---

[47] *Achieving Fusion Ignition*, https://lasers.llnl.gov/science/pursuit-of-ignition (accessed on 24 January 2024).

[48] Max Planck Institute for Plasma Physics, *Wendelstein 7-X Reaches Milestone: Power Plasma with Gigajoule Energy Turnover Generated for Eight Minutes*, 22 February 2023, https://www.ipp.mpg.de/5322229/01_23 (accessed on 24 January 2024).

[49] A. Aftab, *ENG8's EnergiCell Latest Milestone Hits the News*, in *ENG8*, 4 November 2023, https://eng8.energy/eng8s-energicell-latest-milestone-hits-the-news/ (accessed on 24 January 2024).

[50] World Nuclear Association, *Nuclear Fusion Power*, https://world-nuclear.org/information-library/current-and-future-generation/nuclear-fusion-power.aspx (accessed on 25 January 2024).

sustainable development underpins policy responses to the environmental challenges, yet "[i]ts ubiquitous character is only matched by its vagueness; and its vagueness is a deliberate choice driven by its function, which is to rally rather than to divide"[51]. For some scholars, sustainable development is an interpretative tool rather than a source of obligations, allowing to strike balance between conflicting legal interests[52]. Others assume that human rights not only limit negative externalities of energy management, but could constitute a collective legal title to, among others, access to energy resources[53]. Some argue that SDG create obligations of means[54].

While the field is legalising rapidly, especially in the area of ESG, most of the changes concern imposing obligations on investors and expanding the regulatory space for states[55]. However, as the SDGs are increasingly incorporated into investment treaties[56], this regulatory philosophy requires calibration.

RES investments bring benefits to both investors and host state by promoting (global public goods): health, protecting the environmental, and ensuring energy security. Such investments contribute

---

[51] J.E. Vinuales, *Sustainable Development in International Law*, in L. Rajamani, J. Peel (eds.), *The Oxford Handbook of International Environmental Law (2nd ed)*, Oxford University Press, 2021.

[52] V. Barral, *Le rayonnement intra-systémique du concept de développement durable*, in H. Ruiz-Fabri, L. Gradoni (eds.), *Emergence et circulation des concepts juridiques en droit international de l'environnement*, Société générale de législation comparée, 2009, pp. 371-396.

[53] G. Le Moli, *Beyond Externalities: Human Rights as a Foundation of Entitlements over Energy Resources*, in *Journal of International Economic Law*, 2023, 26, p. 649.

[54] V. Barral, *Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm*, in *European Journal of International Law*, 2012, 23, p. 377.

[55] Through NPMs either for the environmental protection (e.g., Art. 12(5), US 2012 Model BIT; Art. XVII(3), Canada-Panama FIPA; Art. 23.02(3), Canada-Panama FTA) or in the nuclear industry (e.g., Japan-Vietnam BIT Annex I; Korea-Japan BIT Annex I), or restrictive definition of an indirect expropriation (e.g., Korea-US FTA Annex I). It is noteworthy that the ECT limits the environmental exception to "what is strictly necessary" (Art. 24(2) ECT) and excludes expropriation from its scope (Art. 24(1) ECT).

[56] Human Rights Council, *Right to Development in International Investment Law*, 2023, A/HRC/EMRTD/7/CRP.2, https://www.ohchr.org/sites/default/files/documents/issues/development/emd/session7/A_HRC_EMRTD_7_CRP.2%20for%20the%20web.pdf (accessed on 26 January 2024).

to the development of the global public good of knowledge. Recognizing this feature is the first step in balancing legitimate expectations of investors, host society and the global ecosystem.

The International Court of Justice in the *Gabčíkovo-Nagymaros* case offers a natural starting premise for such "integrative" or "reconciliatory" approach[57] to conflicting legal expectations[58]: "new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past". The ICJ also acknowledged at the time that environmental obligations are owed not only to States but to the whole mankind[59], which should be treated as a point of reference for weighing legal interests in investment cases.

As one tribunal concluded, investor's legitimate expectations should include "the political, socioeconomic, cultural and historical conditions prevailing in the host State"[60]. This brings us to the key issues of legitimate expectations as an ever more important component of the FET[61].

In a recent paper, Federico Ortino identified a significant gap in case law and scholarly writings on legitimate expectations & FET, namely the lack of express acknowledgement of the public interest component[62]. Ortino focused on conflict between investor and host

---

[57] M.M. Mbengue, *On Sustainable Development: A Conversation with Judge Weeramantry*, in *The Gabčíkovo-Nagymaros Judgment and Its Contribution to the Development of International Law*, Brill Nijhoff, 2020.

[58] *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* [1997] ICJ 92, ICJ Rep 1997 7 [140].

[59] *Ibid*., 53.

[60] *Duke Energy Electroquil Partners & Electroquil SA v Republic of Ecuador* [2008] ICSID Case No. ARB/04/19 [340].

[61] *International Thunderbird Gaming Corporation v the United Mexican States* (NAFTA) [302]; *Wälde, Separate Opinion in International Thunderbird Gaming Corporation v The United Mexican States* (NAFTA) [37].

[62] F. Ortino, *The Public Interest as Part of Legitimate Expectations in Investment Arbitration: Missing in Action?*, in C.N. Brower *et al.* (eds.), *By Peaceful Means: International Adjudication and Arbitration: Essays in Honour of David D. Caron*, Oxford University Press, 2024. For a general discussion on public interest in IIA see, for instance: M. Valenti, *The Protection of General Interests of Host States in the Application of the Fair and Equitable Treatment Standard*, in P. Acconci *et*

state interests. This chapter focuses on the opposite situation, where an investment serves (global) public interest, but is sacrificed for, sometimes arbitrary, host state "private" interest.

Halting wind energy investment to protect the coal industry clearly violates SDGs. Financial reasons for the termination of wind and PV subsidies, which already skewed RES capital allocation, also implies wrongful conduct (subject to contractual and contractual caveats). Even the decision to phase out nuclear energy, without scientific grounds for the new risk assessment, raises questions. As ESG regulations force investors to look for green portfolios, "siphoning" capital for a particular investment, which is then undermined, generates direct and alternative additional costs of the energy transformation. Despite impending irreversible levels of global warming and rising geopolitical tensions, neither investors nor the tribunals view such investments through the lens of the public interest.

Among the 25 identified and available RES investment awards rendered from 2019 to 2024, whether in favour of the investor[63] or the state[64], none of the tribunals considered the synergies between private and (global) public interest, or energy security, energy resilience, or technological progress.

---

*al.* (eds.), *General Interests of Host States in International Investment Law*, Cambridge University Press, 2014.

[63] *The PV Investors v Spain* [2020] PCA Case No. 2012-14; *Infrastructure Services and Energia Termosolar (formerly Antin) v Spain* [2019] ICSID Case No. ARB/13/31; *RREEF v Spain* [2019] ICSID Case No. ARB/13/30; *Voltaic Network v Czechia* [2019] PCA Case No. 2014-20; *InfraRed and others v Spain* [2019] ICSID Case No. ARB/14/12; *NextEra v Spain* [2019] ICSID Case No. ARB/14/11; *RWE Innogy v Spain* [2020] ICSID Case No. ARB/14/34; *9REN Holding v Spain* [2019] ICSID Case No. ARB/15/15; *Cavalum SGPS v Spain* [2020] ICSID Case No. ARB/15/34; *Cube Infrastructure and others v Spain* [2019] ICSID ICSID Case No. ARB/15/20; *Hydro Energy 1 and Hydroxana v Spain* [2020] ICID Case No. ARB/15/42; *OperaFund and Schwab v Spain* [2019] ICSID Case No. ARB/15/36; *Watkins and others v Spain* [2020] ICSID Case No. ARB/15/44; *Eurus Energy v Spain* [2021] ICSID Case No. ARB/16/4; *Infracapital v Spain* [2021] ICSID Case No. ARB/16/18.

[64] *Europa Nova v Czechia* [2019] PCA Case No. 2014-19; *ICW v Czechia* [2019] PCA Case No. 2014-22; *Photovoltaik Knopf v The Czech Republic* [2019] PCA Case No. 2014-21; *Stadtwerke München and others v Spain* [2019] ICSID Case No. ARB/15/1; *Green Power and SCE v Spain* [2022] SCC Case No. 2016/135; *FREIF Eurowind v Spain* [2021] SCC Case No. 2017/060; *Tennant Energy v Canada* [2022] PCA Case No. 2018-54.

In a few instances, tribunals have considered balancing the public interest in the contested regulatory measures and the increased use of green energy resulting from the investment. Ultimately, however, they deferred to the states' prerogative to weigh these interests, even where the judgment shows no trace of the defendant state conducting such an analysis[65]. In one case the respondent argued that implementing pioneer wind farm on a non-experimental scale actually created high technological risks[66].

In some cases claimants merely argued that the Spanish solar market reforms were contrary to[67], or not commensurate[68] with, the public interest. Technological progress was frequently used by the defendant as a justification for withdrawing financial support for investments, as stated in the Preamble of Royal Decree Law RDL 6/2009.

The public interest has only once been framed as a balance between supporting the production of renewable energy and ensuring sustainable burdens for end users[69].

One tribunal acknowledged that the PV law was adopted in response to, *inter alia*, technological barriers and noted the following statement during a parliamentary debate (bolded MJM)[70]:

> [I]n our opinion the Royal Decree and the cutback infringes acquired rights, causes legal uncertainty and discourages future investment in that sector […] we consider the measure radically unfair, unfair because it is disproportionate and unfair because it seems to blame all the problems of the world of electricity, of which there are many – the tariff deficit included – on a sector like the photovoltaic industry, which until a few days ago was a synonym for technological innovation, respect for the environment, commitment to independent energy and new jobs.

---

[65] *RREEF v. Spain* (n 64) paras. 900-901.

[66] *Ibid*., 781.

[67] *BayWa r.e v Spain* [2021] ICSID 25 January 2021.

[68] *SolEs Badajoz v Spain* [2019] ICSID Case No. ARB/15/38. The award also acknowledged that the contested law may have misled investor as to the expected results of technological progress of PV plants built subsequently.

[69] *ESPF and others v Italy* (ICSID) [197].

[70] *Cordoba Beheer and others v Spain* [2022] ICSID Case No. ARB/16/27 [193, 410].

Besides the standard of treatment, the unique characteristics of RES investments should be taken into consideration at the quantum stage. Some BITs have embraced the *Copper Mesa*[71] approach to quantum, reducing investor's compensation for ESG negligence. By the same token, fair compensation for unlawful infringement of a RES investment must include positive environmental, health, and technological externalities. Private investor shouldn't receive the full monetary equivalent of public benefits. Nevertheless, damages cannot be confined solely to incurred expenditures without considering them, as this would contradict the logics of internalizing public costs of investments.

## 6. *Conclusions*

Given the uncertainty around achieving carbon neutrality and energy security, matched with governments' limited ability to ensure timely development of alternative technologies, it's crucial to create a legal and political environment fostering cutting-edge research. Every investment comes with risks, including potential interference from governments. Some of these risks fall within the general margin of technological, political, and economic uncertainties. However, it's essential to acknowledge the intricate connection between energy research and sustainable development.

In the short and medium term, disputes regarding innovative investments in renewable energy cannot be considered in general categories of private and public interests conflict. Energy black swans might be our best hope for survival. While the current IIL trend is to protect host state public goods and impose new obligations for businesses, it should also recognize the global public interest in developing new technologies. Sometimes this may entail costs for the national interests of the country that received the investment.

Looking at the bigger picture, there's been a significant political pushback against investment arbitration lately. It is extreme-

[71] *Copper Mesa Mining Corporation v Republic of Ecuador* [2016] PCA Case No. 2012-2.

ly important to prevent populist impulses to transfer all the risk to foreign investors. When it comes innovative RES investments, one cannot lose sight of relationship between investments, and – using the *Gabčíkovo-Nagymaros'* parlance – mankind's interest in the sustainable development, peace and technological progress.

No country can breed the black swan on its own. However, our civilization as a whole cannot afford to overlook such a rare specimen.

# USING SCIENTIFIC KNOWLEDGE TO COMBAT THE "CHILLING EFFECT" OF INVESTOR-STATE DISPUTES ON CLIMATE POLICIES

*Marina-Elissavet Konstantinidi*

## 1. *Introduction*

It is now well-established that the fight against climate change and its consequences, requires global temperature rise to be kept under 1,5°C[1]. It is also well-established that this requires humanity to put an end to the use of fossil fuels in the next decades, at the latest[2]. Although energy transition is a relatively recent phenomenon, knowledge about the negative impact of fossil fuels existed a long time ago[3]. Despite the existence of this knowledge, investors in the fossil energy sector, notably oil and coal companies, have recently brought, or have threatened to bring, investment arbitration claims against States which put an end to their activity for the purpose of reaching their climate change objectives[4]. Irrespective of the

[1] IPCC, *Global Warming of 1.5°C*, Cambridge (UK)-New York (Usa), Cambridge University Press, 2018, https://doi.org/10.1017/9781009157940; Article 2 of the *Paris Agreement to the United Nations Framework Convention on Climate Change*, T.I.A.S. No. 16-1104, 2015.

[2] IEA, *Net Zero by 2050: A Roadmap for the Global Energy Sector*, Paris, OECD Publishing, 2021, https://doi.org/10.1787/c8328405-en.

[3] See, for example: E. Robinson, R.C. Robbins, *Sources, abundance, and fate of gaseous atmospheric pollutants*, *Final report and supplement*, Menlo Park (CA), Stanford Research Institute, 1968.

[4] See, for example: *WMH v. Canada*, *Lone Pine v. Canada*, *Rockhopper v. Italy*, *Uniper v. Netherlands*, *RWE v. Netherlands.*

outcome of the arbitration proceedings, the risk of being ordered to pay very substantial damages may have a "chilling effect" on States, meaning that they may hesitate to implement the energy transition measures needed to fight climate change and its consequences[5].

In this context, the present paper argues that structured documentation of evidence of knowledge about climate change may influence the adjudication of investment treaty claims, and, consequently, affect the content of energy transition regulations that will be implemented. The paper explores if and how knowledge about the causes and consequences of climate change, both on the part of investors and on the part of States, influences their legal position in investor-State arbitration, and whether, eventually it can provide with a solution to the burden for climate policies. By engaging a doctrinal approach, the paper focuses on specific arguments relevant to the context of Investor-State Dispute Settlement (ISDS) procedures. More specifically, it explores the impact of knowledge about climate change on the fair and equitable treatment standard of protection and the protection from unlawful expropriation. Furthermore, it provides insights into how the legal maxim *nemo auditur* could be applied in such investment treaty claims.

## 2. *The role of scientific evidence about climate change*

Scientific evidence about the causes and consequences of climate change may play a crucial role in the adjudication of investor-State disputes, particularly in cases related to energy transition policies and climate change. Since investment treaty obligations usually refer to the existing framework at the time the investment in question was made, this paper aims to investigate whether and how

[5] UNCTAD/ITE/IIA/2007/3, *Investor-State Dispute Settlement and impact on investment rulemaking*, New York and Geneva, United Nations, 2007; C. Brown, K. Miles, *Evolution in Investment Treaty Law and Arbitration*, Cambridge (NY), CUP, 2011, https://doi.org/10.1017/CBO9781139043809, pp. 134-135, 139-140; B. Merwe, *Why Investor lawsuits could slow the energy transition*, EnergyMonitor, 2020, https://www.energymonitor.ai/policy/international-treaties/why-investor-lawsuits-could-slow-the-energy-transition.

factual evidence existing at that time can be employed in legal argumentation.

Historical evidence shows that knowledge about the causes and consequences of climate change existed long ago. For instance, back in 1968, a report presented to the American Petroleum Institute, a trade association representing nearly all the biggest oil polluters, warned about the potential impact of gaseous atmospheric pollutants to the environment[6]. It stated, amongst others, that "the abundant pollutants which we generally ignore […] may be the cause of serious world-wide environmental challenges". Similarly, a White House climate memo written by Jimmy Carter's chief science adviser in 1977 warned about "the possibility of a catastrophic climate change"[7].

Evidence of existing knowledge about climate change and the impact of GHG emissions already appears in a wave of domestic lawsuits in the US seeking to hold oil companies accountable for climate change[8]. A common argument for these lawsuits is that the fossil fuel industry has long known that emissions from oil and gas combustion would accelerate global warming, and create major global risks, but, nevertheless, carried out decades-long misinformation campaigns to confuse the public and prevent a transition to cleaner fuels[9].

In the context of international investment law, several cases relevant to energy transition and the change of regulatory framework

---

[6] E. Robinson, R. C. Robbins, *Sources, abundance, and fate of gaseous atmospheric pollutants*, *Final report and supplement*, Menlo Park (CA), Stanford Research Institute, 1968.

[7] Executive Office of the President Office of Science and Technology Policy, *Release of Fossil CO2 and the Possibility of a Catastrophic Climate Change*, Washington, D.C. 20500, 7 July 1977, https://uploads.guim.co.uk/2022/06/02/SSO_148878_031_07.pdf.

[8] For example: *State of Minnesota v. American Petroleum Institute*, No. 21-1752, 62-CV-20-3837, *State of Delaware v. B.P. America Inc. et al,* No. 22-821, 20-1429, *Rhode Island v. Chevron Corp. et al.*, C.A. No. PC-2018-4716. See also: M.A. Tigre, M. Barry, *Climate Change in the Courts: A 2023 Retrospective*, Sabin Center for Climate Change Law, 12, 2023.

[9] R.F. Stuart-Smith, F.E.L. Otto, A.I. Saad *et al.*, *Filling the evidentiary gap in climate litigation*, in *Nat. Clim. Chang.*, 11, 2021, pp. 651-655, https://doi.org/10.1038/s41558-021-01086-7.

have emerged. Examples include the cases of *WMH v. Canada*[10], *Lone Pine v. Canada*[11], *Rockhopper v. Italy*[12], *Uniper v. Netherlands*[13] and *RWE v. Netherlands*[14]. Although scientific evidence of knowledge has not been fully integrated into legal argumentation to date, its incorporation could potentially serve as a key component countering claims for damages by fossil fuel investors affected by energy transition measures. Investors, as rational economic actors, are expected to have access to information and conduct due diligence when making investments. The availability and visibility of scientific findings on climate change suggests that the negative impacts of carbon emissions were well-documented and understood back at the time the investments were made[15]. This does not only justify the public interest objective of States' policy measures, but also means that corporations should have considered the risks associated with their investments and have adapted their strategies accordingly.

The use of scientific evidence in investment treaty claims can prove to be quite useful, but is not without its challenges. The interpretation of scientific evidence can be complex and contested, and there may be different views on the significance of particular scientific findings[16]. Moreover, not all scientific knowledge is necessarily widely accepted or available at the time investment treaties were

---

[10] *Westmoreland Mining Holdings LLC v. Government of Canada*, ICSID Case No. UNCT/20/3.

[11] *Lone Pine Resources Inc. v. The Government of Canada*, ICSID Case No. UNCT/15/2.

[12] *Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd, and Rockhopper Exploration Plc v. Italian Republic*, ICSID Case No. ARB/17/14.

[13] *Uniper SE, Uniper Benelux Holding B.V. and Uniper Benelux N.V. v. Kingdom of the Netherlands*, ICSID Case No. ARB/21/22; K. Connolly, *Olaf Scholz announces bailout for Germany's largest Russian gas importer*, in *The Guardian*, 22 July 2022, https://www.theguardian.com/world/2022/jul/22/olaf-scholz-announces-bailout-for-germanys-largest-russian-gas-importer-uniper.

[14] AG and RWE Eemshaven Holding II BV v. Kingdom of the Netherlands, ICSID Case No. ARB/21/4.

[15] B. Franta, *Early Oil Industry Knowledge of CO2 and Global Warming*, in *Nature Climate Change*, 2018, 8, pp. 1024-26.

[16] J. Peel, *Use of science in environment-related Investor-State Arbitration*, in K. Miles (ed.), *Research Handbook on Environment and Investment Law*, Edward Elgar Publishing, 2019, pp. 244-263.

signed. These challenges, though, do not diminish the potential importance of scientific knowledge in investment treaty claims related to energy transition policies.

### 3. *Impact of knowledge about climate change on investment treaty claims*

As already discussed, factual evidence of knowledge about climate change may influence the adjudication of investor-State disputes. Certain obligations relevant to the disputes arising from energy transition measures are for host States to provide foreign investors with, amongst others, fair and equitable treatment, and abstention from illegal expropriation. It is, thus, attempted to explore how pre-existing knowledge may be used in such disputes to foster energy transition, by examining, more specifically, the notion of legitimate expectations, the police power doctrine, and the application of the principle "*nemo auditur propiam turpitudinem allegans*".

#### 3.1. *The fair and equitable treatment Ssandard of protection & the notion of legitimate expectations*

One of the basic premises of international investment law is that investments abroad should be granted fair and equitable treatment (FET). The FET clause protects the foreign investors by assuring that the host-State maintains a stable and predictable investor climate that is in line with the investor's reasonable legitimate expectations[17]. This clause is one of the main topics of debate amongst scholars, mainly due to the broad range of different and wide interpretations by tribunals, along with the fact that it is usually the most

[17] R. Dolzer, C. Schreuer, *Principles of International Investment Law*, Oxford University Press, 2nd ed., 2012, p. 115, doi:10.1093/law/9780199651795.001.0001; R. Nahli *et al.*, *The debate surrounding the definition and legal basis of the legitimate expectations in investor-state dispute*, in *Global Journal of Political Science and Administration*, 2020, 8(1), p. 26.

successful basis for claims when changes in the host-States' national environmental law occur[18].

Legitimate expectations are created by explicit undertakings on the part of the host State but also by undertakings of a more general nature[19]. These may include the legal framework of the host State, consisting of legislation and treaties, assurances contained in decrees, licenses, and similar executive statements, as well as contractual undertakings. Specific representations made explicitly or implicitly may also play an important role in the creation of legitimate expectations[20]. A reversal of such undertakings by the host State may result in the violation of an international investment treaty.

Under the concept of legitimate expectations in international investment law, States are required to maintain a certain degree of stability and predictability in their regulatory framework, which is relied upon by investors when making investments[21]. Substantial changes to the host States' legal framework resulting in serious financial losses for the investors may give rise to claims of violation of the FET rule. However, As ruled in *Isolux v. Spain*, an investor's legitimate expectations can only be considered violated if the new regulatory changes were not foreseeable by a *prudent investor*[22]. In this case, the tribunal established that the investor had made their investments in a photovoltaic (PV) plant in 2012, at the time when Spain had already introduced significant modifications to the regime that regulates renewable energy. According to the tribunal's

---

[18] In 2012, the Tribunal in *Electrabel v. Hungary* highlighted that "the most important function" of the FET standard is the protection of the investor's legitimate expectations. See *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19.

[19] R. Dolzer, C. Schreuer, *Principles of International Investment Law*, Oxford University Press, 2nd ed., 2012, pp. 115, 145.

[20] *Ibid*.

[21] R. Dolzer, Santa Clara J. Int' L., *op. cit.*, p. 20; Y. Levashova, *The Role of Investor's Due Diligence in International Investment Law: Legitimate Expectations of Investors*, in *Kluwer Arbitration Blog*, 22 April 2020, http://arbitrationblog.kluwerarbitration.com/2020/04/22/the-role-of-investors-due-diligence-in-international-investment-law-legitimate-expectations-of-investors/.

[22] *Isolux Netherlands, BV v. Kingdom of Spain*, SCC Case V2013/153, Award (17 July 2016) par. 781.

ruling, the investor could have foreseen that additional State reforms were on their way. The tribunal also noted that the investor possessed specific knowledge that the feed-in tariffs introduced by the Spanish authorities would not last for the entire lifetime of their investments[23].

Furthermore, in *Plama v. Bulgaria* the tribunal concluded that a prudent investor should have been aware of the debates at the parliament relating to the potential changes of the relevant environmental law[24]. In *Chemtura v Canada*[25] and, more recently, *Occidental v Ecuador*[26] and *Charanne v Spain*[27], the tribunals reasoned that the claimants, as sophisticated investors in their respective industries, could not reasonably expect that no regulatory measures would be taken by the respective host States during the period relevant for their investment[28].

Following the same reasoning, it can be argued that evidence of knowledge that change in the regulatory framework for the reduction of GHG emissions could have been predicted, would refute the argument concerning legitimate expectations for legislative stability. Indeed, in *WMH v. Canada case,* the government of Canada defended its phase-out in part by arguing that WMH could not have expected that the federal regulations regarding coal-powered energy would provide a "predictable future", as an informed investor would have known that the State was contemplating further emission regulations[29]. It can, thus, be argued that scientific discoveries about the impact of fossil fuels to the environment and intergovernmental

---

[23] *Isolux v. Spain*, *id.,* par. 787; See also *BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH v. Spain*, ICSID Case No. ARB/15/16, Award, para. 463.

[24] *Plama Consortium Limited v. Bulgaria*, paras. 220, 267.

[25] *Chemtura Corporation v. Government of Canada*, UNCITRAL, Award (2 August 2010) para. 149.

[26] *Occidental v. Ecuador,* para. 383.

[27] *Charanne BV and Construction Investments SARL v. Kingdom of Spain*, ECT Arbitration 062/2012 (SCC Rules), Award (21 January 2016) para. 507.

[28] V. Jorge, *Investor Diligence in Investment Arbitration: Sources and Arguments*, in *ICSID Review*, 2017, 32(2), pp. 346-370, https://doi.org/10.1093/icsidreview/siw041.

[29] *Westmoreland Mining Holdings LLC v. Government of Canada*, ICSID Case No. UNCT/20/3, Statement of Defence, 26 June 2020, par. 89.

discussions on the need to prevent climate change made it obvious for a "prudent investor" to expect the regulatory framework of their host State to be altered.

### 3.2. *Expropriation & the police powers doctrine*

The implementation of mitigation policies requires legislative measures, including taxation and/or restriction of certain commercial activities, which may deprive foreign investors of their investments. If this deprivation is substantial and permanent or prevents the enjoyment of the investments' economic benefits, affected investors may claim damages for illegal expropriation of their property[30].

It is a well-recognised rule in most bilateral and multilateral investment treaties, that the property of foreign investors cannot be expropriated, without prompt, adequate and effective compensation[31]. However, an important question on allocating compensation to foreign investors for indirect expropriation is whether the measures taken by the host State were of general regulatory nature. It is argued, in favor of States' sovereignty, that compensation is not due when a governmental measure is part of a State's power to regulate for the general welfare, the so-called "police powers" of the State[32]. In such case, it is exceptionally permitted to the host State to regulate in derogation of the international commitments it has undertaken under an IIA without incurring a duty to compensate[33].

---

[30] R. Dolzer, C. Schreuer, *Principles of International Investment Law*, Oxford University Press, 2nd ed., 2012, p. 111; See also, amongst others, *AG and RWE Eemshaven Holding II BV v. Kingdom of the Netherlands*, ICSID Case No. ARB/21/4.

[31] OECD, *"Indirect Expropriation" and the "Right to Regulate" in International Investment Law*, OECD Working Papers on International Investment, 4, 2004, OECD Publishing, http://dx.doi.org/10.1787/780155872321.

[32] S. Dolzer, *id*., p. 120; A. Pellet, *Police Powers or the State's Right to Regulate*, in M. Kinner (ed.), *Building International Investment Law: The First 50 Years of ICSID*, Kluwer Law International, 2015.

[33] A. Pellet, *Police Powers or the State's Right to Regulate*, in M. Kinner (ed.), *Building International Investment Law: The First 50 Years of ICSID*, Kluwer Law International, 2015.

Furthermore, existence of good faith is considered of high importance. States' knowledge about climate change and intention to protect the planet from global warming while promoting public welfare can play an important role in the adjudication of such cases. According to the OECD, "it is an accepted principle of customary international law that where economic injury results from a bona fide non-discriminatory regulation within the police powers of the State, compensation is not required"[34]. This principle has been recognised by investment treaty decisions and is now enshrined in certain trade and investment treaties. For example, the EU-Canada Comprehensive Economic and Trade Agreement provides in its article 3 that:

> For greater certainty, except in the rare circumstance when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objective, such as health, safety and the environment, do not constitute indirect expropriations[35].

With regard to jurisprudence, a more consistent inclusion of the principle of the police powers of the State only emerged after 2000[36]. According to the scope that has been developed, whether a measure may be characterized as expropriatory depends on the nature and purpose of the State's action[37].

---

[34] OECD, *"Indirect Expropriation" and the "Right to Regulate" in International Investment Law*, OECD Working papers on International Investment, 4, 2004, (RLA-238), p. 5, n. 10.

[35] Article 3, EU-Canada Comprehensive Trade Agreement.

[36] N. Bernasconi-Ostenwalder, M. Dietrich Brauch, S. Schacherer, *International Investment Law and Sustainable Development: Key cases from the 2010s*, IISD, 2018; N. Bernasconi-Ostenwalder, L. Johnson (eds.), *International investment law and sustainable development: Key cases from 2000-2010*, IISD, 2011, https://www.iisd.org/library/international-investment-law-and-sustainable-development-key-cases-2000-2010.

[37] UNCTAD, *Investor-State Dispute Settlement*, UNCTAD Series on Issues in International Investment Agreements II, UN NY & Geneva, 2014.

For instance, in *Chemtura v. Canada*, where a U.S. manufacturer of lindane, claimed a breach of the NAFTA by Canada's prohibition of its sale, the tribunal upheld the police powers doctrine stating that:

> Irrespective of the existence of a contractual deprivation, the Tribunal considers in any event that the measures challenged by the Claimant constituted a valid exercise of the Respondent's police powers. As discussed in detail in connection with Article 1105 of NAFTA, the PMRA took measures within its mandate, in a non-discriminatory manner, motivated by the increasing awareness of the dangers presented by lindane for human health and the environment. A measure adopted under such circumstances is a valid exercise of the State's police powers and, as a result, does not constitute an expropriation[38].

As concerns the scope, conditions and effects of the police powers doctrine the tribunal in *Saluka v. Czech Republic*, held the following: "It is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner bona fide regulations that are aimed to the general welfare"[39], adding that "the principle that the State adopts general regulations that are "commonly accepted as within the police power of States' forms part of customary international law today"[40].

By integrating scientific evidence into the interpretation of international investment law, it becomes possible to strike a balance between investor protection and the legitimate policy objectives of States. This approach acknowledges that energy transition measures implemented in response to climate change are not arbitrary or unforeseen, but rather grounded in scientific consensus and the need to safeguard the planet's future.

---

[38] *Chemtura Corporation v. Government of Canada*, UNCITRAL (formerly *Crompton Corporation v. Government of Canada*), Award, para. 266.

[39] *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award (Mar 2006), para. 255.

[40] *Ibid.*, para. 262.

### 4. *Applying the legal maxim "nemo auditur propiam turpitudinem allegans"*[41]

Norms and general principles of law can also provide an avenue for bringing the element of knowledge into legal argumentation. In the present section, I will focus on the application of the legal maxim "*nemo auditur propiam turpitudinem allegans*". As provided by this maxim, self-declared turpitude is prohibited and "nobody can benefit from their own wrong"[42]. The fraudulent conduct is closely connected to the initial intent of causing damage to others[43], which means that evidence of malicious intent on the part of fossil fuel investors be provided, pleading the change of circumstances in their benefit will probably be unsuccessful.

Regarding the methodological grounding of the application of *nemo auditur*, international legal principles can enter the sphere of legal interpretation through the Vienna Convention on the Law of the Treaties. International Investment Treaties should be interpreted in the normative environment withing which they exist[44]. According to Article 31 VCLT, "any relevant rules of international law applicable in the relations between the parties' are to be taken into account"[45]. This applies equally to international legal principles and norms[46].

---

[41] On the application of the principle "*nemo auditor*" in investor-State disputes, see also the intervention of Prof. Angelet Nicolas in the webinar *Energy and Climate Change: Arbitration and Investment Law under Fire?*, held on 31 March 2022, as part of the Paris Arbitration Week 2022, https://www.youtube.com/watch?v=sLYrLMqSe8M.

[42] R. Kolb, *La maxime "nemo ex propria turpitudine commodum capere potest" (nul ne peut profiter de son propre tort) en droit international public*, in *Revue belge de droit international*, 2000, pp. 84-136; L. Amianto, *The Role of "Unclean Hands" Defences in International Investment Law*, in *McGill Journal of Dispute Resolution*, 2019-2020, Vol. 6.

[43] T.L. Sombra, *The Duty of Good Faith Taken to a New Le o a New Level: An Analysis of Disloyal Behavior*, in *Journal of Civil Law Studies*, 2014, 9, n. 1 Conference Papers, p. 37, https://digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?article=1167&context=jcls.

[44] Article 31(1) Vienna Convention on the Law of the Treaties, 1969.

[45] Article 31(3)(c) Vienna Convention on the Law of Treaties, 1969.

[46] R. Kolb, *Principles as sources of International Law (with special reference to good faith)*, in *Netherlands International Law Review*, 2006, LIII(1), pp. 1-36, https://doi.org/10.1017/S0165070X06000015.

The principle *nemo auditur* can, amongst others, be used as a defense mechanism in FET and illegal expropriation claims[47]. Provided there is sufficient evidence, the principle of *nemo auditur* can be invoked to reject such claims or limit the available remedies. It can, thus, be argued that a fossil fuel plant, made in violation of the – already known – international environmental and human rights principles, and aggravating climate change, cannot claim protection of the relevant IIA. The investors in this case contributed to the change of circumstances that rendered energy transition a necessity, and cannot, therefore, benefit from their own wrong. Such a rationale is already included in the ILC's Articles on state responsibility, which specify that a State may not evoke necessity as a ground for precluding wrongfulness if this state has contributed to this necessity[48].

The Latin maxim has been expressly recognized as a general principle of law by several investment tribunals[49]. For instance, in *Inceysa* case[50], within its analysis concerning the legality of the investment, the Tribunal found that the legal maxim *nemo auditur* was violated, leading it to decide that Inceysa company was not entitled to the protection granted by the BIT. As analysed by the Tribunal, according to this principle[51], "the foreign investor cannot seek to benefit from an investment effectuated by means of one or several illegal acts and, consequently, enjoy the protection granted by the host State, such as access to international arbitration to resolve disputes, because it is

[47] P. Dumberry, *A Guide to General Principles of Law in International Investment Arbitration*, Oxford University Press, 2020, https://doi.org/10.1093/law/9780198857075.001.0001; R. Kolb, *Principles as Sources of International Law (with Special Reference to Good Faith)*, in *Neth. Int. Law Rev.*, 2006, 53(1), pp. 1-36, https://doi.org/10.1017/S0165070X06000015.

[48] 2001 Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc. A/RES/56/83 (2001), 53 UN GAOR Supp. (No. 10) at 43, Supp. (No. 10) A/56/10 (IV.E.1), (3 August 2001), 53rd Session of the International Law Commission (ILC) from 23 April-1 June and 2 July-10 August 2001.

[49] *Inceysa Vallisoletana S.L. v. Republic of El Salvador* (ICSID Case No. ARB/03/26) par. 243; *Plama Consortium Limited v. Republic of Bulgaria* (ICSID, Case No ARB/03/24), par. 141.

[50] *Inceysa v. El Salvador*, p. 64, 72.

[51] Expressed in Spanish as "nadie puede beneficiarse de su propia torpeza o dolo".

evident that its act had a fraudulent origin"[52]. In this case, allowing the investor to "benefit from an investment made clearly in violation of the rules of the bid in which it originated would be a serious failure of justice"[53]. Similarly, in *Plama v. Bulgaria* case, the Tribunal found that the investment was obtained by deceitful conduct, in violation of Bulgarian law; granting the ECT's protection to the investor would, thereby, be contrary to the principle of *nemo auditur*[54].

The principle of *nemo auditur* can be found in its narrower formulation under the so-called "clean hands" doctrine, which provides that a court will not lend its aid if a claimant's cause of action is based on an unlawful act[55]. This doctrine derives from the English courts of equity and then developed mainly in the Anglo-American legal tradition[56], and has been extensively referred to as a general principle of international law by a large corpus of literature and case law[57]. For instance, Judge Schwebel considered the 1937 PCIJ case concerning the diversion of the Meuse River[58], the consecration of the "clean hands" doctrine[59]. More recently, in *Fraport II*, the tribunal upheld that:

> Investment treaty cases confirm that such treaties do not afford protection to illegal investments either based on clauses of the treaties, […] or, absent an express provision in the

---

[52] *Ibid.*, p. 73, par. 242.

[53] *Ibid*., p. 74, par. 244.

[54] *Plama v. Bulgaria*, p. 42, par. 143.

[55] L. Amianto, *The Role of "Unclean Hands" Defences in International Investment Law*, in *McGill Journal of Dispute Resolution*, 2019-2020, Vol. 6.

[56] T. El Ghadban, C. Gambarini, *Unlcelan hands*, in *Jus Mundi*, 2022, https://jusmundi.com/en/document/wiki/en-unclean-hands?fbclid=IwAR2RahQMtgh7VO1G_tugVuLzcVuRGfxcIOwcP1J2CMrA4qV-HhdvRt-g0g.

[57] L. Amianto, *The Role of "Unclean Hands" Defences in International Investment Law*, in *McGill Journal of Dispute Resolution*, 2019-2020, Vol. 6, p. 13; P. Dumberry, *The Clean Hands Doctrine as a General Principle of International Law*, in *The Journal of World Investment & Trade*, 2020, 21(4), pp. 489-527, https://doi.org/10.1163/22119000-12340182.

[58] *Case Concerning the Diversion of Water from the Meuse (Netherlands v Belgium)*, (1937), PCIJ (Ser A/B) No 70.

[59] S.M. Schwebel, *Clean Hands in the Court* [1999] 31 Studies in Transnational Legal Policy 74, p. 75; See also, *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*), Dissenting Opinion of Judge Schwebel, [1986] ICJ Rep 159, par. 240, p. 259.

> treaty, based on rules of international law, such as the "clean hands" doctrine[60].

In 2014, the tribunal in *Yukos* case[61] denied the existence of the doctrine (even though it is argued that the unlawful conduct was merely related to the subject matter of the case)[62] However, some months later (December 2014), the Tribunal in *Al-Warraq v. Indonesia* case[63], referring to Professor James Crawford's observations on the "clean hands" doctrine and *Holman v Johnson* case, took the view that, the claimant's breach of local laws and regulations rendered their claim inadmissible[64]. It is interesting to note that the Tribunal in its analysis, linked the award of moral damages to a maliciously induced illegal action[65], and states that the invoked doctrine of "clean hands" precludes the awarding of such damages[66].

Returning to the utilization of scientific knowledge, based on factual evidence, it becomes apparent that oil and gas companies were cognizant of the potential environmental impact of their investments on climate change. Despite receiving warnings from scientists, these companies, at times, acknowledged the likelihood of such consequences but proceeded with their investments. Deeming such actions as malpractice, the maxim *nemo auditur* can be invoked. As analyzed above, according to this maxim, individuals cannot benefit from their own wrongdoing and subsequently claim damages in their benefit. Consequently, one could argue that those who contributed to the exacerbation of climate change, necessitating urgent mitigation measures, cannot legitimately invoke legal protections for the resulting loss of profit.

---

[60] *Fraport AG Frankfurt Airport Services Worldwide v Philippines*, (ICSID Case No ARB/11/12), 10 December 2014, par. 328 [Fraport II].

[61] *Yukos Universal Limited (Isle of Man) v. The Russian Federation* (PCA Case No. 2005-04/AA227), Final Award, 18 July 2014, par. 1363.

[62] L. Amianto, *The Role of "Unclean Hands" Defences in International Investment Law*, in *McGill Journal of Dispute Resolution*, 2019-2020, Vol. 6, p. 19.

[63] *Hesham Talaat M. Al-Warraq v. The Republic of Indonesia*, UNCITRAL, Final Award, 15 December 2014.

[64] *Al-Warraq v. Indonesia*, par. 646-647.

[65] *Ibid.*, par. 653.

[66] *Ibid.*, par. 654.

However, for the argument asserting that early knowledge by fossil fuel companies about global warming can preclude legal protection or compensation under the *nemo auditur* doctrine to be self-standing, further elaboration is required. Engaging in fossil fuel investments is not is not illegal per se if conducted in compliance with domestic laws and regulations. To bolster the malpractice argument, it can potentially be linked to the concept of due diligence and backed up by the precedents set by Human Rights Courts.

In any event, despite the often-conservative nature of investment tribunals, incorporating the principle of *nemo auditur* within the context of energy transition could play a role, if not the substance of investors' claims, in mitigating the concept of loss profits considering the patterns of profitability of oil and gas investments. Consequently, the element of knowledge could emerge as a crucial factor in the argumentation of investor-State disputes, potentially shaping the utilization of Investor-State Dispute Settlement (ISDS) as a mechanism for enforcing environmental protection principles.

## 5. *Concluding remarks*

Based on established scientific research and consensus, fossil fuel companies were or should have been aware of the risks associated with fossil fuel investments. In the context of investor-State disputes, this position strengthens the argument that foreign investors cannot claim damages solely on the basis of mitigation measures affecting their investments. At the same time, protection of the environment and the transition towards more sustainable energy sources are legitimate State objectives that should not be impeded by ISDS procedures. Incorporating scientific knowledge in legal argumentation can strengthen existing tools and enhance the prospects for achieving global climate change objectives.

Overall, energy transition can be facilitated if States do not fear that their mitigation measures will backfire through investor-State disputes. The existence of strong defense mechanisms for States against fossil fuel investors' claims, can foster the implementation of energy transition measures in domestic legislation. Many coun-

tries have already taken initial steps towards addressing some of the problems on a policy level, while multiple tribunals have addressed the importance of sustainable development. Whether the existing tools can be shaped to address the issue of energy transition depends on the specific cases, the willingness and legal imagination of arbitrators and the openness of adjudicators to new, more human-centered ideas.

# ENHANCING CORPORATE CLIMATE RESPONSIBILITY: THE INTERSECTION OF MANDATORY SUSTAINABILITY DUE DILIGENCE LAWS AND INTERNATIONAL INVESTMENT AGREEMENTS

*Monika Feigerlová**

## 1. *Introduction*

Both international investment law and human rights law discuss the idea of legally binding obligations on companies[1]. While the first field has traditionally focused on protection of businesses as a means of foreign investments, the latter field has been marked by significant developments in approaches to corporate responsibility over operations conducted abroad. In recognition of insufficiency of voluntary forms of governance, States have recently moved towards enacting mandatory due diligence legislation that requires companies to adopt measures to prevent and remedy harms arising from business activities.

The concept of human rights due diligence is linked to international efforts to regulate corporate responsibility for human rights and environmental harms, which were summarized in the United Na-

* The research for this section has been supported/subsidized also within the *Lumina quaeruntur* award of the Czech Academy of Sciences for the project "Climate law" conducted at the Institute of State and Law.

[1] M. Krajewski, *A nightmare or a noble dream? Establishing investor obligations through treaty-making and treaty-application*, in *Business and Human Rights Journal*, 2020, 5(1), pp. 105-129; S.L. Cheong, *Human Rights Due Diligence and the Climate Change Dimension: Implications for Investor Responsibility in International Investment Law*, in *Climate Law*, 2023, 13, pp. 188-212.

tions Guiding Principles on Business and Human Rights (UNGPs) in 2010[2]. Although not legally binding, UNGPs, unanimously endorsed by the UN Human Rights Council, together with OECD Guidelines on Multinational Enterprises (OECD Guidelines)[3] have established a new normative basis for responsible business conduct. Businesses are urged to carry out a human right and environmental (HRE) due diligence process to identify, prevent, mitigate and account for how they address the most severe risks of their activities to people[4].

From a conceptual standpoint, it is argued that climate aspects are inherent dimension of the HRE due diligence. In other words, under UNGPs and OECD Guidelines companies have a responsibility to reduce greenhouse gas (GHG) emissions directly produced or linked to their operations, set measurable objectives and targets in line with the Paris Agreement, and prevent impacts on climate change and climate-related human rights[5].

In light of the limitations of voluntary efforts on the side of businesses, States have started to adopt mandatory human rights and environmental due diligence (HREDD) laws, aiming to strengthen UNGPs and make the responsibility in the field of sustainability legally binding for companies. Recent HREDD laws featuring across Europe, such as the French Duty of Vigilance Law of 2017[6] or German Supply Chain Due Diligence Act of 2021[7], require companies to engage in due diligence. They, however, exhibit considerable dif-

---

[2] United Nations, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, UN Doc. A/HRC/17/31, New York, 2011.

[3] Organisation for Economic Cooperation and Development, *OECD Guidelines for Multinational Enterprises*, 2011.

[4] Principle 17 of UNGPs, Chapter VI of Guidelines.

[5] C. Macchi, *The Climate Change Dimension of Business and Human Rights: The Gradual Consolidation of a Concept of "Climate Due Diligence"*, in *Business and Human Rights Journal*, 2021, 6(1), pp. 93-119; J. Dehm, *Beyond Climate Due Diligence: Fossil Fuels, "Red Lines" and Reparations*, in *Business and Human Rights Journal*, 2023, 8(2), pp. 151-179; C. Bright, K. Buhmann, *Risk-based due diligence, climate change, human rights and the just transition*, in *Sustainability*, 2021, 13(18), 10454.

[6] Loi no. 2017-399 du 27 Mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre.

[7] Act on Corporate Due Diligence Obligations in Supply Chains (Lieferkettensorgfaltspflichtengesetz – LkSG) of 16 July 2021.

ferences in key points, including the application of HRE due diligence in the climate context. The nearly finalised EU Directive on Corporate Sustainability Due Diligence (CS3D) seeks to harmonize legal frameworks on corporate due diligence obligations within the EU and explicitly addresses climate change[8].

While it is too early to judge whether HREDD laws represent the appropriate approach for the effective regulation of human rights and environmental harms caused by multinational corporations, the implications that these duties can have for investors under IIAs can be assessed at a conceptual level[9]. In several instances, the conduct of investors was linked to environmental degradation and human rights violations in the host States. The idea of encouraging responsible business conduct of investors and establishing investor obligations through corporate social responsibility and human rights clauses incorporated in IIAs is not new, and numerous States have already taken steps in this direction[10]. Typically, the provisions urge States to encourage companies to adhere to UNGPs, OECD Guidelines or other international standards or directly require investors in IIAs to adhere to these standards. These clauses have so far produced limited results.

The question analysed in this paper is whether HREDD laws, as part of the law of the host State or home State, can affect foreign investors' climate duties through the existing provisions in IIAs. Notably, IIAs' provisions that require investors to comply with host State

[8] Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM(2022) 71 final, 23 February 2022; Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 - General Approach, 2022/0051(COD), 30 November 2022; Amendments adopted by the European Parliament on 1 June 2023 on the proposal for a directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (COM(2022)0071 – C9-0050/2022 – 2022/0051(COD).

[9] See e.g. J. Nolan, *Chasing the next shiny thing: Can human rights due diligence effectively address labour exploitation in global fashion supply chains?*, in *International Journal for Crime, Justice and Social Democracy*, 2022, 11(2), pp. 1-14.

[10] UN Working Group on the issue of human rights and transnational corporations and other business enterprises, *Human rights-compatible international investment agreements*, UN A/76/238, 27 July 2021.

laws at the entry and post-entry phase of investments and to carry out impact assessment of investment projects are relevant. The contribution will first address the concept of corporate climate due diligence and its (non)enactment in HREDD laws. It will then provide an overview of the ways in which HREDD laws can affect investors' conduct and establish investor obligations to address climate-related harm arising from investment activities.

## 2. *Corporate climate due diligence*

Pursuant to science, our society has overstepped the planetary boundary of the climate system[11], causing irreversible damage to our planet, and pushing Earth beyond the safe limits for humanity[12].The international community has collectively responded to these findings by committing to limit global temperature rise to well below 2°C above pre-industrial levels in the Paris Agreement of 2015[13]. Climate action, leading to a transition towards climate-resilient development, is also included among 17 UN Sustainable Development Goals[14].

Global decarbonisation requires active participation of businesses, whose engagement in reducing global GHG emissions remains unclear. As adverse impacts of climate change are considered a human rights issue, the business and human rights agenda is increasingly discussing "corporate climate due diligence", and companies' duty to respect climate-related human rights.

The notion of due diligence in the human rights context forms Pillar II of UNGPs. It helps companies to fulfil their human rights responsibilities. The UNGPs' creator, John Ruggie, defined HRDD as

---

[11] Stockholm Resilience Centre, *The nine planetary boundaries*, 2020, available at: https://www.stockholmresilience.org/research/planetary-boundaries/the-nine-planetary-boundaries.html (accessed 15 January 2024).

[12] K. Richardson *et al.*, *Earth beyond six of nine planetary boundaries*, in *Science Advances*, 2023, 9(37), eadh2458.

[13] UN Framework Convention on Climate Change, Conference of the Parties: Adoption of the Paris Agreement, UN Doc. FCCC/CP/2015/ L.9/Rev.1, New York, 2015.

[14] UN General Assembly, Transforming our world: the 2030 Agenda for Sustainable Development, 21 October 2015, A/RES/70/1.

"a comprehensive, proactive attempt to uncover human rights risks, actual and potential, over the entire life cycle of a project or business activity, with the aim of avoiding and mitigating those risks"[15]. It comprises four core steps: identifying any actual and potential human rights impacts that may be "caused by a business" or "to which it may contribute or "be directly linked through its business relationships"; taking appropriate action; tracking the effectiveness of those actions; and publicly communicating the company's human rights policies, practices, and outcomes[16]. The appropriate measures that a business is required to take vary depending on whether the business "caused", "contributed to" or is "linked to" the human rights impact through a business relationship. Severity of the enterprise's human rights impacts will be assessed by their scale, scope, and irremediable character.

While there is a growing solid understanding of the key actions required by businesses to implement a due diligence process, there remains a knowledge gap regarding the precise implications of the HRE due diligence in the context of climate change[17].

### 2.1. *Climate change aspects of corporate behaviour in international standards*

Although UNGPs do not explicitly mention climate change (owing to their 2011 adoption date), academic literature (e.g., Macchi)[18], various climate litigation activities (e.g., the Shell decision or the Philippine Human Rights Commission report)[19] and expert

---

[15] Human Rights Council, *Business and human rights: Towards operationalizing the "protect, respect and remedy" framework*, A/HRC/11/13 22 April 2009, para. 71.

[16] Principle 17 of UNGPs.

[17] C. Bright, K. Buhmann, *Risk-based due diligence, climate change, human rights and the just transition*, in *Sustainability*, 2021, 13(18), 10454 ff.

[18] C. Macchi, *The Climate Change Dimension of Business and Human Rights: The Gradual Consolidation of a Concept of "Climate Due Diligence"*, in *Business and Human Rights Journal*, 2021, 6(1), pp. 93 ff.

[19] See *Milieudefensie et al. v. Royal Dutch Shell* (Milieudefensie), The Hauge District Court C/09/571932 / HA ZA 19-379 26, Judgment May 2021 (Shell judgment); Republic of the Philippines Commission on Human Rights, *National Inquiry on Climate Change Report*, 2022.

group initiatives (e.g. the Oslo Principles of 2018)[20] increasingly articulate corporate responsibility to prevent and remedy human rights impacts of climate change. Macchi advocates for a holistic approach to corporate due diligence that integrates climate change, the environment, and human rights[21].

Likewise, in June 2023, the UN Working Group on the issue of human rights and transnational corporations provided recommendations on how UNGPs can assist States and businesses in addressing the impacts of climate change on human rights[22]. Pursuant to the Information Note, the States' obligations include the duty to regulate business conduct and to protect against foreseeable impacts related to climate change. One recommendation specifically proposes the enactment of mandatory corporate due diligence legislation requiring businesses to identify and address human rights and environmental impacts, including those related to climate change, throughout the entire value chain.

Further, the 2023 OECD Guidelines update mentions for the first time climate change, which is considered a key environmental impact of business activities to be addressed as part of enterprise's due diligence processes[23]. Notably, a business should be mindful of its GHG emissions and reductions in line with internationally agreed global temperature targets based on the best available science as well as of the social impacts of transitioning away from environmentally harmful practices (e.g. mine closures) and moving towards greener industries (e.g. deployment of renewables).

Similar trends can be observed in various litigation efforts and evolving climate case law. For example, the Philippine Commission on Human Rights, in conducting a national inquiry into the role of

---

[20] Principles on Climate Obligations of Enterprises, 2nd edition, 2018, available at: climateprinciplesforenterprises.org (accessed 15 January 2024).

[21] C. Macchi, *The Climate Change Dimension of Business and Human Rights: The Gradual Consolidation of a Concept of "Climate Due Diligence"*, in *Business and Human Rights Journal*, 2021, 6(1), pp. 93 ff.

[22] Working Group on the issue of human rights and transnational corporations and other business enterprises, *Information Note on Climate Change and the Guiding Principles on Business and Human Rights* (June 2023).

[23] OECD, *Guidelines for Multinational Enterprises on Responsible Business Conduct*, Paris, OECD Publishing, 2023.

fossil fuel producing companies "Carbon Majors" in the climate crisis interpreted corporate human rights due diligence to include climate impacts[24]. In its final report, the Commission recommended that the Philippine legislature enact a "carbon footprint due diligence" law and impose reporting requirements on private companies[25]. Under the Commission's analysis, key components of a "climate corporate due diligence" include the recognition of the effect of climate duties on the enjoyment of human rights in company's policy statement, the reduction of GHG emissions, and the identification of the specific human rights impacts of climate change arising from business operations and products, and reporting of company's total GHG emissions throughout its products' life cycles[26]. Similarly, the Dutch court referred to UNGPs when interpreting a duty of care under Dutch law to conduct due diligence over climate impacts of corporate behaviour[27].

The above actions illustrate a progressive development in the concept of a corporate climate due diligence in international standards on corporate behaviour.

### 2.2. *Climate change in mandatory human rights due diligence laws*

Following the developments in soft-law instruments numerous countries have moved from voluntarism towards enacting HREDD laws, making HRE due diligence legally binding[28]. These regulations require corporations by law to conduct due diligence across their operations and supply chains to assess HRE risks, investigate HRE abuses, adopt prevention plans and report on due diligence matters. These domestic legal frameworks establish companies' legally

---

[24] Republic of the Philippines Commission on Human Rights, *National Inquiry on Climate Change Report*, 2022.

[25] *Ibid.*, p. 146.

[26] *Ibid.*, pp. 84-85.

[27] *Milieudefensie et al. v. Royal Dutch Shell* (Milieudefensie), The Hauge District Court C/09/571932 / HA ZA 19-379 26, Judgment May 2021 (Shell judgment).

[28] C. Villiers, *New Directions in the European Union's Regulatory Framework for Corporate Reporting, Due Diligence and Accountability: The Challenge of Complexity*, in E*uropean Journal of Risk Regulation*, 2022, 13(4), pp. 548, 566.

enforceable HRE obligations, respectively link a breach of due diligence obligations to civil liability and/or administrative sanctions. This marks a shift form the soft-law foundation of UNGPs' Pillar II towards a hard-law approach[29].This approach, however, limits the range of companies obligated to undertake due diligence under HREDD laws, and can also narrow the scope of the value chain.

HREDD laws are in their early stages. The first legislation to impose human rights due diligence obligations on companies was the French Duty of Vigilance Law in 2017, serving as inspiration for other countries. Dutch law, which followed in 2019, mandates all companies selling goods or services to Dutch consumers to carry out human rights due diligence concerning child labour[30]. Germany's Act on Supply Chain Due Diligence and Norway's Transparency Act[31] were adopted in 2021 and similar initiatives in other countries are under preparation, most notably in the EU[32]. The only enacted laws covering both the environment and human rights are those of France and Germany. None specifically addresses climate change.

Under the French Duty of Vigilance Law, large companies need to develop a vigilance plan that shall "identify risks and prevent severe impacts on human rights and fundamental freedoms, on the health and safety of persons, and on the environment"[33]. Liability would arise where companies fail to fulfil their obligations, such as the absence of a plan or flaws in its implementation[34]. The exercise of due diligence extends to the company's operations, its controlled subsidiaries and suppliers with whom the corporation maintains an

---

[29] M. Krajewski, *Mandatory Human Rights Due Diligence Laws: Blurring the Lines between State Duty to Protect and Corporate Responsibility to Respect?*, in *Nordic Journal of Human Rights*, 2023, pp. 1-14.

[30] Act on the introduction of a duty of care in relation to distribution of goods and services prevention of Child Labour originating from child labour (Act on the Duty of Care in relation to Child Labour) of 13 November 2019.

[31] Act on business transparency and work with fundamental human rights and decent work (Transparency Law) of 12 October 2021.

[32] For example, Austria, Denmark, Finland, Switzerland.

[33] French Duty of Vigilance Law, article 1.

[34] European Coalition for Corporate Justice, *French Corporate Duty of Vigilance Law: Frequently Asked Questions*, Brussels, 2017, available at: https://media.business-humanrights.org/media/documents/files/documents/French_Corporate_Duty_of_Vigilance_Law_FAQ.pdf (accessed 15 January 2024).

established commercial relationship. Holding corporations accountable can be challenging as the law imposes an obligation of process and not of result[35], and the burden to prove the company's fault and a causal link between the fault and the damage suffered lies on the claimant[36]. Apart from the civil liability mechanism, any interested party can seek an injunction from a French court to order the company to comply with the law.

Although commentators of the French Duty of Vigilance Law focused on the human rights and health and safety angles of the corporate due diligence duty, the environment aspect was used in the first complaints. One notice was specifically targeted at climate change. In a case against a French oil company, Total, citizens and non-governmental organisations asked the court to order Total to publish, as part of its obligations to prevent environmental damage resulting from its activities, a plan to reduce its direct and indirect GHG emissions and to align its operations with the Paris Agreement's temperature goal. Total has so far resisted the application on procedural grounds[37]. What "effective implementation" of a vigilance plan means in the climate context remains to be seen.

Risks to the environment are to some extent covered by the German Law on Supply Chain Due Diligence[38] where certain production related conventions can be violated (e.g. the Minamata Convention on Mercury of 2013)[39]. The law further refers to the risk of polluting soil, water and air if this leads to violations of the rights to food, drinking water, sanitation and health[40]. Due diligence obligations include the adoption of a policy statement, establishment of a

[35] S. Deva, *Mandatory human rights due diligence laws in Europe: A mirage for rightsholders?*, in *Leiden Journal of International Law*, 2023, 36(2), p. 407.

[36] European Coalition for Corporate Justice, *French Corporate Duty of Vigilance Law: Frequently Asked Questions*, Brussels, 2017.

[37] *Notre Affaire à Tous and Others v. Total Energies SE*, Versailles Court of Appeal, [2023] NO. RG 22/03403.

[38] M. Krajewski, K. Tonstad, F. Wohltmann, *Mandatory human rights due diligence in Germany and Norway: Stepping, or striding, in the same direction?*, in *Business and Human Rights Journal*, 2021, 6(3), p. 554.

[39] German Supply Chain Due Diligence Law, Article 2(3).

[40] M. Krajewski, K. Tonstad, F. Wohltmann, *Mandatory human rights due diligence in Germany and Norway: Stepping, or striding, in the same direction?*, in *Business and Human Rights Journal*, 2021, 6(3), p. 554.

risk management system, preventive and remedial measures, regular risk analysis, documentation, and reporting[41]. Their scope is determined by the appropriateness test. The obligations extend to the company's own operations and the activities of direct suppliers. Indirect suppliers are covered when the company acquires substantiated knowledge of a potential violation. The Act provides for a public supervision with administrative fines. A specific liability mechanism is not included.

The proposed EU sustainability due diligence directive[42] represents the most advanced regulatory framework on companies' duties to prevent and address adverse human rights impacts in their own activities and global value chains, including environmental ones. At a conceptual level, it acknowledges the importance of addressing climate change through a stand-alone provision on a climate transition plan that certain companies will have to implement to ensure that their business model and strategy are compatible with the transition to a sustainable economy and the temperature targets of the Paris Agreement. The draft CS3D is currently subject to trialogue negotiations. Both the initial European Commission's and the Council's Proposal exclude climate change from the scope of the company's due diligence obligations[43]. The text from the EU Parliament's legal affairs committee[44] comes closest to integrating climate concerns. At the time of writing uncertainty exists regarding whether the broader concept of "sustainability due diligence" will ultimately include climate aspects in the mandatory due diligence exercise or not.

From the perspective of business and human rights agenda, the aims of the HREDD laws are similar, requiring companies to actively assess their internal structures and identify, prevent or minimise their negative impacts. All seek to align with existing international standards. Nevertheless, these laws differ significantly as regards the

[41] *Ibid.*, p. 555.
[42] CS3D, *cit*.
[43] Article 29 (d).
[44] Report on the proposal for a directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, 23 April 2023.

scope of due diligence obligations, coverage of climate change, and liability provisions.

Given limited experience with HREDD laws, the company's enforceable obligations and liability for failing to carry out climate due diligence still need to be fully evaluated, as the due diligence obligations can expand corporate liability to cover climate change while also potentially create new defences to exempt businesses from liability[45]. The company could defend itself by pointing to the specific HREDD policies, processes, and systems it has incorporated into its corporate governance, and its leadership. Due diligence only imposes due diligence obligations on companies, not human rights obligations. If a human rights violation occurs within a company's supply chain, victims may not be able to bring a claim against the company for the violation itself, but only for the failure to conduct due diligence[46]. Additionally, due diligence entails the responsibility to identify and address risks of adversely affecting human rights, rather than a responsibility to completely avoid any violation of human rights[47]. The CS3D anticipates civil liability for damages if the company's failure to take "appropriate measure" (to prevent, mitigate, bring to an end, or minimize the adverse impact and damage) results in an adverse human rights or environmental impact, leading to damages suffered by the claimant as a consequence of the adverse impact.

In the climate context, liability attaches to the duty of care and occurrence of harm under the CS3D, rather than the company's failure to reduce GHG emissions or to achieve certain climate target. As explained in Recital 15 of the CS3D, the due diligence obligations should be "obligations of means". Moreover, the spatially and temporally dispersed nature of climate-related human rights impacts

---

[45] M. Rajavuori, A. Savaresi, H. van Asselt, *Mandatory due diligence laws and climate change litigation: Bridging the corporate climate accountability gap?*, in *Regulation & Governance*, 2023, 7.

[46] M. Krajewski, *Mandatory Human Rights Due Diligence Laws: Blurring the Lines between State Duty to Protect and Corporate Responsibility to Respect?*, in *Nordic Journal of Human Rights*, 2023, pp. 1-14.

[47] C.M. O'Brien, J. Christoffersen, *The Proposed European Union Corporate Sustainability Due Diligence Directive Making or breaking European Human Rights Law?*, in *Anales de Derecho*, 2023, pp. 177-201.

poses certain operational constraints on conducting climate due diligence[48], and the implementation of climate due diligence continues to evolve[49]. Finally, it is noteworthy that many of the existing or pending legislative proposals do not adequately address access to justice for HREDD violations (e.g., legal aid, burden of proof, access to documents)[50].

Whether the concept of due diligence is generally an appropriate tool for changing corporate behaviour and holding companies accountable for the negative impacts of their activities in the supply chain is a separate question that has not yet been answered unequivocally. Given that there is as yet insufficient empirical research to assess the contribution of corporate due diligence obligations to the prevention and remediation of corporate human rights abuses, mention may be made of the reservations that have generally been expressed about the effectiveness of due diligence[51]. In particular, the literature has pointed out that HRE due diligence is primarily a self-regulatory procedural approach and as such prioritizes the process of implementing due diligence over actual outcomes, which carries the risk of a "formalistic approach to compliance on paper"[52].

Assuming that, for purposes of this contribution, an HREDD law contains robust provisions on corporate climate due diligence,

---

[48] J. Dehm, *Beyond Climate Due Diligence: Fossil Fuels, "Red Lines" and Reparations*, in *Business and Human Rights Journal*, 2023, 8(2), pp. 151-179.

[49] S.L. Cheong, *Human Rights Due Diligence and the Climate Change Dimension: Implications for Investor Responsibility in International Investment Law*, in *Climate Law*, 2023, 13, p. 192. The clarification will also be needed regarding the interpretation of the value chain scope.

[50] J. Nolan, *Chasing the next shiny thing: Can human rights due diligence effectively address labour exploitation in global fashion supply chains?*, in *International Journal for Crime, Justice and Social Democracy*, 2022, 11(2), pp. 1-14.

[51] See e.g. R. McCorquodale, J. Nolan, *The Effectiveness of Human Rights Due Diligence for Preventing Business Human Rights Abuses*, in *Netherlands International Law Review*, 2021, 68, pp. 455-478; J. Nolan, *Chasing the next shiny thing: Can human rights due diligence effectively address labour exploitation in global fashion supply chains?*, in *International Journal for Crime, Justice and Social Democracy*, 2022, 11(2), pp. 1-14; J. Dehm, *Beyond Climate Due Diligence: Fossil Fuels, "Red Lines" and Reparations*, in *Business and Human Rights Journal*, 2023, 8(2), pp. 151-179.

[52] See e.g. I. Landau, *Human rights due diligence and the risk of cosmetic compliance*, in *Melbourne Journal of International Law*, 2019, 20, pp. 221 ff.

outlining detailed and clear climate-related duties of companies, the next section will analyse the implications of these national laws for investors' duties within the investment law architecture.

## 3. *Climate responsibility of investors under international investment agreements*

### 3.1. *Investor rights without obligations*

Most IIAs, especially those pre-dating 2010, impose obligations only on States and confer rights on investors, including the possibility to bring claims against States before the investor-state dispute settlement mechanism (ISDS)[53]. Provisions on investor obligations are missing and the international investment regime provides limited opportunities to hold foreign investors accountable for HRE violations linked to the investment activities[54]. To counterbalance this situation, several States have started incorporating investor responsibility provisions in IIAs using the principles of corporate social responsibility (CSR), such as UNGPs and OECD Guidelines. In the future, CSR clauses in treaty drafting is likely to be followed by clauses referencing domestic HREDD legislation. This would provide a legal basis for requiring investors to conduct human rights and environmental (including climate) due diligence. Such approach is still to develop but arguably would create a comparable legal situation as if investor obligations to conduct human rights due diligence were directly stipulated in IIAs[55].

Climate change considerations tend to be perceived an inherent component of HRE due diligence under soft-law instruments. In international investment law climate change has assumed a contentious role. While foreign investments are important for the transition to low-carbon economy, ISDS is viewed as having detrimen-

[53] UN WG, *Human rights-compatible international investment agreements*, UN A/76/238, 27 July 2021.

[54] *Ibid*.

[55] S.L. Cheong, *Human Rights Due Diligence and the Climate Change Dimension: Implications for Investor Responsibility in International Investment Law*, in *Climate Law*, 2023, 13, pp. 188-212.

tal impacts on the ability of host States to adopt climate mitigation measures[56]. Arguably, the company's decision to bring an investment claim before ISDS should itself be subjected to the HREDD process to assess potential adverse impacts[57].

The HRE obligations for investors can be primarily established by including provisions to this effect in IIAs. If such provisions require foreign investors to comply with domestic law of the host State or to conduct impact assessment, the HREDD regulations will clearly apply to the case via the reference to domestic law. HREDD laws can also be relevant for human rights abuses and environmental harms related to the investment even if the IIA does not contain any provisions on investor's obligations. This situation will be analysed based on the so-called "legality" or "in accordance with law" clauses.

### 3.2. *Provisions in IIAs regarding Investor Obligations*

#### 3.2.1. *Investor legality clauses incorporating HREDD laws in IIAs*

First, it must be mentioned that CSR, human rights or sustainability development provisions are already present in some IIAs and they either urge States as contracting parties to the relevant IIA to encourage companies to adhere to the international standards on responsible business conduct (such as UNGP or OECD Guidelines) in conducting their activities in the host State[58], or they address directly investors[59]. In the latter scenario, investors are usually encouraged

[56] See IPCC, AR6 Mitigation (2022), TS-120. Similarly, the Special Rapporteur on the promotion and protection of human rights in the context of climate change recommended the repeal of the ECT, pointing to use of the ISDS by fossil fuel producers suing States for taking policy actions to reduce the use of fossil fuels. UN Doc A/77/226.

[57] S. Triefus, *The UNGPs and ISDS: Should Businesses Assess the Human Rights Impacts of Investor–State Arbitration?*, in *Business and Human Rights Journal*, 2023, 8(3), pp. 329-351.

[58] See Canada-Mongolia BIT of 2016, Article 14: "Each Party should encourage enterprises […] to voluntarily incorporate internationally recognized standards of corporate social responsibility in their practice[s]".

[59] See India-Kyrgyzstan BIT of 2019, Article 12: "Investors and their enterprises operating within its territory of each Party shall endeavour to voluntarily incorporate internationally recognized standards […] in their practice[s]".

in IIAs to implement, on voluntary basis, CSR into their practices. These clauses have so far produced limited results in terms of ensuring effective investor accountability due to their vague and hortatory language[60], lack of recognition of affected communities as beneficiaries of investor obligations or lack of provisions on access to remedy[61].

A stronger version of direct IIA's provisions require investors to respect domestic law, which includes mandatory HREDD regulations. Currently, these clauses are present in certain model bilateral investment treaties (BITs) and rare IIAs. For example, the 2019 Dutch Model BIT stipulates that "[i]nvestors and their investments shall comply with domestic laws and regulations of the host state, including laws and regulations on human rights, environmental protection and labour laws"[62]. It further underlines "the importance of investors conducting a due diligence process to identify, prevent, mitigate and account for the environmental and social risks and impacts of its investment"[63]. An example of an investor legality clause in an effective IIA is OIC Investment Agreement[64], whose Article 9 has been already tested in practice[65].

Provisions obliging investors to continuously comply with domestic laws, including the HREDD laws, if adopted by the relevant host State, are considered to strengthen the investor's obligations. They provide the possibility to elevate a breach of domestic law to the international sphere and to bring such claim before an investment tribunal, especially by way of a counterclaim by the host State[66]. Refer-

---

[60] Y. Levashova, *The accountability and corporate social responsibility of multinational corporations for transgressions in host states through international investment law*, in *Utrecht Law Review*, 2018, 14(2), pp. 40-55.

[61] N. Bueno, A.Y. Vastardis, I.N. Djeuga, *Investor Human Rights and Environmental Obligations: The Need to Redesign Corporate Social Responsibility Clauses,* in *The Journal of World Investment & Trade*, 2023, 24(2), pp. 179-216.

[62] Article 7.1. of Netherlands Model BIT.

[63] Netherlands Model BIT, Article 7.2.

[64] Agreement on Promotion, Protection and Guarantee of Investments amongst the Member States of the Organization of the Islamic Conference (1981).

[65] *Hesham Talaat M. Al-Warraq v. The Republic of Indonesia*, Final Award (15 December 2014), paras. 631, 645, 663.

[66] M. Krajewski, *A nightmare or a noble dream? Establishing investor obligations through treaty-making and treaty-application*, in *Business and Human Rights Journal*, 2020, 5(1), pp. 105-129.

ring to these laws ensures that the tribunal can apply them as part of the applicable law, as for example anticipated in Article 42(1) of the ICSID Convention. The investor's obligation to comply with domestic law throughout the investment duration should explicitly refer to HREDD laws, mirroring similar references to human rights and environmental laws[67]. Additionally, referencing HREDD laws of the host States poses no risk for treaty drafters of imposing more stringent obligations on foreign investors compared to domestic investors within the host State, as can be the case with CSR clauses.

Direct investor clauses can be further reinforced by provisions on investor liability and procedural issues. For example, Article 20 of the 2016 Morocco-Nigeria BIT (not yet in force) stipulates that claims over investor's liability for acts or decisions, which lead to significant damage, personal injuries or loss of life in the host State, shall be possible to be brought before domestic courts of the investor's home State. This addresses a corporate veil hurdle that victims of human rights violations done by foreign investor's subsidiary in the host State usually face when pursuing claims directly against the foreign investor in its home jurisdiction. This novel clause also underlines the home State potential to exercise legal control over the activities of their multinational corporations operating abroad and to ensure that they act in accordance with international standards on responsible business conduct.

Moreover, if the HREDD law of the host State contains liability provisions, affected third parties, which are outside the IIA's investor-state regime, for example local communities, could be able to bring a claim against the foreign investor or its mother company in the host State courts for human rights and environmental harms caused by the foreign investor. This claim would be, however, based on the HREDD law and not investment law.

HREDD laws and investor liability provisions in the IIAs should mutually reinforce each other in terms of access to remedy, removing procedural and jurisdictional barriers and to provide victims

[67] N. Bueno, A.Y. Vastardis, I.N. Djeuga, *Investor Human Rights and Environmental Obligations: The Need to Redesign Corporate Social Responsibility Clauses*, in *The Journal of World Investment & Trade*, 2023, 24(2), pp. 179-216.

with multiple avenues where to best pursue their claims for harms related to investments and overcome complex corporate investment structures. Clarifying the conditions of foreign investor liability for human rights and environmental violations in the domestic courts of the home State and of the host State can rectify the current imbalance in investor's rights and obligations[68].

### 3.2.2. *EIA and SIA impact assessment clauses*

Some BITs have also integrated pre-establishment obligations that require investors to conduct environmental (EIA) and social (SIA) impact assessments. Although EIA and SIA are distinct processes, they can overlap with some elements or parts of a human rights due diligence process as understood under UNGPs[69]. These IIA's provisions usually refer to impact assessments *in accordance with host state laws.* Progressive clauses can be found in the (not yet ratified) 2016 Morocco-Nigeria BIT, which mandates investors to conduct a pre-establishment EIA in accordance with the laws of either the host State or the home State, whichever is more stringent regarding the specific investment, and to maintain an environmental management system once the investment is made, such as ISO 1400, especially for high-risk industrial enterprises[70].

To the extent that domestic laws include a climate change aspect in the EIA, the requirement to assess the climate impacts of the relevant investment would be interwoven into the obligation of foreign investors under IIAs.

## 3.3. *Provisions in IIAs referring to host States regulations*

Many IIAs, including non-reformed ones, contain a requirement that investments covered by the IIA must be made "in accordance with the [host State's] laws". These provisions have been mostly interpreted to exclude "illegal investments", i.e. made in breach of

[68] *Ibid.*
[69] See commentary to principle 18 of UNGPs.
[70] Articles 14 and 18 of the Morocco-Nigeria BIT.

relevant laws, from IIA's protection, leading to the dismissal of investment claims[71].Additionally, numerous arbitral tribunals have implied the legality requirement of investment based on generally accepted or international legal principles[72]. For example, a foreign investor in Kenya was denied protection under the IIA without explicit legality requirement for its failure to comply with the Kenyan's regulations on environmental impact assessment[73]. This case also illustrates that a violation of an environmental norm of the host State in the process of obtaining a special mining license was considered a disrespect of a "significant legal requirement of the host State", which sufficed for an illegality defence[74].

The question is the extent to which the legality requirement can be leveraged to incorporate HREDD obligations, as stipulated in domestic law, into the investment context. Is HREDD law a fundamental norm or important law to the host State? To what extent must the investor's flagrant disregard for such law be in order to constitute a serious breach, prompting a tribunal to decline jurisdiction, thereby denying BIT protection to the investment?

Considering arbitral practice, which is far from uniform, several hurdles for asserting an illegality defence based on HREDD law must be taken into account. Notably, not all violations of the host State's laws result in the disqualification of investment protection, the alleged illegality must arise in the making of the investment, constitute a serious breach, and the gravity of the illegality must be evaluated against the sanction of declining jurisdiction over the investment dispute[75]. Specifically, breaches of the host State law must concern its fundamental norms, leading to the nul-

---

[71] C. Mouawad, J. Beess und Chrostin, *The illegality objection in investor–state arbitration*, in *Arbitration International*, 2021, 37(1), pp. 57-95.

[72] *Ibid.*, pp. 63 ff.

[73] *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya*, ICSID Case No. ARB/15/29, Award (22 October 2018) paras. 333 and 365.

[74] *Ibid.*, para. 321.

[75] C. Mouawad, J. Beess und Chrostin, *The illegality objection in investor–state arbitration*, in *Arbitration International*, 2021, 37(1), p. 58. See also the three-step analysis summarized in *Vladislav Kim and others v. Republic of Uzbekistan*, ICSID Case No. ARB/13/6, Decision on Jurisdiction (8 March 2017).

lification of the investment, or serious breaches by the investor of these fundamental norms[76].

Taking into account the aforementioned Kenyan case, where the tribunal rejected an investment claim upon finding that the environmental license was of a "fundamental importance in an environmental vulnerable area" and the investor's conduct showed "serious disrespect" for the host State's environmental policies, coupled with insights from scholarly writings, it seems plausible that a tribunal could refuse jurisdiction over an investment made in violation of human rights law[77]. However, a breach of due diligence obligation does not necessarily equate to a violation of human rights law[78] and the non-compliance with HREDD law does not necessarily meet the proportionality test. In other words, concerning the HREDD law, the combination of the seriousness of the investor's conduct and the importance of the violated HREDD law may or may not lead to "a compromise of a correspondingly significant interest of the Host State" in a particular case[79].

Moreover, the alleged illegality must arise in the phase of establishing the investment and relate to domestic investment regulations for the claim to be dismissed under the legality requirement clauses. The HREDD laws, as they stand now, are typically not tied to securing environmental approvals or other permitting rules, the non-compliance with which would lead to the nullification of the relevant license or render the investment void ab initio.

Nevertheless, the illegality or investor's misconduct occurring during the operation of the investment is not devoid of relevance. Pursuant to UNGPs, investors are expected to conduct due diligence to evaluate the impacts of their investments and operations throughout their life cycle. Post-establishment illegality can serve as a defence against claimed violations of treaty standards and play a role

---

[76] *Ibid*., p. 73.

[77] B. Choudhury, *cit*.

[78] M. Krajewski, *Mandatory Human Rights Due Diligence Laws: Blurring the Lines between State Duty to Protect and Corporate Responsibility to Respect?*, in *Nordic Journal of Human Rights*, 2023, pp. 1-14.

[79] *Vladislav Kim and others v. Republic of Uzbekistan*, ICSID Case No. ARB/13/6, Decision on Jurisdiction (8 March 2017), paras. 404, 398.

in the assessment of damages. If the investor acts illegally, the host State can request corrective measures and impose sanctions available under its domestic law. If the investor deems these sanctions unjustified, it has the right to challenge the State's conduct before an investment tribunal. Non-compliance with the HRE due diligence obligations can be a "serious mater", especially if a damage is caused. The difficulty is that these laws are usually addressed to companies doing business in the relevant jurisdiction in contrast to those who own or control them, which are typically foreign investors. This can be overcome by an explicit IIA's provision requiring the investor to comply with HREDD law (as described in section above).

Additionally, the case law suggests that the investor has an obligation to exercise due diligence before making the investment, in particular to assure itself that its investment comply with the law[80]. The investor's conduct and the lack of due diligence for climate-related human rights impacts can help to better contextualize the interpretation of IIAs beyond the illegality defence[81]. Investor's non-compliance with the due diligence obligations under the HREDD laws may be examined as part of the context in assessing treaty breaches and lead to no or diminished protection under the substantive standards of treatment at the merits stage, including in determining compensation[82]. For instance, investing in a high-carbon industry without conducting an environmental (climate) due diligence can undermine an investment claim based on the fair and equitable treatment and investor's legitimate expectations where the investor ought to have known of climate risks of such investments. Economic and socio-political circumstances in the host State, including for example publication of its National Determined Contributions under the Paris Agreement, can signal future regulations, which can have disruptive effects on such investments. Investor's conduct is thus put into broader context in considering whether an IIA breach has occurred.

---

[80] C. Mouawad, J. Beess und Chrostin, *The illegality objection in investor–state arbitration*, in *Arbitration International*, 2021, 37(1), pp. 77 ff. *Alasdair Ross Anderson and others v. Republic of Costa Rica*, ICSID Case No. ARB(AF)/07/3, Award 19 May 2010, para. 58.

[81] B. Choudhury, *cit*.

[82] See. Article 23 of the Netherlands Model BIT.

As part of the home State law, HREDD requirements can form a condition to development assistance or receipt of export credits[83]. Further, these laws can provide access to remedy in the home States for the harm caused in the host States. However, most HREDD laws, save for the French Duty of Vigilance Law, still do not provide for liability mechanism for companies operating abroad[84]. They however would require the foreign investor (a company incorporated in the home State) to cover its investment in the due diligence process and to take into account the risks of the activities of the investment taking place in the host State and to report on them. Such duties could trigger a separate claim under the home State HREDD law.

### 3.4. *Counterclaims*

The relevance of domestic law, including HREDD regulations, is closely linked to the potential to assert counterclaims alleging investor misconduct based on host State's law. In practice, host States have used the mechanism of counterclaims rarely due to jurisdictional and procedural requirements[85], but recent positive results concerning environmental harms might signal a change of course[86]. When analysing the merits of counterclaims, tribunals have taken into consideration the investor's lack of diligence with respect to environmental laws.

In the future, counterclaims could be an option to enforce direct obligations of investors. Some new IIAs explicitly mention the host State's right to assert counterclaims against the investor, thereby af-

---

[83] OECD, *Promoting Sustainable Global Supply Chains: International Standards, Due Diligence and Grievance Mechanisms*, 2017, p. 15.

[84] N. Bueno, C. Bright, *Implementing human rights due diligence through corporate civil liability*, in *International & Comparative Law Quarterly*, 2020, 69(4), pp.789-818.

[85] H. Thomé, *Holding Transnational Corporations Accountable for Environmental Harm Through Counterclaims in Investor-State Dispute Settlement: Myth or Reality?*, in *The Journal of World Investment & Trade*, 2021, 22(5-6), pp. 651-686.

[86] *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Counterclaims (7 February 2017); *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Interim Decision on the Environmental Counterclaim (11 August 2015).

firming the tribunal's jurisdiction[87]. Additional clarifications regarding potential remedies for breaches of HREDD laws, including their quantification, will be necessary to facilitate straightforward host State's counterclaims.

Emerging progressive IIA's provisions define the implication of investor's non-compliance, including, for example, the ability of the host State to deny benefits of the BIT protection if investors do not conduct meaningful human rights due diligence, are involved with human rights abuses or "caused serious environmental damage in the territory of the host party"[88].

## 4. *Conclusions*

The concept of HREDD, seeking to foster corporate action on human rights and environmental risks, is well-supported in the business and human rights field and is increasingly being codified in national HREDD laws. These laws compel companies to engage in risk-based due diligence to identify, prevent, and mitigate human rights-related impacts of business operations through the value chain. They vary significantly, including differences regarding whether they require businesses to investigate and address the risks of adverse impacts of their activities on climate change.

Most HREDD laws so far do not expressly include climate impacts into the company's duty to conduct HRE due diligence. We are still yet to reach the clarity on corporate climate accountability, which needs a strong national regulatory framework with effective supervisory and enforcement mechanisms. Furthermore, the HRE due diligence is a flexible concept that allows room for decision-makers. In an individual case, the regime can provide better HRE protection in general but can lead to protection of the investor that duly conducted climate due diligence. The field is, however, evolving. A significant step can present the EU Corporate Sustain-

[87] See Colombia-United Arab Emirates BIT, which establishes a mechanism for obtaining an investor's consent for counterclaims.

[88] Colombia Model BIT of 2017, p. 12.

ability Due Diligence Directive, currently under negotiation, which also extends its scope to certain non-EU companies. In addition to HRE due diligence, businesses are to implement a climate transition plan detailing steps to reduce GHG emissions and achieve climate neutrality.

There are several ways in which climate due diligence can be considered in the international investment regime. To the extent the HREDD laws impose climate responsibility over companies, IIAs can serve as a vehicle to introduce investor's responsibility over climate impacts of investments and strengthen current CSR clauses in the IIAs, which are mostly of hortatory and non-binding nature. This can be done by either directly introducing investor due diligence obligations in the IIA or by referencing HREDD laws. Legality clauses requiring continuous investor's compliance with domestic law of the host State or specifically with HREDD laws are so far rare in IIA practice, however, have the potential to establish investor obligations, including those on climate impacts of investments. They provide the possibility to elevate a breach of domestic law to international level. On the other hand, legality investment clauses ("in accordance with law") are present in many (non-reformed) IIAs and can be invoked as a defence against claims based on illegal investments. The HREDD laws, as they stand now, are typically not tied to securing environmental approvals or other permitting rules, the non-compliance with which would render the investment void ab initio. The non-compliance with HREDD laws will unlikely lead to the illegality of investment and denial of the tribunal's jurisdiction to hear the investment claim under current IIAs. Post-establishment illegality can serve as a defence against claimed violations of treaty standards, affect the assessment of damages or form a basis for host States bringing counterclaims.

Incorporating HREDD laws into IIAs with implications for investor's non-compliance could provide an additional avenue of how to prevent climate-related adverse impacts on human rights and environment of typical investment activities linked to natural resources. As HREDD laws mandate companies to resolve disputes at an early stage, they can contribute to the prevention of investment disputes.

SESSION II

# SUSTAINABLE DEVELOPMENT, THE MARITIME SECTOR AND SUSTAINABLE MOBILITY

# ENVIRONMENTAL PROTECTION AND ECONOMIC DEVELOPMENT IN THE MARITIME SPACE PLANNING

*Greta Tellarini*

## 1. *Introduction*

The gradual and increasing demand for maritime space for purposes of a different nature (maritime transport, fishing, aquaculture, tourism, exploitation of natural resources, energy production activities from renewable sources, conservation of ecosystems and biodiversity, and underwater cultural heritage)[1] calls for an integrated space planning and management strategy.

In particular, the innumerable human activities, which may take place at sea, governed by various regulatory sources, which assign the relevant administrative powers to distinct entities, at different territorial levels, and affecting different public interests (from marine and coastal environmental protection to economic development) require interventions of coordination of powers aimed at ensuring the coexistence of sea uses, imposing a unified implementation management of planning that takes into account the interests involved through the application of the various relevant sectoral disciplines[2].

---

[1] See A. Carapellucci, *La tutela del mare e delle risorse idriche*, in *Trattato di diritto dell'ambiente*, directed by R. Ferrara, M.A. Sandulli, vol. III, Milano, 2014, p. 813, which states how human activities have acquired the ability to affect the seas to an extent once unimaginable.

[2] See M. Roversi Monaco, *La pianificazione marittima in Italia: un percorso in atto*, in *Federalismi.it*, 2018, p. 3; G. Tellarini, *La pianificazione degli spazi*

Such a strategy for the management of the seas and maritime governance has been developed under the Integrated Maritime Policy for the European Union[3], which aims to foster the sustainable development of the seas and oceans and to encourage coordinated, coherent and transparent decision-making with regard to EU sectoral policies affecting maritime and coastal economies. In the Integrated Maritime Policy, maritime spatial planning is identified as a cross-sectoral policy tool, enabling public authorities and stakeholders to apply an integrated, coordinated and cross-border approach.

## 2. *European legislation establishing a framework for maritime spatial planning*

The need to promote the sustainable coexistence of activities at sea, as well as the appropriate allocation of maritime space among the various relevant uses, has urged an intervention to regulate a new administrative function, that of "maritime spatial planning". This function is designed to contribute to the effective management of maritime activities and the sustainable use of marine and coastal resources through the establishment of a coherent, transparent and sustainable decision-making process.

To this end, at the European level, the need to delineate a framework relating to the development and implementation by Member States of maritime spatial planning that can be implemented through the preparation of management plans was assessed.

Directive 2014/89/EU, which establishes a framework for maritime spatial planning[4], aims to promote the sustainable growth of maritime economies (so-called Blue economy), the sustainable development of marine areas and the sustainable use of marine re-

*marittimi*, in C. Ingratoci, A. Marino (a cura di), *Il controllo del traffico della navigazione: stato dell'arte e evoluzione*, Napoli, ESI, 2022, pp. 523 ff.; C. Telesca, *Pianificazione dello spazio marittimo: stato dell'arte e prospettive evolutive*, in *Riv. dir. nav.*, 2022, pp. 137 ff.

[3] See A. Del Vecchio (a cura di), *La politica marittima comunitaria*, Roma, Aracne, 2009.

[4] Published in *OJEU* L 257, Aug. 28, 2014.

sources (Art. 1). Within the framework of the Integrated Maritime Policy for the European Union, this regime requires the development and implementation by Member States of maritime spatial planning in order to contribute to the achievement of the objectives, set out in Article 5 of the directive, taking into account land-sea interactions and the strengthening of transboundary cooperation, in accordance with the provisions set out in the United Nations Convention on the Law of the Sea (Montego Bay, 1982) (Art. 1(2))[5].

Under the same directive, "maritime spatial planning" is defined as that "process by which the relevant Member State's authorities analyse and organize human activities in marine areas to achieve ecological, economic and social objectives" (Art. 3(2)).

The scope of the directive, as defined in Article 2, is "marine waters", corresponding to the waters (and associated seabed and subsoil), located beyond the baseline used to measure the extent of territorial waters to the boundaries of the area over which the Member State exercises jurisdiction, in accordance with the United Nations Convention on the Law of the Sea. Thus, included in the definition of "marine waters" are the territorial sea, the exclusive economic zone and the continental shelf. As a result, those coastal waters, to which the national system applies urban and rural planning, are excluded, provided this being expressly foreseen in the maritime spatial management plans (Art. 2(1)).

In the preparation and implementation of maritime spatial planning, Member States shall pursue those objectives, set forth in Article 5, aimed at sustainable development and growth in the maritime sector, with attention to environmental, economic and social dimensions. This shall be done through the application of an "ecosystem approach", as well as the promotion of the coexistence of activities and uses of the sea. Management plans, prepared by Member States,

[5] For further discussion, see V. Starace, *La protezione dell'ambiente marino nella Convenzione delle Nazioni Unite sul diritto del mare*, in *Diritto internazionale e protezione dell'ambiente marino*, Milano, 1983, pp. 804 ff.; T. Treves, *La Convenzione delle Nazioni Unite sul diritto del mare del 10 dicembre 1982*, Milano, 1983, pp. 4 ff.; T. Treves, *Il diritto del mare e l'Italia*, Milano, 1995, pp. 4 ff.; T. Scovazzi, *Elementi di diritto internazionale del mare*, Milano, 2002, pp. 35 ff.; M.M. Angeloni, A. Senese, *Principi applicativi dei principali istituti del nuovo diritto del mare*, Bari, 1998, pp. 59 ff.

aim "to contribute to the sustainable development of energy sectors at sea, of maritime transport, and of the fisheries and aquaculture sectors, and to the preservation, protection and improvement of the environment, including resilience to climate change impacts", as well as may pursue other objectives, such as the promotion of sustainable tourism and the sustainable extraction of raw materials (Art. 5(2)).

In pursuing these objectives, Member States shall develop maritime spatial management plans, which identify the spatial and temporal distribution of current and future activities and uses of marine waters, providing an indicative list of the same, which may include: aquaculture areas; fishing areas; facilities and infrastructure for the exploration, exploitation and extraction of oil, gas and other energy resources, minerals and aggregates and the production of energy from renewable sources; maritime transport routes and traffic flows; military training areas; nature and species conservation sites and protected areas; raw material extraction areas; scientific research; submarine cable and pipeline routes; tourism; and underwater cultural heritage (Art. 8).

The directive recalls in Art. 6 a number of minimum requirements that must necessarily be taken into account in the implementation phase of maritime spatial planning and which include land-sea interactions; environmental, economic, and social and safety aspects; stakeholder involvement; consistency of planning with the plan(s) derived from it, such as integrated coastal management; stakeholder involvement, in accordance with Art. 9; the use of best available data in accordance with Art. 10; effective cross-border cooperation among Member States, in accordance with Art. 11, and the promotion of cooperation with third countries, in accordance with Art. 12.

One of the main purposes of Directive 2014/89/EU is to ensure the coexistence of uses and activities in the maritime space in a balancing relationship between competing interests and activities, thus making it necessary to coordinate between different sectors for the allocation of maritime spaces.

In this view, planning is proposed as a cross-sectoral tool, enabling public authorities and stakeholders to apply "a coordinated,

integrated and trans-boundary approach" (recital 3 of the directive). It is, therefore, a matter of promoting planning that is integrated, that is, that finds implementation through a coordinated and inclusive approach of several management plans so as to have a single coherent framework within which to make the relevant decisions.

The directive has also the objective to ensure sustainable development, that is, the sustainable growth of maritime economies and the sustainable use of sea and coastal resources. To this end, the directive itself calls for the need to follow an "ecosystem approach", which, now widespread in the various national legal systems, involves a process of managing land, water and living resources, aimed at preserving the structure and functioning of the ecosystem and achieving a socially and scientifically acceptable balance between conservation and resource use[6].

From the overall examination of the directive's framework, some general reflections can only be inferred. The legislation, which establishes a framework for maritime spatial planning, is set within the context of the Marine Strategy Framework Directive 2008/56/EU[7], which represents the pillar of the European Union's Integrated Maritime Policy.

It establishes common principles for Member States designed to foster the sustainable development of the seas and maritime and coastal economies by applying the "ecosystem approach", which requires that the collective pressure of activities be kept within levels compatible with the "good environmental status"[8] of marine waters.

Directive 2014/89/EU requires each Member State to develop and implement maritime spatial planning, taking into account

---

[6] See M. Roversi Monaco, *La pianificazione marittima in Italia: un percorso in atto*, in *Federalismi.it*, 2018, p. 5.

[7] Published in *OJEU* L 164, June 25, 2008. Transposed in Italy by Legislative Decree No. 190 of October 13, 2010 (published in G.U.R.I. No. 270 of November 18, 2010).

[8] According to Article 3 (point n. 5) of Directive 2008/56/EU, "good environmental status" is defined as the "ecological status of marine waters such that they preserve the ecological diversity and vitality of seas and oceans that are clean, healthy and productive in their own intrinsic condition and the use of the marine environment remains at a sustainable level, thereby safeguarding the potential for the uses and activities of present and future generations […]".

land-sea interactions (Art. 4). When developing management plans, Member States must give due consideration to the specific features of marine regions, relevant current and future activities and uses, natural resources, and the resulting effects on the environment (Art. 4(5)). Indeed, Directive 2014/89/EU considers the assessment of land-sea interactions as an indispensable element in the maritime planning process so that full coherence between maritime and land strategies and plans can be ensured, achieved through multi-level coordination and stakeholder involvement[9].

### 2.1. *The implementation of European legislation on maritime spatial planning in Italy*

Italy has diligently implemented Directive 2014/89/EU, within the deadline for its transposition, with the approval of Legislative Decree No. 201 of October 17, 2016, establishing a framework for maritime spatial planning[10].

This legislative decree is presented as the national transposition of Directive 2014/89/EU, reiterating in its Art. 1, how the planning process[11] is aimed at "promoting the sustainable growth of maritime economies, the sustainable development of marine areas and the sustainable use of marine resources", and ensuring, in line with EU legislation, the protection of the marine and coastal environment through the application of an ecosystem approach, taking into account land-sea interactions and the strengthening of transboundary cooperation, in accordance with the United Nations Convention on the Law of the Sea[12].

---

[9] See G. Tellarini, *La pianificazione degli spazi marittimi*, in C. Ingratoci, A. Marino (a cura di), *Il controllo del traffico della navigazione: stato dell'arte e evoluzione*, Napoli, ESI, 2022, pp. 529-530.

[10] Published in G.U.R.I. No. 260, November 7, 2016.

[11] In the wake of the EU directive, the implementing decree understands "maritime spatial planning" as that process by which human activities in marine areas are analysed and organized in order to achieve ecological, economic and social objectives.

[12] See C. Rovito, *La pianificazione dello spazio marittimo attraverso il D.L.vo n. 201/2016 e la Direttiva 2014/89/UE nel quadro dello sviluppo sostenibile*, available at: www.tuttoambiente.it.

However, with regard to the establishment of maritime spatial management plans, which according to Directive 2014/89/EU should have been prepared as quickly as possible and, in any case, no later than March 31, 2021, Italy is among those Member States that fall significantly behind schedule, having not yet complied with the implementation of these plans by the deadline specified in EU regulations.

It may seem reasonable to argue that the delay in the spatial planning of sea uses has inevitably slowed down the development of those strategic objectives for the realization of the European Union's Agenda for the so-called Blue Economy (2012)[13] and for the European Green Deal (2019)[14], holding back the growth of leading sectors and today an absolute priority (e.g., renewable energy) for the country's economy.

Legislative Decree 201/2016 was followed by a Decree of the President of the Council of Ministers of December 1, 2017[15], adopting guidelines, pursuant to Article 6 of Legislative Decree 201/2016, establishing the criteria for the preparation of maritime spatial management plans and the identification of maritime reference areas, as well as those relevant to land-sea interactions[16].

These guidelines indicate, more specifically, the methodological process for developing maritime spatial management plans. This should be done with a view to transparency and simplification, to be achieved through internal governance, including the constant involvement of all economic and social stakeholders in the most important stages of the decision-making process, also with regard to the planning and programming tools already in place in the areas of reference.

---

[13] European Commission Communication, *Blue Growth. Opportunities for sustainable growth in the marine and maritime sectors*, September 13, 2012 (COM(2012) 494 final).

[14] European Commission Communication, *The European Green Deal*, December 11, 2019 (COM(2019) 640 final).

[15] Published in G.U.R.I. No. 19, January 24, 2018.

[16] In the development of these guidelines, the state of the art in planning and programming was taken into account with the intention of providing guidelines with respect to the strategic outcome to which maritime spatial planning should strive, identifying and proposing a set of integrated strategic objectives of a general nature.

Proceeding to a coordinated analysis of Legislative Decree No. 201/2016 and the guidelines, maritime spatial planning pursues the objective of contributing to the sustainable development of the marine energy, maritime transport, fisheries and aquaculture sectors for the conservation, protection and enhancement of the environment, including resilience to the impact of climate change, ensuring the coexistence of relevant activities and uses, as specified in Article 4 (paragraph 1) of the decree.

It also reiterates the need for planning to be developed and implemented by applying an "ecosystem approach", which is discussed in more detail in the next section.

The implementation of maritime spatial planning is to be carried out through the development of management plans, for each maritime area identified by the guidelines, which provide for the spatial and temporal distribution of present and future relevant activities and uses of marine waters, including, for example, fishing and aquaculture areas, facilities and infrastructure for the exploitation and extraction of natural resources and the production of energy from renewable sources, maritime transport routes, sites of nature conservation and natural species, scientific research, tourism, and underwater cultural heritage (Art. 5(1) of the decree and Ch. 1 of the guidelines).

The guidelines intervene to divide the plannable marine waters into distinct maritime areas, each of which is to be the subject of a different maritime space management plan. There are three maritime areas identified: the Western Mediterranean Sea, the Adriatic Sea, and the Ionian Sea together with the Central Mediterranean Sea, which correspond, moreover, to the three marine sub-regions of the Mediterranean Sea, already identified by the aforementioned Legislative Decree 190/2010, implementing Directive 2008/56/EC on Marine Strategy.

However, the management plans may also establish sub-areas, if necessary, in view of the extremely varied characteristics of the relevant maritime areas, in addition to the identification of land areas relevant to land-sea interactions. The reference is obviously to the territorial scope of coastal municipalities and additional specific areas to be defined in management plans, which may, for example, consist of UNESCO sites or marine or coastal protected areas.

While the legislative decree stipulates in Article 5, paragraph 2, that the management plan for each maritime area should include strategic environmental assessment and impact assessment, where they are provided for, the guidelines state that, in any case, precisely because of the nature of its contents, the plan should be subjected to VAS (*Valutazione ambientale strategica*)[17] procedure, which is suitable for ensuring the application of the "ecosystem approach". Moreover, since it is a plan also drawn up for the fishing, transport, tourism, and energy sectors, it should, in any case, fall within the scope of application of the VAS, pursuant to Article 6 of Legislative Decree No. 152 of April 3, 2006 (*Norme in materia ambientale*)[18], which requires the VAS procedure for plans and programs that may have significant impacts on the environment and cultural heritage[19].

The decree also stipulates, in Article 5, paragraph 3, that existing plans or programs, which take into consideration inland waters and the economic and social activities carried out thereto, as well as those concerning land-based activities relevant to land-sea interactions, must be included and harmonized with the provisions of maritime space management plans. This raises the question of the relationship between the maritime spatial management plan and other adopted plans or programs.

---

[17] The assessment of the effects of certain plans and programs on the natural environment was introduced in the European Community by Directive 2001/42/EC, known as the VAS Directive, which came into force on July 21, 2001, and represents an important contribution to the implementation of Community strategies for sustainable development by operationalizing the integration of the environmental dimension into strategic decision-making processes. At the national level, Directive 2001/42/EC was implemented by Part II of Legislative Decree No. 152 of April 3, 2006, which came into force on July 31, 2007, subject to subsequent amendments and additions. The environmental assessment of plans and programs that may have a significant impact on the environment, as set forth in Article 4 of Legislative Decree 152/2006, as amended, is intended to ensure a high level of environmental protection and contribute to the integration of environmental considerations when preparing, adopting and approving said plans and programs by ensuring that they are consistent with and contribute to the conditions for sustainable development.

[18] Published in G.U.R.I. No. 88, April 14, 2006.

[19] See M. Roversi Monaco, *La pianificazione marittima in Italia: un percorso in atto*, in *Federalismi.it*, 2018, p. 14.

The aforementioned Article 5 specifies how not only these different and additional plans will have to be taken into account, but the same will become part of the maritime space management plans, being able, therefore, their contents to be subject to modifications in order to ensure full harmonization with what is provided by the management plan.

It seems, therefore, that a fundamental role is assigned to the maritime space management plan and, therefore, precedence over the individual sector plans. Ch. 14 of the guidelines stipulates that the maritime space management plan "precisely because of its character as an integrated plan, will have a reference role for the individual sector plans" and will have to "transpose existing planning", being intended to "draw an integrated framework in which the sector plans will go on to define their sectoral objectives and actions", in line with what the same EU directive on the subject requires.

The national maritime planning process, which is currently underway, will now have to take into consideration the strategic directions of the Plan of the Sea, recently adopted in Italy[20], which is positioned as an instrument of political direction and coordination of a unified national maritime strategy[21]. Such strategy includes the pro-

[20] Published in G.U.R.I. No. 248, October 23, 2023. The new Plan of the Sea, pursuant to Decree-Law No. 173/2022 and without prejudice to the competences of individual administrations, is a programmatic document, which contains strategic guidelines on: protection and enhancement of the sea resource from the ecological, environmental, logistical, economic point of view; economic valorization of the sea with particular reference to underwater archaeology, tourism, initiatives in favor of fishing and aquaculture and the exploitation of energy resources; enhancement of sea routes and development of the port system; promotion and coordination of policies aimed at improving territorial continuity to and from the islands, overcoming the disadvantages arising from island status and enhancing the economies of the smaller islands; promotion of the national sea-system at the international level, consistent with the strategic guidelines on the promotion and internationalization of Italian enterprises; enhancement of the maritime state property, with particular reference to maritime state property concessions for tourism-recreational purposes. The Plan of the Sea aims to outline the strategic directions of national maritime policy with an all-inclusive and transversal approach to the various interests underlying the sea resource, with the intention of supporting and promoting the development of the maritime industry and the economic growth of the country in full harmony with a sustainable and safe use of its marine resources.

[21] While the "Maritime Space Management Plans" indicate the spatial and temporal distribution of uses, the "Plan of the Sea", from the perspective of an

posal of subsequent regulatory and/or administrative interventions by the Ministries holding administrative functions, to be planned with a view to harmonization and composition among the various interests involved in the development of the "Blue economy", in that maritime spatial and temporal distribution of human activities in maritime areas is intended to be organized in order to achieve economic, environmental and social objectives.

The process of maritime spatial planning will also have regard to the recent approval of Law No. 91 of June 14, 2021[22] on the establishment of an exclusive economic zone beyond the outer limits of the territorial sea, which will have to bring to attention the question of extending the scope of maritime planning legislation to this zone, as has happened in other Member States.

### 2.2. *The "Ecosystem approach" in the development of maritime spatial planning*

Maritime spatial planning should pursue the objective of contributing to the sustainable development of the marine energy, maritime transport, fisheries and aquaculture sectors for the preservation, protection and enhancement of the environment, including resilience to the impact of climate change, by ensuring the coexistence of relevant activities and uses.

Maritime spatial planning must therefore be developed and implemented by applying an "ecosystem approach", taking into account the peculiarities of marine regions, present and future relevant activities and uses, and their effects on the environment and natural resources. In addition, planning should give due consideration to economic, social and environmental aspects, those relating to the safety of sea uses, as well as land-sea interactions including

"overview" of how to structure the use of the sea, prepares the useful guidelines under Art. 12 Decree-Law No. 173 of November 11, 2022, converted into law, with amendments, by Art. 1, paragraph 1, Law No. 204 of December 16, 2022, as well as the general actions to be taken in pursuit of the stated strategic objectives. See G. Tellarini, *El nuevo Plan del Mar italiano*, in *Rev. der. transp.*, 2023, pp. 11 ff.

[22] Published in G.U.R.I. No. 148, June 23, 2021.

through the use of elements contained in other planning processes, such as integrated coastal zone management.

European law provides for the need to follow the "ecosystem approach", currently prevalent in various national legal systems, including groundwater and biological resource management processes in order to protect and achieve ecosystem structures and functions in a socially and scientifically acceptable balance between conservation and resource use.

The "ecosystem approach" consists of a strategy that promotes the conservation and sustainable and equitable use of land, water and living resources through integrated management of them. The goal of ecosystem management is to maintain an ecosystem in a healthy, productive and resilient condition so that it can provide humans with the goods and services they want and need. Unlike current approaches, which are usually aimed at considering a specific activity or a single area, ecosystem management considers the cumulative impacts of different sectors as a whole.

The "ecosystem approach" is therefore the main tool for implementing proper maritime spatial planning, playing a bridging role between it and the regulatory system referred to in the aforementioned Marine Strategy Framework Directive 2008/56/EU, which is the pillar, as noted above, of the Integrated Maritime Policy of the European Union.

This approach is articulated both at the strategic level, in relation to the appropriate integration and application of the methods and objectives declined within the Community framework, as set out in Directive 2008/56/EU, and at the functional and procedural level with regard to the use of the operational tool of VAS procedure, as a means of declining the ways in which the "ecosystem approach" must be integrated and used for the definition of management plans.

The VAS procedure must be initiated simultaneously with the management plan formation process so that the latter, from its earliest stages, is oriented toward a sustainable strategic framework.

This implies that the plan, at its preliminary stage, must define the environmental context, the objectives and potential measures it intends to adopt, the indicators for carrying out monitoring, and the relevant administrative entities directly or indirectly affected by the plan.

Regarding the indication of objectives, it should be noted that the guidelines indicate, in addition to those contained in the directive and taken up in the implementing decree, the environmental objectives, referred to in the Marine Strategy Directive 2008/56/EC and those referred to in the National Strategy for Sustainable Development, referred to in Article 3 of Law No. 221 of December 28, 2015[23].

An involvement of the smaller territorial authorities in the maritime planning process, although the latter has been placed in the state, could, in truth, assume a relevant role in the interest of a better and more fruitful assessment of land-sea interactions, but also in light of the application of the "ecosystem approach", to which the planning process will have to conform[24].

Moreover, the Convention on Biological Diversity, signed at Rio de Janeiro on June 5, 1992[25], which has as its objectives the conservation of biological diversity and the sustainable use of the components of biological diversity, ensuring the fair and equitable sharing of the benefits derived from the exploitation of resources, argues that, in line with the "ecosystem approach", decentralized management, closer to the land, may be able to ensure greater accountability and participation and help consolidate the concepts of efficiency, effectiveness and equity.

## 3. *Conclusions: environmental protection as fundamental principle of maritime economic activity*

In the European vision, maritime spatial planning must presuppose the concept of the "sea system", as an organic governance of instances and needs with a view to sustainable development and

[23] Published in G.U.R.I. No. 13, January 18, 2016.

[24] See M. Roversi Monaco, *La pianificazione marittima in Italia: un percorso in atto*, in *Federalismi.it*, 2018, p. 16.

[25] For more details, please refer to D.E. Bell, *The 1992 Convention on Biological Diversity: The Continuing Significance of U.S. Objection at the Earth Summit*, in *The George Washington Journal of International Law and Economics*, 1993; F. Burthenne-Guilmin, S. Casey-Lefkowitz, *The Convention on Biological Diversity: A Hard Won Global Achievement*, in *Yearbook of International Environmental Law*, 1993.

provide for adequate governance allowing for effective coordination through systemic, single and structured action, so as to foster sustainable economic, social and environmental development in full compliance with the Europe 2020 Strategy and Agenda 2030.

In the same vision, maritime spatial planning is an essential tool to prevent conflict between policy priorities and to reconcile nature conservation with economic development. It tends to ensure that potential negative impacts on the natural environment are identified and prevented at a much earlier stage in the planning process, and that national maritime spatial management plans are in line with national energy and climate plans, as well as good environmental status as defined by the European Marine Strategy legislation.

The main critical issue that the European Union intended to solve with the adoption of the EU Maritime Spatial Planning Directive is to improve the articulation between economic objectives and environmental regulations and reduce the resulting potential conflicts that could arise.

The implementation of maritime planning, therefore, is intended to foster collaboration and the development of a common approach, through the assumption of similar obligations, for the management, in a transboundary context, of maritime activities and for the protection of the marine environment, promoting sustainable growth in maritime sectors.

The fruitful relationship between maritime activities and sustainable development can be ensured by maritime spatial planning, as an increased risk of territorial conflicts for the expansion of maritime activities can negatively impact the sustainable growth of the sector.

The recent European Commission Communication *On a new approach for a sustainable blue economy in the EU. Transforming the EU's blue economy for a sustainable future* (dated May 17, 2021)[26] aimed at outlining a new approach for a sustainable "Blue economy" in the European Union reaffirms how conservation and protection of biodiversity are the fundamental principles of maritime economic activity and how maritime spatial planning is the es-

[26] COM(2021) 240 final.

sential tool for reconciling nature conservation with economic development[27].

The maritime planning process currently under way in Italy is part of a historical period in which it has been decided to accept, and finally crystallize, the idea that the environment constitutes a heritage to be protected independently of the quantity and importance of the human initiatives that may eventually take place in it.

In fact, the Italian legal framework has recently been enriched with the amendment of Articles 9 and 41 of the Constitution (Constitutional Law February 11, 2022, No. 1)[28], which recognized among its fundamental principles the protection of the environment, biodiversity and ecosystems also in the interest of future generations (Art. 9) and established how the economic initiative cannot take place if in conflict with the environment (Art. 41)[29].

From the perspective of freedom of economic initiative, the constitutional amendment has aligned itself with the jurisprudence of the Italian Constitutional Court[30], which for years has affirmed the need to verify the compatibility of freedom of economic initiative with environmental protection.

---

[27] See G. Tellarini, *La pianificazione degli spazi marittimi*, in C. Ingratoci, A. Marino (a cura di), *Il controllo del traffico della navigazione: stato dell'arte e evoluzione*, Napoli, ESI, 2022, pp. 550 ff.

[28] Published in G.U.R.I. No. 44, February 22, 2022.

[29] The search for a new balance in the balancing of values is the subject of several recent writings, including, in particular, R. Cabazzi, *Dalla "contrapposizione" alla "armonizzazione"? Ambiente ed iniziativa economica nella riforma (della assiologia) costituzionale*, in *Federalismi.it*, 2022, 7, pp. 31 ff.; R. Montaldo, *La tutela costituzionale dell'ambiente nella modifica degli artt. 9 e 41 Cost.: una riforma opportuna e necessaria?*, in *Federalismi.it*, 2022, 13, pp. 187 ff.; Idem, *Il valore costituzionale dell'ambiente, tra doveri di solidarietà e prospettive di riforma*, in *Forum di Quaderni Costituzionali*, 2021, 2, pp. 441 ff.; V. Onida, *Ambiente in Costituzione*, in *Corti supreme e salute*, 2022, 1, pp. 1 ff.; C. Sartoretti, *La riforma costituzionale "dell'ambiente": un profilo critico*, in *Riv. giur. edilizia*, 2022, 2, pp. 119 ff.; R. Montaldo, M. Cecchetti, *La revisione degli articoli 9 e 41 della Costituzione e il valore costituzionale dell'ambiente: tra rischi scongiurati, qualche virtuosità (anche) innovativa e molte lacune*, in *Forum di Quaderni Costituzionali*, 2021, 3, pp. 285 ff.; Y. Guerra, R. Mazza, *La proposta di modifica degli articoli 9 e 41 Cost.: una prima lettura*, in *Forum di Quaderni Costituzionali*, 2021, 4, pp. 109 ff.

[30] With regard to the importance to be attached to the environment in balancing opposing interests, see, in particular, Constitutional Court No. 127 of March 16, 1990 and No. 85 of May 9, 2013.

The reform enhances the environment in at least two respects: by giving constitutional value to sustainable development through reference to the "interest of future generations" and by legitimizing the development and adoption of "green" economic policies.

Moreover, the reference to the protection of future generations is a novelty, having so far appeared only timidly in constitutional jurisprudence.

Even the "green" call of Article 41, by explicating the environment as a limitation on economic initiative and as the purpose of economic policies, seems at least to push toward a rethinking of the traditional balancing points between opposing values so far crystallized by constitutional jurisprudence.

The recent reform of articles 9 and 41 of the Constitution may represent an opportunity to effectively re-balance the relationship between such opposing interests and ensure that environmental protection has a proper prominence in the legislative and administrative planning and programming strategy.

# SMART PORTS AS DRIVERS OF SUSTAINABILITY*

*Elena Orrù*

## 1. *Sustainable development and society 5.0 in the logistics and transport sectors*

Digital transformation, automation, and sustainability of most aspects of business and human life are at the core of the strategies of several international organizations, the EU and many domestic policies, among others. These goals go hand in hand, being the former also relevant instruments for achieving the latter.

Under the UNDP[1] "s Digital Strategy for the years 2022-2025[2], for example, the rapid digital transformation that the world is experiencing is considered as an opportunity for the achievement of the SDGs by 2030 and the UNDP's broader programmatic goals,

* The article is the result of the research performed by the author also within the international project *El transporte ante el desarrollo tecnológico y la globalización: nuevas soluciones en materia de responsabilidad y competencia* (Principal Investigator, Prof. Mª Victoria Petit Lavall), and the Italian research project of relevant national interest (PRIN) *The One Belt - One Road (OBOR) Initiative: Legal Issues and Effects on the Financing and Development of Maritime and Multimodal Infrastructures by Chinese Investors in Italy* (Principal Investigator, Prof. Stefano Zunarelli).

[1] United Nations Development Programme.

[2] The strategy was published in February 2022.

where "harnessed as a positive means to empower both people and planet"[3].

As for the EU, following the Paris Agreement, on 28 November 2018, with the Communication *A Clean Planet for all. A European strategic long-term vision for a prosperous, modern, competitive and climate neutral economy* (COM/2018/773 final), the Commission launched its strategy for achieving a sustainable, climate-neutral, but also modern and prosperous economy by 2050 that involves all the sectors, including transportation. Digitalization and ICTs represent important tools towards this goal[4].

Moreover, on 11 December 2019, the European Commission published the communication *The European Green Deal* (COM(2019) 640 final), whose objective is "to transform the EU into a fair and prosperous society, with a modern, resource-efficient and competitive economy where there are no net emissions of greenhouse gases in 2050"[5]. For this purpose, the communication advocates the "need to rethink policies for clean energy supply across" the different sectors, including large-scale infrastructures and transport[6]. Within this strategy, digital technologies are considered – among other tools – as critical enablers of this major transformation.

In its communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions *Pathway to a Healthy Planet for All. EU Action Plan: 'Towards Zero Pollution for Air, Water and Soil'* (COM(2021) 400 final), of 12 May 2021, the Commission evidenced, among other aspects, that "digitisation, data processing and new innovative approaches such as remote sensing, artificial intelligence and machine learning can be used to accelerate and transform the way regulators and industry tackle industrial emissions"[7].

These concepts are furthermore confirmed by the EU Climate Law, where it is stated that "digital transformation, technological in-

[3] *Introduction*, pp. 6 ff.; pp. 9, 20, 42.
[4] *Introduction*, para. 3, pp. 6 ff. and *passim*.
[5] *Introduction*, para. 1, p. 2.
[6] Para. 2.1, p. 4.
[7] Para. 2.4.

novation, and research and development are also important drivers for achieving the climate-neutrality objective"[8].

As for the EU Digital Strategy, it's worth recalling the Decision (EU) 2022/2481 of the European Parliament and of the Council of 14 December 2022, following the Commission's communication of 9 March 2021 entitled *2030 Digital Compass: the European way for the Digital Decade* (the *Digital Compass Communication*) establishing the Digital Decade policy programme 2030. The programme is consistent with the Green Deal: it will involve all the sectors of the life of citizens and businesses and recognizes, on the one hand, the need to achieve the digital transformation by respecting sustainability, and, on the other, the importance to contribute to a dynamic, resource-efficient, and fair economy and society in the EU.

The above-mentioned considerations are particularly true for international commerce, transports, and logistics[9]. The latter two play an important role for most of the SDGs and the related targets. Their relevance has two faces: first, transports are heavy contributors to greenhouse gas (GHG) emissions, being responsible for approximately a quarter of the EU's total GHG emissions, while contributing also to other types of pollution[10]: therefore, for achieving environmental sustainability, it is necessary to change the current mobility system and the approach to trade. According to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions *Sustainable and Smart Mobility Strategy – putting European transport on track for the future* (COM(2020) 789 final), "the transport sector contributes 5% to European GDP and directly employs around 10 million workers"[11].

---

[8] Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021, establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ("European Climate Law"), eleventh recital.

[9] Cf. UNDP Digital Strategy 2022-2025, p. 47.

[10] European Environment Agency, *Transport and environment report 2022. Digitalisation in the mobility system: challenges and opportunities*, n. 7, 2022, p. 25.

[11] Para. 1, p. 2.

Second, transport and logistics services and infrastructures are crucial for enabling the sustainable development of most – if not all – the aspects of businesses and daily life considered by the SDGs. They are also a key factor for enhancing the economic and social progress in developing Countries[12].

The development of transport infrastructures and networks is an important component of national economic, environmental and transport policies, which however are currently subject to the strategies and constraints set at the EU level for avoiding unlawful State aids or the disruption of the relative markets. Moreover, given natural monopolies, oligopolies and market failures that are quite common in transportation and the high need for safety and security, the sector is subject to both economic and technical regulation.

In the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, adopted on 30 November 2016, *A European strategy on Cooperative Intelligent Transport Systems, a milestone towards cooperative, connected and automated mobility* (COM/2016/0766 final), the Commission pointed out that "profound change lies ahead for the transport sector; both in Europe and in other parts of the world. A wave of technological innovation and disruptive business models has led to a growing demand for new mobility services. At the same time, the sector is responding to the pressing need to make transport safer, more efficient and sustainable"[13]. On this regard, in the Communication it is further stated that "digital technologies are one, if not the strongest, driver and enabler of this process. Exchanging data between different actors in the transport system means supply and demand can be matched in real time, leading to a more efficient use of resources, be it a shared car, a container or a rail network. Digital technologies help reduce human error, by far the greatest source of accidents in transport. They can also create a truly multimodal transport system integrat-

[12] See also the Commission's *White Paper – Roadmap to a Single European Transport Area – Towards a competitive and resource efficient transport system* [COM(2011) 144 final].

[13] *Introduction*, p. 2.

ing all modes of transport into one mobility service, allowing people and cargo to travel smoothly from door to door. And they can spur social innovation and ensure mobility for all, with the emergence of new players and new forms of value creation such as the collaborative economy"[14].

In the above mentioned Commission's Communication *Sustainable and Smart Mobility Strategy – putting European transport on track for the future*, it is recognized that, for having sustainable transports, it is also necessary to create zero-emission ports (and airports)[15] and to reinforce the Single Market, for example by completing the Trans-European Transport Network (TEN-T) by 2030. In the same year, recognizing the importance of "waterborne transport systems as key elements for general and sustainable growth in Europe", the EU launched the Advanced, Efficient and Green Intermodal System (AEGIS) within the H2020 programme[16]. The project is implementing "new innovations from the area of connected and automated transport", including interconnections among Maritime Autonomous Surface Ships (MASS) and smart ports.

Furthermore, according to its charter, the IAPH's[17] World Ports Sustainability Programme (WPSP)[18] has as main mission "to demonstrate global leadership of ports in contributing to the Sustainable Development Goals of the United Nations. The program wants to empower port community actors worldwide to engage with business, governmental and societal stakeholders in creating sustainable added value for the local communities and wider regions in which their ports are embedded". It includes projects addressing the application of digital technologies in the operation and management of seaports.

---

[14] *Ibid*.

[15] *Passim*, especially paras. 24 ff., 31 ff., and 74 ff.

[16] https://cordis.europa.eu/project/id/859992 (accessed on 25 January 2024). A. Baskin, M. Swoboda, *Automated Port Operations: The Future of Port Governance*, in T. Matin Johansson, D. Dalaklis, J. Echebarria Fernández, A. Pastra, M. Lennan (eds.), *Smart Ports and Robotic Systems. Navigating the Waves of Techno-Regulation and Governance*, Cham, Palgrave Macmillan, 2023, p. 154.

[17] The International Association of Ports and Harbours.

[18] The programme was established with a charter signed on 14 March 2018.

Whilst in most of the strategies and plans considered above, the technologies referred to are usually falling within the "Industry 4.0" concept[19], their implementation is currently envisaged as involving also societal and sustainability considerations, under the "Industry 5.0" or even "Society 5.0"[20] approach. The latter reflects the fact that digitalization's disruptive effects on society need to be positively driven by sustainability[21]. "Industry 4.0" essentially pursues an adaptive and continuously self-optimizing industrial production process[22] according to a "a winner-takes-all model"[23], thus it is considered insufficient to successfully smooth over the current emergency. Industry 5.0, on the contrary, implies a green and social industrial strategy, based on three main cornerstones: "regenerative features of industrial transformation", "an inherently social dimension", and "a mandatory environmental dimension"[24].

---

[19] A. Romagnoli, *Il processo di trasformazione dei porti in* Smart infrastructures*: il modello degli* Smart ports, in *Il Diritto marittimo*, 2022, p. 240. Industry 4.0 can be described as "a paradigm that is essentially technological, centred around the emergence of cyber-physical objects, and offering a promise of enhanced efficiency through digital connectivity and artificial intelligence" (European Commission, Directorate-General for Research and Innovation, *Industry 5.0: A Transformative Vision for Europe*, ESIR Policy Brief No. 3, 2022, retrieved on European Commission Directorate-General for Research and Innovation, accessed on 3 January 2024. The technologies developed within the 4th Industrial Revolution (4IR) include, for example, artificial intelligence (AI), blockchain and smart contracts, Internet of Things (IoT), Big Data and 5G (UNESCAP, *Smart Ports Development Policies in Asia and the Pacific*, February 2021, p. 13).

[20] Society 5.0 is "so called to indicate the new society created by transformations led by scientific and technological innovation, after hunter-gatherer society, agricultural society, industrial society, and information society" (Hitachi-UTokyo Laboratory (ed.), *Society 5.0: A People-centric Super-smart Society*, Springer Open, Tokyo, 2020, p. ix).

[21] European Environment Agency, *Transport and environment report 2022. Digitalisation in the mobility system: challenges and opportunities*, n. 7, 2022, *passim*.

[22] A. Rojko, *Industry 4.0 Concept: Background and Overview*, in *iJIM*, 2017, 11(5), p. 78.

[23] European Commission, Directorate-General for Research and Innovation, *Industry 5.0: A Transformative Vision for Europe*, ESIR Policy Brief No. 3, 2022, p. 5.

[24] *Ibidem*.

## 2. *Focus on smart port infrastructures*

### 2.1. *From smart terminals to smart ports*

With regard to the port sector, the most important aspect of the current digital transformation consists in smart terminals and ports, implementing Industry 4.0/5.0 tools.

The first instance depicts, for example, container terminal automation for managing the movement of containers. This is indeed the very first example where automation of processes and activities was considered as viable in this sector[25]. A container terminal can be divided into three main areas: the quay, the yard, and the landside. According to a study performed by the International Transport Forum (ITF) and published in 2021[26], most cases concern the container yards, few ones the transport between the latter and the quays, whereas no one employs fully automated quay cranes. The study in question concludes that, at the time it was drafted, completely automated container terminals or ports did not exist. However, after the study was published, in 2022, within the Guangdong-Hong Kong-Macao Greater Bay Area, a fully automated container terminal was opened at the Port of Nansha, according to the information provided on the related website[27].

Concerning other types of cargo, bulk terminals, especially those devoted to liquid bulk, are experiencing an even higher level of automation[28]. On this regard, within the overall strategy pursued by the People's Republic of China following the launch of the Belt and Road Initiative in 2013[29], and in particular the Dig-

[25] McKinsey and Company, *Containerization: the key to low-cost transport*, London, British Transport Docks Board, 1967.

[26] ITF, *Container Port Automation: Impacts and Implications*, *International Transport Forum Policy Papers*, n. 96, Paris, OECD Publishing, 2021, p. 5.

[27] https://english.www.gov.cn/news/topnews/202207/29/content_WS62e33068c6d02e533532e9b3.html (accessed on 4 January 2024).

[28] ITF, *Container Port Automation: Impacts and Implications*, *International Transport Forum Policy Papers*, n. 96, Paris, OECD Publishing, 2021, p. 5.

[29] One of the main documents is the *Vision and Actions on Jointly Building Silk Road Economic Belt and 21st Century Maritime Silk Road*, issued by the National Development and Reform Commission, Ministry of Foreign Affairs, and Ministry of Commerce of the People's Republic of China in March 2015 (available in its

ital Silk Road, involving, among the others, transport, and digital infrastructure development both at the domestic and international level, several smart port projects have been launched[30]. As for bulk cargo terminals, it is worth to mention Luojing Automated Bulk Terminal, Huangye Port Coal Terminal, Tianjin Port Nanjiang Bulk Cargo Terminal, and the Caofeidian Coal Terminal of Tangshan Port[31].

Regarding smart ports, four levels of digital transformation and automation have been envisaged: Organizational Level, Port Connected Level, Port Community Level, and Hyperconnected Port Level[32]. In the first level, the port is undergoing a digital transformation for improving its efficiency and economic viability. Usually, this process involves the single structures or organizations within the same seaport. In this situation many operations are still manually performed.

In the second occurrence, the digital transformation involves the entire seaport structure and facility. The entities much more in-

English translation at https://eng.yidaiyilu.gov.cn/p/1084.html, accessed on 4 January 2024). On the PRC's BRI (a.k.a. OBOR) project, and the transport infrastructures' development within it, K.C. Li, J. Chaisse, *Infrastructure Investments: Port, Rail, and International Economic Rules*, in J. Chaisse, J. Górski (eds.), *The Belt and Road Initiative: Law, Economics, and Politics*, Leiden, Brill-Nijhoff, 2018, pp. 465-504; A.M. Lechner, *The Belt and Road Initiative*, 1st ed., Singapore, ISEAS - Yusof Ishak Institute, 2019; H. Liang, Y. Zhang, *Theoretical system of Belt and Road Initiative*, Singapore, Springer, 2019; S.Y.S. Wong, J.C.S. King, G.W.T. Luo, N.H.T. Lau, *An integrated approach to sustainable infrastructure standards for the Belt and Road Initiative*, in F.M. Cheung, Y. Hong (eds.), *Green finance, sustainable development and the Belt and Road Initiative*, London-New York, Routledge, 2020, pp. 285-310; D. Gordon, M. Nouwens (eds.), *The Digital Silk Road: China's Technological Rise and the Geopolitics of Cyberspace*, Milton Park, Taylor & Francis, 2022.

[30] The BRI, including the Digital Silk Road, is shaped by an "ecological civilization philosophy", for promoting sustainable development and building a green silk road. In May 2017, the *Guidance on Promoting Green Belt and Road* was issued by the Minister of Environmental Protection, the Minister of Foreign Affairs, the National Development and Reform Commission, and the Minister of Commerce, https://eng.yidaiyilu.gov.cn/p/12479.html (accessed on 4 January 2024). On this topic, B. Verri, *La Nuova Via della Seta e il cammino della Cina verso il modello del "Sustainable Going Out"*, in *Opinio Juris in Comparatione*, 2020, pp. 145-162.

[31] https://www.gloryrail.com/ai-empowers-smart-ports-my-countrys-automated-bulk-cargo-terminals/ (accessed on 4 January 2024).

[32] Sinay, *5 Steps to Become a Smart Port*, July 21, 2021, https://sinay.ai/en/5-steps-to-become-a-smart-port/ (accessed on 5 January 2024).

volved in this process are port authorities, on the one hand, and terminal operators, on the other, that seek to convert the processes they are involved in into automated and digitalized systems.

At the Port Community Level, the integration among the different stakeholders is higher, since ports, the related communities, and the competent authorities are linked in an "interconnected logistics hub", to enable the different entities to share information through standardized platforms and procedures[33]. This situation should smooth managing the different operations and avoid duplications.

At the fourth stage, the highest level of interconnection among the several players, both inside the port environment and outside it, is achieved, through Industry 5.0 tools, such as AI, Digital Twins, Big Data, cognitive computing, blockchain, IoT, digital twins, and 5G networks. According to some recent studies, in order to achieve this level of automation, the several management areas (identified as innovation management, technological development, safety and security, environmental management, logistics and hinterland development, operations management, cluster management, administrative management, trade management, and people management) should be all digitalized and automated. Sustainability and societal needs are taken into consideration when setting the system. An "ecosystem of partners" is therefore created[34].

The evolution herewith described shows the transition from "intelligent" ports, adopting new technologies, to "smart" ones, developing "enhanced connectivity and ecosystem integration"[35]. However, from the exam of the existing smart ports, such as those of Hamburg, Los Angeles, Qingdao, Rotterdam, Singapore, and Busan, it is possible to infer that there is not a uniform empirical model. The re-

---

[33] *Ibid*. Since 2011, Physical Internet is being implemented in logistics for enhancing efficiency and environmental sustainability. See E. Hirata, D. Watanabe, M. Lambrou, *Shipping Digitalization and Automation for the Smart Port*, in T. Bányai, Á. Bányai, I. Kaczmar (eds.), *Supply Chain - Recent Advances and New Perspectives in the Industry 4.0 Era*, London, Intechopen, 2022, p. 1.

[34] *Ibidem.*

[35] Y. Leclerc, M. Ircha, *Canada's rapidly evolving smart ports*, in T. Matin Johansson, D. Dalaklis, J. Echebarria Fernández, A. Pastra, M. Lennan (eds.), *Smart Ports and Robotic Systems. Navigating the Waves of Techno-Regulation and Governance*, Cham, Palgrave Macmillan, 2023, pp. 175 and 178.

sults achieved depend also on the single port's specific situation, on the technologies therein implemented, on the level of digitalization in each Country, and of investments[36].

### 2.2. *What's in a word? The modern concept of "smartness" as applied to the implementation of society 5.0 in business and services*

The word "smart" has met a great success and is widespread for designating technological innovations involving digitalization and automation not only of industrial and business activities and services, but also in daily life especially in the last thirty years. Due to its wide usage in different contexts and its appealing meaning, it could be considered as a sort of a buzzword.

Therefore, to correctly ascertain what a smart port is and how it could be described, it could be useful to investigate whether it is possible to develop a common definition of the word "smart" as applied to the above-mentioned innovations.

One of the first common uses of this term in the aforesaid sense were smartphones. A smartphone can be described as "a mobile phone that performs many of the functions of a computer"[37]. This word was employed for the first time for describing Ericsson's prototype GS88 "Panelope" in 1997[38], which worked on a computer operating environment GEOS and integrated different applications, such as SMS, emails, browser, integrated modem, infrared port and PC connection[39].

Another pioneering use of the word "smart" in the sense mentioned above, dating back to 1994, is "smart contract". The expression is said to have been coined by a certain Nick Szabo for describ-

---

[36] UNESCAP, *Smart Ports Development Policies in Asia and the Pacific*, February 2021, pp. 10 ff.

[37] *Oxford English Dictionary*.

[38] D.Y. Jin, *Smartland Korea: Mobile Communication, Culture, and Society. Perspectives on Contemporary Korea*, Michigan, University of Michigan Press, 2017, p. 34.

[39] https://ericssoners.wordpress.com/2016/06/13/gs88/ (accessed on 29 August 2023).

ing "a computerized transaction protocol that executes the terms of a contract. The general objectives […] are to satisfy common contractual conditions (such as payment terms) […] and minimize the need for trusted intermediaries"[40]. The typical example is vending machines. The main feature of smart contracts is the automation of their execution and performance and their role as source of information and value accrual[41].

A further development in the use of the qualification as "smart" can be retrieved in the context of connected and automated mobility, requiring networks for connecting vehicles, transport infrastructures and allowing co-operation and exchange of information among them (i.e. vehicle-to-vehicle/s; vehicle-to-infrastructure/s). Therefore, this kind of transport means and infrastructures designed and implemented for this purpose are called "smart": smart roads, smart vehicles, and smart cities[42].

---

[40] N. Szabo, *Smart contracts*, 1994.

[41] F. Ghodoosi, *Contracting in the Age of Smart Contracts*, in *Washington Law Review*, 2021, 96(1), pp. 51-93.

[42] On these topics, L. Butti, *Auto a guida autonoma: sviluppo tecnologico, aspetti legali e etici, impatto ambientale*, in *Riv. giur. ambiente*, 2016, pp. 435-452; G. Olivieri, V. Falce (a cura di), *Smart cities e diritto dell'innovazione*, Milano, Giuffrè, 2016; M.M. Comenale Pinto, E.G. Rosafio, *Responsabilità civile per la circolazione degli autoveicoli a conduzione autonoma. Dal grande fratello al grande conducente*, in *Diritto dei trasporti*, 2018, 1-2, pp. 379 ff.; C. Severoni, *Prime considerazioni su un possibile inquadramento giuridico e sul regime di responsabilità nella conduzione dei veicoli a guida autonoma*, in *Diritto dei trasporti*, 2018, 2, pp. 340 ff.; P. Cardullo, C. Di Feliciantonio, R. Kitchin Bingley (eds.), *The right to the smart city*, Leeds, Emerald, 2019; M. Ferrazzano, *Dai veicoli a guida umana alle* autonomous cars*. Aspetti tecnici e giuridici, questioni etiche e prospettive per l'informatica forense*, Torino, Giappichelli, 2019; S. Scagliarini (a cura di), *Smart roads e driverless cars: tra diritto, tecnologie, etica pubblica*, Torino, Giappichelli, 2019; A. Taeihagh, H.S.M. Lim, *Governing autonomous vehicles: emerging responses for safety, liability, privacy, cybersecurity, and industry risks*, in *Transport reviews*, 2019, 39(1), pp. 103-128; G. Dekoulis (ed.), *Autonomous vehicles*, London, IntechOpen, 2020; C. Ingratoci, *Autonomous vehicles in smart roads: an integrated management system for road circulation*, in *Diritto dei trasporti*, 2020, 2-3, pp. 501-526; S. Pollastrelli, *Driverless cars: i nuovi confini della responsabilità civile automobilistica e prospettive di riforma*, in E. Calzolaio (a cura di), *La decisione nel prisma dell'intelligenza artificiale*, Milano, Wolters Kluwer, Padova, Cedam, 2020; G. Calabresi, E. Al Mureden, *Driverless cars: intelligenza artificiale e futuro della mobilità*, Bologna, il Mulino, 2021; E. Maio, *Civil liability and autonomous vehicles*, Napoli, Edizioni scientifiche italiane, 2022; G. Cassano, L. Picotti (a cura di), *Veicoli a guida autonoma, veicoli a impatto zero: regole, intelligen-*

Under Article 2, first paragraph of the decree of the Italian Minister for Infrastructures and Transports of 28 February 2018 on the implementation and the tools for road testing of Smart Road and connected and automatic driving solutions, for example, smart roads are defined as road infrastructures that underwent a completed process of digital transformation meant to introduce traffic observation and monitoring platforms, models for processing data and information, advanced services for infrastructures' operators, public administrations and road users, all within a technological ecosystem for enhancing interoperability among new generation infrastructures and vehicles.

As for "smart city", some scholars trace back this expression to an IBM's 1980s marketing campaign purposes. However, it has acquired a wider meaning. According to some studies, in fact, the term encompasses six main aspects: smart economy, smart citizens, smart governance, smart mobility, smart environment and lifestyle[43]. On this regard, another significance of "smartness" envisaged by some scholars[44] is its sustainability (therefore, for example, smart roads need to be "sustainably smart"), also by attuning it to the needs of all users, especially of the vulnerable ones.

Following the considerations above, it can be envisaged that often the term "smart" started being employed for marketing reasons and that no actual uniform definition can be retrieved, but some common features can be recognized: the use of digital technologies for adding functions previously unknown to the specific device or situation, automatizing processes, and improving performance. In the last occurrences, the aims pursued with "smartness" are not on-

---

*za artificiale, responsabilità*, Pisa, Pacini giuridica, 2023; C. Tincani (a cura di), *La responsabilità civile e penale e la circolazione dell'autovettura senza conducente*, Napoli, Edizioni Scientifiche Italiane, 2023.

[43] V. Kumar, V. Jain, B. Sharma, J. M. Chatterjee, R. Shrestha (eds.), *Smart City Infrastructure: The Blockchain Perspective*, Wiley, Scrivener Publishing, 2011, pp. 37-38.

[44] K. Anastasiadou, S. Vougias, *"Smart" or "sustainably smart" urban road networks? The most important commercial street in Thessaloniki as a case study*, in *Transport Policy*, 2019, 82, pp. 18-25; V. Kumar, V. Jain, B. Sharma, J. M. Chatterjee, R. Shrestha (eds.), *Smart City Infrastructure: The Blockchain Perspective*, Wiley, Scrivener Publishing, 2011, p. 38.

ly efficiency and customers' satisfaction, specifically addressing (and creating) individual needs and tastes, but also sustainability.

### 2.3. *Smart ports: a conundrum?*

As noticed above, there is neither a uniform model of smart port, nor a unique definition. According to the Smart Ports Alliance (SPA)[45] "a smart port equips the workforce with the relevant skills and technology to facilitate the movement of goods, delivery of services and smooth flow of information", while "smart port executives and senior management teams openly advocate the use of relevant technology to support technology-driven change in the business".

The website describes a smart port as "a port that uses automation and innovative technologies including Artificial Intelligence (AI), Big Data, Internet of Things (IoT) and Blockchain to improve its performance".

A smart port is also described as "an effective, efficient, safe, and sustainable port [that] creates added value", an "intelligent port [that] is an alternative for effective decision support through the mobilization of new information and communication technologies (ICT) and decision support systems"[46].

Following the above-mentioned considerations, it is possible to describe a smart port as a comprehensive port infrastructure where Industry 5.0 technologies are implemented for establishing a Port Community System implying the integration and co-ordination of the several systems and processes insofar separately managed by the different authorities or private entities, and improving efficiency, sustainability, safety, and security. However, depending on the specific technologies implemented in the single seaport or terminal/s, in particular on the possibility of automating execution of contracts and performance of port activities, and on de-

[45] Mentioned in *What to expect from Smart Ports*, at https://www.wartsila.com/insights/article/what-to-expect-from-smart-ports (accessed on 11 September 2023).

[46] B. Belmoukari, J.-F. Audy, P. Forget, *Smart port: a systematic literature review*, in *European Transport Research Review*, 2023, 15(4), p. 1.

cision-making processes based on predictive analytics, the consequences in terms of the regime of the relationships between the different stakeholders, and of the possible public/contract liabilities could considerably vary.

The implementation of these technologies in seaports has resulted in the development of the Port Community System (PCS)[47]. PCSs can be described as "complex systems for concentrating, centralizing, serving and optimizing business processes within port communities promoting faster and safer data exchange among private and public organizations, with the main goal of improving the seaports' competitiveness"[48]. Therefore, a Port Community System is not limited to collect and share information from different sources, as provided so far by other information and communication technologies in the maritime and port sector itself, which consist mostly of separated platforms, but in the creation of new information from the existing data, for improving the performance of the whole port and creating new value. In this sense, where the smart infrastructure is the port or even the port system itself, the port managing body or Port Authority amounts to a network developer[49].

On this regard, three main categories of PCS's functions can be identified, i.e. port management functions, referring to the processes implemented by the Port Authority and terminal operators, customs functions, and other online platforms meant to enable electronic commerce between port customers[50].

It is also necessary to consider the increase of port systems or of co-operation and co-ordination between seaports since the 1990s and, particularly, during the last ten years, when they have interest-

---

[47] A. Romagnoli, *Il processo di trasformazione dei porti in* Smart infrastructures*: il modello degli* Smart ports, in *Il Diritto marittimo*, 2022, p. 266.

[48] E. Tijan, M. Jović, A. Panjako, D. Žgalji´c, *The Role of Port Authority in Port Governance and Port Community System Implementation*, in *Sustainability*, 2021, 13(5), 2795, para 2.2.

[49] T. Matin Johansson, D. Dalaklis, J. Echebarria Fernández, A. Pastra, M. Lennan (eds.), *Smart Ports and Robotic Systems. Navigating the Waves of Techno-Regulation and Governance*, Cham, Palgrave Macmillan, 2023, pp. 1-11.

[50] Y. Keceli, *A proposed innovation strategy for Turkish port administration policy via information technology*, in *Maritime Policy and Management*, 2011, 38, pp. 151-167.

ed also non-proximate ports[51]. As far as they do not infringe the EU competition law, these solutions can improve efficiency and sustainability. PCS's platforms are therefore key tools in the implementation of the different forms of integration or co-operation/co-ordination.

In this way, transport infrastructures are experiencing a radical shift from their original "passive" approach to an "active" one as able to adapt to real-time situations and current needs of their users[52], offering just-in-time services: thus, a smart port can also be constructed as-a-service system[53].

## 3. *The role of smart ports for sustainable development*

PCSs can therefore not only increase seaports' competitiveness, efficiency, and productivity from a commercial perspective, but also enhance safety, security, sustainability[54] (for example, enabling energy savings and the implementation of low-carbon shipping), effective multimodality and integrated logistics, and improve the working conditions of seafarers and dockers[55], by sharing the relevant information and documents among the different relevant authorities

---

[51] T. Notteboom, G. Knatz, F. Parola, *Port co-operation: types, drivers and impediments*, in *Research in Transportation Business and Management*, 2018, 26, pp. 1-4.

[52] A. Romagnoli, *Il processo di trasformazione dei porti in* Smart infrastructures*: il modello degli* Smart ports, in *Il Diritto marittimo*, 2022, p. 236.

[53] O. Troisi, C. Tuccillo, *A re-conceptualization of port supply chain management according to the service dominant logic perspective: A case study approach*, in *Esperienze d'impresa*, 2014, 2, pp. 33-50.

[54] G. Befani, *L'ordinamento amministrativo-funzionale dei porti verdi tra congestione di competenze, efficientamento energetico e transizione ecologica*, in *Rivista giuridica dell'edilizia*, 2022, p. 450; J. Chuah, *Concession-Based Project Finance for Smart Ports with a Special Focus on Emerging Economies*, in T. Matin Johansson, D. Dalaklis, J. Echebarria Fernández, A. Pastra, M. Lennan (eds.), *Smart Ports and Robotic Systems. Navigating the Waves of Techno-Regulation and Governance*, Cham, Palgrave Macmillan, 2023, p. 189; A. Romagnoli, *Il processo di trasformazione dei porti in* Smart infrastructures*: il modello degli* Smart ports, in *Il Diritto marittimo*, 2022, pp. 245 ff.

[55] ITF, *Container Port Automation: Impacts and Implications*, *International Transport Forum Policy Papers*, n. 96, Paris, OECD Publishing, 2021, p. 5.

and, through digital twin applications, forecasting traffic flows and incoming events. Other tools are UAVs that can be integrated in the smart port system and used for monitoring and preventing pollution[56].

However, one of the main issues is to effectively drive digital transformation towards these purposes: according to some scholars and despite common believes, the equation between the former and sustainability or safer and healthier working conditions is still undemonstrated[57].

Another problem could also be the possible conflict with some commercial interests of shipping companies. For example, smart ports could enable saving time and reducing GHG emissions[58], but, for the same reason, this could prevent earning demurrages[59].

---

[56] G. Argüello, *Smart Port State Enforcement Through UAVs: New Horizonsnfor the Prevention of Ship Source Marine Pollution*, in T. Matin Johansson, D. Dalaklis, J. Echebarria Fernández, A. Pastra, M. Lennan (eds.), *Smart Ports and Robotic Systems. Navigating the Waves of Techno-Regulation and Governance*, Cham, Palgrave Macmillan, 2023, pp. 207-226.

[57] ITF, *Container Port Automation: Impacts and Implications*, *International Transport Forum Policy Papers*, n. 96, Paris, OECD Publishing, 2021, p. 5. See also A. Baskin, M. Swoboda, *Automated Port Operations: The Future of Port Governance*, in T. Matin Johansson, D. Dalaklis, J. Echebarria Fernández, A. Pastra, M. Lennan (eds.), *Smart Ports and Robotic Systems. Navigating the Waves of Techno-Regulation and Governance*, Cham, Palgrave Macmillan, 2023, pp. 151 and 156 ff. *Contra*, S. Bevilacqua, *Porti e automazione: spunti in materia di responsabilità delle imprese di sbarco*, in *Diritto dei trasporti*, 2019, p. 558.

[58] Since 1 January 2024, all the ships of 5000 gross tonnage and entering EU ports (regardless of the flag they fly) are subject to the EU Emissions Trading System (EU ETS). The inclusion of the shipping sector in the EU ETS was introduced by the Regulation (EU) 2023/957 of the European Parliament and of the Council of 10 May 2023 amending Regulation (EU) 2015/757 in order to provide for the inclusion of maritime transport activities in the EU Emissions Trading System and for the monitoring, reporting and verification of emissions of additional greenhouse gases and emissions from additional ship types, and by the Directive (EU) 2023/959 of the European Parliament and of the Council of 10 May 2023 amending Directive 2003/87/EC establishing a system for greenhouse gas emission allowance trading within the Union and Decision (EU) 2015/1814 concerning the establishment and operation of a market stability reserve for the Union greenhouse gas emission trading system.

[59] Laytime starts to count after a valid Notice of Readiness (NOR) has been tendered, as soon as the vessel has arrived at the destination agreed upon under the charterparty, which could be a port, a berth, a dock, etc. Therefore, it is the ship's interest to reach the destination agreed upon as soon as possible, within the laycan

## 4. *Public law issues on smart ports. Focus on the Italian law*

### 4.1. *The responsibilities of the Italian port system authorities*

Seaports operation and management vary consistently all over the world. Currently, there is not a uniform regime of ports and port services either at the international or at the EU level[60]. It is possible to distinguish three or four main models of port governance. According to some scholars, seaports can be the categorized under the following groups: the Comprehensive Port Authority, the Landlord Port Authority, and the Port Company[61]. Following another school of thought, it is possible to distinguish the Service Port, the Tool Port, the Landlord Port, and the Private Service Port[62].

Within the EU law, the main law source is the Regulation (EU) 2017/352 of the European Parliament and of the Council of 15 February 2017 establishing a framework for the provision of port services and common rules on the financial transparency of ports. However, the Regulation does not address port governance, for example by imposing a specific model. EU ports are therefore subjected to general provisions concerning public contracts and concessions, including the Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts[63], and the Regulation (EU) 2019/452 of the European Parlia-

---

period (this practice is known also as "Sail fast, then wait" - SFTW). C. Padayachee, M.J. Naude, *Laytime and demurrage implications in voyage charterparties for chemical tankers*, in *Int. J. Innovation and Sustainable Development*, 2021, 15(4), pp. 496-516. Another practice that could be in contrast with sustainability is the "first-come, first-served" principle in port operations.

[60] G. Vezzoso, *La riforma dei porti italiani in una prospettiva europea*, in *Rivista di Diritto dell'Economia, dei Trasporti e dell'Ambiente*, 2015, pp. 260 ff.; P. Verhoven, *European Port Governance. Report of an Enquiry into the Current Governance of European Seaports*, ESPO, 2010.

[61] G. Vezzoso, *La riforma dei porti italiani in una prospettiva europea*, in *Rivista di Diritto dell'Economia, dei Trasporti e dell'Ambiente*, 2015, p. 262.

[62] The World Bank, *Port Reform Toolkit*, 2nd ed., 2007, p. 9.

[63] The directive was recently modified by the Commission Delegated Regulation (EU) 2023/2497 of 15 November 2023 amending Directive 2014/23/EU of the European Parliament and of the Council in respect of the thresholds for concessions.

ment and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union.

Consequently, the actual responsibilities and procedures for the implementation of smart ports or smart infrastructures within seaports, depend on the national regime. On this regard, also the legal instruments for enabling the co-ordination among different entities within port systems or the collaboration between different ports should be considered, together with their regime. Moreover, for the development of a seaport as a smart port and its improvement in terms of competition, efficiency, and sustainability, for implementing intermodal transport corridors and logistics services, it is important to take into account also the environment where the infrastructure is located. Consequently, planning the digital, sustainable, and multimodal strategical improvement of a port has to involve the different stakeholders, mainly the operator of other transport infrastructures (such as railways, logistics centres, etc) and the public bodies and authorities having the responsibility for the different level of territorial governance and the related policies, in particular Municipalities of port cities[64].

In Italy, sea ports fall within the Landlord Port Authority model and are governed by the Law 8 January 1994, No 84, recently modified by the Legislative decree 4 August 2016, No 169, the Legislative decree 13 December 2017, No 232, and the Law Decree 10 September 2021, No 121, as modified by Law 9 November 2021,

[64] The love-hate relationship between ports and the cities where they are located is a debate dating back to the foundation of port cities themselves. On the one hand, a port contributes to the commercial development of its city, on the other, it is often accused of being a factor of degradation. E. Van Hooydonk, *The Law Ends Where the Port Area Begins: on the Anomalies of Port Law*, Antwerp/Apeldoorn, Maklu, 2006. It is however necessary to involve all the relevant stakeholders, at the regional and even, where the case, national level, not limiting to Municipalities, since the evolution from the so-called port-marketplace to its role as a strategic maritime cluster, gateway to the whole transport, logistics and economic network [G. Befani, *L'ordinamento amministrativo-funzionale dei porti verdi tra congestione di competenze, efficientamento energetico e transizione ecologica*, in *Rivista giuridica dell'edilizia*, 2022, pp. 433 ff; M. D'Arienzo, S. Pugliese, *Pianificazione portuale in Italia alla luce dei riflessi della politica europea dei porti*, in *Il diritto dell'economia*, 2020, 2, p. 308; M. Ragusa, *Quali piani per i porti italiani? Ripresa (economica) e resilienza (del monadismo) nell'ultima disciplina della pianificazione portuale*, in *Rivista giuridica dell'edilizia*, 2022, 3, pp. 227-229].

No 156, along with the Code of Maritime and Air Navigation. The former two law sources introduced the Port System Authorities with the intention of rationalizing and improving the competitiveness of the Italian economic system[65].

According to Article 6, para 4, let. a), of Law No 84/1994, among the tasks conferred to Port System Authorities, are direction, planning, coordination, regulation, promotion, and control of cargo handling and the other related services, of the commercial and industrial activities performed within seaports and the related territorial districts. According to the following let. d), the Port System Authority is entrusted also with the co-ordination of the administrative activities performed by public entities and bodies within the seaport and the public domain areas included in its territorial district. Furthermore, under let. f) of the same article, the Port System Authority is responsible for promoting and co-ordinating forms of connection with dry ports and logistic systems. According to Article 8, para 3, let. g), it is the Port System Authority's President that provides for co-ordinating the activities performed by public and private entities within the port (with the exception of the single window for customs procedures), and promotes solutions for enhancing, integrating, and speeding up the different procedures[66].

Furthermore, under Article 9, second para of the Law Decree No 50, of 17 May 2022, as converted in Law by the Law 15 July 2022 No 91, the Port System Authority can establish one or more renewable energy communities.

The Legislative Decrees No 169/2016 and No 232/2017, along with the Law Decree No 121/2021, as amended by Law No 156/2021, introduced changes in the Port System Authority's planning and programming function that are relevant for the present topic, too.

---

[65] See the *Strategic Plan for Ports and Logistics*, approved with decree of the Prime Minister of 26 August 2015; Law 7 August 2015, No 124, the preamble to the Legislative decree No 169/2016. As it happened in other Countries, there has been a shift from "city-ports" to port systems. L. Scotto, *La visione strategica della Corte costituzionale sulla portualità dello Stretto di Messina (riflessioni a margine della sent. Cost. n. 208/2020)*, in *Italian Papers on Federalism*, 2021, 1, p. 78.

[66] S. Bevilacqua, *Porti e automazione: spunti in materia di responsabilità delle imprese di sbarco*, in *Diritto dei trasporti*, 2019, p. 567.

Under Article 5 of Law No 84/1994, the Port System Authority must draft the Strategic Planning Document (SPD), conforming to the national Plan for Transports and Logistics, to the Italian Strategic Plan for Ports and Logistics, and the EU guidelines on seaports, logistics, and transport infrastructures. The SPD includes the partition of areas that are functional to the port into harbour areas, dry port areas and the waterfront along with the other areas of port-city interaction. It also identifies the last mile road and railway links with the ports belonging to the port system, that lie outside the seaport domain, including those crossing city centres[67].

Another important document is the Structure Plan for each port included in the Port System[68]. Following the amendments introduced by the Law Decree No 121/2021 along with the Law No 156/2021, the current regime does not provide for a Port System Structure Plan and the plan issued for the single port is the sole instrument devoted to territorial planning and governance with State-level relevance. The Structure Plan must comply with the Italian Strategic Plan for Ports and Logistics, and the port's SPD, along with the Guidelines enacted by the High Council of Public Works and approved by the Minister of Infrastructures and Sustainable Mobility (currently, the Minister of Infrastructures and Transports)[69]. The Plan's provisions must not contrast with the urban development plans, and the document is subject to Strategic Environmental Assessment; for this purpose, an environmental report must be included.

Other planning documents are the Three-year Operating Plans, that address the strategies for the development of port and logistics activities.

As for the environmental aspects, Article 4 bis provides, in addition to the above-mentioned requirements, that the port system's

---

[67] A. Scattaglia, *Interazione porto-città: fra pianificazione portuale e novità legislative*, in *AmbienteDiritto.it*, 2021, 3, pp. 176 ff. The Law Decree 16 July 2020 No 76, as transposed in Law by the Law 11 September 2020 No 120 has modified the procedures for implementing the above-mentioned provisions by simplifying the requirements.

[68] M.P. La Spina, *Brevi note sulle novità introdotte dal decreto legislativo n. 232 del 13 dicembre 2017 in materia portuale*, in *Rivista di Diritto dell'Economia, dei Trasporti e dell'Ambiente*, 2018, p. 239.

[69] The Guidelines were enacted in March 2017.

planning must conform to criteria of energy and environmental sustainability. To this end, the article introduced the Energy and Environment Strategy Document, to be drafted according to the guidelines published by the Minister for Environment, Land and Sea Protection (currently, Minister of the Environment and Energy Security)[70]. The regional and municipal planning documents and the port planning ones must conform to each other.

It is also necessary to consider that, pursuant to the Code of Maritime and Air Navigation and article 2 and 3 of Law No 84/1994, within each port system, the responsibilities concerning safety and security within ports, along with the regulation and supervision on pilotage, towage, mooring, and boating, still lie with the Maritime Authority. Moreover, the responsibilities of Customs and other Authorities need to be considered, too.

For implementing the necessary co-ordination among the different entities and the participation in the decision-making, the instruments chosen by Italian lawmakers are the *Conferenza dei servizi* under Article 14-bis of Law 7 August 1990, No 241[71], programme agreements, and other types of agreements among the different parties (such as the Municipalities affected by the project), compulsory advices, and two important bodies, the Sea Resource Partnership Body and National Conference for the Co-ordination of Port System Authorities[72]. When an agreement cannot be reached, according to the aforementioned article of Law No 241/1990, the Council of Ministers is entrusted with the issue.

Law No 84/1994 does not expressly provides for the procedures and legal instruments for leading or participating in projects concerning intelligent, automated, and smart mobility and logistics involving different transport infrastructures, such as when a port is

---

[70] On this topic, F.M. Di Majo, *I prossimi scenari ambientali europei nel settore marittimo e problematiche giuridiche nell'attuazione delle future normative*, in *Rivista del Diritto della Navigazione*, 2022, pp. 217-258.

[71] I.e. planning and decision-making meetings among the different public bodies.

[72] The latter entities were introduced by the reform enacted in 2016. The former includes representatives of the different stakeholders that can confront and provide advice on the port planning documents. The latter is consulted by the Minister of Infrastructures and Transports before approving the SPD.

part of an Intelligent Transport System (ITS)[73]. However, the procedures and tools above described are provided for by general Italian provisions, such as the Law No 241/1990, and, for those aspects encompassing the specific responsibilities of the Port System Authority, the Maritime Authority or the aforementioned special bodies, the sector provisions should be applied at least by analogy. Consequently, they appear to be compatible also with these projects and should therefore be implemented along with public private partnerships and similar agreements when private entities are involved.

Following the considerations above, the main responsibility for approving and implementing projects aimed at digital transformation and sustainable development within a Port System lies with the Port Authority, who however has to co-ordinate with the other entities within and outside the port areas.

However, the Law 84/1994 introduced a multi-level governance system[74]. The Port System Authority is, in fact, subject to the control of the Minister of Infrastructures and Transports. According to Article 5, para 8 of Law No 84/1994, the latter holds the authority to approve and finance major projects in ports with international or national economic relevance, whereas for seaports of interregional or regional importance, the responsibility lies with the Regions. For this purpose, the Minister annually identifies the projects to be financed. Current examples of projects that are important for sustainability pertain to cold ironing, that are financed under the 2021 and 2022 Economic and Financial Document.

The Port System Authority can also provide with its own resources or co-finance the projects.

Moreover, digital transformation and sustainable development of ports fall within the TEN-T aims, under its Article 4: since the Port System Authorities are established in seaports included in the

[73] On the ITS, Directive 2010/40/EU of the European Parliament and of the Council of 7 July 2010 on the framework for the deployment of Intelligent Transport Systems in the field of road transport and for interfaces with other modes of transport.

[74] A. Marino, *Infrastruttura marittima e sistema porto nella pianificazione delle reti TEN-T: l'Autorità di Sistema Portuale*, in *Rivista del Diritto della Navigazione*, 2020, pp. 51 ff.

Network, the related projects can be co-financed according to the Regulation (EU) No 1315/2013 of the European Parliament and of the Council of 11 December 2013 on Union guidelines for the development of the trans-European transport network, as recently modified by the Commission delegated Regulation (EU) 2023/1176 of 14 July 2022.

Along with the TEN-T, other projects of EU relevance are those falling within the Next Generation EU[75], that has been implemented in Italy with the National Plan for Recovery and Resilience (PNRR)[76].

Finally, it is worth to mention that specific provisions are devoted to seaports included in a Special Economic Zone: in Italy the Single SEZ of South Italian Regions, comprising the Regions Abruzzo, Basilicata, Calabria, Campania, Molise, Puglia, Sicily, and Sardinia, has been established by the Law Decree 19 September 2023 No 124, as modified by the Law 13 November 2023, No 162. It replaces the ZESs established by the Law Decree 20 June 2017 No 91, as modified by the Law 3 August 2017 No 123.

### 4.2. *Smart port terminals: the relationship between the terminal operator and the port authority*

Digital transformation and sustainable projects can be implemented in port terminals only, without including the entire seaport. On this regard, it is necessary to take into consideration the regime of the single terminal. In Italy, for example, in Port Systems the Port System Authorities hold the authority to grant port terminal concessions.

---

[75] Regulation (EU) 2020/2094 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis; Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088; Regulation (EU) 2021/240 of the European Parliament and of the Council of 10 February 2021 establishing a Technical Support Instrument; Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility.

[76] The Plan was approved by the EU Council on 13 July 2021.

The main principle concerning the integration of environmental protection requirements is set by Article 11 of the TFEU and Article 37 of the Charter of Fundamental Rights of the European Union. As for public contracts, since years, green public procurements have developed as a tool for balancing competition and entrepreneurship, from the one side, and environmental sustainability, from the other[77]. Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, as modified, provides, as a general principle, for Member States to "take appropriate measures to ensure that in the performance of concession contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in (its) Annex X"[78]. Moreover, the characteristics of the work or service that is the subject-matter of a concession may include environmental and climate performance levels[79], and the award criteria may also be of environmental, social or innovation-related kind. According to some authors[80], even where the domestic provisions does not set mandatory provisions on this regard, following the EU level provisions, along with Article 9, para 3 of the Italian Constitution, the awarding authority should apply the above-mentioned principles.

---

[77] Interpretative communication of the Commission on the Community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement, COM(2001) 274 final; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Public procurement for a better environment*, COM(2008) 400 final, of 16 July 2008; S. Colombari, *Le considerazioni ambientali nell'aggiudicazione degli appalti e delle concessioni*, in *Urbanistica e appalti*, 2019, 1, pp. 5-20; F. Novello, *Il "green public procurement" nelle regole, nelle politiche e nelle prassi dell'Unione Europea e degli Stati membri*, in *Rivista trimestrale degli appalti*, 2017, fasc. 4, pp. 1097-1152; A. Perini, *Appalti verdi: una strategia per lo sviluppo sostenibile*, in *Le Regioni*, n. 1-2, 2022, pp. 147-186; S. Villamena, *Appalti pubblici e clausole ecologiche: nuove conquiste per la competitività non di prezzo alla luce della recente disciplina europea*, in *Diritto dell'economia*, 2015, 2, pp. 355-388.

[78] Article 30, para. 3.

[79] Article 36.

[80] S. Colombari, *Le considerazioni ambientali nell'aggiudicazione degli appalti e delle concessioni*, in *Urbanistica e appalti*, 2019, 1, p. 12.

In Italy, since the 2017 Public Contract Code[81], contracting authorities must apply the environmental minimum criteria approved by the Minister of the Environment and Energy Security. Under Article 30, first and third paras of the Code, contracting authorities must award public contracts taking into consideration, among the others, health and environment protection and the enhancement of sustainable development. Moreover, contractors must ensure compliance with environmental, social, and labour laws. It is necessary to ascertain whether similar provisions apply to port concessions.

For terminals devoted to cargo handling and the related services, the regime is provided by Article 18 of the Law No 84/1994. Its provisions have been recently implemented by the Regulation governing the procedure for awarding these concessions, enacted with the Decree No 202 of 28 December 2022 by the Minister of Infrastructures and Transports[82]. According to its Article 2.1, in case of awarding procedures following an application by an interested party, the latter is assessed also on the basis of the principle of environment protection and energy efficiency, in accordance with Articles 1 and 3 of the 2023 Code of Public Contracts. Para 4 of the same article includes the following criteria of evaluation of the tenders: the level of coherence with the port's strategic planning documents; the nature and consistency of investments in infrastructure, facilities, equipment, technologies meant to enhance port productivity and the protection of the environment, safety, and security; the environmental sustainability and impact of the proposed industrial project, and its level of technological advancement. Therefore, these principles do not simply inform the regime of concessions in this field anymore, they are – together with others – the drivers for the concession's award[83]. Under Article 5 of the same Decree the variable

[81] Legislative Decree 18 April 2016, No 50, as modified by the Legislative Decree 19 April 2017, No. 56. This requirement was confirmed by Article 57, secondo para, of the Legislative Decree 31 March 2023, No. 36.

[82] M. Brignardello, *Il regolamento di attuazione dell'art. 18 l n. 84/1994 in materia di concessione di aree e banchine portuali: la fine di una storia infinita?*, in *Rivista del Diritto della Navigazione*, 2022, pp. 971-991.

[83] G. Falsetta, A. Cuneo, *The new Italian regulation of port concessions: some ideas on the centrality of the theme of "sustainability"*, in *The MediTelegraph*, 23 March 2023.

component of the concession charge is based also on the activity's production, energy, and environmental efficiency, and on the services' quality, taking also in consideration the promotion and development of intramodality.

On 21 April 2023, the Ministerial Decree No 110 providing Guidelines on the implementation of the Regulation was enacted[84]. This further decree provides that each Port System Authority shall specify the elements of the charge's variable component meant to adequately appreciate the project's technological innovation, environmental sustainability, and energy efficiency[85].

Moreover, it is worth noting that the subject-matter is also interested by the regulatory powers of the Authority for the Regulation in the Transport Sector (ART), according to Article 37, second para of Law Decree 6 December 2011 No 201, as modified by Law 22 December 2011, No 214[86]. The last Resolution issued by the Authority is the No 57/2018, that is still in force. Its annex A provides that the charge's variable component should include incentive methods, among which those pertaining to energy and environmental efficiency of the port operations' cycle in the areas granted in concessions.

## 5. *Conclusions*

As gateways for international trade and clusters for the development of multimodal transport, seaports play a pivotal role in the current and future strategies for a sustainable development. Digital transformation and automation of seaports, in particular by shifting

[84] *Rivista del Diritto della Navigazione*, 2023, pp. 533 ff., with comment by M. Brignardello, *Linee guida sul regolamento in materia di concessioni portuali: una nuova puntata di una storia infinita*.

[85] Para. 6.

[86] The issue concerning overlaps in the regulating powers of the ART and the Port System Authorities and the Minister's powers under the current regime is widely debated among Italian scholars. P. Brambilla, *La riforma delle concessioni portuali tra PNRR e ddl concorrenza 2021*, in *Federalismi.it*, 2022, 18, pp. 9 ff.; M. Brignardello, *Linee guida sul regolamento in materia di concessioni portuali: una nuova puntata di una storia infinita*, in *Rivista del Diritto della Navigazione*, 2023, p. 553.

intelligent infrastructures into smart ones through the implementation of Industry 5.0 technologies has revealed to be a crucial process for this aim, provided that it is specifically coherent with and driven towards this aim.

However, for effectively achieving this goal, it should be necessary to involve in the process not only all the infrastructures, facilities and activities performed within the port, but also the other transport infrastructures and services, through an integration and co-ordination of strategies and networks at the local, national and EU level[87].

The absence of a uniform model of seaports and the related services and facilities, both from the practical and technical point of view and from the legal one, and the complexity of domestic and international transport and logistics systems, could hinder achieving the inner potentialities of these technologies in international transportation, logistics and commerce.

At the domestic level, the organization of the Italian seaport sector as a whole in port systems was meant to overcome the past issues of overcapacity, on the one hand, and the lack of adequate infrastructures, on the other[88]. However, the current local rivalry that even now appears to affect the sector, and the legal framework still lacking efficacious legal tools for enabling an effective development of a transport and logistics network extending over the single port system, hinder the actual achievement of a competitive, integrated, and multimodal transport and logistics system in Italy.

---

[87] A. Marino, *Infrastruttura marittima e sistema porto nella pianificazione delle reti TEN-T: l'Autorità di Sistema Portuale*, in *Rivista del Diritto della Navigazione*, 2020, p. 53.

[88] M. Ragusa, *Quali piani per i porti italiani? Ripresa (economica) e resilienza (del monadismo) nell'ultima disciplina della pianificazione portuale*, in *Rivista giuridica dell'edilizia*, 2022, 3, p. 237.

SESSION III

# EU ENERGY LAW, SUSTAINABILITY AND THE EU AUTONOMOUS MEASURES

# EU ENERGY LAW AND SUSTAINABILITY

*Patrick Abel**

## 1. *Introduction*

The energy sector is central to economic governance and public affairs. Without an energy supply, the modern economy cannot operate. Consumers require energy for their everyday activities. A secure energy supply is also increasingly a matter of national security, as shown by Russia's illegal war against Ukraine, which caused a European energy crisis. It has proven that the EU is vulnerable and (at least partly) dependent on other States in the essential question of energy supply. At the same time, the energy industry is also crucial to further sustainable development. The energy transition is underway as Member States decarbonize their economies to reduce greenhouse gas emissions and mitigate climate change. This chapter explores how sustainable development forms a fundamental pillar in EU energy law as a field of law central to European economic governance and public affairs. After introducing the concept of sustainability and its presence in general EU law (2.), the chapter will set the scene by tracing sustainability in the EU "Energy Constitution", that is, in primary law (3.). On this basis, it analyses how EU sec-

* This article is partly based on a German article written by the author: Abel, Energiesouveränität, in Holterhus/Weber (eds.), Europäische Energiesouveränität, pp. 388 *et seq*.

ondary energy law addresses sustainability, internally towards and with the Member States (4.) and externally vis-à-vis third States (5.) before concluding (6.).

## 2. *The concept of sustainability and its presence in general EU law*

In international law, the idea of sustainability or sustainable development is mainly traced back to the 1987 Brundtland Report on "Our Common Future", which described it as a "development that meets the needs of the present without compromising the ability of future generations to meet their own needs"[1]. Sustainable development, as a principle, requires optimizing policy decisions by balancing the interests of the economy, social justice, and environmental protection[2]. The concept has heavily influenced EU law.

The Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) enshrine that the EU must promote sustainable development in its internal and external actions. We can find the principle in the preamble of the TEU as the EU's determination to "promote economic and social progress for their peoples, taking into account the principle of sustainable development"[3]. For the internal action, Article 3 paragraph 3 subparagraph 1 TEU highlights that the EU shall establish an internal market and "shall work for the sustainable development of Europe based on balanced economic growth and price stability, a high-

[1] UN, Report of the World Commission on Environment and Development: Our Common Future, UN Doc A/42/427 Annex, 1987, para. 27.

[2] J.E. Viñuales, *Sustainable Development*, in L. Rajamani, J. Peel (eds.) *The Oxford Handbook of International Environmental Law*, Oxford, Oxford University Press, 2021, pp. 285, 293 ff., observes that sustainable development as a legal norm has "architectural" and "interpretive", but not "decision-making" functions. For a critical perspective on the term, its vagueness and misuse, see U. Natarajan, *International Law and Sustainable Development*, in R.M. Buchanan *et al.* (eds.), *The Oxford Handbook of International Law and Development*, Oxford, Oxford University Press, 2023[2], pp. 565, 568 ff.

[3] Para. 9. See G. Bándi, *Principles of EU Environmental Law Including (the Objective of) Sustainable Development*, in M. Peeters, M. Eliantonio, *Research Handbook on EU Environmental Law*, Cheltenham, Edward Elgar Publishing, 2020, pp. 36, 38 ff.

ly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment", reflecting the triangle mentioned above. Concerning EU external action, Article 21 paragraph 2 TEU lays out that the EU must follow the policy objectives to "foster the sustainable economic, social and environmental development of developing countries" (lit. d) and to "help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development" (lit. f). Finally, Article 11 TFEU fuses internal and external EU action by comprehensively requiring that "[e]nvironmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development".

And indeed, the idea of sustainability has profoundly influenced EU policy and secondary law. Repeatedly, the European Commission has highlighted sustainability as an essential policy objective at home and abroad[4]. The European Green Deal, a policy strategy of the European Commission to tackle the environmental challenges of our century, especially climate change and biodiversity loss, proclaims that the "EU has the collective ability to transform its economy and society to put it on a more sustainable path"[5]. The 8th Environmental Action Programme – which defines the EU's long-term environmental strategy until 2050 – sets sustainable development as the key objective, stating in Article 1 paragraph 2 that it "aims to accelerate the green transition to a climate-neutral, sustainable, non-toxic, resource-efficient, renewable energy-based, resilient and competitive circular economy in a just, equitable and inclusive way"[6]. In light of this, it is fair to say that sustainable development

[4] See, for example, European Commission, *A Sustainable Europe for a Better World: A European Union Strategy for Sustainable Development*, COM/2001/0264 final.

[5] *The European Green Deal*, Communication from the Commission of 11 December 2019, COM(2019) 640 final.

[6] Decision (EU) 2022/591 of the European Parliament and of the Council of 6 April 2022 on a General Union Environment Action Programme to 2030, *OJ* L 114/22.

is a general policy objective that holistically covers all of EU law and has been spelled out in many concrete regulations and directives, including energy law.

## 3. *EU Energy Constitution and Sustainability*

Exploring the European Treaties in terms of what they say about energy policy, it becomes apparent that the "EU Energy Constitution" contains the idea of sustainable development as well. Article 194 TFEU, the central provision of the EU's energy policy, mirrors the concept of sustainability without mentioning the term explicitly. Its paragraph 1 defines the main objectives that the EU shall pursue in its energy policy by stating that in the "context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim, in a spirit of solidarity between Member States, to: (a) ensure the functioning of the energy market; (b) ensure security of energy supply in the Union; (c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and (d) promote the interconnection of energy networks". The linkage between fostering the economy and protecting the environment is evident from the text. It mentions the renewable forms of energy and, thereby, the path to decarbonization that the EU has pursued for many years, as well as energy security. The social justice dimension is less visible in Article 194 TFEU. One may consider it to be implicit in the energy security goal because providing stable energy to the population is a service that the State (through State agencies, state-owned enterprises, but also by regulating private companies) provides to the population as an essential requirement of modern life that is based on energy consumption.

The European Treaties provide the EU with potent energy competences to promote sustainability vis-à-vis the Member States. Energy policy is a shared competence which means that Member States can only legislate and adopt legally binding acts in energy law to the extent that the EU has not exercised its competence or decid-

ed to cease exercising it[7]. This is counteracted to some extent by the sovereignty clause in Article 194 paragraph 2 subparagraph 2 TFEU, which states that EU energy policy measures "shall not affect a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply, without prejudice to Article 192(2)(c)". This means that in these three alternatives, the EU can only pursue a special legislative procedure that requires unanimity in the Council in which all Member State governments are represented, giving every Member State a veto[8].

However, the Court of Justice of the European Union (CJEU) interpreted this sovereignty clause narrowly. In a judgment from 2018 on the market stability reserve of the EU emissions trading system, the CJEU interpreted Article 192 paragraph 2 TFEU as applying "only if it follows from the aim and content of that measure that the primary outcome sought by that measure is significantly to affect a Member State's choice between different energy sources and the general structure of the energy supply of that Member State"[9]. It was not sufficient if these areas were affected only as an "indirect consequence"[10]. This finding is transferable to the almost identical provision of Article 194 paragraph 2, which refers to Article 192 paragraph 2 as seen[11]. Especially in pursuing sustainable development, the EU will, in many cases, be able to find other main policy objectives justifying that the sovereignty clause is not trig-

[7] Article 2 paragraph 2, Article 4 paragraph 2 lit. i and Article 194 paragraph 2 subparagraph 1 TFEU. On the sovereignty dimension of this provision, see K. Huhta, *The Scope of State Sovereignty under Article 194(2) TFEU and the Evolution of EU Competences in the Energy Sector*, *International & Comparative Law Quarterly*, 2021, pp. 991, 993.

[8] The details are set out in Article 192 paragraph 2 TFEU, including the fact that the Council only consults the European Parliament in these cases. This differs strongly from the ordinary legislative procedure in which the Council and the European Parliament are equal legislators and in which the Council decides by qualified majority, thus preventing that individual Member States have a veto. See Articles 289 and 194 TFEU.

[9] CJEU, Judgment of 21 June 2018, C-5/16, para. 46.

[10] *Ibid.*, para. 68.

[11] Cf. K. Huhta, *The Scope of State Sovereignty under Article 194(2) TFEU and the Evolution of EU Competences in the Energy Sector*, *International & Comparative Law Quarterly*, 2021, pp. 999, 1008.

gered. In the case before the CJEU, it was the environmental objective to strengthen the EU emissions trading system to combat climate change. In energy law, the EU could thus pursue decarbonization efforts or social measures to assure a just transition within its competence, even if this has indirect effects on Member States' conditions for exploiting their energy resources, their choice between different energy sources, and the general structure of their energy supply; overall, the EU thus has a relatively broad mandate to pursue sustainable energy regulation[12]. There are limits, though. For example, it is an exclusive sovereign decision of the Member States if they consider nuclear energy as part of their sustainability strategy to decarbonize their energy industry, a matter on which, for example, France and Germany disagree[13].

## 4. *Internal EU energy law and sustainability*

The idea of sustainability is present in many EU energy laws. Following Article 194 TFEU, EU secondary law has emphasized the decarbonization of the energy industry for many years, mirroring the environmental dimension of sustainable development. The EU committed to reduce greenhouse gas (GHG) emissions by 55 percent by 2030 compared to 1990 levels and to reach net climate neutrality by 2050 in the European Climate Law, based on the Fit-for-55 package[14]. Thereby, the EU implements the goals and obligations under the Paris Agreement[15]. The energy industry is the sector that emits

[12] *Ibid.*, pp. 1008 ff.

[13] See for example CJEU, Judgment of 22 September 2020, C-594/18 P, paras. 48 ff.; K. Talus, P. Aalto, *Competences in EU Energy Policy*, in R. Leal-Arcas, J. Wouters (eds.), *Research Handbook on EU Energy Law and Policy*, Cheltenham, Edward Elgar Publishing, 2017, pp. 15, 21.

[14] Article 4 Regulation (EU) 2021/119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ("European Climate Law") OJ L 243/1 (hereafter "European Climate Law").

[15] On the connection to the Paris Agreement, see E. Brosset, S. Maljean-Dubois, The Paris Agreement, EU Climate Law and the Energy Union, in M. Peeters, M. Eliantonio, *Research Handbook on EU Environmental Law*, Cheltenham, Edward Elgar Publishing, 2020, pp. 412 ff.

the most emissions in the EU, followed by industry and transportation[16]. It is thus essential to transform the European energy industry, mainly by turning to renewable energies such as wind, solar, geothermal, and hydropower[17]. The latest Renewable Energy Directive (RED III) sets the binding overall Union target that the EU must have a share of at least 42,5 % renewable energy sources in its gross final energy consumption in 2030[18].

### 4.1. *Emissions trading system*

The main EU instrument to pursue sustainability in the energy sector is the emissions trading system (ETS), created under Directive 2003/87/EC[19]. The ETS is a "cap and trade system". It puts a price on emitting GHG. The idea is to internalize the costs that the energy industry causes to the public by polluting the atmosphere, a global public good[20]. Internalizing costs means that the person causing the pollution must bear the costs, not the public (polluter pays principle)[21].

---

[16] European Commission, *Climate Action Progress Report 2023*, p. 6 based on data for 2022.

[17] S.-L. Hsu, *International Market Mechanisms*, in K.R. Gray (ed.) *The Oxford Handbook of International Climate Change Law*, Oxford, Oxford University Press, 2016, pp. 239, 244 ff.

[18] Article 3 paragraph 1 subparagraph 1 of the Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources, OJ L 328/82, changed most recently by Directive (EU) 2023/2413 of the European Parliament and of the Council of 18 October 2023 amending Directive (EU) 2018/2001, Regulation (EU) 2018/1999 and Directive 98/70/EC as regards the promotion of energy from renewable sources, and repealing Council Directive (EU) 2015/652, OJ L 2023/2413. On the history of the RED, see P. Crossley, *The Role of Renewable Energy Law and Policy in Meeting the EU's Energy Security Challenges*, in R. Leal-Arcas, J. Wouters (eds.), *Research Handbook on EU Energy Law and Policy*, Cheltenham, Edward Elgar Publishing, 2017, pp. 469, 475 ff.

[19] Directive 2003/87/EC of 13 October 2003, OJ L 275/32 (hereafter: "EU ETS").

[20] On the costs of GHG emissions, see J. Feiler, P. Vajda, *Energy and Environment*, in R. Leal-Arcas, J. Wouters (eds.), *Research Handbook on EU Energy Law and Policy*, Cheltenham, Edward Elgar Publishing, 2017, 432, 435 ff.

[21] On the principle, see G. Bándi, *Principles of EU Environmental Law Including (the Objective of) Sustainable Development*, in M. Peeters, M. Eliantonio, *Research Handbook on EU Environmental Law*, Cheltenham, Edward Elgar Publishing, 2020, pp. 36, 48 ff.

The ETS makes it so by establishing a market-based system. It sets a maximum volume of GHG that the covered sectors, including energy installations, may emit in a year on EU territory (the "cap"). It turns this GHG volume into ETS certificates. A certificate acts as a permit to emit a certain amount of GHG. Energy companies must acquire these certificates to emit GHG in energy production. Most GHG certificates are sold in public auctions[22]. Companies acquiring these certificates can use them themselves or trade them to other companies (the "trade" aspect of the "cap and trade" system). The idea is that there is a price incentive to use energy-efficient and clean technology, as this decreases the need for ETS certificates. At the same time, GHG emission-intensive production requires purchasing lots of certificates, making it expensive and putting it at a competitive disadvantage[23]. From an economic perspective, this market-based solution should make GHG reductions efficient as the ETS market will ensure that emissions are reduced where it is cheapest[24].

In 2005, the EU introduced the ETS[25]. It has undergone different trade periods in which the instrument has been reformed and changed significantly[26]. Reforms have caused a significant increase in certificate price so that in the current fourth trading period, the ETS produces a substantial steering effect that leads the energy industry to cleaner technologies[27]. The annual cap that the ETS sets on

[22] See Article 10 EU ETS.

[23] V. Koumpli, *EU ETS and Voluntary Carbon Markets: Key Features and Current Challenges*, in *Journal of World Energy Law and Business*, 2024, pp. 87, 88 ff.

[24] See Directive 2003/87/EC of 13 October 2003, OJ L 275/32 (hereafter: "EU ETS").

[25] V. Koumpli, *EU ETS and Voluntary Carbon Markets: Key Features and Current Challenges*, in *Journal of World Energy Law and Business*, 2024, p. 88.

[26] On the evolution of the instrument, see S.E. Weishaar, *EU Emissions Trading – Its Regulatory Evolution and the Role of the Court*, in M. Peeters, M. Eliantonio, *Research Handbook on EU Environmental Law*, Cheltenham, Edward Elgar Publishing, 2020, pp. 443 ff. For a comprehensive analysis of the evolution of emissions trading systems worldwide, see P. Ekins *et al.*, *Impacts and Evolution of Emissions Trading Systems: Insights from Research and Regulation*, Florence, EUI Robert Schuman Centre, 2023.

[27] M. Knondt, *Instruments and Modes of Governance in EU Climate and Energy Policy: From Energy Union to the European Green Deal*, in T. Rayner, K. Szulecki (eds.), *Handbook on European Union Climate Change Policy and Politics*, Cheltenham, Edward Elgar Publishing, 2023, pp. 202, 205.

annual GHG emissions is being reduced continuously until 2030, increasing the price incentive for green energy even further[28].

Overall, the ETS can be considered an effective approach to strengthen sustainability in the EU energy sector. The advantage is that it is not the EU or the Member States that set the price for GHG emissions but a market. The ETS thus creates a green framework under which energy production takes place in the EU, fundamentally altering the industry's competition rules without restricting companies with prohibitions in what they can do[29]. However, the third dimension of sustainable development should be remembered when reflecting on the EU ETS. Social justice may be endangered if energy companies pass on high ETS certificate prices to consumers[30]. High energy prices mainly affect lower-income households as they typically use more of their available financial resources for energy than middle- and high-income households[31]. The EU ETS already considers this effect to some degree in the form of a market stability reserve. It is a reserve of certificates taken from the market and (automatically) reintroduced into it in case of an exceptional increase in certificate prices to soften the volatility and the impact of market changes[32]. However, the EU and the Member States should flank the EU ETS with additional social policies. This is something that the European Commission has underlined time and again by highlighting that the energy transition is to be made "leaving no one behind"[33]. To that

[28] Article 9 paragraphs 3 and 4 EU ETS.

[29] S.E. Weishaar, *EU Emissions Trading – Its Regulatory Evolution and the Role of the Court*, in M. Peeters, M. Eliantonio, *Research Handbook on EU Environmental Law*, Cheltenham, Edward Elgar Publishing, 2020, pp. 443 ff.

[30] On this matter, see the comprehensive study by C. Strambo *et al.*, *The Impact of the New EU Emissions Trading System on Households: How can the Social Climate Fund Support a Just Transition?* (Stockholm Environment Institute, Stockholm, 2022).

[31] See, for example, J. Priesmann *et al.*, *Does Renewable Electricity Hurt the Poor? Exploring Levy Programs to Reduce Income Inequality and Energy Poverty across German Households*, in *Energy Research & Social Science*, 2022, 93, 102812, p. 2.

[32] S.E. Weishaar, *EU Emissions Trading – Its Regulatory Evolution and the Role of the Court*, in M. Peeters, M. Eliantonio, *Research Handbook on EU Environmental Law*, Cheltenham, Edward Elgar Publishing, 2020, p. 451.

[33] See, for example, European Commission, *A Green Transition that Leaves No One Behind*, 21 June 2023, https://ec.europa.eu/commission/presscorner/detail/en/AC_23_3426 (accessed on 30 April 2024).

end, the EU has, for example, created the Just Transition Mechanism and the Social Climate Fund to finance social support to account for the burdens that the energy transition may inflict[34].

### 4.2. *Energy governance and reporting*

The EU also pursues sustainability in energy law by implementing an elaborate energy governance and reporting system through the Governance Regulation (EU) 2018/1999[35]. It requires the Member States to be transparent about their energy policies, targets, and realities on which they must provide reports. They must present long-term strategies for the next thirty years, integrated national energy and climate plans for ten years, integrated national energy and climate progress reports every two years and annual reports[36]. The Governance Regulation also requires them to set national climate mitigation objectives, targets and contributions by which they show how they contribute to the EU reaching its energy decarbonization and climate mitigation goals[37]. The Commission assesses the reports and the progress made by Member States and can make non-binding recommendations to them in case it finds their efforts to be insufficient[38]. The Commission also assesses the EU's overall progress and publishes annual Energy Union Reports[39]. The Governance Regulation on the Energy Union is integrated into the more general reporting and monitoring framework of the European Climate Law that covers all sec-

[34] Regulation (EU) 2023/955 of the European Parliament and of the Council of 10 May 2023 establishing a Social Climate Fund and amending Regulation (EU) 2021/1060, OJ L 130/1.

[35] Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action, amending Regulations (EC) No 663/2009 and (EC) No 715/2009 of the European Parliament and of the Council, Directives 94/22/EC, 98/70/EC, 2009/31/EC, 2009/73/EC, 2010/31/EU, 2012/27/EU and 2013/30/EU of the European Parliament and of the Council, Council Directives 2009/119/EC and (EU) 2015/652 and repealing Regulation (EU) No 525/2013 of the European Parliament and of the Council, OJ L 328/1 (hereafter "Governance Regulation").

[36] Articles 3, 15, 17, 26 of the Governance Regulation.

[37] Article 4 of the Governance Regulation.

[38] See Articles 29 ff. of the Governance Regulation.

[39] Articles 29 and 35 of the Governance Regulation.

tors[40]. Overall, the Governance Regulation, together with the European Climate Law framework, mirrors the "soft" approach of the transparency, reporting, and monitoring approach of the Paris Agreement.

### 4.3. *Energy-related regulatory standards*

Furthermore, the EU also pursues sustainable development in the energy sector by setting regulatory standards. There is a plethora of relevant legislation that cannot be covered here comprehensively. For example, EU law introduced a ban on the sale of combustion engine cars by 2035, with the possibility of an exception for vehicles that use GHG-neutral e-fuels[41]. The EU also set ambitious energy efficiency standards. For example, the Ecodesign Directive sets framework requirements for the energy efficiency of certain products, and there is a new proposal to expand and increase these requirements[42]. Energy efficiency promotes sustainability as the economic outcome remains the same with lower energy costs, decreasing the emission intensity[43].

### 4.4. *Subsidies*

Subsidies play a pivotal role in sustainable EU energy law, too. They have been and continue to be crucial for building renewable

[40] Article 7 paragraph 7 subparagraph 1 lit. a of the European Climate Law.

[41] See Proposal for a Regulation of the European Parliament and of the Council on type-approval of motor vehicles and engines and of systems, components and separate technical units intended for such vehicles, with respect to their emissions and battery durability (Euro 7) and repealing Regulations (EC) No 715/2007 and (EC) No 595/2009, COM/2022/586 final.

[42] Directive 2009/125/EC of the European Parliament and of the Council of 21 October 2009 establishing a framework for the setting of ecodesign requirements for energy-related products (recast), OJ L 285/10; Proposal for a Regulation of the European Parliament and of the Council establishing a framework for setting ecodesign requirements for sustainable products and repealing Directive 2009/125/EC, COM/2022/142 final.

[43] See J. Rosenow, F. Kern, *EU Energy Innovation Policy: The Curious Case of Energy Efficiency*, in R. Leal-Arcas, J. Wouters (eds.), *Research Handbook on EU Energy Law and Policy* (Edward Elgar Publishing, Cheltenham, 2017), pp. 501 ff. on the relationship to technological innovation, criticizing that the EU has an insufficient institutional set up to promote technological innovation for energy efficiency.

energy capacity. By setting requirements and conditions for the legality of subsidies, EU law substantially influences the rules of the subsidies game. Block exemption regulations and the Commission Guidelines on State Aid for Climate, Environmental Protection, and Energy Technology, Research, and Development set detailed requirements that incentivize the proper use of subsidies, for example, for renewable energies[44].

## 5. *External EU energy law and sustainability*

Sustainable development also extends to the external dimension of EU energy policy. In 2020, the EU produced only 42 % of its energy demand; it imported the rest from abroad[45]. Therefore, the sources of that imported energy play a significant role in determining how sustainable EU energy policy is in its impact on the environment. Trade in fossil fuels such as oil, gas, and coal must be replaced with cleaner energy products. In the mid-to long-term, the EU aims to import hydrogen produced sustainably from abroad[46]. Today, there is substantial trade in electricity where transnational electricity grids exist in third states[47], but its environmental sustainability again depends on the foreign electricity production methods. Furthermore, there is an increasing import dependency on critical raw materials that the industry requires for modern renewable energy technology, such as solar panels[48]. External EU energy law has reacted to these necessities in recent years.

---

[44] See for example Articles Art. 36a, 38-44, 46, 48, 49 of the Commission Regulation (EU) No. 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 187/1; Communication from the Commission of 18 February 2022, *Guidelines on State aid for climate, environmental protection and energy 2022*, OJ 80/1.

[45] Eurostat, Shedding Light on Energy in the EU, 2022 Interactive Edition (PDF-Version), 5.

[46] See Communication from the Commission of 8 July 2020, *A Hydrogen Strategy for a Climate-Neutral Europe*, COM(2020) 301 final.

[47] UN, *International Trade Statistics Yearbook 2021*, United Nations, Vol II, 2022, p. 99.

[48] See https://www.consilium.europa.eu/en/infographics/critical-raw-materials/ (accessed on 30 April 2024) and the reaction in form of the Proposal for a Regula-

### 5.1. *Open, strategic autonomy*

The EU's general trade strategy of pursuing an "open, strategic autonomy" is crucial for external EU energy law. The European Commission introduced this strategy in 2020. With it, the EU remains committed to multilateralism while being increasingly strategic in its choice of partners and less naïve in offering the openness of its markets without reciprocity[49]. Thereby, the EU reacts to a changing international landscape of increasing tensions between China and the US, bringing about a renaissance of geoeconomics and a priority for energy security[50].

In its external energy policy, the EU does not seek complete energy autarky, that is, to produce 100% of its energy demand on its soil. It still aims to harvest the welfare gains that trade has to offer. But it increasingly does so (only) with selected like-minded partners. The Energy Community is a case in point. It is an international organization based on an international agreement of the EU with its neighbouring countries, Albania, Bosnia and Herzegovina, Georgia, Kosovo, Moldova, Montenegro, Serbia, North Macedonia, and Ukraine[51]. The agreement requires the parties to adopt a list of EU energy laws for a transnational electricity and gas network[52]. Furthermore, the EU has concluded free trade agreements (FTA) with countries such as Singapore, Vietnam, Japan, New Zealand and

---

tion of the European Parliament and of the Council establishing a Framework for Ensuring a Secure and Sustainable Supply of Critical Raw Materials and Amending Regulations (EU) 168/2013, (EU) 2018/858, 2018/1724 and (EU) 2019/1020, COM/2023/160 final.

[49] Communication from the Commission of 10 March 2020, *A New Industrial Strategy for Europe*, COM/2020/102 final.

[50] See A. Roberts, H.C. Moraes, V. Ferguson, *Toward a Geoeconomic Order in International Trade and Investment*, in *Journal of International Economic Law*, 2019, 655.

[51] https://www.energy-community.org/aboutus/whoweare.html (accessed on 30 April 2024).

[52] See the comment by S. Fischer, *Global Energy Security and EU Energy Policy*, in R. Leal-Arcas, J. Wouters (eds.), *Research Handbook on EU Energy Law and Policy*, Cheltenham, Edward Elgar Publishing, 2017, pp. 150, 160 ff. who considers the Energy Community an "enlargement of the EU's domestic market to neighboring countries with an accession perspective".

Kanada, including chapters and provisions on energy trade, sustainability, and environmental protection[53].

The plurilateral Energy Charter Treaty (ECT) contains specific obligations on energy trade and investment, including the EU and many of its Member States but also, for example, Japan[54]. The ECT has been heavily criticized as an obstacle to decarbonization because States would abstain from taking the necessary steps for fear of investment arbitration claims that investors may bring under the rules of the ECT[55]. Therefore, the EU and many of its Member States have declared their intention to terminate the agreement or have already done so[56]. But the likely alternative of more contract arbitration (based on individual contracts that investors conclude with host states) may prove to be even worse[57].

### 5.2. *Diversifying energy supply*

The EU is increasingly seeking to diversify its sources of energy supply. It has reinforced its efforts in reaction to the illegal act of aggression by Russia against Ukraine under the REPowerEU Plan[58]. As a result of this war and EU sanctions, Russia terminated large parts of its energy exports to the EU; this severely affected the EU energy supply as Russia had been the most important source of EU energy imports for many years, causing a severe energy crisis[59].

---

[53] European Parliamentary Research Service, *Trade and Sustainable Development in EU Free Trade Agreements* (2023), https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/754613/EPRS_BRI(2023)754613_EN.pdf (accessed on 30 April 2024).

[54] See https://www.energycharter.org/who-we-are/members-observers/ (accessed on 30 April 2024).

[55] See T. Morgandi, L. Bartels, *Exiting the Energy Charter Treaty under the Law of Treaties*, in *King's Law Journal*, 2023, pp. 145, 146 ff.

[56] *Ibid.*, pp. 146 ff. with further references.

[57] A. Daszko, *The Energy Charter Treaty at a Critical Juncture: of Knowns, Unknowns, and Lasting Significance*, in *Journal of International Economic Law*, 2023, pp. 720, 732 ff.

[58] Communication from the Commission of 18 May 2022, *REPowerEU Plan*, COM/2022/230 final.

[59] A.-A. Marhold, *Towards a "Security-Centred" Energy Transition: Balancing the European Union's Ambitions and Geopolitical Realities*, in *Journal of International Economic Law*, 2023, pp. 756, 762 ff.

This also proved problematic for decarbonization efforts, as Member States such as Germany had envisaged Russian gas as a transitional energy commodity, replacing coal due to its lower GHG emissions per energy unit generated[60].

Consequently, Member States had to resort to the more expensive liquified natural gas (LNG) shipped from States such as the US or increase energy production by coal plants[61]. Diversification of energy supply has been a part of the EU energy strategy for a long time[62]. Still, it is taken more seriously only in light of recent events. *Inter alia*, the objective of diversification forms part of the Governance Regulation, according to which Member States must explain their efforts to reduce energy dependency from third States[63].

### 5.3. *Assertive extraterritorial energy regulation*

Increasingly, the EU is taking a more assertive stance to spread its understanding of sustainable development in energy policy to other States worldwide. The best example is the Carbon Border Adjustment Mechanism (CBAM). The regulation entered into force in 2023, introducing a transitional phase while becoming fully operational from 2026[64]. It complements the ETS presented above and tries to solve the problem of carbon leakage.

Carbon leakage is about the concern that companies could escape the ETS by relocating their production abroad to a location

---

[60] See T.T. Pedersen *et al.*, *Long-term Implications of Reduced Gas Imports on the Decarbonization of the European Energy System*, in *Joule*, 2022, 6(7), pp. 1566 ff.

[61] A.-A. Marhold, *Towards a "Security-Centred" Energy Transition: Balancing the European Union's Ambitions and Geopolitical Realities*, in *Journal of International Economic Law*, 2023, p. 766.

[62] See S. Fischer, *Global Energy Security and EU Energy Policy*, in R. Leal-Arcas, J. Wouters (eds.), *Research Handbook on EU Energy Law and Policy*, Cheltenham, Edward Elgar Publishing, 2017, pp. 161 ff. who rightly observes a shift in strategy towards energy security since the gas crisis in winter 2009 and the energy trade disruptions with Russia in winter 2014/2015.

[63] Article 4 lit. c of the Governance Regulation.

[64] Regulation (EU) 2023/956 of the European Parliament and of the Council of 10 May 2023 establishing a carbon border adjustment mechanism, OJ L 130/52 (hereafter "CBAM").

that does not have an ETS or other stringent climate regulation in place and importing goods produced in that third country to the EU. This would give these companies a competitive advantage as they would not have to purchase costly ETS certificates, unlike companies producing in the EU[65]. To prevent carbon leakage, the EU ETS currently allocates certificates for free to specific GHG emissions-heavy industries with intense international competition[66]. This is a problem because these companies are thus currently effectively escaping the ETS and are not subject to the steering effect that putting a price on GHG emissions exerts.

CBAM aims to prevent carbon leakage by putting a price on the embedded GHG emissions of goods imported to the EU. The idea is that importers must provide data on the GHG emitted while producing the imported goods abroad. They must then purchase a CBAM certificate equivalent to the price they would have paid for an ETS certificate had they produced the good on EU territory (and thus been subject to the EU ETS). As CBAM phases in, the EU is phasing out the free allowances under the EU ETS. This should create a level playing field between EU importers and domestic companies as all are subject to instruments that internalize the costs that the society faces for polluting the atmosphere[67]. For now, CBAM only applies to specific key GHG emission-heavy industries exempted from the ETS so far, such as cement and steel, but significantly, it also covers hydrogen, the main trade commodity in a sustainable future that no longer resorts to fossil fuels[68]. In addition, the EU is considering extending CBAM to other or even all imported goods; therefore, it can be viewed as a comprehensive attempt to introduce

[65] K. Kulovesi, *EU Emissions Trading Scheme: Preventing Carbon Leakage Before and After the Paris Agreement*, in R. Leal-Arcas, J. Wouters (eds.), *Research Handbook on EU Energy Law and Policy*, Cheltenham, Edward Elgar Publishing, 2017, pp. 417, 420 ff.

[66] *Ibid.*, p. 422.

[67] See P. Abel, *The Carbon Border Adjustment Mechanism: Reconciling the Principles of Sustainability and Free Trade in the EU's External Action?*, in M. Diz, R.A. Wessel (eds.), *EU External Relations Law and Sustainability: The EU, Third States and International Organizations*, The Hague, T.M.C. Asser Press, 2024 forthcoming.

[68] See Annex I of the CBAM.

a green competition framework applicable to domestic and foreign companies[69].

CBAM qualifies as an assertive tool of external EU energy policy because it explicitly and intentionally aims to incentivize third States to pursue specific energy regulations that the EU considers sustainable and sound[70]. This is because CBAM exempts EU importers from having to buy CBAM certificates to the extent they have already paid a carbon price in the State where the goods to be imported were produced[71]. Carbon prices are market-based regulations for climate change mitigation, including, for example, cap and trade systems such as an ETS and carbon taxes[72]. In addition, EU importers are entirely exempted from the CBAM if the country of origin has an ETS linked with the EU[73]. Hence, importers have easier access to the EU internal market in both cases. This incentivizes third States to introduce carbon pricing or link an ETS to the EU's. The EU thus uses its economic weight as leverage to induce – or, as some criticize, coerce – third States to pursue similar climate laws. For this reason, it is controversial if the CBAM violates WTO law[74]. From a political perspective, the CBAM is a (partial) departure from a cooperative approach that centres on multilateral negotiations under the UN Framework Convention on Climate Change and the Paris Agreement to achieve global sustainable development[75]. And it is not the only example of the EU's unilateral, extraterritorial outreach[76].

---

[69] See recital 30 of the CBAM.

[70] See recital 14 of the CBAM.

[71] Article 9 of the CBAM.

[72] See S.-L. Hsu, *International Market Mechanisms*, in K.R. Gray (ed.) *The Oxford Handbook of International Climate Change Law*, Oxford, Oxford University Press, 2016, pp. 239, 244 ff.

[73] Article 2 paragraph 6 of the CBAM and its Annex III, point 1.

[74] See P. Abel, *The Carbon Border Adjustment Mechanism: Reconciling the Principles of Sustainability and Free Trade in the EU's External Action?*, in M. Diz, R.A. Wessel (eds.), *EU External Relations Law and Sustainability: The EU, Third States and International Organizations*, The Hague, T.M.C. Asser Press, 2024 forthcoming.

[75] A.-A. Marhold, *Towards a "Security-Centred" Energy Transition: Balancing the European Union's Ambitions and Geopolitical Realities*, in *Journal of International Economic Law*, 2023, pp. 767 ff.

[76] See, for example, M. Cremona, J. Scott, *EU Law Beyond EU Borders: The Extraterritorial Reach of EU Law*, Oxford, Oxford University Press, 2019.

## 6. *Conclusion*

This chapter has shown that sustainable development constitutes a fundamental pillar of EU energy law. It is enshrined in the European Treaties as a crosscutting principle that the EU must integrate into all of its policies. This includes energy and is essential because it constitutes the sector with the highest share of GHG emissions. In line with the idea of sustainability, the EU is obliged to reduce these emissions to mitigate climate change. To this end, EU energy law is integrated into and transforms the framework of the Paris Agreement, operating as a hinge to domestic law. Sustainability is present in the internal and external dimensions of EU energy law. The EU combines different approaches to promote the principle. Internally, it has the ETS in place as a market-based instrument, complemented by a governance and reporting mechanism, regulatory standards (including energy efficiency), and subsidy rules. Externally, the EU aims for an open, strategic autonomy in energy vis-à-vis third States. The EU does not try to achieve energy autarky but wants and needs to find reliable, like-minded trading partners – for fossil fuels as long as they are still required, for critical raw materials necessary for renewable energy technologies, and for sustainably produced hydrogen in the mid-and long-term. Especially the experience of Russia's aggression against Ukraine has led the EU to realize that it must diversify its energy supply. In the current new era of geopolitics and geoeconomics, energy security has become ever more relevant. However, the EU is also increasingly taking a more assertive stance towards other countries to actively incentivize them to pursue more rigorous sustainability policies, as reflected by the example of the CBAM. Overall, sustainable development is an overarching principle of energy policy that brings together its internal and external dimensions and will only increase in relevance in the coming years and decades.

# THE EUROPEAN UNION BETWEEN SUSTAINABLE DEVELOPMENT AND OPEN STRATEGIC AUTONOMY: PROSPECTS FOR ACTION IN LIGHT OF THE 2023 STRATEGIC FORESIGHT REPORT

*Federico Siscaro*

## 1. *Introduction*

The European Union (EU) faces a crucial challenge in today's world: balancing the promotion of sustainable development and the pursuit of open strategic autonomy. These two objectives, though complementary, require careful navigation and precise strategic planning. This paper will explore how the EU is addressing this challenge, trying to reconcile its ambition to become an environmentally responsible global player while preserving its strategic independence. It will first devise the principle of sustainability in the framework of EU policies. Over the last past years, sustainability-oriented policies have been hampered and encouraged at once by recent international crises. Such crises have also inspired the search for open strategic autonomy, a concept that refers to an approach that aims to combine the objective of strengthening the EU's strategic autonomy with a commitment to multilateralism, international cooperation and openness to global partners and allies. The genesis and development of this concept will thereafter be drawn up. Secondly, this paper will focus on the intersections between the advocacy of sustainable development interests and the quest for open strategic autonomy. The Strategic Foresight Re-

port 2023[1] has highlighted the connection between the two concepts, identifying a number of key issues that need to be addressed. Amidst these questions, this paper will steer its attention towards two sensitive themes. In the first place, it will discuss how, in an era where the international order is evolving towards a multipolar system, the EU can advance sustainability. It will investigate the multi-faceted strategy that embraces and exploits both the hurdles and opportunities that accompany the dawn of a transformative era in globalization. This strategy encompasses the use of a broad spectrum of measures aligned to sustainability goals, namely a new trade policy carried out through trade agreements embedding sustainability clauses, a fostered support for sustainable development initiatives in developing countries and meaningful action in international fora that may bolster international cooperation. Secondly, it will analyse the endeavour to attain a net-zero economy while pursuing open strategic autonomy. This mandates an enhancement of the Single market, achieved by revitalizing industrial policies and strengthening value chains and critical infrastructures. Additionally, the success of a net-zero economy hinges on promoting equitable market conditions that ensure a uniform application of environmental regulations and reinforcing sustainability within corporate governance.

## 2. *Sustainable development and open strategic autonomy in EU policies*

The European Union has always been at the forefront of the global fight against climate change and environmental degradation and has always regarded issues related to social and economic aspects of sustainability as a cornerstone of its policies. The promotion of sustainable development in the European Union is a key objective involving interconnected policies in many areas. The legal

[1] Communication from the Commission to the European Parliament and the Council, *2023 Strategic Foresight Report: Sustainability and people's wellbeing at the heart of Europe's Open Strategic Autonomy*, Doc. COM/2023/376 final.

basis for sustainable development strategies is enshrined in both Arts. 3 and 21 of the Treaty on European Union (TEU), which affirms the EU's internal and external responsibility to safeguard this principle. In this context, the EU has adopted the United Nations Sustainable Development Goals (SDGs) as a guiding framework for its policies and actions. The 2030 Agenda of the United Nations (UN)[2], linked to the Paris Agreement on climate change[3] and the Addis Ababa Action Agenda[4], offers a set of ambitious goals that embrace economic, social and environmental dimensions of sustainable development, including combating climate change, reducing inequalities, promoting gender equality and protecting ecosystems. Under President von der Leyen's guidance, the Commission has unveiled an ambitious policy agenda dedicated to advancing sustainability within the European Union and beyond. The SDGs form an integral part of the President's political agenda[5] and serve as the cornerstone of policymaking, both domestically and in foreign affairs, across all sectors. During the von der Leyen Commission's tenure, the SDGs have taken centre stage in major initiatives such as the European Green Deal and Recovery and Resilience Plans. Launched in December 2019, the European Green Deal[6] is an ambitious plan to transform the EU into a climate-neutral continent by 2050. Other goals include reducing greenhouse gases, promoting renewable energy, energy efficiency, circular economy, sustainable mobility and social justice. In broader terms, the goal is to make Europe an example of leadership in combating climate

[2] Resolution adopted by the General Assembly of the United Nations on 25 September 2015, *Transforming our world: the 2030 Agenda for Sustainable Development*, A/RES/70/1.

[3] United Nations Climate Change Conference (COP21), *Paris Agreement*, 2015.

[4] United Nations, *Addis Ababa Action Agenda of the Third International Conference on Financing for Development*, 2015.

[5] U. von der Leyen, *Political Guidelines for the Next European Commission: A Union that strives for more*, 2019.

[6] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, *The European Green Deal*, Doc. COM(2019) 640 final.

change and promoting globally environmental sustainability. Subsequently, the pandemic crisis led to the creation of the Next Generations EU (NGEU)[7], the epochal fiscal stimulus programme devised by European institutions, along with the implementation of related national recovery and resilience programmes, which put digitisation, competitiveness, the green revolution and energy transition at the centre of the Union's agenda.

Thereafter, in 2021, the European climate law has been put in place[8]. Even so, external adverse turmoil has exerted pressure on the post-pandemic economic upturn and global efforts toward sustainable development, causing a deceleration in progress, at times even resulting in setbacks[9]. Likewise, recent international crises have accelerated the awareness of the need for a rapid twin transition of the European economy, green and digital, which at the same time can ensure the full competitiveness of its industry vis-à-vis international competitors and promote the creation of quality, long-term jobs. The targets pursued through the new European industrial policy, which seems to be moving away from classic market liberalisation towards more explicit steering of the economy, are based on the evolving international and geopolitical context[10]. The current situation, defined as "polycrisis"[11], has shown the vulnerability of European industry and the lack of autonomy in strategic sectors, as well as the fragility of global supply chains that have been undermined by the trade blockage caused by the pandemic. Through the implementation of the new industrial policy, the Union wishes to act independently from the global superpowers and

[7] Council Regulation (EU) 2020/2094 of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis, in OJEU L433I of 22.12.2020.

[8] Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ("European Climate Law").

[9] EU Voluntary Review on progress in the implementation of the 2030 Agenda, 2023.

[10] I. Begg, *One Instrument, Many Goals: Some Delicate Challenges Facing the EU's Recovery Fund*, in *Cesifo Forum*, 2021, 22(1), pp. 9-13.

[11] World Economic Forum, *This is why "polycrisis" is a useful way of looking at the world right now*, 2023.

desires to become such a power itself, capable of exerting influence on global affairs commensurate with its economic weight[12]. The focus of the update is on reducing the Union's technological and industrial gap and dependencies, which prevent it from playing a leading role in technological innovation and from being self-sufficient, particularly in critical situations and emergencies. In 2021, the European Council's President Michel affirmed: "We will reduce dependencies and achieve resilience in areas such as energy, digital, cyber security, semi-conductors, industrial policy, trade and reinforcing the Single market"[13]. In this sense, the concept of strategic autonomy[14] has become a key consideration for the EU. As stated by the European Parliament, strategic autonomy "refers to the capacity of the EU to act autonomously – that is, without being dependent on other countries – in strategically important policy areas. These can range from defence policy to the economy and the capacity to uphold democratic values"[15]. Strategic autonomy became central to the European debate in 2016 when the former High Representative for Foreign Policy Mogherini made it the cornerstone of the Union's global strategy[16]. At the time, reference was made to strategic autonomy, especially in the field of defence. Afterwards, the concept has been widened to other subjects, namely trade and economic policies, advanced technologies, energy security, external action and diplomacy. However, European policy-makers realized that for an export-oriented economy like Europe's, aspiring for autonomy in a highly globalized economy is not exactly desirable. Hence, the concept has slightly changed into "Open Strategic Autonomy", an expression used by the Commis-

---

[12] I. Begg, *One Instrument, Many Goals: Some Delicate Challenges Facing the EU's Recovery Fund*, in *Cesifo Forum*, 2021, 22(1), pp. 9-13.

[13] Oral Conclusions drawn by President Charles Michel following the informal meeting of the Members of the European Council in Brdo pri Kranju (Slovenia), 2021.

[14] D. Schmid, S. Lavery (eds.), *Will "Strategic autonomy 3.0" deliver?*, in *Social Europe*, 2023.

[15] Briefing of the European Parliament, *EU strategic autonomy 2013-2023. From concept to capacity*, 2022.

[16] Council of the European Union, *A Global Strategy for the European Union's Foreign and Security Policy*, 2016.

sion to position itself somewhere in between its natural predilection for free trade and more protectionist positions, prompted by the term "autonomy"[17]. In other terms, open strategic autonomy reflects the EU's approach to balancing its quest for strategic autonomy with its openness to international cooperation and multilateralism. This stance certainly entails a few contradictions, as expressed by the High Representative of the EU for Foreign Affairs and Security Policy J. Borrell: "We don't want to be protectionists, but we have to protect ourselves"[18].

## 3. *An overview of the 2023 strategic foresight report*

Against this backdrop, the 2023 Strategic Foresight Report[19] envisages the pursuit of sustainability in the context of the realization of Open Strategic Autonomy. As intended in the title of the report, *Sustainability and people's wellbeing at the heart of Europe's Open Strategic Autonomy*, the two goals are strictly intertwined in EU policy. According to the report, "The European Union is forging ahead with unprecedented action to achieve climate neutrality and sustainability. A successful transformation will limit the existential risks of climate change and the environmental crisis while strengthening the EU's open strategic autonomy and economic security. To succeed in this transformation, it is essential to recognize the links between the environmental, social, and economic dimensions of sustainability. This will enable Europe to pursue a forward-looking geopolitical strategy that successfully leverages its most valuable assets – namely, its unique social market economy and its position as the largest trading block in the world". The report sheds light on how sustainable development

[17] T. Gehrke, *EU Open Strategic Autonomy and the Trappings of Geoeconomics*, in *European Foreign Affairs Review*, 2022, 27, pp. 61-78.

[18] European External Action Service, *Why European Strategic Autonomy Matters*, 2020.

[19] Communication from the Commission to the European Parliament and the Council, *2023 Strategic Foresight Report: Sustainability and people's wellbeing at the heart of Europe's Open Strategic Autonomy*, Doc. COM/2023/376 final.

enhances the EU's resilience, innovation, and global influence, all of which are vital for achieving strategic autonomy in an interdependent world. Balancing these objectives requires careful policy coordination and integration, acknowledging that sustainable development is not only an environmental imperative but also a strategic asset for the EU's long-term security and prosperity. Succeeding this task is crucial for Europe's long-term competitiveness, social model, and global leadership in a net-zero economy, with benefits for current and future generations. However, the green transition, alongside the digital one, presents challenges and trade-offs that impact economies and societies on an unprecedented scale and speed. Acknowledging the interconnections between environmental, social, and economic aspects of sustainability is crucial for shaping a forward-thinking geopolitical approach. The 2023 Strategic Foresight Report delves into the intersections among structural trends that impact sustainability and places strong emphasis on the significance of advancing inclusive well-being, sustainability, and democracy to enhance Europe's global influence. Based on the Strategic Report's findings, this paper will focus on two specific subject matters. The first topic concerns the challenges to sustainability policies posed by the new emerging global order and reshaping of globalization, which will require an empowerment of the EU's global stance. This will imply the use of a wide set of instruments, namely a trade strategy that upholds sustainability interests through careful use of free trade agreements and the generalized scheme of preferences, an actual and comprehensive strategy to sustain developing countries in the green transition and a successful climate diplomacy aimed at developing meaningful international cooperation in sustainability issues. The second topic analysed concerns the pursuit of a net-zero economy, which will necessitate a deepening of the single market through a renewed use of industrial policy as well as a reinforcement of value chains and critical infrastructures. Furthermore, an effective net-zero economy will require both a strengthening of sustainable-related conducts in corporate governance and an increased market fairness that favours a level playing field with respect to the application of environment-related legislation.

## 4. *The Quest for Sustainability in an Increasingly Multipolar World. Challenges and Opportunities against the Backdrop of a New Globalization*

Over the last decade, several international crises have contributed to shaping a new international order, accelerating a new rise of geopolitics. The illegal annexation of Crimea by Russia followed by the full-scale invasion of Ukraine, Brexit, the migration and energy crisis, the danger of terrorism, the pandemic and the threat of autocracies outline an increasingly multipolar international order. In this scenario, the EU has been compelled to reorganize its internal and external policies, given its ambition to become a global player in the geopolitical arena has become a necessity and considering the international community's expectation of the EU as a promoter of peace and security[20]. The invasion of Ukraine notably put an end to the West's plan to create a rule-based international order. Not just Russia, but a growing number of countries, with different governance models and values, are challenging the Western-led global order. The so-called "Global South" (i.e. developing countries) increasingly demand more representation in international fora. China proposes itself as the head of this group that sees the Ukrainian conflict simply as another European war that has nothing to do with them[21]. Global South countries, especially African ones, have then become a strategic competition field, both in terms of a "battle of models" and a "battle of offers"[22] between Western countries and authoritarian regimes. Hence, there are today several decision-making centres, forming a multipolar system, in which tackling transnational issues such as climate change, climate justice and energy transition is more and more difficult. According to the European Commission, "the question Europe faces is a simple one: whether Europeans will

[20] Camera dei Deputati, *L'azione esterna e la politica estera e di sicurezza comune dell'UE*, Documentazione per le Commissioni, Attività dell'Unione Europea, 7, 2022.

[21] Indeed, many of these countries have not imposed sanctions on Russia. On the contrary, they continue to trade with it in pursuit of their own interests.

[22] Communication from the Commission to the European Parliament and the Council, *2023 Strategic Foresight Report: Sustainability and people's wellbeing at the heart of Europe's Open Strategic Autonomy*, Doc. COM/2023/376 final.

decide on their common destiny, or whether that destiny will be decided by others. Whether the European Union wants to be a pillar of the emerging multipolar global order or whether it will resign itself to being a pawn. The challenges that Europe faces today will not go away. Global competition will harden. The pace of technological change will increase. Geopolitical instability will grow. The effects of climate change will be felt. Demographic trends mean that migration to the EU will continue"[23]. Moreover, international trade has been strongly affected by rising geopolitical tensions, and has, in turn, contributed to fuelling them. Among the most prominent geopolitical issues are the trade war between China and the United States, with the EU as the needle in the balance of contention, along with the paralysis of the World Trade Organisation (WTO). Besides, the COVID-19 pandemic, together with infrastructural deficiencies and bottlenecks for strategic goods, have shown the lack in global supply chains of an essential feature: resilience. These tensions have led to the rise of protectionism and economic nationalism, which is reflected above all in the quest for autonomy in sectors deemed strategic (like semiconductors and strategic minerals). The events have led analysts to point to a substantial acceleration in the so-called "deglobalisation" trend. On closer scrutiny, however, we can observe that tensions in international relations are provoking the development of new phenomena, such as the diversification of supply chains, the decoupling of economies and the regionalisation of trade, i.e. the creation of an increasing number of preferential trade agreements. This is referred to as "selective globalisation", indicating the so-called "nearshoring" and "friendshoring" phenomena[24]. Regionalism, although envisaged by the WTO, undermines its foundations, as it contributes to complicating and rendering less transparent the framework of global trade relations. This new con-

[23] Communication from the Commission to the European Council, the European Parliament and the Council, *A stronger global actor: a more efficient decision-making for EU Common Foreign and king for EU Common Foreign and Security Policy*, Doc. COM(2018) 647 final.

[24] *Nearshoring* refers to the relocation of production to countries close to those of origin, or to countries other than China, but still with low labour costs. By *friendshoring*, on the other hand, we mean relocation to countries that are geopolitically allied.

text has contributed to the rise of geo-economic confrontation and has affected EU sustainable policies, hampering the stream of green goods and technologies and exposing the EU's strategic dependencies on critical raw materials crucial for its twin transition. It also forced the EU to partly relocate its productions in order to guarantee more resilient supply chains.

Given this context, the advancement of sustainable development objectives compels the EU to adopt a multi-faceted and integrated approach to policymaking. It needs to leverage its diplomatic, economic, and political influence on the global stage, so as to contribute to a more sustainable and equitable world. In concrete terms, it means it will have to adopt a wide array of instruments. Sustainable purposes lie at the heart of the new trade strategy presented in February 2021[25], which frames the EU's trade initiatives in the new context of open strategic autonomy. Within the framework of its trade policy, the EU can foster sustainability aims through a wide range of tools, with an approach defined as "governing through trade"[26]. First, it can incorporate sustainability clauses into Free Trade Agreements (FTAs), encouraging trade partners to adopt more sustainable practices involving environmental protection, labour standards and sustainable development. While these concerns have gradually found their way into EU trade agreements in recent times, the Commission has now committed to independently prioritize and advance them further[27]. The first, vivid example of this strategy was the EU-Korea free trade agreement[28]. It was the first of a new generation of European FTAs that included Trade and Sustainable Development (TSD) chapters dedicated to environmental and labour standards. To fully enforce the TSD chapter, the EU has launched

[25] Communication from the Commission to the European Parliament, the Council, the European Social and Economic Committee and the Committee of the Regions, *Trade Policy Review – An Open, Sustainable and Assertive Trade Policy*, Doc. COM(2021) 66 final.

[26] A. Marx, *Integrating Voluntary Sustainability Standards in Trade Policy: The Case of the European Union's GSP Scheme*, in *Sustanability*, 10(12), 2018.

[27] T. Gehrke, *EU Open Strategic Autonomy and the Trappings of Geoeconomics*, in *European Foreign Affairs Review*, 2022, 27, pp. 61-78.

[28] Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, 2011.

dispute proceedings against South Korea due to Korea's delay in the ratification of fundamental conventions of the International Labour Organisation (ILO). This case showed how the EU is willing to enforce sustainability interests through its trade policy[29]. At the same time, it reveals how this strategy can be contentious. Recently, the FTA with MERCOSUR has raised similar concerns. Negotiations between the EU and four of South America's largest economies have encountered a new obstacle as Brasilia criticized Brussels' efforts to introduce environmental obligations concerning deforestation into the export agreement[30]. The agreement, which underwent twenty years of negotiations and was ultimately finalized in 2019, has faced ratification delays. EU nations, led by France, have demanded a concrete commitment from Brasilia to safeguard the amazon forest before they will endorse it. To this extent, the European Commission has recently created the Chief Trade Enforcement Officer, a newly established role responsible for ensuring that trade partners fulfil their FTA obligations, which also encompass sustainability commitments, and taking enforcement actions when required[31]. Under the trade policy framework, the Generalised Scheme of Preferences (GSP) can also be used for sustainable commitments. The GSP is a unilateral and non-reciprocal scheme offering developing nations improved access to the majority of its goods, in the form of the partial or entire suspension of import tariffs. The GSP usually includes conditionality provisions aimed at promoting human rights and labour standards[32]. In its recent application, the Commission has been granting preferences to countries that meet conditions related to good governance and sustainable development[33], using the facilitated access to the Single market as a "carrot" to foster the

[29] M. Garcìa, *Sanctioning Capacity in Trade and Sustainability Chapters in EU Trade Agreements: The EU–Korea Case*, in *Politics and Governance*, 2022, 10(1), pp. 58-67.

[30] A. Bounds, B. Harris (eds.), *EU trade deal with South America delayed by row over environmental rules*, in *Financial Times*, 2023.

[31] European Commission, *Chief Trade Enforcement Officer*, 2021.

[32] C. Portela, *Are EU GSP Withdrawals and CFSP Sanctions Becoming More Alike*, in *European Foreign Affairs Review*, 2023, 28, pp. 35-52.

[33] T. Verellen, A. Hofer (eds.), *The Unilateral Turn in EU Trade and Investment Policy*, in *European Foreign Affairs Review*, 2023, 28, pp. 1-14.

achievement of its sustainable goals[34]. Although improvements in sustainability commitments have been achieved, a compliance gap has emerged[35], which needs to be properly addressed in the future.

As an instrument placed at the crossroads of different fields of EU external action[36], The GSP is strictly linked with EU development cooperation policy, a significant sector of the EU's external action to enhance global sustainability. In the forthcoming years, it will be fundamental for the EU to allocate a significant portion of EU development aid to projects and programs that promote sustainable development. It will have to provide technical assistance and capacity-building support to developing countries to help them implement sustainable policies and practices. This can include training, technology transfer, and knowledge sharing. In this regard, the new Global Gateway Strategy plays a pivotal contribution. Launched in December 2021, this is the EU strategy to harness public and private investment in infrastructure connections between the EU and its partners[37]. Sustainability is a core pillar of the Global Gateway strategy. It aims to narrow the international gap in infrastructure investments related to the global green and digital transition. It is also designed to make international trade more resilient to future shocks, improving supply chains around the world and helping partner countries fight climate change[38]. As it was argued[39], the Global

[34] Report from the Commission to the European Parliament and the Council on the Generalised Scheme of Preferences covering the period 2014–2015, Doc. COM/2016/029 final.

[35] Joint Staff Working Document: The EU Special Incentive Arrangement for Sustainable Development and Good Governance ('GSP+') Covering the Period 2014-2015, Accompanying the document – *Report from the Commission to the European Parliament and the Council Report on the Generalised Scheme of Preferences during the period 2014-2015*, Doc. SWD/2016/08 final.

[36] G. Siles-Brügge, *EU Trade and Development Policy Beyond the ACP: Subordinating Developmental to Commercial Imperatives in the Reform of GSP*, in *Contemporary Politics*, 2014, 20(1), pp. 49-62.

[37] Joint Communication to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank, *The Global Gateway*, Doc. JOIN(2021) 30 final.

[38] C. Shirley, *A gateway to partnership*, in *European Investment Bank*, 2023.

[39] C. Teevan, S. Bilal, E. Domingo, A. Medinilla (eds.), *The Global Gateway: A recipe for EU geopolitical relevance?*, in *The Centre for Africa-Europe relations*, 2022.

Gateway might give the EU a stronger geopolitical relevance. It represents the answer to China's Belt and Road Initiative and to other global rivals to restore the EU's position in the world, especially in Africa. If the EU manages to combine a new approach to development policies, more focused on concrete development issues of partners, with a long-term vision centred on sustainable objectives and values, it will overcome reputational issues in developed countries and therefore will be able to boost its global standing. This will allow the EU to increase its geopolitical influence and assertiveness, becoming a global leader in shaping global rules and standards regarding sustainable development issues. In addition, the EU can engage with other nations on climate change mitigation and adaptation, as well as advocate for the green transition of developing countries through an effective and assertive climate diplomacy in international fora. At the COP27 summit, the European Commission demonstrated ambition and flexibility to keep the goal of limiting global warming to 1.5°C[40]. The EU supported the creation of a "loss and damage" fund to support the most vulnerable countries affected by climate-related disasters[41]. This fund pertains to the issue of climate justice, which involves the responsibility of developed countries to provide financial support to developing nations, which are more vulnerable to the effects of global warming, considering their limited contribution to climate change[42].

## 5. *Achieving a net-zero economy within the context of open strategic autonomy. The EU's drive for a European industrial policy, market fairness and sustainable corporate behaviour*

The EU's endeavours to achieve a net-zero economy are a response both to the escalating climate crisis and to the changing geopolitical landscape, which requires bolstering the EU's resilience and

[40] European Commission, *EU at COP27 Climate Change Conference*, 2022.

[41] *Cop27: cosa c'è, cosa manca*, in *Istituto per gli Studi di Politica Internazionale* (ISPI), 2022.

[42] R. Bosticco, *Loss and damage: c'è speranza per la finanza climatica*, in *Affari Internazionali*, 2023.

capacity in strategic green technologies. As sustainability will constitute a crucial source of its long-term competitive advantage[43], the EU will have to safeguard its leading position in the global race to net-zero industry, considering also that the global market for net-zero technologies will triple by 2030[44]. In doing so, it must strengthen its industrial capabilities in critical technologies while making its strategic supply chains more resilient. In addition, as the world's largest trading bloc, it can leverage its social market economy to drive positive change, pushing both foreign and European operators to adopt high sustainability standards. Europe is currently a net-zero technology importer[45]. To advance its green and digital ambitions, the EU needs to enhance its industrial and technological capacity. This means, on the one hand, underpinning the creation of strategic value chains capable of strengthening the EU's supply-chain resilience[46], thus reducing and diversifying foreign dependencies in strategic sectors (i.e. semiconductors, raw materials, batteries, hydrogen). On the other hand, it entails a massive flow of investments to be directed into research, development and manufacturing to support the advancement of EU-based productions of net-zero technologies. Meanwhile, it becomes imperative to back the execution of an ambitious economic security strategy[47], capable of assessing future dependencies across strategic sectors. These actions are pivotal to fortifying the EU's open strategic autonomy as well as to sustaining its quest for a net-zero economy. In concrete terms, the EU is carrying out these objectives

[43] *Competitive Sustainability Index: New Metrics for EU Competitiveness for an Economy in Transition*, in *Cambridge Institute for Sustainability Leadership*, 2022.

[44] *Net Zero Industry Act: l'Ue gonfia i muscoli (industriali)*, in *Istituto per gli Studi di Politica Internazionale* (ISPI), 2023.

[45] A. Gili, *Clean Tech: l'UE risponde all'IRA (e a Xi)*, in *Istituto per gli Studi di Politica Internazionale* (ISPI), 2023. About a quarter of Europe's electric cars and batteries and almost all of its photovoltaic modules are imported. In the clean tech market, China is at the forefront, being facilitated by its abundance of metals and rare earths that are crucial in the energy transition industry.

[46] T. Gehrke, *EU Open Strategic Autonomy and the Trappings of Geoeconomics*, in *European Foreign Affairs Review*, 2022, 27, pp. 61-78.

[47] Joint Communication to the European Parliament, the European Council and the Council on the "European Economic Security Strategy", Doc. JOIN(2023) 20 final.

through a coordinated package of measures, which encompasses the European Green Deal Industrial Plan[48], the Net Zero Industry Act[49] (NZIA) and the Critical Raw Materials Act[50].

The Green Deal Industrial Plan is structured around four key elements. First, establishing a stable and streamlined regulatory framework, facilitating permits for production and assembly sites for clean tech products, thus accelerating European industrial production in these sectors. In second place, expediting financial access to allow state aid to increase production in these critical sectors. In this regard, the Commission has proposed the creation of a European Sovereignty Fund intended to avoid a fragmentation of the European Single market that could occur due to the larger fiscal space of some countries. Thirdly, strengthening skills development, thereby increasing labour market participation in green sectors. Finally, promoting open trade with like-minded countries and resilient supply chains through their diversification for critical raw materials, an objective pursued by the Critical Raw Material Act[51]. The NZIA, on the other hand, introduces an industrial strategy aimed at advancing clean tech manufacturing through a structured approach. To achieve this, it follows a four-step plan. Initially, it identifies eight specific net-zero technologies categorized as "strategic": solar photovoltaic and solar thermal, onshore wind and offshore renewables, batteries and storage, heat pumps and geothermal energy, electrolysers

[48] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, *A Green Deal Industrial Plan for the Net-Zero Age*, COM/2023/62 final.

[49] Proposal for a Regulation of the European Parliament and of the Council on establishing a framework of measures for strengthening Europe's net-zero technology products manufacturing ecosystem (Net Zero Industry Act), Doc. COM/2023/161 final.

[50] Proposal for a Regulation of the European Parliament and of the Council establishing a framework for ensuring a secure and sustainable supply of critical raw material, Doc. COM(2023) 160 final.

[51] The Critical Raw Materials Act mandates the EU to achieve specific targets by 2030. These include covering 10% of the consumption of critical minerals through domestic production, processing 40% of these minerals, and recycling at least 15% of them. Furthermore, it stipulates that no more than 65% of the EU's annual consumption of any critical raw material, at any significant processing stage, should originate from a single third country.

and fuel cells, sustainable biogas and biomethane, carbon capture and storage (CCS) and grid technologies. Secondly, it establishes an overarching target for EU domestic manufacturing in these technologies, aiming to fulfil at least 40% of the EU's annual deployment requirements by 2030. Thirdly, it outlines a governance framework, where member states propose Net-Zero Strategic Projects with minimal oversight from the European Commission. Lastly, the NZIA delineates a suite of policy tools, primarily at the national level, to support the selected NZIA projects[52]. These initiatives represent an answer to similar acts implemented by major trade competitors[53]. The return of industrial policy, albeit motivated by the quest for strategic autonomy in key green and digital sectors, has been deemed as a dangerous return to economic protectionism[54]. These plans risk indeed violating WTO rules, hence undermining free trade and cooperation in tackling global public goods such as the environment and the twin transition. To this extent, it will be crucial to preserve collaboration and promote industrial cooperation agreements, at least with like-minded countries. An example of this kind of cooperation is the recent EU-US Trade and Technology Council (TTC), which also handles topics like green technology and supply chain security[55]. Such actions will help conjugate autonomy and openness so as to reinforce both EU sovereignty and the achievement of a net-zero economy.

The EU has also been trying to leverage its single market to force trading partners to adopt similar green policies. Besides, it has been trying to bolster responsible corporate behaviour embedding human rights and environment-related concerns into companies' practices and corporate governance. That is the case with the Carbon Border Adjustment Mechanism (CBAM)[56], the Deforesta-

---

[52] D. Kleimann, D. Poitiers, N. Sapir, A. Tagliapietra, S. Véron, N. Veugelers, R. Zettelmeyer (eds.), *Green tech race? The US Inflation Reduction Act and the EU Net Zero Industry Act*, in *The World Economy*, 2023.

[53] Such as the Inflation Reduction Act (IRA) enacted by the United States.

[54] L. Tajoli, *Politiche industriali: paga giocare in difesa?*, in *Italian Institute for International Political Studies* (ISPI), 2023.

[55] Joint Communication to the European Parliament, the European Council and the Council, *A new EU-US agenda for global change*, Doc. JOIN(2020) 22 final.

[56] Regulation (EU) 2023/956 of the European Parliament and of the Council of 10 May 2023 establishing a carbon border adjustment mechanism, in OJEU L130 of 16.5.2023.

tion Regulation[57] and the Due Diligence Directive proposal[58]. The main goal of CBAM is to reduce the risk of carbon leakage, i.e. the relocation of carbon-intensive productions outside the EU, which would offset EU's efforts to reduce carbon emissions caused by European productions. Concretely, it means to impose tariffs on several imported polluted goods that are not subjected to carbon prices in their origin country. This will also help maintain a level playing field inside the internal market, allowing European undertakings subjected to carbon pricing to compete with foreign companies that are not exposed to the same rules. As for the Deforestation Regulation, which entered into force in May 2023, it establishes new rules aimed at minimizing the risk of deforestation and forest degradation associated with products entering or exported from the EU market. Accordingly, mandatory risk-based due diligence to assess and mitigate risks along supply chains is imposed on all operators and traders who place or make available in the single market a specific list of products whose production is linked to deforestation and forest degradation[59]. Finally, on February 2023 the European Commission adopted a proposal for a Directive on corporate sustainability due diligence. The goal is to introduce compulsory due diligence criteria for corporate supply chains. This legislation may hold EU firms accountable for breaches of human rights and environmental standards within their global supply networks. This could empower the Commission to intervene, potentially including measures such as blocking imports in response to such violations[60]. In a nutshell, these initiatives help promote responsible business practices, encouraging foreign and

[57] Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation, in OJEU L150 of 9.6.2023.

[58] Proposal for a Directive of the European Parliament and the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, Doc. COM/2022/71 final.

[59] L. Berning, M. Sotirov (eds.), *Hardening corporate accountability in commodity supply chains under the European Union Deforestation Regulation*, in *Regulation & Governance*, 2023.

[60] I. Zamfir, *Towards a Mandatory EU System of Due Diligence for Supply Chains*, in *European Parliamentary Research Service*, 2020.

European companies to adhere to ethical and sustainable business practices when operating in the single market.

## 6. *Conclusion*

Overall, this paper offers different insights into how the EU can successfully navigate the intersection of sustainable development and open strategic autonomy, ultimately contributing to global leadership and the well-being of current and future generations. It highlights the importance of an integrated approach that harmonizes these two critical dimensions to create a more sustainable and equitable future. The insights drawn from the 2023 Strategic Foresight Report have provided a valuable framework for understanding the challenges and opportunities ahead. Among the key areas of action outlined by the Strategic report, both the strengthening of the EU's offer on the global stage and the reinforcement of the Single market to Champion a net-zero economy are crucial to the EU's commitment to sustainable development. This paper emphasizes the interconnections between sustainability and strategic autonomy in the attainment of such objectives, highlighting how they can complement and reinforce each other. This duality underscores the complex yet crucial balancing act that the EU must navigate to tackle global environmental challenges while maintaining its autonomy and resilience as well as its commitment to multilateralism. If we are to achieve the sustainability transition, it will be crucial in the upcoming future to place sustainability at the heart of the EU's open strategic autonomy, so as to deliver on a triple promise: "a healthy planet and thriving environment; economic growth that is decoupled from resource use and environmental degradation; and an assurance that no person or place will be left behind"[61].

[61] Communication from the Commission to the European Parliament and the Council, *2023 Strategic Foresight Report: Sustainability and people's wellbeing at the heart of Europe's Open Strategic Autonomy*, Doc. COM/2023/376 final.

# THE EU APPROACH TO "GLOBAL VALUE CHAIN REGULATION": A SEISMIC SHIFT IN HOW EU TRADE POLICY INTERACTS WITH THE UNITED NATIONS SUSTAINABLE DEVELOPMENT GOALS?

*Josephine Norris**

## 1. *Introduction*

The link between global trade and sustainable development is firmly established, yet complex[1]. Economists have long made the case that the capacity of trade to promote income growth can in turn drive economic development. Lowering trade barriers can, therefore, contribute to multiple objectives reflected in the UN Sustainable Development Goals (SDGs). At the same time, economic growth resulting from an expansion in trade can have negative impacts on the environment and can adversely impact labour standards and human rights, particularly in those jurisdictions where there is weak enforcement. As a result, even though there is no specific SDG for "trade", there is broad consensus that trade as a policy, plays a significant role in the implementation of many of the SDGs. The interlinkages between trade policies and sustainable development are the subject of discussion and debate in a growing number of multilateral fora and the nexus between trade and sustainability is reflected both

---

* The information and views set out in this article are those of the author and do not necessarily reflect the official opinion of the European Commission or its Legal Service.

[1] The 2030 Agenda for Sustainable Development recognises international trade as an engine for economic growth.

in the international legal framework and within the legal framework of the European Union (EU)[2].

The EU's focus in the context of its trade policy has been on linking economic development to specific non-economic values such as the promotion of human rights, securing high levels of environmental protection, social justice, and labour standards. The principal "trade instrument" through which this "sustainability agenda" has been implemented has been the EU's bilateral agreements with third countries. This has been complemented, to an extent, by the EU's Generalized System of Preferences (GSP)[3].

In particular, since 2009, the EU's Free Trade Agreements (FTAs) have systematically included a Trade and Sustainable Development (TSD) chapter[4] and there are now 11 Agreements with such TSD chapters in place[5]. Other bilateral cooperation agreements also include provisions intended to promote non-economic values such as environmental protection[6]. Modern FTAs have also been preceded by Sustainability Impact Assessments which are intended to evaluate the potential social, environmental, and economic impacts of proposed trade agreements and ex post evaluations are being conducted in accordance with the European Commission's "Better Regulation" framework.

Trade policy is a constantly evolving domain shaped by the interplay of economic interests, political agendas, and societal values, both domestically and internationally. In recent years, global value chains (GVCs) have risen in prominence, a phenomenon which has

---

[2] Since the adoption of the Lisbon Treaty, EU law requires all relevant EU policies, including trade policy, to promote sustainable development. See Article 21 of the Treaty on European Union. See also Commission Staff Working Document, *Delivering on the UN's Sustainable Development Goals – A comprehensive approach*, SWD(2020) 400 final.

[3] 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, OJ L 303, 31.10.2012, pp. 1-82.

[4] The EU-Korea Free Trade Agreement was signed in 2009.

[5] These include the Agreements with New Zealand, the UK, Canada, and Korea. Bilateral cooperation agreements also generally contain clauses aimed at promoting the SDGs with partners, although these are often more general in scope.

[6] The EU has also entered into a large number of Economic Partnership Agreements (EPA) which include development mechanisms.

fundamentally altered patterns of trade in goods and services across the world. Over time, GVCs have also become increasingly complex and fragmented, often extending across multiple jurisdictions[7]. This has added to the difficulties in addressing the negative externalities associated with certain production processes which can create tensions with the achievement of the SDGs.

Against this economic backdrop and under the auspices of the "Green Deal", the EU has progressively been adopting regulatory "tools" which are designed to promote the Union's non-economic values by regulating along GVCs that are connected to the EU's internal market to address and mitigate risks. By setting market access conditions which integrate "sustainability" requirements, these new regulatory acts provide an additional means to mainstream the implementation of the SDGs across the EU's internal and external policy. Since these rules have significant implications for operators in third countries, they have a close nexus to the EU's trade policy, even if formally "owned" by another policy Directorate General[8]. Indeed these new acts have been described by the European Commission as "an ambitious set of additional autonomous instruments to support sustainable trade"[9].

Two of the most prominent of these new "green measures" are the Regulation on Deforestation Free Products (EUDR)[10] and the Regulation on a Carbon Border Adjustment Mechanism (CBAM)[11] both of which were adopted by the EU in 2023. But other regulatory

---

[7] OECD data published in 2023 confirms that there has been no general trend towards deglobalisation, and fragmentation remained at a historic high in 2019.

[8] Many of these new instruments have been developed and are managed by other Directorates General such as the Directorate General for Environment.

[9] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *The power of trade partnerships: together for green and just economic growth*, COM(2022) 409 final, p. 3.

[10] Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010, PE/82/2022/REV/1, OJ L 150, 9.6.2023, pp. 206-247, "the EUDR".

[11] Regulation (EU) 2023/956 of the European Parliament and of the Council of 10 May 2023 establishing a carbon border adjustment mechanism, PE/7/2023/REV/1, OJ L 130, 16.5.2023, pp. 52-104, "CBAM".

acts in the environmental sphere, including the EU Battery Regulation[12] and proposed rules on eco-design will also have impacts along value chains linked to the Union market for the specific products they address. More measures that could impact GVCs are foreseen or have been recently adopted[13]. Moreover, this regulatory model is being used to address a broadening range of core Union values. For example, in the field of social policy and labour standards, the European Commission's proposal for a ban on products made from forced labour seeks to integrate the Union's objectives to secure decent work for all through requirements that will also apply along value chains[14]. Equally, the horizontal due diligence obligations that will be introduced by the recently agreed Corporate Sustainability Due Diligence Directive will impact operators established inside and outside the Union and will require a holistic appraisal of environmental and human rights risks along the covered supply chains[15].

The EU's new regulatory approach has been met with criticisms, especially from low- and middle-income countries, questioning the consistency of these new rules with international law and their efficacy in delivering the objectives of the SDGs[16]. Certain EU legisla-

[12] Regulation (EU) 2023/1542 of the European Parliament and of the Council of 12 July 2023 concerning batteries and waste batteries, amending Directive 2008/98/EC and Regulation (EU) 2019/1020 and repealing Directive 2006/66/EC (Text with EEA relevance) OJ L 191 28.07.2023, p. 1.

[13] See for instance, Regulation (EU) 2024/1252 of the European Parliament and of the Council of 11 April 2024 establishing a framework for ensuring a secure and sustainable supply of critical raw materials and amending Regulations (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1724 and (EU) 2019/1020 published in the Official Journal on 3 May 2024.

[14] The Commission proposal for a regulation of the European Parliament and of the Council on prohibiting products made with forced labour on the Union market was published in September 2022. The final text was adopted by the European Parliament on 23 April 2024.

[15] The final text of the Corporate Sustainability Due Diligence Directive was approved by the European Parliament on 24 April 2024.

[16] See for instance the statements of India, South Africa, China and Brazil at the 28th Meeting of the Conference of the Parties of the United Nations Climate Change Convention – "COP 28" and the Communication FROM Argentina, Bangladesh, Barbados, Plurinational State Of Bolivia, Brazil, Cabo Verde, Colombia, Ecuador, Egypt, Honduras, Indonesia, Kazakhstan, Panama, Paraguay, Peru, South Africa, Uruguay, Bolivarian Republic Of Venezuela, and the African Group at the thirteenth Ministerial Conference of the World Trade Organization on 29 February 2024.

tion seeking to promote non-economic values has already been challenged both before the Court of Justice and in disputes brought to the World Trade Organization (WTO)[17]. Discussions in multilateral fora in relation to the EU's legislation are continuing.

The emerging "EU approach" to global value chain regulation marks a substantial evolution in the interplay between the EU's trade policy and the implementation of the SDGs. This transition from a predominant reliance on negotiated international agreements to a focus on market access requirements arguably reflects a seismic shift in how sustainability objectives are addressed. However, it is crucial to contextualise this transition within the broader landscape of geopolitical and societal dynamics which are shaping international trade policy.

This paper examines the core constituent elements of the EU's new "GVC regulations" and the comparative contribution that these instruments could make to the EU's efforts to secure the implementation of the SDGs.

## 2. *An "EU approach" to global value chain regulation*

In the years since the SDGs were developed there has been significant progress in mainstreaming global attachment to the values they represent. This is evidenced, *inter alia*, by the number of parties signatory to major multilateral initiatives such as the 2015 Paris Agreement on climate change and the growing number of states that have ratified the International Labour Organisation's core conventions[18]. Unsurprisingly therefore, the EU is not alone in seeking

[17] An action for annulment of the CBAM is pending before the Court of Justice of the European Union, alongside parallel actions against other energy and environmental measures adopted in the "Fit for 55 package". *European Union and certain Member States - Certain Measures concerning Palm Oil and Oil Palm Crop-Based Biofuels*, Panel report, WT/DS600/10, 30 April 2024 concerned the Renewable Energy Directive and certain aspects of the rules for determining the eligibility of palm oil-based biofuel to contribute to renewable energy targets have been held to give rise to arbitrary and unjustified discrimination.

[18] Effective implementation of the SDGs remains more elusive. See The Sustainable Development Goals Report Special edition, 2023, United Nations which

to address non-economic objectives linked to the implementation of the SDGs through its trade policy. Other jurisdictions have also sought to use their FTAs for precisely that purpose[19]. Increasingly, jurisdictions across the globe are also adopting other forms of regulation intended to address risks along supply chains in their territories[20].

However, not all jurisdictions are adopting the same regulatory model as that which is now being relied upon by the EU. Even though the stated policy objectives are similar (environmental protection, social rights, labour standards etc.), there is no multilaterally agreed approach as to how these values can be reinforced, including in the economic context of GVCs, which inevitably often have a cross-jurisdictional character[21]. As a result, a recurrent point of discussion relating to the EU's new regulatory acts is the extent to which these are perceived as "unilateral" measures, albeit that they are designed to address issues of "global concern".

Whilst the EU's new instruments are not identical in structure and design, it is possible to identify common elements reflecting an emerging "EU approach" to the regulation of GVCs linked to the internal market.

First, these EU legislative acts acknowledge in their recitals that they will impact economic operators established inside and outside the Union but regulate only those products exported from or placed on the Union market. In addition, the objectives they pursue are linked expressly to the furtherance of one or more of the SDGs. For

---

identifies that the latest global-level data and assessments from custodian agencies indicates that of the approximately 140 targets that can be evaluated, half of them show moderate or severe deviations from the desired trajectory.

[19] See J. Velut *et al.*, *Comparative Analysis of Trade and Sustainable Development Provisions in Free Trade Agreements*, London, LSE Consulting, 2022, available at https://trade.ec.europa.eu/doclib/docs/2022/february/tradoc_160043.pdf.

[20] See for instance the UK Modern Slavery Act, the Australian Modern Slavery Act, The Lacey Act (United States), the Frank Dodd Act (United States). Within the European Union, France, Germany and the Netherlands have adopted legislation addressing supply chains.

[21] There are also divergent approaches to addressing sustainability through FTAs. The EU approach relies to a greater extent on cooperation than that used in certain jurisdiction such as the US, which relies on sanctions.

example, the EUDR refers to the contribution it can make to meeting the goals regarding life on land (SDG 15), climate action (SDG 13), responsible consumption and production (SDG 12), zero hunger (SDG 2) and good health and well-being (SDG 3) whilst indicating that the rules will apply to products imported to and exported from the Union[22]. Therefore, it is by design rather than inadvertently that these measures impact production processes that may occur at least partially in third countries, but the focus is on shifting patterns of and ultimately regulating EU demand.

Second, the EU's regulatory acts are built around due diligence mechanisms and reporting requirements. Supply chain due diligence is essentially a risk-management process. It places the burden on companies and economic operators to identify, prevent, mitigate and account for the potential adverse environmental and social impacts of their specific practices. The due diligence rules themselves are not invented by the EU, but deliberately build upon existing soft law spearheaded by other multilateral fora, such as the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct[23].

The EU's reliance on due diligence as a regulatory tool is consistent with its earlier legislative initiatives such as the EU Timber Regulation and the FLEGT regime[24] which sought to address the illegal timber trade. The Conflict Minerals Regulation[25] which seeks to control trade in minerals from conflict areas is another example of legislation which uses a risk-based due diligence approach. In this sense, the new due diligence requirements set down in horizontal legislation such as the Corporate Sustainability Due Diligence Directive, as well as sectoral due diligence rules established under the EUDR and the prospective Regulation banning products made from forced la-

[22] See EUDR, recital (20) and recital (48).

[23] The EU had already established a practice of referring to OECD Guidance in Trade Agreements.

[24] Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market, OJ L 295, 12.11.2010, pp. 23-34.

[25] Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas, OJ L 130, 19.5.2017, pp. 1-20.

bour, extend existing mechanisms rather than create an entirely novel regulatory approach. What is new is the depth and breadth of the due diligence requirements as well as their mandatory character.

Third, the EU has adopted a regulatory model which applies requirements to products rather than to the geographic regions from which those products originate. The choice to focus on high-risk products rather than on high-risk regions was spotlighted during the inter-institutional discussions on the Commission's proposal for a Regulation banning products made from forced labour as, during the same period, the United States was in the process of adopting the Uyghur Forced Labor Prevention Act. Indeed, in contrast to the EU's product-oriented model, the US legislation applies restrictions to products originating in an identified region (Xinjiang, China).

Fourth, the EU relies on framework legislation which is designed to be supplemented by implementing acts. In some cases, such as the framework set down in the EU Battery Regulation, the number of implementing acts that will be required to make the legislation operational is significant. In other cases, it is the implementing rules which will determine the degree of due diligence which operators will be required to undertake. For instance, under the EUDR, the implementing rules on country benchmarking will determine whether a country or part thereof is "low" or "high" risk. Due diligence will be attenuated for "low risk" countries and parts thereof and the minimum level of compliance checks by competent authorities will also be lower.

This regulatory structure requires the Commission to comply with ambitious time frames to ensure that the relevant operational rules will be in place prior to the core obligations becoming applicable for operators and with sufficient lead time. This approach also means that the European Commission typically has a wide marge of delegated power to adjust the legislation. This is accompanied with legislated obligations of review.

Finally, many of the instruments envisage a phased and progressive entry into force. The logic underlying this phased approach is both to afford operators sufficient time to adapt and the Commission time to evaluate and eventually refine the application of the legislative framework and the implementing rules. For example, the

CBAM envisages a transitional and definitive phase of application. The former is intended to provide a means to obtain experience and hard data that can be used to refine the methodology for reporting before purchases of CBAM certificates become obligatory. In sum, there is an element of "learning by doing".

### 3. *Assessing the efficacy of GVC regulation: FTAs as a benchmark*

The novelty of the EU's efforts to regulate global value chains poses challenges in evaluating the effectiveness of this regulatory device in advancing the objectives of the SDGs. Due to the relatively short period during which many of these measures have been adopted or implemented, that assessment can primarily only be explored on a theoretical level.

On the other hand, as FTA's have been used by the EU as a vehicle to implement the SDGs through its trade policy for over a decade, the lessons learned from the mechanisms set down in TSD chapters provide a useful benchmark. Indeed, the effectiveness of TSD commitments in delivering on sustainability goals has been extensively evaluated, including in the framework of a comprehensive review of the EU's approach which commenced in 2017[26]. The shortcomings in the commitments relied on in TSD chapters that were identified in that review process provide a framework against which the anticipated comparative efficacy of the EU's new regulatory approach can be assessed.

One of the limitations in relying on sustainability provisions in FTAs is the variable nature of the commitments entered into with different bilateral partners. This is inherent to the nature of an FTA as a negotiated outcome which inevitably reflects the ambition of both parties to the agreement. This inevitably implies that the substantive "sustainability commitments" that are applicable between the EU and its global partners are not uniform. On a very general level, those

[26] See Commission Services' non-paper dated 26.02.2018, *Feedback and way forward on improving the implementation and enforcement of Trade and Sustainable Development chapters in EU Free Trade Agreements*.

trading partners who already apply higher standards for environmental and social protection have been more willing to subscribe to ambitious commitments than those who had lower domestic protections[27].

Equally, the commitments agreed in FTAs are not updated on a continuous basis. Therefore, older FTAs do not refer to newer multilateral agreements and negotiations to modernise FTAs can take years[28]. For example, the 2019 EU-Japan Economic Partnership Agreement is the first of the EU's FTA to include commitments to implementing the UN Framework Convention on Climate Change, as well as the Paris Agreement.

A second perceived shortcoming of TSD commitments relates to the overall "low" level of ambition in their normative scope. An international agreement, such as an FTA, is necessarily built on the consent of both parties. Consequently, sustainable development commitments tend to be set at the lowest common denominator. This is also reflected in the typology of the most common commitments in those chapters, which usually incorporate by reference obligations to which the parties have already adhered at the multilateral level. For instance, clauses in TSD chapters may confirm the parties' existing commitment to adhere to multilateral environmental agreements or the core ILO Conventions but do not necessarily create new, substantive obligations[29]. Whilst the EU has sought to secure an additional commitment to "effectively implement" these obligations, defining and enforcing this has proven more complex. Indeed, the TSD review process identified that implementation objectives needed to be more country-specific and that work towards securing effective adherence to international agreements such as the ILO conventions should continue[30].

---

[27] For recent examples of ambitious FTAs see EU-New Zealand and EU-UK.

[28] A recent example of a modernised FTA is the EU-Chile Agreement.

[29] For an analysis, see G. Marín Durán, *Sustainable development chapters in EU free trade agreements: Emerging compliance issues*, in *Common Market Law Review*, 2020, 57(4), pp. 1031-1068, https://kluwerlawonline.com/journalarticle/Common+Market+Law+Review/57.4/COLA2020715.

[30] For an example of this being implemented, on 20 March 2024, the European Commission and the Peruvian government agreed on a list of technical cooperation activities to implement the labour rights commitments taken under the EU-Colombia-Peru-Ecuador Trade Agreement.

A third and arguably the most significant limitation of sustainability commitments in the EU's FTAs has been their implementation and enforceability[31]. This has affected institutional structures and substantive obligations. For example, several recent ex-post evaluations have affirmed that not all the mechanisms for dialogue provided for in TSD chapters have been used by third country partners and overall, implementation has not matched expectations in some areas[32].

Equally, the EU's TSD chapters have, until recently[33], been subject to a specific form of dispute settlement and in particular, have been exempted from the general dispute settlement mechanism of EU FTAs, which has been modelled on that of the WTO. The limitations of these bespoke enforcement mechanisms for non-implementation of sustainability commitments in the EU's TSD chapters came to the fore in the dispute between the EU and South Korea over labour obligations[34]. The TSD review process launched in 2017 and which led to a new approach that was launched in 2022 is intended to address these issues[35].

## 4. *The comparative efficacy of regulating "global value chains"*

Assessed against these three criteria – (i) uniformity (ii) normative ambition and (iii) enforceability – the EU's new GVC instruments appear to have potential advantages.

---

[31] This is a factor which has been highlighted by the European Parliament.

[32] See for instance the Ex-post evaluation of the EU-SADC Economic Partnership Agreement Interim Report published on 11 December 2023, section 4.1 and Commission Staff Working Document Evaluation of the Impact of the Trade Agreement between the European Union and its Member States, of the one part, and Colombia, Ecuador and Peru, of the other part, SWD (2023) 328 final.

[33] A new approach to TSD chapters was launched in 2022 and is reflected in the EU's recent FTA with New Zealand.

[34] The Report of the Panel of Experts in the dispute between the EU and South Korea was published on 20 January 2021. For an analysis of the challenges of securing enforcement under FTAs, see M. Bronckers, G. Gruni, *Retooling the Sustainability Standards in EU Free Trade Agreements*, in *Journal of International Economic Law*, 2021, 24(1), pp. 25-51, https://doi.org/10.1093/jiel/jgab007.

[35] The European Commission has also put in place the Single Entry Point, a platform for stakeholders to submit complaints to the Commission concerning violations of sustainability commitments of trading partners. It also created the role of a Chief Trade Enforcement Officer.

First, since the obligations or "product requirements" apply along value chains connected to the EU internal market and are origin-neutral, there is not the same potential for variation in the scope and extent of the requirements that apply to individual trading partners. This has an "equalising" effect and hence ensures a greater degree of uniformity since "sustainability norms" will apply to all relevant products to be exported from or placed on the internal market.

Second, the level of ambition has been set by the EU in line with its domestic policy objectives and values. Since the regulatory standard has not been negotiated as it would be in the context of an FTA there is not an equivalent pressure to apply the lowest mutually agreeable approach. Indeed, the EU openly identifies that it is using these instruments to project its values and raise global ambition[36]. Moreover, since the new legislative instruments set market access conditions the requirements are mandatory as opposed to aspirational. For instance, under the EUDR it will only be possible to import or export the products in scope if it can be shown that they are deforestation-free[37]. The Battery Regulation likewise introduces a rule that batteries must meet sustainability requirements as a condition prior to their being placed on the internal market[38].

Finally, in terms of implementation and enforcement, the regulatory instruments are EU legislative acts as opposed to international agreements. Controls are conducted at the border and products may be refused access to the internal market or authorisation for export in the event that non-compliance is identified. Member States may sanction operators who do not comply, facilitating enforcement overall. This is fundamentally different to the implementation and enforcement mechanisms under FTAs, both in terms of the identity of the core actors, and the comparative lack of politicisation of any decision to impose a sanction.

These *prima facie* comparative strengths of the EU's GVC regulations as a means to reinforce sustainability objectives must, however, be balanced against the concerns that they have elicited, par-

[36] See for instance CBAM, recital (14) and EUDR recital (11).
[37] See EUDR, Article 3.
[38] See EU Battery Regulation, Article 4.

ticularly from low- and middle-income countries and SMEs. The criticisms of the EU's new measures have been articulated around two axes. First, the effectiveness of this regulatory approach for furthering the objectives SDGs. Second, the consistency of such an approach with existing norms of international law, including the rules established under the WTO Agreements.

In particular, the lack of differentiation between global partners has been identified as potentially problematic[39]. Since the increased compliance costs and overall regulatory burden associated with GVC regulations will not impact all participants in GVCs to the same extent, it has been argued that this type of regulatory model may, conversely, diminish the competitiveness of inputs currently produced by operators, including smallholders, in developing countries. Indeed, as is encapsulated in the term the "green squeeze", there are fears that the pressure or constraints faced by small businesses or operators in complying with the EU's "green rules" will ultimately preclude them from participating in GVCs connected to the EU internal market[40]. Theoretically, this could in turn drive trading patterns towards destination markets with lower standards, a risk exacerbated by the characteristics of GVCs which are essentially global production networks driven by efficiencies and comparative advantage. Should this occur, the intended global upgrading of environmental and labour standards may not, in fact, materialise or could be undermined. Similarly, it has been argued that the selection of specific products on which to impose sectoral requirements fails to sufficiently account for the fact that sustainability issues vary depending on where those products originate. Finally, the fact that en-

[39] In a statement from the 30th BASIC (Brazil, South Africa, India and China) Ministerial Meeting on Climate Change held on 8 April 2021, ministers expressed "grave concern regarding the proposal for introducing trade barriers, such as unilateral carbon border adjustment, that are discriminatory and against the principles of Equity and principles of Equity and CBDR-RC [Common but Differentiated Responsibilities and Respective Capabilities]" (South African Government, 2021). Statements have also been made in various WTO Committees and at the meeting of the Conference of the Parties of the United Nations Framework Convention on Climate Change.

[40] See UNCTAD Division on International Trade and Commodities, *A European Border Adjustment Mechanism: Implications for Developing Countries*, 14 July 2021. https://unctad.org/system/files/official-document/osginf2021d2_en.pdf.

forcement is largely divested to Member States has prompted concerns that a different degree of scrutiny will apply resulting in loopholes or shifts in trading patterns depending on which entry points to the EU market are considered to be more or less stringent in their controls[41]. Ultimately, the efficacy of GVC regulation as an instrument for "sustainable trade" will depend on the ability of operators in third countries to effectively implement the rules and hence remain active in those GVCs linked to the EU's market.

## 5. *Conclusion*

FTAs have historically served as the primary means by which the EU has leveraged its trade policy to advance the implementation of the SDGs. However, the emergence of "GVC regulation" using market access combined with due diligence as a tool for promoting "sustainable trade" introduces both opportunities and challenges. This is prompting a re-evaluation of how best to develop the relationship between economic development and other fundamental objectives such as robust environmental protection, climate change mitigation, and the promotion of decent work for all.

The shift from reliance on bilateral and multilateral agreements to the adoption of "unilateral" legislation signifies a significant departure in regulatory strategy and alters the dynamics of how the EU's trade policy intersects with the pursuit of non-economic values. It can be understood, at least in part, as a response to the limited ability to achieve consensus at the international level to establish new rules. Indeed, despite the EU's ongoing commitment to multilateralism, institutions like the WTO have encountered difficulties in enacting reforms to their core legal frameworks[42]. Consequently, jurisdictions with ambitious agendas, particularly concerning pressing global issues such as climate change and forced labour, have tak-

[41] This issue was already identified as a problem in the review of the EU Timber Regulation and FLEGT.

[42] WTO members began negotiating agricultural trade policy reforms in 2000. Despite reaffirming a commitment to making progress in these negotiations, concrete outcomes have proven to be elusive.

en the initiative to implement domestic mechanisms while global discussions grind on[43].

While it is premature to definitively assess the effectiveness of GVC regulation in advancing the implementation of the SDGs, this regulatory model clearly offers certain advantages. However, the degree to which these could be undermined if the bar to implementation is set too high remains uncertain. Importantly, the EU's pivot towards "unilateral" regulation of global value chains as a tool for mainstreaming the SDGs internally and externally is not occurring in isolation from other policy developments. Specifically, this transition is taking place concurrently with efforts to reinforce and upgrade TSD chapters in new FTAs, to increase the opportunities for stakeholders to raise their concerns and to facilitate implementation including through financing[44]. In this regard, these novel mechanisms complement rather than overhaul the EU's TSD toolkit.

Finally, while the emergence of autonomous "GVC regulation" arguably represents a seismic change within the sphere of "sustainable trade", it is merely one component of broader transformations that are currently reshaping the entire landscape of global trade policy. Indeed, geopolitical tensions and apprehensions over economic security are influencing "sustainable trade" policies worldwide.

[43] For example, the US unsuccessfully proposed language on forced labour to be included in the WTO Agreement on Fisheries Subsidies in the context of Illegal Unreported and Unregulated (IUU) fishing, but has adopted domestic legislation to limit the importation of products that may be associated with forced labour in certain regions of the world.

[44] See for instance: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *The power of trade partnerships: together for green and just economic growth*, COM(2022) 409 final: "All these trade-related policy instruments and initiatives form part of a comprehensive response to global sustainability challenges and go hand-in-hand with trade agreements".

# DEFORESTATION AND SUSTAINABILITY IN THE COCOA SECTOR: ANALYSING THE ROLE OF THE EU'S DEFORESTATION REGULATION

*Aishwarya Narayanan*

## 1. *Introduction*

Europe is the largest manufacturer and exporter of chocolate in the world. Valued at EUR 42 billion in 2022, the European chocolate market accounted for about 76% of global chocolate sale[1].

Cocoa beans constitute the key ingredient for the manufacture of chocolate. They grow on the cocoa plant (*Theobroma cacao*), which requires high temperatures and heavy rainfall for its cultivation[2]. Given these climatic requirements, cocoa is cultivated in the tropical belt, clustered within 10 degrees on either side of the equator[3], with the world's key cocoa growing regions located in West Africa and South America. Of these, West Africa produces the major chunk of standard quality cocoa beans (*Forastero* variety), while South America produces fine-flavour cocoa beans (*Criollo* or

[1] Centre For The Promotion Of Imports From Developing Countries (CBI), *What is the demand for cocoa on the European market*, https://www.cbi.eu/market-information/cocoa/what-demand#:~:text=Forecasts%20indicate%20a%20growth%20perspective,global%20grindings%20in%202020%2F2021 (accessed on 31 October 2023).

[2] International Cocoa Organisation (ICCO), *Growing cocoa*, https://www.icco.org/growing-cocoa/ (accessed on 31 October 2023).

[3] *Ibid.*

*Trinitario* varieties)[4]. Europe imports most of its cocoa beans from West Africa, with the top suppliers being Ivory Coast (39%), Ghana (11%) and Nigeria (10%)[5]. Given the leading role played by Ivory Coast and Ghana in the supply of cocoa beans to Europe, the analysis in this paper is limited to West Africa.

The cocoa sector constitutes an integral part of the economy in the producing countries and has played an important role in driving their socio-economic development. In Ivory Coast, it contributes to 15% of the gross domestic product[6], employs 25% of the population[7], and accounts for 40% of the total export earnings[8]. In Ghana, it contributes to 3.5% of the gross domestic product[9], employs 17% of the population, and accounts for 30% of the total export earnings[10]. Cocoa farming is typically carried out by smallholder farmers in family-run farms measuring around 2 to 4 hectares[11].

The cocoa sector has historically been associated with a number of sustainability challenges, ranging from deforestation and environmental degradation to labour issues and social concerns around poverty, working conditions and human rights. Recent times have witnessed a sharp rise in the clamour for sustainability, including in the cocoa sector, triggering responses from actors

---

[4] ICCO, *Fine flavour cocoa*, https://www.icco.org/fine-or-flavor-cocoa/ (accessed on 31 October 2023).

[5] CBI, *Demand for cocoa*, *loc. cit.*

[6] *Cocoa exporters in Ivory Coast fear default as bean shortage hits hard*, in *Africanews*, 14 February 2023, https://www.africanews.com/2023/02/14/i-coast-domestic-cocoa-exporters-allegedly-fearing-default-amid-bean-shortage//#:~:text=Cocoa%20farming%20employs%20nearly%20600%2C000,15%25%20of%20the%20nation's%20GDP.

[7] *Cocoa exporters fear default*, loc. cit.

[8] *Cote d'Ivoire wants to capture greater share of cocoa value chain*, in *Africanews*, 10 March 2023, https://www.africanews.com/2022/10/03/cote-divoire-wants-to-capture-greater-share-of-cocoa-value-chain//.

[9] GCB Bank Limited, *Sector industry analysis: 2022 Cocoa sector report*, https://www.gcbbank.com.gh/research-reports/sector-industry-reports/120-cocoa-industry-in-ghana-2022/file (accessed on 31 October 2023).

[10] H. Hudson, *Ghana is cocoa, cocoa is Ghana*, in *The OPEC Fund for International Development*, 2 June 2022, https://opecfund.org/news/ghana-is-cocoa-cocoa-is-ghana.

[11] S.K. Gayi, K. Tsowou, *Cocoa industry: Integrating small farmers into the global value chain*, at *United Nations Conference on Trade and Development*, 21 April 2016, https://unctad.org/system/files/official-document/suc2015d4_en.pdf.

across the supply chain – first from industry players, and more recently in the form of public legislation. While sustainability initiatives have grown in number and prominence, it is far from certain that they have succeeded in having the desired impact. Despite their best intentions, the gaping power differential between the market-leading standard-setters and the on-ground smallholder producers has generated a plethora of challenges in the producing countries, often posing a threat to the very livelihood of the producers. Though measures are already being taken to minimise the adverse impact of such sustainability initiatives, a more holistic approach which duly accounts for challenges at all stages of the cocoa supply chain and caters to the interest of the actors involved at the grassroots level would be necessary to ensure sustainability in the sector.

This paper is divided into 3 parts. The first part looks at the various sustainability issues in the cocoa sector. The second part provides an overview of the various sustainability initiatives that have been introduced in the cocoa sector, including the European Union's (EU) *Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the making available on the Union market and export from the Union of certain commodities and products associated with deforestation and forest degradation* (EUDR). The third part looks into the impact of such sustainability initiatives, responses to such initiatives, evaluates how the EUDR fits into the broader sustainability landscape in the cocoa sector and discusses the possible way forward. This is followed by the conclusion.

## 2. *Sustainability concerns in the cocoa sector*

The cocoa sector has historically been associated with a number of sustainability issues, as illustrated in figure 1[12].

[12] See A.C. Fountain, F. Heutz-Adams, *2022 Cocoa Barometer*, in *CocoaBarometer.org*, December 2022, p. 7, https://cocoabarometer.org/wp-content/uploads/2022/12/Cocoa-Barometer-2022.pdf.

Sustainability concerns can broadly be classified into environmental issues (such as deforestation and forest degradation) and social issues (relating to human rights and labour conditions), both of which find their base in farmer poverty[13].

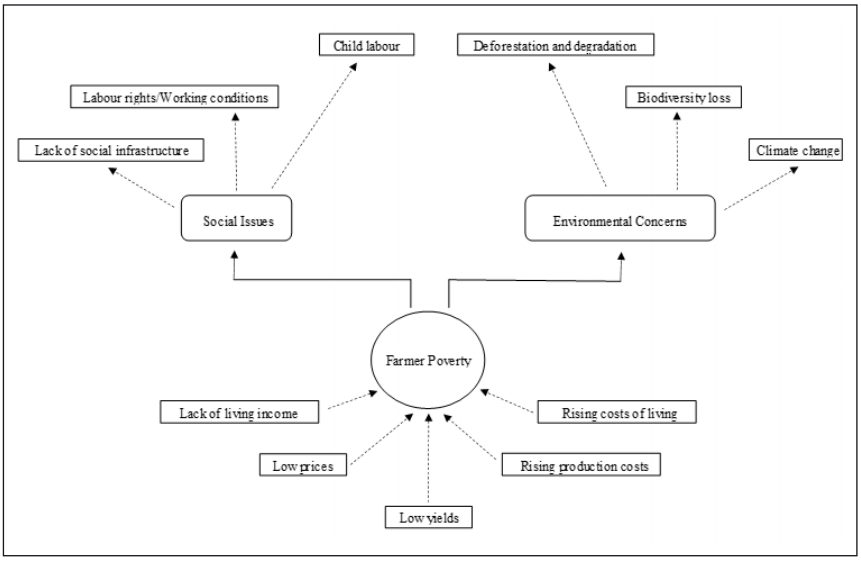



Fig. 1. Sustainability issues in the cocoa sector.

Deforestation, in particular, has been a key sustainability concern associated with the cocoa sector. In Ivory Coast, for instance, it is estimated that around 70% of illegal deforestation is related to cocoa farming[14] and almost 40% of the cocoa crop is grown illegally in national parks and protected forests[15]. A major cause of the deforestation problem is the nature of the cocoa crop itself, which is

[13] *Ibid*.

[14] World Wildlife Fund, *Bittersweet: Chocolate's impact on the environment*, in *World Wildlife Magazine*, Spring 2017, https://www.worldwildlife.org/magazine/issues/spring-2017/articles/bittersweet-chocolate-s-impact-on-the-environment.

[15] F. Pearce, *The real price of a chocolate bar: West Africa's rainforests*, in *Yale Environment 360*, 21 February 2019, https://e360.yale.edu/features/the-real-price-of-a-chocolate-bar-west-africas-rainforests.

typically grown in monocultures that require the removal of all surrounding trees[16]. Further, cocoa has traditionally been cultivated in a highly decentralised manner, in small plots of land held and managed by smallholder farmers – a system which has continued over time[17].

However, farmer poverty has been the root cause of sustainability challenges in the cocoa sector. Most cocoa farmers in Ghana earn around USD 1 per day, while those in Ivory Coast earn around USD 0.78 per day – falling well below the World Bank's extreme poverty threshold of USD 1.90 per day[18]. The absence of a decent wage both creates and exacerbates other problems such as deforestation, child labour and gender inequality[19]. The continuing use of child labour in particular is a result of insufficient labour availability and lack of resources to hire adult labour, which necessitates recruiting from within the family[20]. Gender inequality is also rampant in the cocoa sector, with women's labour on cocoa farms often being invisible and unpaid, further compounded by lack of access to land title or ownership[21].

Another key structural consideration that has shaped sustainability concerns in the cocoa sector is the long and complex nature of the supply chain. A simplified version of a typical cocoa supply chain is indicated in figure 2[22].

---

[16] F. Pearce, *The real price of a chocolate bar: West Africa's rainforests*, in *Yale Environment 360*, 21 February 2019.

[17] *Ibid*.

[18] G. Bhutada, *Cocoa's bittersweet supply chain in one visualisation*, at *World Economic Forum*, 4 November 2020, https://www.weforum.org/agenda/2020/11/cocoa-chocolate-supply-chain-business-bar-africa-exports/.

[19] A.C. Fountain, F. Heutz-Adams, *2022 Cocoa Barometer*, in *CocoaBarometer.org*, December 2022, p. 11.

[20] *Ibid.*, p. 17.

[21] *Ibid.*, p. 65.

[22] See P. Bastide, *Atlas on regional integration in West Africa: Economy series*, in *ECOWAS-SWAC/OECD*, September 2007, p. 6, https://www.oecd.org/swac/publications/39596493.pdf.

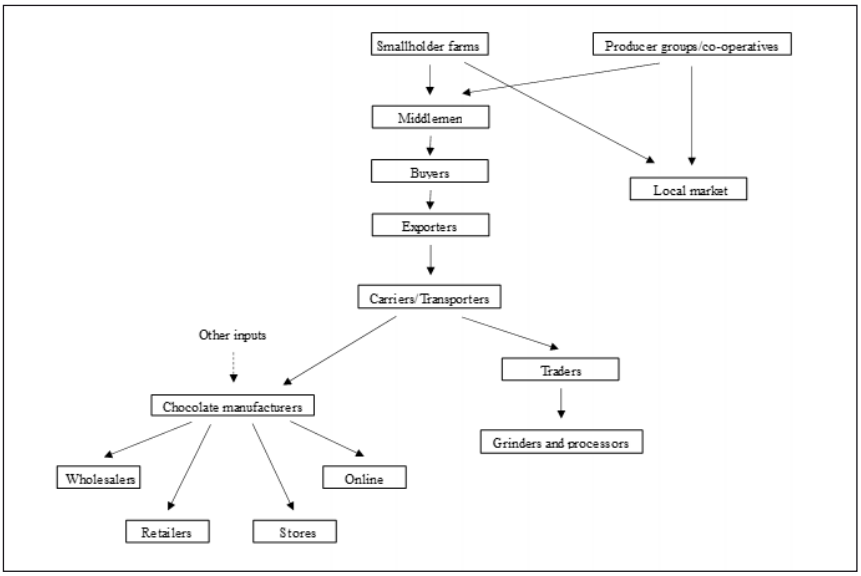



Fig. 2. Cocoa supply chain.

The cocoa supply chain suffers from a curious anomaly, where the production side is highly fragmented and cultivation is split amongst thousands of smallholder farmers, while the consumption side is tightly consolidated and concentrated, with the purchase and manufacturing stages being dominated by a handful of industry giants at the global level[23]. The stark power imbalance between the upstream and downstream actors is further compounded by a major mismatch in the distribution of value across the supply chain, with a major chunk of value creation happening in the downstream stages on account of the intangible leverages possessed by the downstream actors (such as brand value, marketing and reputation)[24]. Given the

[23] S.K. Gayi, K. Tsowou, *Cocoa industry: Integrating small farmers into the global value chain*, at *United Nations Conference on Trade and Development*, 21 April 2016, pp. 13-14.

[24] Food and Agriculture Organisation (FAO), Bureau d'Analyse Societale pour une Information Citoyenne (BASIC), *Comparative study on the distribution of value in European chocolate chains* 2020, p. 121, https://lebasic.com/wp-content/uploads/2020/07/BASIC-DEVCO-FAO_Cocoa-Value-Chain-Research-report_Advance-Copy_June-2020.pdf.

oligopolistic market structure, farmers find themselves in a low bargaining position and need to be better integrated into the global value chain to get a fairer share of the total value generated in this lucrative industry[25].

### 3. *Sustainability initiatives in the cocoa sector*

The last 3 decades have witnessed the proliferation of a vast number of sustainability initiatives in the cocoa sector[26], which broadly fall into 3 groups: (a) corporate sustainability initiatives floated by chocolate manufacturers or large-scale retailers; (b) voluntary certification schemes such as Fairtrade and Rainforest Alliance, which involve certification by independent third parties on fulfilment of certain stipulated conditions; and, more recently, (c) public legislation in the jurisdiction of consumption. This paper focuses on the EUDR as an example of recent sustainability legislations.

Sustainability-related legislations are unilateral and autonomous measures implemented by consuming countries that typically stipulate the minimum requirements for placing products on the domestic market. With the growing realisation of the dangers presented by environmental degradation and climate change, the EU has been at the forefront of driving the global push towards sustainability and has adopted a package of measures termed as the "European Green Deal", which aim to eliminate the emission of greenhouse gases by 2050, decouple economic growth from resource use and ensure that no person and place is left behind in this effort[27]. The EUDR is an important component of such efforts.

---

[25] S.K. Gayi, K. Tsowou, *Cocoa industry: Integrating small farmers into the global value chain*, at *United Nations Conference on Trade and Development*, 21 April 2016, p. 18.

[26] A concise timeline and summary of the various initiatives is available at ICCO, *Cocoa sustainability initiatives landscape*, https://www.icco.org/cocoa-sustainability-initiatives-landscape/ (accessed on 31 October 2023).

[27] European Commission, *A European Green Deal*, https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal_en (accessed on 31 October 2023).

The EUDR[28] was promulgated with the slated objective of reducing EU consumption-driven global deforestation and forest degradation caused by the expansion of agricultural land, thereby reducing greenhouse gas emissions and biodiversity loss[29]. The EUDR, which entered into force on 29 June 2023[30], applies to a specified list of products – cattle, *cocoa*, coffee, oil palm, rubber, soya and wood, along with their derivative products (Relevant Products)[31] – that have the highest contribution to EU-driven deforestation in the world, irrespective of their place of production.

Broadly speaking, the EUDR stipulates certain market access conditions for the Relevant Products, imposes extensive due diligence obligations on operators and traders, and introduces a country benchmarking system for risk assignment. In terms of market access conditions, the EUDR allows the Relevant Products to be placed on or exported from the EU market only if they are deforestation-free (i.e., produced on land that has not been subject to deforestation after 31 December 2020)[32], comply with local laws in the producing country (including environmental, social and labour laws)[33], and are covered by a detailed due diligence statement[34]. The due diligence exercise requires extensive information collection (including the exact geo-localisation co-ordinates of all plots of land where the Relevant Products were produced, along with the date or time range of production)[35], detailed risk assessment (based on factors such as the assignment of risk to the producing country[36] and

[28] The final version of the EUDR, as published in the *Official Journal of the European Union* on 9 June 2023, is available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32023R1115.

[29] European Commission, *Questions and answers on new rules for deforestation-free products*, 17 November 2021, https://ec.europa.eu/commission/presscorner/detail/en/qanda_21_5919.

[30] European Commission, *Green Deal: New law to fight global deforestation and forest degradation driven by EU production and consumption enters into force*, 29 June 2023, https://environment.ec.europa.eu/news/green-deal-new-law-fight-global-deforestation-and-forest-degradation-driven-eu-production-and-2023-06-29_en.

[31] Article 1, paragraph 1 of the EUDR.

[32] Article 2, paragraph 13 of the EUDR.

[33] Article 2, paragraph 40 of the EUDR.

[34] Article 4, paragraph 2 of the EUDR.

[35] Article 9, paragraph 1(d) of the EUDR.

[36] Article 10, paragraph 2(a) of the EUDR.

prevalence of deforestation in the producing country[37]) and risk mitigation (through model risk management[38] and independent auditing[39]). Moreover, the EUDR introduces a 3-tier risk-based classification of producing countries as low, standard and high risk[40], which will determine the extent of due diligence required and the level of scrutiny that the Relevant Products will be subject to[41]. The risk categorisation will be announced by competent EU authorities through implementing legislation and there is little guidance in the EUDR as to how such categorisation will be determined.

With respect to timelines, the EUDR provides for an implementation period of 18 months for large operators and traders (effectively 30 December 2024)[42], with a slightly longer transition period of 24 months for micro and small enterprises (effectively 30 June 2025)[43].

## 4. *Impact, analysis and way forward*

### 4.1. *Potential impact of the EUDR*

The introduction of a wide range of sustainability initiatives in the cocoa sector has had far-reaching impact on the various actors involved in the supply chain. At the upstream level, this has resulted in increased compliance costs, even leading to complete exclusion from the supply chain. At the downstream level, it has resulted in increased oversight and more direct supply chain management.

### 4.2. *Increasing costs and exclusion*

Ever since the proposal was first floated, the EUDR has raised a number of concerns amongst producing countries. For instance, the

[37] Article 10, paragraph 2(f) of the EUDR.
[38] Article 11, paragraph 2(a) of the EUDR.
[39] Article 11, paragraph 2(b) of the EUDR.
[40] Article 29, paragraph 1 of the EUDR.
[41] Article 13, paragraph 1 of the EUDR.
[42] Article 38, paragraph 2 of the EUDR.
[43] Article 38, paragraph 3 of the EUDR.

governments of Ivory Coast and Ghana have warned against the risk of increasing poverty amongst cocoa farmers if the EUDR is adopted without considering its adverse impact on the income of smallholder farmers[44]. These fears are not unfounded as the corporate drive for zero deforestation cocoa has already resulted in the development of independent mapping and traceability systems by leading chocolate manufacturers[45], which allows them to identify and exclude "non-compliant" farmers from their supply chains[46]. The excluded farmers are left without livelihood and with no means to seek redress and compensation.

Aside from complete exclusion, the stringent traceability requirements imposed under the EUDR could potentially result in a restructuring of the upstream stages of the supply chain by dividing the producer base into 2 distinct factions – one which caters exclusively to strictly regulated markets, and another which caters to other (developing country or domestic) markets. The emergence of a specialised producer base would drive farmers out of the lucrative international market while also completely defeating the purpose of the EUDR by incentivising leakage and aggravating deforestation. There are also growing concerns that measures such as the EUDR could turn out at best to be ineffective in practice, and at worse, do more harm than good[47]. Corporate sustainability initiatives have failed to meaningfully increase farmer productivity or profits, with farmers conversely being forced to bear the extra costs of implementation[48], which is further compounded by the soaring cost of production and cost of living over the years[49]. There are legitimate fears that the EUDR could go down the same route.

---

[44] Cote d'Ivoire-Ghana Initiative, *Press Release*, 18 February 2022, https://cocobod.gh/news/press-release-cote-divoire-ghana-initiative.

[45] A. Chandrasekhar, *West Africa braces for tough sustainable cocoa rules in Europe*, in *Swissinfo*, 2 August 2022, https://www.swissinfo.ch/eng/business/west-africa-braces-for-tough-sustainable-cocoa-rules-in-europe/ 47713236.

[46] A. Chandrasekhar, *West Africa braces for tough sustainable cocoa rules in Europe*, *loc. cit*.

[47] S. Savage, *Who's going to pay for an ethical chocolate bar?*, in *Politico*, 24 November 2022, https://www.politico.eu/article/ghana-ivory-coast-cocoa-farmers-price-eu-supply-chain-cleanup-sustainability/.

[48] S. Savage, *Who's going to pay for an ethical chocolate bar?*, loc. cit.

[49] *Ibid*.

There has also been considerable backlash from the chocolate industry against the increased cost and burden of complying with the stringent traceability requirements under the EUDR[50]. To facilitate meeting the new requirements, chocolate manufacturers have pledged to share their cocoa farm mapping data with the governments of Ivory Coast and Ghana, by consolidating the various individual databases into an overarching database[51]. Combined with national efforts to create a comprehensive cocoa database, this move should help streamline the process and reduce compliance costs. However, the anti-trust aspects of such pre-competitive collaboration will need to be duly addressed.

### 4.3. *Proliferation of schemes and standards*

As things stand, the EUDR will operate in conjunction with extant sustainability initiatives and voluntary certification schemes. The increasing prevalence of third-party certification standards in the EU market has turned voluntary sustainability standards into *de facto* mandatory requirements. The compliance costs associated with obtaining such certification are often passed down to the producers instead of being borne by the consumers, while the certifications themselves make a negligible difference to the overall value distribution in the supply chain[52]. Given the many overlaps and contradictions between the various sustainability initiatives, producers often face the choice of either bearing the additional cost of obtain-

[50] European Cocoa Association, *Position paper on the proposed EU regulation on deforestation and forest degradation*, 18 February 2022, https://www.eurococoa.com/wp-content/uploads/20220218-ECA-position-paper-on-the-proposed-EU-Regulation-on-deforestation-free-products-FINAL.pdf.

[51] A. Chandrasekhar, *European chocolate makers agree to share data with West Africa*, in *Swissinfo*, 15 September 2022, https://www.swissinfo.ch/eng/business/european-chocolate-makers-agree-to-share-data-with-west-africa/47888676#:~:text=European%20chocolate%20makers%20agree%20to%20share%20data%20with%20West%20Africa,-%C2%A9%20Keystone%20%2F%20Gaetan&text=-Chocolate%20and%20cocoa%20companies%20in,improve%20traceability%20and%20reduce%20deforestation.

[52] Food and Agriculture Organisation (FAO), Bureau d'Analyse Societale pour une Information Citoyenne (BASIC), *Comparative study on the distribution of value in European chocolate chains* 2020, p. 137.

ing a variety of certifications for different buyers, or limit sales to a specified set of buyers who accept a common certification.

The promulgation of the EUDR raises questions over the need for and relevance of voluntary certification schemes in the presence of mandatory legislation. In terms of obligations, the EUDR goes far beyond third-party certification and requires direct engagement by operators and traders with their upstream supplier base to ensure traceability in their supply chains. Going forward, more clarity will be needed on how the various sustainability initiatives can interact with one another and streamline processes to ease compliance obligations across all levels of the supply chain.

### 4.4. *Responses to sustainability initiatives*

The proliferation of sustainability initiatives in the cocoa sector has resulted in the emergence of a corresponding range of responses by the various stakeholders involved in the industry.

### 4.5. *National and regional efforts*

The cocoa sector in both Ivory Coast and Ghana is tightly regulated at the domestic level with heavy government involvement across all stages of the industry[53]. The Cote d'Ivoire-Ghana Cocoa Initiative was created in 2020, with the vision to "transform the current cocoa sector into a prosperous and sustainable one" by ensuring decent wages for farmers, saving forests, protecting fundamental human rights, and promoting better social and environmental practices[54]. Contemporaneously, the African Organisation for Standards introduced the ARS-1000 series of standards in 2020, with a view to promoting and maintaining a framework for the production of sustainable cocoa beans in Africa, which *inter alia* focussed on promot-

[53] The relevant regulatory body in Ivory Coast is the Coffee and Cocoa Board, and that in Ghana is the Ghana Cocoa Board.

[54] Cote d'Ivoire-Ghana Cocoa Initiative, *About us*, https://www.cighci.org/about-us/ (accessed on 31 October 2023).

ing farmer organisations, improving farmer income and maintaining cocoa quality[55].

### 4.6. *Measures addressing deforestation and poverty*

Specific measures are being undertaken in the producing countries to tackle deforestation and mitigate the anticipated adverse impact of the EUDR. In Ivory Coast, a new forest code was enacted in 2019 that zoned protected forests within its territory and emphasised on building public-private partnerships to address deforestation[56]. In Ghana, the government introduced the Cocoa Management System in 2020 as a comprehensive national project to ensure traceability of cocoa beans to the farm level[57]. The project envisages the compilation of a comprehensive cocoa database by collecting extensive socio-economic data on farmers, mapping all cocoa farms in Ghana, creating a national biometric database, and digitising payments for all cocoa transactions[58]. Crucially, in a marked departure from existing practice, the project will allow farmers to contest the exclusion of their produce from international supply chains and provide for a redressal mechanism[59].

Stepping beyond national borders, collaboration has already been underway between the chocolate industry and the producing countries to address deforestation-related concerns in the cocoa sector. In 2017, the governments of Ivory Coast and Ghana joined hands with 36 leading chocolate manufacturers to launch the Co-

---

[55] African Organisation for Standardisation, *African Standard DARS 1000-1*, 2020, https://members.wto.org/crnattachments/2020/TBT/GHA/20_6088_00_e.pdf.

[56] F. Pearce, *The real price of a chocolate bar: West Africa's rainforests*, in *Yale Environment 360*, 21 February 2019.

[57] IDH, *COCOBOD makes strides towards fully traceable cocoa through the new cocoa management system in Ghana*, 16 December 2020, https://www.idhsustainabletrade.com/news/cocobod-makes-strides-towards-fully-traceable-cocoa-through-the-new-cocoa-management-system-cms-in-ghana/.

[58] K. Hayford, *10 things to know about Ghana's cocoa management system*, in *Cocoa Post*, 8 September 2020, https://thecocoapost.com/10-things-to-know-about-ghanas-cocoa-management-system/.

[59] A. Chandrasekhar, *West Africa braces for tough sustainable cocoa rules in Europe*, loc. cit.

coa and Forests Initiative under the aegis of the World Cocoa Foundation[60]. The project saw the planting of almost 10 million trees in Ivory Coast and the restoration of about 230,000 hectares of forest land in Ghana[61].

The fight against poverty has been another key component of efforts to bring about sustainability in the cocoa sector. Recognising that farmer poverty lies at the heart of all sustainability issues in the sector, the governments of Ivory Coast and Ghana introduced a "living income differential" (LID) in 2019 as a collaborative effort towards developing a pricing mechanism that enables farmers to earn a living wage through the cultivation of cocoa for export purposes[62]. This differential amounts to USD 400 per tonne of cocoa, above the floor price set by the respective governments at the beginning of the harvest season[63]. However, since its introduction in the 2020/2021 harvest season, the LID has failed to make a major impact on farmer incomes, both on account of overproduction of cocoa that has driven prices down and the reluctance of chocolate manufacturers to pay the price premium by either circumventing these markets or negotiating with governments to lower the floor price[64].

### 4.7. *Addressing sustainability issues in the cocoa sector*

Given that sustainability in the cocoa sector is a broad and multi-faceted issue, addressing sustainability concerns in the sector also needs a comprehensive and wholistic approach. Deforestation, although important, is just one part of the problem. The broader

---

[60] World Cocoa Foundation, *Cocoa & Forests Initiative*, https://www.worldcocoa foundation.org/initiative/cocoa-forests-initiative/ (accessed on 31 October 2023).

[61] M. Igini, *How does cocoa farming cause deforestation*, in *Earth.org*, https://earth.org/how-does-cocoa-farming-cause-deforestation/ (accessed on 31 October 2023).

[62] E. Blackmore, T. Berger, *Civil society perspectives on the living income differential for cocoa producers*, at *International Institute for Environment and Development*, 23 August 2021, https://www.iied.org/civil-society-perspectives-living-income-differential-for-cocoa-producers.

[63] *Ibid*.

[64] *Ibid*.

discourse around sustainability needs to factor in the myriad social issues that lie at the heart of the problem in order to find effective solutions that cater to the interests of all the actors involved in the sector. In fact, leaders in the West African producing countries have explicitly recognised that the issues of deforestation and child labour are intricately linked to the living conditions of farmers, which need to be addressed at the forefront to bring about sustainability in the cocoa sector[65]. The costs and benefits of the various alternatives to address sustainability concerns in the cocoa sector are discussed below, along with the role of the EUDR and its contribution to the sustainability landscape.

### 4.8. *Addressing deforestation*

Deforestation is undoubtedly one of the most visible sustainability-related problems that is associated with the cocoa sector and has received significant corporate and regulatory attention over the years. A major contributor to this problem is the nature of cultivation of the cocoa plant. In a system centred around smallholder farming, clearing out forests is but a natural option for farmers looking to expand their production area, and thus increase income. One possible solution is a switch from smallholder farming to large-scale consolidated plantations which are either state-run or commercially managed. Such a change would not only simplify traceability procedures, but would also drive down deforestation by clearly establishing criteria for setting up cocoa plantations. However, such a switch would not only transform the very structure of the cocoa supply chain at the upstream end, but would also require significant reforms in existing land rights and tenure, formulation of a committed rural development strategy and concrete relocation and rehabilitation measures for the displaced farmers[66].

As far as the EUDR is concerned, despite its best intentions, the emphasis on merely stopping deforestation is not enough by it-

[65] Cote d'Ivoire-Ghana Initiative, *Press Release*, 18 February 2022.

[66] A.C. Fountain, F. Heutz-Adams, *2022 Cocoa Barometer*, in *CocoaBarometer.org*, December 2022, p. 18.

self to tackle the problem. Given the extent of deforestation already caused by cocoa cultivation, it is important to promote restoration and reforestation to allow rainforests to regenerate over time[67]. In this vein, an approach that incentivises reforestation may be more beneficial from a purely environmental perspective than one which exclusively sanctions deforestation.

### 4.9. *Role of legislation and corporate action*

Legislation has conventionally been used as a tool to introduce change and provide solutions to a range of problems, including sustainability concerns. However, legislation by itself can only be a guiding principle, while the crux of the problem lies in profit-maximising corporate behaviour. In such a scenario, the solution is not to penalise the producers, but to ensure that corporations act in a manner that does not worsen an already bad situation. The EUDR seeks to serve exactly this purpose. However, there is a need to go beyond mere corporate accountability and adopt an enabling approach that assists producer states with creating the conditions that allow for the adoption of sustainable practices to rectify the problems that plague the cocoa sector. As it currently stands, the EUDR *prima facie* appears to be a punitive regulation, that seeks to penalise, albeit indirectly, producing countries for their failure to control deforestation. Nowhere does it provide for the creation of an enabling environment that will help eliminate the root cause of the problem. What is needed in addition to stringent regulation is targeted financial and technical assistance along with capacity building, so as to incentivise and enable producing countries to meet their obligations.

### 4.10. *Cost and pricing issues*

Cost and pricing mechanisms adopted by downstream actors in the supply chain that fail to account for the social value of cocoa have been a key reason why sustainability measures in the cocoa sec-

[67] *Ibid.*, p. 36.

tor have largely failed. Even targeted measures such as the introduction of LID in Ivory Coast and Ghana have seen little success simply because industry players choose to source cocoa from other parts of the world, where they are exempt from paying the price premium. One possible solution to this problem is setting a fixed price for cocoa at the global level, to ensure that buyers do not have the option to source cheaper cocoa from elsewhere[68]. The creation of a level playing field could focus on involving other producer countries in a fully transparent and rule-based price-setting process, which ensures that cocoa prices are determined as a function of the actual costs of production[69].

In addition to increasing cocoa prices at the base level, it is also important to address the asymmetry in the cocoa value chain. The need of the hour is to create mechanisms to ensure a fairer distribution of value along the supply chain, by raising consumer awareness and ensuring that the costs of compliance are borne by the end consumers, and not the producers.

### 4.11. *Comprehensive solutions*

Given the broad and complex nature of the sustainability problem, ensuring sustainability in the cocoa sector requires concerted congruence between good agricultural practices, good governance policies and good purchasing practices[70]. Systemic change is required for cocoa to become truly sustainable in a manner that affords decent wages to the producers, does not damage the environment, and respects human rights[71]. Attempts at bringing about sustainability in the cocoa sector have traditionally focused on increasing pro-

[68] E. Blackmore, T. Berger, *Civil society perspectives on the living income differential for cocoa producers*, at *International Institute for Environment and Development*, 23 August 2021.

[69] O. Boysen et al, *Earn a living? What the Cote d'Ivoire-Ghana cocoa living income differential might deliver on its promise*, in *Food Policy*, January 2023, p. 114, https://www.sciencedirect.com/science/ article/pii/S0306919222001580.

[70] A.C. Fountain, F. Heutz-Adams, *2022 Cocoa Barometer*, in *CocoaBarometer.org*, December 2022, pp. 106-113.

[71] *Ibid.*, pp. 6-7.

ductivity, diversifying farmer income and increasing farm size. However, such approaches have limited to no impact in the absence of higher cocoa prices[72]. Sustainability challenges need to be addressed across all relevant avenues, such as addressing poverty and raising income levels, providing farmers with easily accessible financing options, developing strong social and rural infrastructure, providing access to quality education, increasing farmer representation in the decision-making process and raising community awareness[73].

At a broader level, it is important to not lose sight of the inherent power imbalance in the global cocoa industry that lies at the very heart of sustainability issues and allows them to perpetuate. The structure of the industry is such that both money and decision-making power are vested in certain parts of the world, and there is a gaping lack of representation in the discussions around sustainability[74]. With decision-making led by consuming countries and powerful industry players, both the producing countries and cocoa farmers are left out of the conversation on a matter that has a direct impact on their economies and livelihoods[75]. Viewed in this light, the EUDR only serves to reinforce the existing power imbalance and further exclude the affected communities from the decision-making process.

### 4.12. *Measures in producing countries*

Since cocoa farmers form the very backbone of global cocoa production, it is essential to support the farming business and better integrate farmers into the global value chain for attaining a sustainable cocoa economy[76]. This integration exercise will require targeted legal and economic reform in producing countries, in the form of stronger competition law and policy, optimal macroeconomic policies, and increased access to information about the downstream

[72] *Ibid.*, pp. 22-27.
[73] *Ibid.*, pp. 116-117.
[74] *Ibid.*, pp. 70-73.
[75] *Ibid.*, pp. 70-73.
[76] S.K. Gayi, K. Tsowou, *Cocoa industry: Integrating small farmers into the global value chain*, at *United Nations Conference on Trade and Development*, 21 April 2016, pp. 30-31.

stages of the supply chain[77]. This must be accompanied by policies that are specifically designed to support cocoa farmers, such as the formation of commercially oriented farmer organisations, facilitating access to financing options, and encouraging the differentiation of cocoa products[78].

## 4.13. *Possible way forward*

In a nutshell, a truly sustainable cocoa sector will be one which can effectively address concerns relating to farmer poverty, environmental protection and social factors. Each of these limbs will need to be addressed together in a fair, comprehensive and wholistic manner to take one step closer towards achieving the goal of sustainable cocoa. Figure 3 sets out an overview of the type of measures that will be required to address sustainability issues in the cocoa sector.

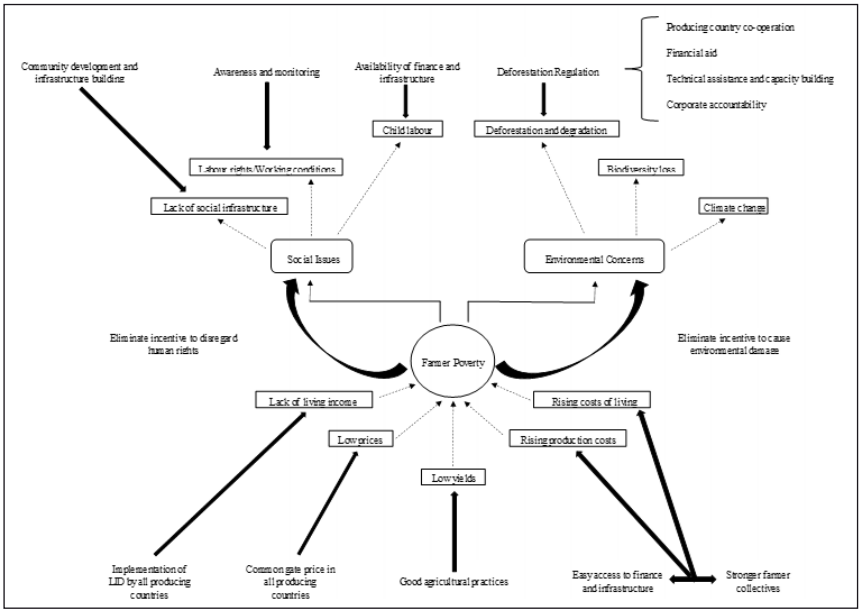



Fig. 3. Solutions for sustainable cocoa.

[77] *Ibid.*, pp. 28-29.
[78] *Ibid.*, pp. 32-34.

As figure 3 indicates, eliminating farmer poverty must lie at the heart of any sustainability initiatives in the cocoa sector, since it directly impacts the incentive to both cause environmental damage and disregard human rights. In this context, the EUDR is but one amongst the wide range of measures that must be simultaneously implemented to address sustainability challenges. Each of these measures will require concerted action from and co-operation amongst a wide range of stakeholders – producing and consuming country governments, corporations, civil society organisations, intermediaries and the farmers themselves.

With respect to the deforestation problem in particular, there is no doubt that deforestation is one of the biggest threats to the cocoa sector and amongst the greatest challenges of our times. However, trying to arrest deforestation either exclusively or primarily through externally-imposed legislation such as the EUDR risks creating a new set of problems. As it stands, the EUDR is likely to impact the sustainability landscape in the cocoa sector as indicated in figure 4, creating both new opportunities and new challenges in its wake. As a symptomatic treatment exclusively geared towards arresting deforestation, the EUDR fails to adequately address (and runs the risk of further exacerbating) the underlying problem of farmer poverty, which forms the very core of sustainability issues in the cocoa sector.

In order to truly make an impact and achieve any tangible progress on the laudable mission to bring about sustainability in the cocoa sector, the EU will need to actively work with the key actors that form the backbone of the industry. With its abundant capital and resources, backed by the might of its sheer size and leverage in the global market, the EU is well-placed to direct the path of the cocoa sector in the years to come. However, despite its many strengths, the EUDR is perhaps somewhat ill-suited as a standalone policy instrument for achieving this goal. Instead, a more inclusive and participatory approach would better serve the purpose that the EU is trying to achieve, in so far as the issue of deforestation in particular and sustainability in the cocoa sector in general is concerned. Only time will reveal the true impact and potential of the EUDR, and interesting times lie ahead as we move through the transition and implementation phase.

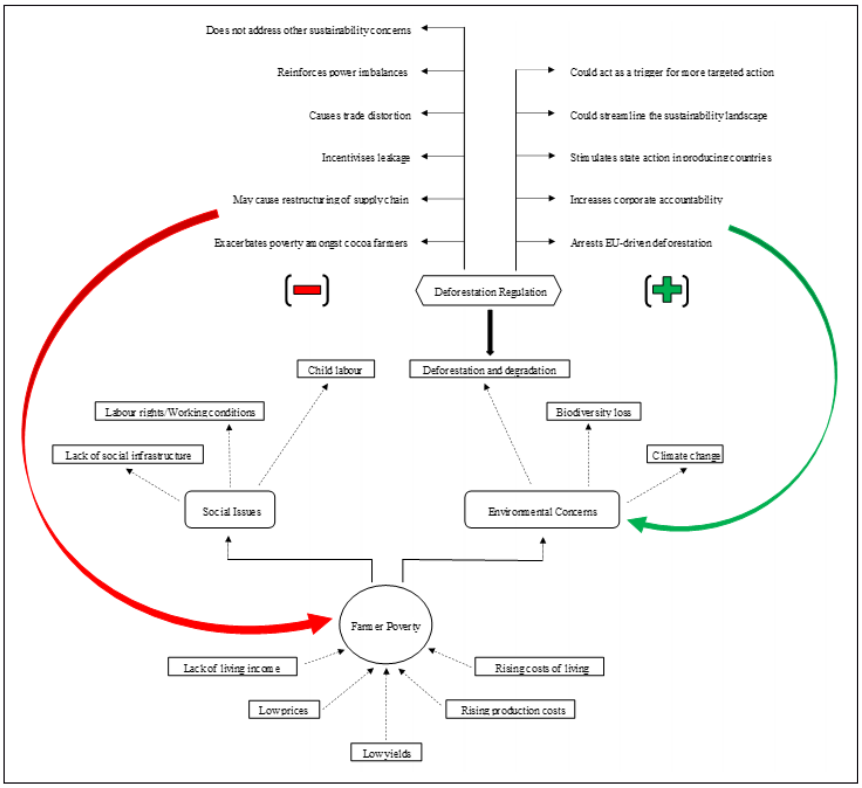



Fig. 4. Impact of the EUDR.

## 4.14. *Conclusion*

The cocoa sector has historically been plagued by a range of sustainability issues. While farmer poverty lies at the heart of most sustainability challenges in the sector, these issues have manifested in the form of environmental and social concerns, with deforestation being the most visible amongst them.

A plethora of sustainability initiatives have proliferated in the recent past in a bid to address sustainability concerns in the sector. The EUDR is the latest amongst such initiatives and is one of the key components of the EU's recent push towards sustainability. With its stringent due diligence obligations and market access conditions, it is expected to be a game-changer in tackling global deforestation.

However, despite its best intentions, there are several concerns surrounding the implementation of the EUDR. As it stands, the EUDR risks going down the same route as other sustainability initiatives in the cocoa sector – well-meaning, but potentially resulting in the unintended negative consequences of increasing compliance costs and being exclusionary. As a standalone measure, it does little to address farmer poverty, which is the root cause of most sustainability concerns in the cocoa sector.

The cocoa farmer is the key actor in the cocoa story and must be at the heart of any initiatives undertaken to address sustainability issues in the sector. Excluding the producer from the solution only serves to further widen the gap between the producer and the consumer in an industry which is already characterised by a stark imbalance of bargaining power. A wholistic approach will be needed to ensure that sustainability is fostered across all facets of the cocoa sector. Towards this end, concerted action and targeted intervention is necessary to ensure that each of the limbs of farmer poverty, environmental protection and social issues are simultaneously addressed to provide for truly sustainable cocoa. The EUDR has the potential to be a step in the right direction, but much will depend on actual implementation and the extent to which it can mobilise and galvanise action across the other stakeholders involved in the cocoa sector, particularly at the grassroots level in the producing countries.

# BORDER CARBON ADJUSTMENT MECHANISMS: LEGAL AND POLITICAL BARRIERS, AND THE REFORM OF THE WTO

*Goran Dominioni and Alessandro Monti**

## 1. *Introduction*

Products traded internationally account for a large share of global greenhouse gas (GHG) emissions – and thus, the trading system has been widely regarded as a problem with respect to the global response to climate change. In this chapter, we take up the issue of the alignment of the WTO's vision, rules, and procedures with the world community's commitment to climate change action. We focus, in particular, on the issue of policy-induced GHG leakage[1], i.e. the displacement of GHG emissions from countries that increase the stringency of domestic GHG policies to low-standard countries. Increasing the stringency of domestic GHG policies often imposes additional costs on domestic producers, thereby re-

* We are grateful to Elisa Baroncini, Kasturi Das, Dan Esty, Kateryna Holzer, Jan Yves Remy, Joel Trachtman, and the other participants to the workshops in Bogotà, Bologna, and Talloires, for helpful comments. We are particularly grateful to the Remaking the Global Trading System for a Sustainable Future Project for supporting the writing of an earlier version of this chapter, which was circulated as a White Paper under the title *Internalizing Climate Externalities from Internationally Traded Goods: Challenges and Way Forward for Border Carbon Adjustment Mechanisms*. The usual disclaimer applies.

[1] M. Grubb, N.D. Jordan, E. Hertwich *et al.*, *Carbon Leakage, Consumption, and Trade*, in *Annual Review of Environment and Resources*, 2022, 47(1), pp. 753 ff.

ducing their competitiveness and incentivizing shifts in the production and investments (and related GHG emissions) to low-standard countries. As a result, GHG emission reductions achieved by a more stringent GHG jurisdiction are offset by increased emissions in a low-standard jurisdiction. Hence, concerns for GHG leakage can hamper climate action in high-ambition jurisdictions, threatening the achievement of commitments to deep decarbonization set in the Paris Agreement.

International trade contributes to GHG leakage by allowing the shift of production – and related investments – of GHG-intensive goods from high- to low-standard jurisdictions. To the extent that WTO rules and practices prevent high-ambition jurisdictions from addressing carbon leakage, there is a fundamental tension between the climate and trade regimes, which puts the latter under pressure.

In this chapter, we argue that a first step to reconciling the climate and trade regimes is to ensure that the prices of internationally traded products reflect the *climate-related harm* of producing and consuming these goods and we analyze possible ways to achieve this. In particular, we analyze the possibility of adopting border carbon adjustment (BCA) mechanisms on imports to price GHG emissions from international trade. In essence, BCA mechanisms apply a charge on the GHG emissions embedded in – i.e., released in the production and (sometimes) the consumption of – imported products. This charge aims to level the playing field between domestic producers and their competitors in low-standard jurisdictions, thereby reducing GHG leakage risks.

Academic and grey literature has discussed various instruments that can address GHG leakage[2]. This chapter focuses on BCA mechanisms due to their prominence in the policy debate. The EU has recently adopted the Carbon Border Adjustment Mechanism (CBAM)[3]. Other jurisdictions have also announced their intention

[2] C. Böhringer, C. Fischer, K.E. Rosendahl *et al.*, *Potential impacts and challenges of border carbon adjustments*, in *Nature Climate Change*, 2022, 12(1), pp. 22 ff.

[3] Regulation (EU) 2023/956 of the European Parliament and of the Council of 10 May 2023 establishing a carbon border adjustment mechanism, OJ L 130, 16.5.2023, pp. 52-104.

to follow a similar path, including Canada, the United Kingdom, and the United States[4]. Furthermore, BCA mechanisms are sometimes seen as instruments to support the creation of an international sub-global agreement on climate change mitigation (a so-called climate club). The discussion on implementing a climate club is now high on the G7 agenda[5].

After delineating the role for BCA mechanisms to internalize climate externalities and – thereby – address carbon leakage, we analyze potential legal and political barriers to implementation and discuss possible ways to resolve these conflicts. Lastly, we broaden the discussion to potential reforms of the vision, rules, and procedure of the WTO system, to better align it with the sustainability agenda.

## 2. *Addressing GHG leakage concerns through border carbon adjustment mechanisms*

This section discusses GHG leakage and the contribution of international trade to the problem. It then looks at how BCA mechanisms can help address GHG leakage related to international trade. Lastly, this section discusses the rationale for focusing on pricing GHG emissions embedded in internationally traded goods at the social cost of carbon – i.e., the economic cost of emitting an additional ton of GHGs – as a *first step* to addressing GHG leakage and reconciling the trade and climate regimes.

### 2.1. *GHG leakage and international trade*

The stringency of current GHG policies diverges significantly across countries, reflecting differences in policy priorities and resources available to address the climate problem. These variations can result in GHG leakage. In particular, an increase in the stringency of climate change mitigation policies in a given jurisdiction can raise

[4] M. Jakob, S. Afionis, M. Åhman *et al.*, *How trade policy can support the climate agenda*, in *Science*, 2022, 376(6600), pp. 1401 ff.

[5] G7, *G7 Statement on Climate Club*, 2022.

costs for domestic producers, reducing their competitiveness in the domestic and foreign markets. This reduction in competitiveness can shift production and investments (and the related GHG emissions) to low-standard jurisdictions. International trade enables these shifts, for instance, by allowing consumers and producers in high- standard countries to consume goods produced in low-standard ones.

GHG leakage can hamper climate action in high-ambition jurisdictions due to the fact that climate harms are global – albeit not evenly distributed – and do not depend on where GHG emissions occur. Thus, countries that wish to increase the stringency of domestic GHG policies risk losing competitiveness while not reaping the climate benefits of their policies. This is daunting for climate action given the bottom-up approach embraced in the Paris Agreement, which calls for climate ambition at the domestic level, as well as in light of with respect to the more general expectation for developed countries to take the lead in mitigating climate change, in line with the Common but Differentiated Responsibilities and Respective Capabilities (CBDR-RC) Principle.

Ex-post econometric analyses from emission-intensive and trade-exposed industries under the EU emission allowances trading scheme do not provide strong evidence of carbon leakage[6]. However, the low price of emission allowances under this scheme in the periods considered in these studies can explain these results. Ex-ante numerical simulations confirm the theoretical intuition that an increase in the stringency of GHG emission policies will result in carbon leakage. In particular, these studies indicate that carbon leakage would be 5-30 percent, depending on assumptions on, for instance, carbon price level and the elasticity of the supply of fossil fuels[7]. Thus, countries that plan to increase their ambition on climate mitigation action have legitimate concerns that their efforts will be significantly offset by GHG emissions increases abroad.

---

[6] S.F. Verde, *The impact of the EU emissions trading system on competitiveness and carbon leakage: the econometric evidence*, in *Journal of Economic Surveys*, 2020, 34(2), pp. 320 ff.

[7] These are reviewed in C. Böhringer, C. Fischer, K.E. Rosendahl *et al.*, *Potential impacts and challenges of border carbon adjustments*, in *Nature Climate Change*, 2022, 12(1), pp. 22 ff.

In light of the above considerations, the next sub-section will discuss how BCA mechanisms can help address GHG leakage.

### 2.2. *Border carbon adjustments mechanisms and GHG leakage*

By charging a price on GHGs embedded in imported products, BCA mechanisms can *level the playing field* between domestic and foreign producers selling in the importing country.

Furthermore, when carbon adjustment mechanisms also apply to exports by the implementing country (e.g., exported goods are exempted from domestic GHG policies), domestic producers can more easily compete in foreign markets. Both options can, in principle, help address competitiveness concerns and related GHG leakage issues. However, this chapter only focuses on imports, as the GHG benefits of export BCA mechanisms are not fully clear[8].

Furthermore, BCA mechanisms incentivize the uptake of more ambitious climate policies in trading partner countries – thereby reducing GHG leakage – in two ways. On one hand, the exporting country's government has an incentive to reduce the *compliance cost* in export sectors by implementing new climate policies. These could include, for instance, energy efficiency policies that help close the energy efficiency gap and subsidies for deploying environmental technologies.[8] On the other hand, BCA mechanisms can be structured so that the price applied to each tonne of GHGs embedded in imported products equals the *difference* between the stringency of domestic and foreign climate policies. Under a BCA mechanism structured in this way, the exporting country can implement revenue-raising climate policies (such as carbon taxes) to reduce the carbon price applied by the foreign jurisdiction on its export and *collect revenues* that would otherwise accrue to the importing jurisdiction[9].

---

[8] G. Dominioni, D.C. Esty, *Designing Effective Border-Carbon Adjustment Mechanisms: Aligning the Global Trade and Climate Change Regimes*, in *Arizona Law Review*, 2023, 65, pp. 1 ff.

[9] *Ibid.*

Existing research suggests that BCA mechanisms can address carbon leakage and competitiveness concerns effectively[10]. A meta-analysis of more than 30 studies finds that BCA mechanisms can reduce leakage by more than one-third on average (from 14 percent to 6 percent)[11]. However, the effectiveness of these mechanisms may depend on the specific design of the measure. Thus, jurisdictions interested in implementing a BCA mechanism should think carefully about its design. In any case, the next sub-section identifies a number of rationales for BCAs as a tool to internalize climate externalities from GHG emissions embedded in internationally traded goods to address GHG leakage and reconcile the trade and climate regimes. In particular, we argue that these instruments can also address trade distortions and can therefore be well aligned with the aims of the WTO.

### 2.3. *Border carbon adjustment mechanisms, climate externalities, and trade distortions*

A key aim (and responsibility) of the WTO is to increase the welfare of people globally and ensure an optimal allocation of scarce resources. Uninternalized climate externalities reduce the price of goods, the production or consumption of which releases GHG emissions. Besides causing carbon leakage, this under-pricing distorts trade by impeding that their production is located in countries characterized by a comparative advantage – a key condition for maximizing social welfare. Estimates by the International Monetary Fund indicate that climate externalities are almost one-third of the global unpriced externalities from fossil fuels in 2020[12]. These externalities

[10] C. Böhringer, C. Fischer, K.E. Rosendahl *et al.*, *Potential impacts and challenges of border carbon adjustments*, in *Nature Climate Change*, 2022, 12(1), pp. 22 ff.

[11] F. Branger, P. Quirion, *Would border carbon adjustments prevent carbon leakage and heavy industry competitiveness losses? Insights from a meta-analysis of recent economic studies*, in *Ecological Economics*, 2014, 99, pp. 29 ff.

[12] I. Parry, S. Black, N. Vernon, *Still not getting energy prices right: A global and country update of fossil fuel subsidies*, IMF Working Paper WP/20/236, International Monetary Fund, 2021.

are large, amounting to about 6.8 percent of global GDP, or 5.9 trillion US Dollars[13].

By pricing GHG emissions embedded in goods produced in low-standard jurisdictions, BCA mechanisms can help internalize climate externalities, thereby ensuring that international trade supports welfare creation. Thus, to the extent that BCA mechanisms allow pricing GHG emissions embedded in internationally traded products at the social cost of carbon, these instruments align with widely accepted aims of the WTO[14].

Indeed, leakage concerns may also exist in a world where all environmental externalities are already internalized. This is the case, for instance, if a country decides to implement a domestic carbon price per tonne of GHG emitted domestically that is much higher than the global social cost of carbon. Such country may still face carbon leakage problems that are worth addressing, even if all other countries already price GHG emissions at the social cost of carbon. Should the WTO be held accountable for these leakage effects? While in principle the answer might be yes, a first and easier step to take is to ensure that the WTO fulfils its widely acknowledged aims.

On this ground – and in alignment with recent scholarship on trade and climate change[15] – we think that as a *first step* towards reconciling the trade and climate regimes, it would be desirable to implement BCA mechanisms that price GHG emissions embedded in internationally traded products at the social cost of carbon, starting from the more carbon-intensive and trade-exposed industries. Focusing on pricing externalities from international trade can facilitate the acceptance of these instruments and it is thus well suited as

---

[13] *Ibid*.

[14] We recognize that estimates of the social cost of carbon vary significantly across studies. However, this has not prevented countries from acting on this. For instance, the Biden administration applies a social cost of carbon of 51 U.S. dollars per metric ton of carbon, see Interagency Working Group on Social Cost of Greenhouse Gases, United States Government Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates under Executive Order 13990. Similarly, this should not halt the implementation of a BCA mechanism. Ideally, cooperation among trading partners can help reaching an agreement on how to estimate the social cost of carbon.

[15] D.C. Esty, *Trade Implications of Greenhouse Gas Emissions Pricing*, in *World Trade Report 2022*, World Trade Organization, 2022.

a starting point for bridging the existing gaps between the *climate* and the *trade communities* and, pragmatically, as a logical springboard for efforts to align the WTO system with the need to address climate change.

## 3. *The legal and political viability of border carbon adjustment mechanisms: A deeper dive*

Implementing a BCA mechanism requires complying with WTO law and addressing political challenges. In this section, we discuss key WTO law and political challenges of implementing BCA mechanisms and potential ways to address these.

### 3.1. *WTO law compatibility*

A crucial challenge for the implementation of a BCA mechanism is to ensure compatibility with WTO law, to strengthen its legitimacy and avoid legal disputes[16]. In this regard, the rules concerning most-favored-nation treatment and national treatment under Articles I and III of the General Agreement on Tariffs and Trade (GATT) have particular relevance. These provisions respectively require that trade policies do not discriminate between different trade partners (most-favored-nation) and between domestic and foreign producers (national treatment). Below, we discuss three key potential issues on the compatibility of BCA mechanisms with these provisions. In particular, we focus on (i) whether products with differ-

[16] There is significant scholarship on the compatibility of BCA mechanisms with WTO law. This section aims to touch upon some of the key issues. See, for instance, J.P. Trachtman, *WTO law constraints on border tax adjustment and tax credit mechanisms to reduce the competitive effects of carbon taxes*, in *National Tax Journal*, 2017, 70(2), pp. 469 ff.; J. Bacchus, *Legal issues with the European carbon border adjustment mechanism*, CATO Briefing Paper, 2021, 125, pp. 3-6; M.A. Mehling, H. Van Asselt, K. Das *et al.*, *Designing border carbon adjustments for enhanced climate action*, in *American Journal of International Law*, 2019, 113(3), pp. 433 ff.; G. Dominioni, D.C. Esty, *Designing Effective Border-Carbon Adjustment Mechanisms: Aligning the Global Trade and Climate Change Regimes*, in *Arizona Law Review*, 2023, 65, pp. 1 ff.

ent levels of embedded GHGs can be considered "like products"; (ii) what GHG pricing instruments can be subject to adjustment under the GATT; and (iii) whether crediting climate policies implemented in the exporting country is compatible with the most-favored-nation principle.

The *like-products* question concerns whether adjustments for charges related to processes and production methods (PPMs) that do not leave physical traces in the product itself is compatible with Article III:2 GATT. This Article requires that imported products are not treated less favorably than domestic "like products". The issue of "likeness" with respect to PPMs and import taxes represents a long-standing and still ongoing discussion among trade lawyers. The landmark 1970 Report of the Working Party on Border Tax Adjustments clarified the legal treatment of these measures but did not take a position on the PPMs issue[17]. Nor was the issue fully clarified in WTO jurisprudence. A relevant precedent can be seen in the *Superfund* case, in which the importing country (United States) imposed an environmental tax on certain imported products due to the use of chemical feedstock in the production process, and the measure was deemed legitimate by a GATT panel[18]. However, this case concerned inputs that were physically incorporated, albeit in a different form, in the final product. Thus, at the moment, WTO jurisprudence does not explicitly recognize the possibility to adjust for charges on non-product-related PPMs, such as charges that target GHG emissions released in the production of imported goods.

The second key issue concerns what type of *GHG pricing instruments* can be taken into account within BCA mechanisms. In particular, it is debated whether border tax adjustments are feasible only for fiscal instruments, or also for regulatory instruments. Regulatory instruments include, for instance, emission allowance trading schemes, which – despite putting an explicit price on carbon

[17] GATT, *Border Tax Adjustments: Report of the Working Party*, L/3464, BISD 18S/97, 2 December 1970.

[18] GATT, *Panel Report, United States–Taxes on Petroleum and Certain Imported Substances*, BISD 34S/136, 17 June 1987.

– are generally not seen as fiscal instruments, or other non-price GHG policies, such as non-tradable performance-based standards[19]. Scholarly research is divided on this matter[20].

Lastly, a third critical point is whether *crediting* climate policies implemented in the exporting country is compatible with the most-favored-nation principle. From a trade law perspective, crediting for climate policies implemented abroad may give rise to legal challenges under Article I GATT. In particular, trade partners with weak GHG policies could be concerned with the more stringent border adjustment applied to their exports compared with products exported from high-standard jurisdictions. At the same time, also not crediting for policies abroad may lead to legal challenges. In this case, the challenge could come from countries that do have stringent GHG policies in place, as their products would be subject to both these policies *and* the border adjustment charge – and thus risk losing competitiveness compared with exports from low-standard jurisdictions[21]. Recently, Dominioni and Esty have argued that BCA mechanism should credit for a broad set of GHG policies, accounting for the administrative difficulties of doing so[22]. This would not only help delivering better environmental outcomes, make BCA mechanisms more politically acceptable, but and increase their alignment with WTO law[23].

---

[19] W.A. Pizer, E.J. Campbell, *Border Carbon Adjustments without Full (or Any) Carbon Pricing*, 2021, Working Paper 21-21, Resources for the Future.

[20] Some authors argue that border carbon adjustment can be problematic to justify for regulatory instruments such as emissions trading schemes. In this sense, see C. Böhringer, C. Fischer, K.E. Rosendahl *et al.*, *Potential impacts and challenges of border carbon adjustments*, in *Nature Climate Change*, 2022, 12(1), pp. 22 ff. For a diverging view, see J. Englisch, T. Falcao, *EU Carbon Border Adjustments and WTO Law, Part One*, in *Environmental Law Reporter*, 2021, 51(10), 10857 ff.

[21] M.A. Mehling, H. Van Asselt, K. Das *et al.*, *Designing border carbon adjustments for enhanced climate action*, in *American Journal of International Law*, 2019, 113(3), pp. 433 ff.

[22] G. Dominioni, D.C. Esty, *Designing Effective Border-Carbon Adjustment Mechanisms: Aligning the Global Trade and Climate Change Regimes*, in *Arizona Law Review*, 2023, 65, pp. 1 ff.

[23] G. Dominioni, D.C. Esty, *Designing Effective Border-Carbon Adjustment Mechanisms: Aligning the Global Trade and Climate Change Regimes*, in *Arizona Law Review*, 2023, 65, pp. 1 ff.

The practical relevance of the three mentioned issues is mitigated by the applicability of Article XX GATT[24]. Article XX GATT provides for general exceptions, which allow justifying measures that are otherwise incompatible with GATT obligations, as long as such measures qualify under one of the subheadings and meet the requirements of the "chapeau" of Article XX.

While Article XX does not specifically mention climate change as a possible justification for national measures, it is widely recognized that two exceptions – at least – can be relevant for such purposes: i) Article XX(b) for measures necessary to protect human, animal, or plant life or health, and ii) Article XX(g) for measures relating to the conservation of exhaustible natural resources[25].

To satisfy the requirements of the Chapeau of Article XX, the BCA mechanism should not be applied in such a way as to give rise to arbitrary or unjustifiable discriminations, or disguised restrictions on international trade. In other words, the WTO Member invoking the exception will have to demonstrate that no less-restrictive alternative was reasonably available and that the measure genuinely pursues climate-change objectives, and does not represent a form of disguised protectionism[26].

Case law has clarified various features that matter in establishing whether a BCA mechanism meets the criteria of the Chapeau of Article XX. Various features of the BCA mechanism discussed above help meet these criteria. The first factor relates to the climate change effects of the instrument[27]. Implementing the adjustment mechanism to sectors most exposed to carbon leakage and selecting carefully the emission benchmarks can improve the climate outcomes of the measure, and therefore also its compatibility with

---

[24] M.A. Mehling, H. Van Asselt, K. Das *et al.*, *Designing border carbon adjustments for enhanced climate action*, in *American Journal of International Law*, 2019, 113(3), pp. 433 ff.

[25] J.P. Trachtman, *WTO Trade and Environment Jurisprudence: Avoiding Environmental Catastrophe*, in *Harvard International Law Journal*, 2017, 58, pp. 273 ff.

[26] WTO, Appellate Body Report, *European Communities–Measures Affecting Asbestos and Products Containing Asbestos*, WT/DS135, 2001.

[27] GATT, Panel Report, *United States–Prohibition of Imports of Tuna and Tuna Products from Canada*, (BISD 29S/91), 1982, para. 4.8.

Article XX[28]. Similarly, the Chapeau of Article XX will require to take into account the climate policies implemented in the exporting country as well as leave flexibility to the exporting country on how to avoid the imposition of the border change on its exports[29]. Crediting a broad set of policies implemented in the exporting country can help meet these requirements[30].

Compliance with the Chapeau of Article XX GATT also requires that the WTO Members that intend to implement BCA mechanisms first engage in serious and good-faith negotiations with affected countries to reach an agreed solution[31]. Arguably, the wide-ranging consensus in negotiations that led to the adoption of international climate agreements – such as the Paris Agreement or the Glasgow Climate Pact – might qualify as such. Yet, neither of these instruments explicitly refer to BCA, therefore it is recommendable that specific negotiations are held with the affected countries before the implementation of such a measure[32]. We further discuss these needs for negotiations below. Lastly, the mechanism needs to be implemented in a transparent manner. Below we discuss possible collaborations between the implementing jurisdiction and various international institutions that can help increase the level of transparency of the mechanism.

Overall, the analysis presented above indicates that a well-designed BCA mechanism would likely comply with WTO law. However, the lack of specific WTO jurisprudence on border carbon adjustments might lead to a certain reluctance by governments in adopting such instruments.

---

[28] M.A. Mehling, H. Van Asselt, K. Das *et al.*, *Designing border carbon adjustments for enhanced climate action*, in *American Journal of International Law*, 2019, 113(3), pp. 433 ff.

[29] WTO, Appellate Body Report, *United States–Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia,* WT/DS58, 2001, para. 149.

[30] G. Dominioni, D.C. Esty, *Designing Effective Border-Carbon Adjustment Mechanisms: Aligning the Global Trade and Climate Change Regimes*, in *Arizona Law Review*, 2023, 65, pp. 1 ff.

[31] Appellate Body, *United States– Import Prohibition of Certain Shrimp and Shrimp Products,* WT/DS58, 1998.

[32] M.A. Mehling, H. Van Asselt, K. Das *et al.*, *Designing border carbon adjustments for enhanced climate action*, in *American Journal of International Law*, 2019, 113(3), pp. 433 ff.

Therefore, in the following section, we discuss a few options through which WTO Members could better clarify the scope for the implementation of border carbon adjustments under existing WTO law. Before doing so, we discuss more in detail potential political obstacles to the implementation of BCA mechanisms and ways to address them.

### 3.2. *Other (non-legal) considerations*

Besides legal risks, the implementation of BCA mechanisms may disrupt existing cooperation on climate change and increase the risk of trade frictions. For instance, BASIC countries have pushed back on the implementation of BCA mechanisms, declaring these measures "discriminatory and against the principles of Equity and CBDR-RC"[33]. Along these lines, stakeholder and expert interviews indicate that the implementation of the EU BCA mechanisms can threaten current collaborations on climate change between the EU and other major emitters[34].

The key concern expressed by developing countries concerning current plans to implement BCA mechanisms by developed countries is the impact on their economies. Research indicates that implementing a BCA mechanism will reduce exports from trading partners, negatively impacting their GDP and employment[35]. Some analysts have raised concerns regarding the compatibility of this burden shift with the UNFCCC principle of Common but Differentiated Responsibilities and Respective Capabilities[36]. In addition, some countries have expressed concerns that the BCA mechanism coerces

[33] BASIC Ministerial Meeting, *Joint Statement issued after the 30th BASIC Ministerial Meeting on Climate Change*, 2021.

[34] C. Hübner, *Perception of the Planned EU Carbon Border Adjustment Mechanism in Asia Pacific–An Expert Survey*, Konrad-Adenauer-Stiftung, 2021.

[35] C. Böhringer, C. Fischer, K.E. Rosendahl *et al.*, *Potential impacts and challenges of border carbon adjustments*, in *Nature Climate Change*, 2022, 12(1), pp. 22 ff; G. Magacho, É. Espagne, A Godin, *Impacts of CBAM on EU trade partners: consequences for developing countries*, *AFD Research Papers*, 2022, 238, pp. 1 ff.

[36] M. Jakob, S. Afionis, M. Åhman *et al.*, *How trade policy can support the climate agenda*, in *Science*, 2022, 376(6600), pp. 1401 ff.

exporting countries to implement certain measures, in contrast with the bottom- up approach of the Paris Agreement[37]. Addressing these concerns will require that countries implementing a BCA mechanism act strategically, both at the *design* and at the *diplomatic* level.

From a *design* perspective, there are at least two features that can reduce the risks of trade retaliation and of disrupting climate change cooperation. First, the narrow application to sectors most exposed to carbon leakage would reduce the negative impacts on third countries[38]. Second, by crediting *effective carbon prices*, the proposed BCA mechanism offers greater flexibility to exporting countries on how to reduce the burden of the charge on their exporting sectors, thus reducing the mechanism's alleged "coercive" effect[39].

The negative impacts of BCA mechanisms on exporting countries could be addressed in various ways, including: i) implementing exemptions or lower charges for developing countries – especially SIDS and LDCs; ii) scheduling longer timelines for developing countries to meet decarbonization targets; iii) distributing carbon revenues collected through the BCA mechanism to trade partners to act on climate change or development more broadly; iv) a mix of two or three of these options. Current debates on the distribution of carbon revenues from international shipping could be a useful starting point to discuss the distribution of revenues from BCA mechanisms[40].

---

[37] A. Gläser, C. Oldag, *Less confrontation, more cooperation: increasing the acceptability of the EU Carbon Border Adjustment in key trading partner countries*, Policy Brief Germanwatch (interviews with Chinese and Russian officials), 2021; C. Hübner, *Perception of the Planned EU Carbon Border Adjustment Mechanism in Asia Pacific–An Expert Survey*, Konrad-Adenauer-Stiftung, 2021.

[38] H. Shen, Q. Yang, L. Luo, *Market reactions to a cross-border carbon policy: Evidence from listed Chinese companies*, in *The British Accounting Review*, 2022, 101116.

[39] Potentially, as adequate methods are developed and data are collected, BCA mechanisms could also look beyond effective carbon prices and include other GHG policies. However, at the moment this route seems impracticable from an administrative perspective, see G. Dominioni, D.C. Esty, *Designing Effective Border-Carbon Adjustment Mechanisms: Aligning the Global Trade and Climate Change Regimes*, in *Arizona Law Review*, 2023, 65, pp. 1 ff.

[40] G. Dominioni, D. Englert, *Carbon Revenues from International Shipping: Enabling an Effective and Equitable Energy* Transition, Technical Paper, World Bank, 2023; G. Dominioni, I. Rojon, R. Salgmann *et al.*, *Distributing Carbon Revenues from Shipping*, World Bank, 2023.

Carbon revenue use could be combined with capacity building and knowledge exchange activities sponsored by the implementing jurisdiction, to help trading partners with capacity deficiencies to reduce the impact of the BCA mechanism on their exporting sectors. For instance, the training could focus on building capacity to close the energy efficiency gap in exporting sectors of negatively impacted countries.

Implementing a BCA mechanism will also require a *diplomatic* effort by the implementing country. Besides increasing the chances of meeting the requirements of Article XX GATT (see above), these diplomatic efforts can help reduce opposition from trading partners. For instance, diplomatic engagements can foster transparency of the BCA mechanism and contribute to designing it in such a way that takes into account and (potentially) addresses the concerns of trading partners regarding the impacts of the BCA mechanism on their exports. This can help tailor the implementation of the BCA mechanism to the circumstances of trading partners, for instance regarding how to establish equivalence between GHG policies implemented in various jurisdictions.

Besides bilateral diplomatic efforts, the implementation of BCA mechanisms designed as illustrated above can greatly benefit from support from various international organizations. We focus on these cooperation needs in the next section.

## 4. *Cooperation needs to implement a border carbon adjustment mechanism*

Various international organizations can cooperate with the WTO in supporting the implementation of BCA mechanisms. For instance, the International Organization for Standardization (ISO) could help set up a certification standard for GHG emissions embedded in producing the goods under the BCA mechanism[41]. Exporters

[41] S. Droege, M. Panezi, *How to design border carbon adjustments*, in M. Jakob (ed.) *Handbook on Trade Policy and Climate Change*, Edward Elgar Publishing, 2022, 163 ff.

could use these certificates to reduce the charge applied to their products when the GHG embedded in their export is lower than the benchmark the importing country applies. There are long-standing collaborations between ISO and the WTO, and ISO classifications are often employed by the WTO, for instance, to determine whether products are like[42]. These collaborations can be a solid starting point for future collaborations.

The Organization for Economic Cooperation and Development (OECD), International Monetary Fund (IMF), and the World Bank could be engaged to produce approaches to estimate effective carbon prices in the importing and exporting countries, and more broadly to establish the equivalence between national GHG policies. Some of these organizations have developed method and collected data that could help to set default values for crediting effective carbon prices[43]. These methods can serve as a foundation to produce estimates of effective carbon prices on which adjustments can be established[44].

Other organizations could help increase the transparency and acceptability of BCA mechanisms among trading partners. Organizations such as the United Nations Conference on Trade and Development (UNCTAD) – which already performs impact assessments for the decarbonization of international trade concerning the shipping sector[45] – are well-positioned to provide a third-party assessment of the economic impacts of BCA mechanisms.

The participation of national trade ministries and environmental ministries to discussions on the implementation of BCA mechanisms is essential to facilitate governments' buy-in. To this end, one could also envision the creation of a joint expert working group between trade ministries and environmental ministries that operates under the auspices of the WTO and the UNFCCC.

---

[42] *Ibid*.

[43] G. Dominioni, D.C. Esty, *Designing Effective Border-Carbon Adjustment Mechanisms: Aligning the Global Trade and Climate Change Regimes*, in *Arizona Law Review*, 2023, 65, pp. 1 ff.

[44] *Ibid*.

[45] See, for instance, UNCTAD, *UNCTAD Assessment of the Impact of the IMO Short-Term GHG Reduction Measure on States*, 2021.

### 4.1. *A way towards a climate club?*

As discussed above, the implementation of BCA mechanisms may have the adverse effect of increasing tensions between trade partners. However, implementing a BCA mechanism is sometimes seen as a vehicle to increase international cooperation on climate change because, as mentioned above, it can incentivize the uptake of more stringent climate policies in trade partner countries. Studies that account for strategic choices of individual countries confirm that – under some conditions – BCA mechanisms can help increase cooperation on carbon pricing[46].

Creating a climate club is now high on the G7 agenda, with the 2022 German presidency pushing for the establishment of such a club[47]. In light of this, it becomes even more important to implement a BCA mechanism that reduces trade tensions between G7 countries.

In this respect, it is important to implement BCA mechanisms that allow G7 countries that do not have an explicit carbon price in place at the national level – such as the United States – to participate in the climate club combined with a BCA mechanism[48]. Recognizing the adjustment for effective carbon prices in the BCA mechanism –instead of explicit carbon prices alone – can better enable the United States' participation in the climate club[49]. Such *an effective carbon pricing club* could also bring additional benefits in terms of increased domestic capacity to address climate change and include finance ministries more closely in the adoption of climate change policies[50].

---

[46] See, for instance, Z.B. Irfanoglu *et al.*, *Potential of border tax adjustments to deter free riding in international climate agreements*, in *Environmental Research Letters*, 2015, 10(2), 024009.

[47] G7, *G7 Statement on Climate Club*, 2022.

[48] G. Dominioni, D.C. Esty, *Designing Effective Border-Carbon Adjustment Mechanisms: Aligning the Global Trade and Climate Change Regimes*, in *Arizona Law Review*, 2023, 65, pp. 1 ff.

[49] *Ibid.*

[50] G. Dominioni, *Pricing carbon effectively: a pathway for higher climate change ambition*, in *Climate Policy*, 2022, 22(7), pp. 897 ff.

## 5. *Rethinking WTO vision, rules, and procedures to align the trade and climate regimes*

We have argued that well-designed BCA mechanisms are unlikely to violate WTO rules. Nevertheless, the existence of some grey areas may represent a barrier to their implementation, especially by risk-averse governments. To overcome such challenges, in this section we suggest how to rethink the WTO's vision, rules, and procedures to facilitate the adoption of BCA mechanisms, and, ultimately, ensure a better alignment of the trade and climate regimes.

### 5.1. *Rethinking the WTO vision*

Supporting the establishment of BCA mechanisms to internalize climate externalities represents a key opportunity for the WTO to reassert its central role in governing international trade relationships. In the current political landscape, dominated by mounting skepticism towards multilateral institutions, the overall legitimacy of the WTO has been undermined on several fronts[51]. These include the United States' blocking of Appellate Body appointments and, more recently, speculations around the possible withdrawal of Russia following the conflict in Ukraine. In this context, the need to undertake urgent climate action can serve as a catalyst for cooperation among WTO Members.

We think that setting the internalization of climate externalities at the center of the vision for the 21st century should be a priority for the WTO. Focusing on climate externalities is an opportunity for the WTO to show leadership in international trade relations, as efforts to link climate and trade considerations are already taking place in a wide range of bilateral trade agreements. In this sense, the latest free trade agreements (FTAs) concluded by the European Union, such as the EU-UK FTA which includes several provisions on trade and climate change, represent a prominent example.

---

[51] P. Low, *The WTO in Crisis: Closing the Gap between Conversation and Action or Shutting Down the Conversation?*, in *World Trade Review*, 2022, 21(3), pp. 274 ff.

The WTO has begun to intensify its work on the link between trade and environmental sustainability, including trade and climate change. Negotiations on relevant issues are taking place both within well-established fora, such as the Committee on Trade and Environment (CTE)[52], and in newly established ones, such as the Trade and Environmental Sustainability Structured Discussions (TESSD). In both cases, the issue of border carbon adjustment is at the forefront of the debate. Within the TESSD, in particular, parties have voiced their concerns regarding the need to ensure compatibility of carbon border adjustment mechanisms with the WTO legal framework[53]. These fora, alongside initiatives such as the *Remaking the Global Trading System for a Sustainable Future Project* and the related Villars Framework[54], may provide a suitable environment to start re-thinking the WTO vision and better align it with the international climate change regime.

In the following, we suggest a way to rethink WTO rules and procedures to facilitate the adoption of BCA mechanisms.

### 5.2. *Rethinking WTO rules and procedures*

In our analysis of potential legal issues that may arise from the implementation of BCA mechanisms, we have highlighted that no major amendments are required to ensure the WTO compatibility of BCA mechanisms, provided that these are adequately designed.

However, a practical issue remains: the imposition of carbon-based levies at the border might nevertheless raise legal claims before the WTO, especially considering the lack of WTO jurisprudence on the matter. Hence, it is recommended that WTO Members take proactive steps to minimize such risk. Given the urgency to reduce GHG emissions, it is important to minimize areas of uncertainty that could slow down ambitious climate action.

---

[52] WTO, Committee on Trade and Environment, *Report of the meeting held on 2 February 2022*, WT/CTE/M/74, 2022.

[53] WTO, Trade and Environmental Sustainability Structured Discussions, *Communication by Japan, 23 March 2021*, INF/TE/SSD/W/10, 2021.

[54] J. Tracthman *et al.*, *Villars Framework for A Sustainable Global Trade System*, Villars Institute, 2023.

To this end, a first possibility is given by the adoption of an *authoritative interpretation*, which generally serves to clarify the legal boundaries to implement a WTO law-compatible BCA mechanism. The possibility to approve an authoritative interpretation is provided under Article IX:2 of the WTO Agreement, and this instrument could be well-suited to specify the boundaries of application of Article XX GATT exceptions to BCA mechanisms. However, the adoption of an authoritative interpretation appears practically challenging at the current juncture. According to the provision of Article IX:2 of the WTO Agreement, it requires at least a three-quarter majority of WTO Members, although there is a general preference for consensus[55].

Alternatively, a further option that has gained some popularity among legal scholars is for WTO Members to agree on the adoption of a waiver[56], as regulated under Article IX:3 of the WTO Agreement, whereby in exceptional circumstances an obligation imposed under WTO law is waived. Such a waiver could clarify the circumstances under which a BCA mechanism is exempted from the most-favored-nation and national treatment obligations. This would improve legal certainty and facilitate the adoption of more ambitious climate policies. Moreover, when compared to authoritative interpretations, a waiver appears politically more viable. Although its adoption also requires at least a three-quarter majority, its reach is not as broad as authoritative interpretations, as its validity can be circumscribed to specific Members and for a limited time. In fact, it is an instrument more frequently adopted in WTO practice, as waivers are adopted on a yearly basis[57]. However, the prospects of adoption of a waiver are likely to remain slim unless consensus is reached on key issues such as the design of BCA mechanisms, including standardized methods to establish the equivalence of GHG policies and GHG embedded in goods, and the operationalization of differentiation between developed and developing countries. Co-

[55] I. Van Damme, *Treaty Interpretation by the WTO Appellate Body*, in *European Journal of International Law*, 2010, 21(3), pp. 605 ff.

[56] J. Bacchus, *The case for a WTO Climate* Waiver, Special Report, Centre for International Governance Innovation, 2017.

[57] See, for instance, the list of waivers adopted in 2019, WT/GC/W/795.

operation efforts among trade ministries and within the CTE and TESSD are therefore essential to make a climate waiver possible.

From a longer-term perspective, the WTO could further strengthen its alignment with the climate change regime by amending its internal procedures. In particular, WTO member states could implement *ex ante* review mechanism under which sub-global instruments aimed to tackle climate change are scrutinized before being implemented[58]. If the instruments are deemed in alignment with international commitments to mitigate climate change enjoying broad support at the international level, such as those included in the Paris Agreement, the instrument would be barred from further scrutiny under WTO law. The assessment could be carried out by a new specialized body, perhaps established in cooperation with other international institutions (e.g. the UNFCCC Secretariat), that carries out the assessment following a lighter procedure than that required for climate waivers, to fasten the review process[59]. The governance arrangements and procedural rules for such an ex-ante review will need to be thought through carefully to ensure that the interest of relevant stakeholders are represented and the assessment adequately balances climate and trade considerations[60].

## 6. *Conclusions*

In this chapter, we have argued that implementing a well-designed BCA mechanism on imported products is a viable way to start reconciling the climate and trade regimes, as it can help to ensure that the price of internationally traded products reflects the social cost of carbon. In particular, we have discussed how such a BCA mechanism could look like to adequately address carbon leakage, taking into account legal, political, and administrative constraints. The analysis has also revealed that WTO law is unlikely to pose ma-

[58] G. Dominioni, D.C. Esty, *Designing Effective Border-Carbon Adjustment Mechanisms: Aligning the Global Trade and Climate Change Regimes*, in *Arizona Law Review*, 2023, 65, pp. 1 ff.

[59] *Ibid.*

[60] *Ibid.*

jor obstacles to the adoption of a well-designed BCA mechanism. Yet, grey areas remain which may prevent risk-averse governments to implement these instruments. In light of this, we have argued that there is a role for the WTO to clarify the conditions under which BCA mechanisms can be compatible with WTO law and we have examined possible ways forward. We think that acting on this could reaffirm the leadership of the WTO in international trade for the 21st century.

# SESSION IV

# MULTILATERALISM, SUSTAINABILITY AND CLIMATE CHANGE

# IS AN INCLUSIVE AND SUSTAINABLE MULTILATERALISM POSSIBLE? IN SEARCH OF A NEW GLOBAL ECONOMIC GOVERNANCE

*Maria Rosaria Mauro*

## 1. *The need for a global economic governance reform*

In September 2015, the Members of the United Nations (UN) unanimously adopted the 2030 Agenda for Sustainable Development, an action program that identifies 17 Sustainable Development Goals (SDGs)[1] to be achieved by 2030.

In a harmonious convergence, the summit on the SDGs unfolded on September 18 and 19, 2023, guided by the collective vision of the UN General Assembly to review progress and determine future high-level political actions for realizing these Goals[2].

Yet, even though the global community stands united in acknowledging that the goals set for 2030 are a shared responsibility, it is far from achieving the objectives that should be accomplished by this date. As confirmed by the SDG index, which evaluates the

[1] See the General Assembly Resolution *Transforming Our World: The 2030 Agenda for Sustainable Development*, A/RES/70/1, September 25, 2015.

[2] This was the second SDG Summit since the adoption of the 2030 Agenda in September 2015. This summit anticipated what should be decided at the Summit of the Future, convened by the UN for September 22-23, 2024. The "Summit of the Future", proposed by UN Secretary-General António Guterres in his report (see *Our Common Agenda – Report of the Secretary-General*, New York, 2021, p. 66), aims to strengthen the structures of the UN and global *governance*, as well as to promote the conclusion of a "Pact for the Future" to allow a more rapid realization of the 2030 Agenda SDGs.

progress of each country with respect to the SDGs, in recent years, due to the overlapping of crises of different nature (health, energy, food, sovereign debt,…), triggered first by the COVID-19 pandemic and then by the conflict in Ukraine, there has been no progress in achieving these Goals. In any case, even in the period 2015-2019, progress in implementing the SDGs had been very limited[3]. Therefore, more significant transformations of national social and economic systems are required, along with a reform of the international institutional framework and global economic governance to facilitate such changes[4].

In this context, the debate on the reform of multilateral organizations takes place, particularly the economic international institutions that operate in the three main sectors of international economic cooperation (commercial, monetary, and financial)[5].

Today, most international organizations reflect the changes in international society in the decades following the end of the Second World War in a very limited way. This is pretty obvious for the International Monetary Fund (IMF) and the World Bank (WB), which continue to be under the influence of industrialized States (in particular, of the United States and of European countries) and to be focused on their original mandate.

The article analyzes the weaknesses of the current global economic governance and its possible improvements.

---

[3] On this aspect, see J.D. Sachs, G. Lafortune, G. Fuller, E. Drumm, *Sustainable Development Report 2023. Implementing the SDG Stimulus*, Dublin, Dublin University Press, 2023, p. 4.

[4] See in this regard UN, Inter-agency Task Force on Financing for Development, *2023 Financing for Sustainable Development Report: Financing Sustainable Transformations*, United Nations, New York, 2023, p. 15 ff., which highlights the following key aspects: the need for immediate action to expand development cooperation and to enhance investment in the SDGs; the need to address shortcomings in the international financial architecture; the need for feasible strategies to accelerate national sustainable industrial transformations. On this topic, see also G. Papaconstantinou, J. Pisani-Ferry (eds.), *Global Governance: Demise or Transformation? Progress Report on the Transformation of Global Governance Project 2018-2019*, San Domenico di Fiesole (FI), European University Institute (EUI), 2019.

[5] See C. Monticelli, *Global Economic Governance at a Crossroads*, in *SUERF Policy Note*, July 2019, 83; M. Rewizorski, K. Jędrzejowska, A. Wróbel, *The Future of Global Economic Governance: Challenges and Prospects in the Age of Uncertainty*, Cham, Springer, 2020.

## 2. *The weaknesses of the current economic multilateral architecture*

With a view to achieve a sustainable and inclusive multilateralism, the current economic international architecture presents three main limitations: the reduced quality of the decision-making process; the institutional and operational fragmentation; the modest level of implementation of international commitments on human rights and sustainable development by economic international organizations.

### 2.1. *The reduced quality of the decision-making process*

The limited quality of the decision-making process derives, in large part, from the lack of inclusiveness and the democratic deficit that often characterize international organizations. It is clear, for example, that middle-income and poorer States are in a position of weakness due to more limited financial and technical resources, which continues to reduce their ability to negotiate with more powerful actors.

It is clear that global economic governance has not followed the changes already affecting the world economy and the international geopolitical framework.

The present international financial institutions (IFIs) were created almost 80 years ago on occasion of a conference[6] with only 44 delegations present, while IMF and the WB now have 190 and 189 members, respectively.

Notwithstanding attempts to reform the existing economic governance to ensure a better compliance with the new international balances, and notwithstanding some improvements between 2005 and 2015, the representation of developing countries in IFIs, regional development banks and standard-setting bodies remains highly

[6] The Bretton Woods Conference, formally known as the United Nations Monetary and Financial Conference, was held on July 1-22, 1944. It gathered 730 delegates from all 44 "allied nations". On that occasion, agreements establishing the IMF and the International Bank for Reconstruction and Development (IBRD) were signed.

insufficient, due to the dominant position of the biggest developed countries in the decision-making bodies of these institutions.

This circumstance often impacts collective ability to address the needs of Global South countries, while the challenges faced by these nations should be considered as shared concerns.

Recently, some important events have happened for Global South countries. Firstly, the African Union (AU) became a permanent member of the Group of 20 (G20) and an additional chair on the IMF Executive Board was created for sub-Saharan African countries. At the same time, a group of States (including Barbados, Kenya, Colombia, and France) has launched a new model of cooperation between North and South to reform the international financial architecture. Furthermore, six countries have decided to join the "South club" of BRICS. Finally, the decision to conclude a tax convention in the UN context proves the research of alternative solutions to traditional "North" fora (such as the Organisation for Economic Cooperation and Development – OECD, where corporate taxation negotiations have normally taken place)[7].

Unfortunately, a decision which could have had a fundamental impact on the global economic governance, the IMF 16th General Review of Quotas, will not be probably followed by significative governance reforms. On December 15, 2023, the IMF Board of Governors concluded the General Review of Quotas approving an increase of IMF members quotas from 238.6 billion of special drawing rights (SDRs), i.e. US$320 billion, to SDR 715.7 billion or US$960 billion[8]. Even though the proposal presented by the IMF Executive Board recommends an equiproportional increase in IMF quotas by 50%, Bilateral Borrowing Agreements and New Arrangements to Borrow are reduced according to the same amount, leaving unchanged the IMF's overall lending capacity, with possi-

[7] On these aspects, see T. Hirschel-Burns, *Stops and Starts i Global Economic Governance Reform in 2023*, in *Global Economic Governance Newsletter*, December 13, 2023.

[8] See IMF, *Sixteenth General Review of Quotas – Report to the Board of Governors and Proposed Resolution, and Proposed Decision to Extend the Deadline for a Review of the Borrowing Guidelines*, Policy Paper No. 2023/059, December 18, 2023.

ble negative consequences on the poorest countries. In addition, the proposal foresees merely an equiproportional increase, without realigning vote shares while breaking historical precedent to guarantee a selective quota expansion. The 50% increase in IMF quotas, therefore, will be distributed in proportion to countries' existing share of quotas. Consequently, advanced economies will continue to have a significantly larger share of quotas than their share of global population.

It is worth mentioning that the IMF quota system pursues three different goals: to determine voting weight; to set the potential for contribution to the IMF lending activity; and, to define access limits to resources by borrowers. However, this mechanism does not allow for equitable representation of the IMF members, since the US and European countries hold 16.5 and 29.4 % respectively of the voting power. This means that this system cannot effectively achieve all pursued goals, given that the low- and middle-income countries, which are most likely to borrow from the IMF, have a reduced influence on the decisions of the Organization.

### 2.2. *The Institutional and Operational Fragmentation*

Another weak point of the present multilateral institutional framework is its fragmentation[9]. The number of international organizations responsible for development has increased significantly[10] but, often, these bodies do not operate in a synergistic way, while the achievement of SDGs requires integrated actions.

The fragmentation has determined a lack of coherence and coordination in global management of recent economic, financial, food,

[9] However, according to some authors, fragmentation would be an inevitable component of a multipolar system and, in some cases, it could also favor greater effectiveness of global governance. On this aspect, see A. Acharya, *The Future of Global Governance: Fragmentation May Be Inevitable and Creative*, in *Global Governance: A Review of Multilateralism and International Organizations*, 2016, 4, pp. 453-460; M. Larionova, *Assessing Summit Engagement with Other International Organizations in Global Governance*, in *International Organizations Research Journal*, 2016, 1, pp. 126-152.

[10] See OECD, *Multilateral Development Finance 2020*, Paris, 2020, p. 30.

energy crises and other emergencies, phenomena that rapidly spread in a globalized world.

The collapse of the Bretton Woods system of exchange rates in the 1970s led to the end of coordination mechanisms (indeed, unsatisfactory in themselves) introduced in the 1940s, giving way to an array of clubs and informal institutions (such as the Groups of Five, Six, Seven, Eight and 10, the Committee of Twenty and G20), as well as formal institutions with different memberships (for instance, Basel Committee on Banking Supervision, International Organization of Securities Commissions, Financial Action Task Force, Financial Stability Board, International Monetary and Financial Committee and Development Committee), which do not allow an effective representation of developing countries and an adequate global coordination on economic and related issues.

In such a fragmented and intricate tapestry, the UN Secretariat underscores the necessity to transform the governance of IFIs and to create a representative apex body, forging a path toward enhanced coherence within the global system[11].

### 2.3. *The modest level of implementation of international commitments on human rights and sustainable development by economic international organizations*

A third problem of the current global economic governance is linked with the limited level of implementation of international commitments on human rights and sustainable development by economic international organizations.

Indeed, even though the UN champions the adoption of sustainable development objectives, this Organization often lacks the financial resources or political weight necessary to concretely implement the commitments promoted in this area. On the other hand, IFIs,

[11] See UN, *Reforms to the International Financial Architecture, Our Common Agenda Policy Brief 6*, May 2023, pp. 6 ff. This document is part of a group of 11 policy briefs wanted by the UN Secretary-General to offer Member States concrete ideas for the implementation of the proposals included in *Our Common Agenda – Report of the Secretary-General*, New York, 2021.

which could have the required resources to do so, are bound by the so-called "political neutrality", the rule which constitutes a constitutional foundation for the majority of IFIs. This principle has often been applied in an excessively broad and superficial way. In fact, IFIs have traditionally justified the lack of attention to issues such as the protection of human rights by invoking the aforementioned principle[12], which is explicitly provided for in both the IBRD and IDA Articles of Agreements. By virtue of this principle, the Bank is required to operate acting only on the basis of economic considerations and with a mandate aimed exclusively at economic development. The Statute, in fact, contains an explicit prohibition on any political activity or interference by the Bank[13]. The Legal Department of this Organization has long considered activities relating to the protection of human rights to be matters of a political nature and, therefore, outside the mandate of the Bank. However, this Organization has, over time, partially changed its position on human rights. In fact, the awareness has gradually emerged that economic aid alone is not sufficient for the development of a country, also because it has been demonstrated that financial support can induce greater growth only if the beneficiary State has already implemented policies of good governance and created adequate public institutions[14].

We must, therefore, ask ourselves how to apply the principle of political neutrality without compromising the new aspirations

---

[12] On this aspect, see M.R. Mauro, *The Protection of Non-economic Values and the Evolution of International Economic Organizations: The Case of the World Bank*, in R. Virzo, I. Ingravallo (eds.), *Evolutions in the Law of International Organizations*, Leiden, Boston, Brill/Nijhoff, 2015, pp. 244-274.

[13] First, the IBRD and its officers cannot intervene in the political affairs of any Member State, nor can they allow themselves to be influenced in their decisions by the political orientation of the Member State (or Member States) in question. Furthermore, the Bank's decisions must be based exclusively on economic considerations, which are evaluated impartially with the aim of achieving the Organization's objectives set out in Article I of the Statute (see Article IV, section 10 Articles of Agreement). Finally, the IBRD must ensure that the proceeds of any loan are used only for the purposes for which the loan was granted, with due attention to considerations of economy and efficiency and without regard to political or other non-economic influences or considerations (see Article III, section 5, (b) Article of Agreement).

[14] See WB, *Assessing Aid: What Works, What Doesn't and Why?*, New York, 1998.

that multilateralism should have, overcoming a concept of "growth" based solely (or almost exclusively) on income.

## 3. *Some recent developments: towards a new model of economic governance?*

In the last few years, new initiatives were launched to improve the international economic governance, which seem to reveal a more effective effort of cooperation and the possibility of a new approach in the management of international economic issues.

First signals of a change came from the IFIs, in particular, the IMF and WB have begun to opt for principles and tools dedicated to the research of a greater sustainability.

In 2023, for instance, the World Bank Group's Boards of Executive Directors started to debate with Management an Evolution Roadmap for the Bank Group to foster the Group's ability to achieve its mission better addressing global development challenges[15]. However, four foundations seem to be fundamental for a successful reform: a mission-driven approach founded on investing in national development strategies that are equitable, low-carbon and resilient to reduce poverty and provide global public goods; an operational model aimed at limiting risk and waste and maximizing sustainable development; a gradual increase in the WB capital and lending capacity; an enlarged voice, representation and accountability to developing countries and their citizens[16]. In any case, the IFIs modified their operational strategies only very gradually and with delay[17].

Turning to the issue of sovereign debt, it should be noticed that there are still no global universal institutions that guarantee the restructuring of foreign sovereign debt in accordance with the need to

[15] See WB, *Evolving the World Bank Group's Mission, Operations, and Resources: A Roadmap*, December 18, 2022). See also *World Bank Group Statement on Evolution Roadmap*, January 13, 2023.

[16] See K.P. Gallagher, R.R. Bhandary, *World Bank Evolution as If Development and Climate Change Really Mattered Four Foundations for Successful Reform*, in *GEGI Policy Brief*, 2023, 3.

[17] For example, in the past, the World Bank has often financed projects in the energy sector based on the use of fossil fuels.

promote human rights and sustainable development. A new model in the governance of sovereign debt crises which considers the impact of these crises on the protection of economic and social rights and the affirmation of new principles aimed at ensuring greater sustainability and justice is struggling to catch on[18].

Furthermore, debt restructuring for developing countries continues to be entrusted, essentially, to the Paris Club, an informal group of creditor States that operates outside the multilateral system in the often-exclusive interest of these subjects.

However, due to the COVID-19 pandemic emergency and, subsequently, the war in Ukraine, the debt difficulties of most countries have increased[19].

Some new solutions for managing sovereign debt crises were proposed on April 15, 2020, within the context of the G20, leading to the announcement of the Debt Service Suspension Initiative (DSSI) in favor of the most disadvantaged States[20], operational from 1 May 2020[21]. This Initiative allowed 73 highly indebted low-income countries to suspend interest payments on their official bilateral debts until the end of 2021. Nevertheless, the DSSI had important limitations. First, only the so-called "IDA Countries"[22] and Angola could have benefited, while other low- and middle-income States were excluded. Furthermore, the DSSI was dedicated exclusively to easing liquidity pressures of a temporary nature, leaving the issue of debt sustainability neglected. Finally, this Initiative did not

---

[18] On this topic, see M.R. Mauro, *Sustainability and Justice in the Governance of Sovereign Debt Crisis. Is a More Balanced Approach Possible?*, in *L'Observateur des Nations Unies*, 2022, 2, pp. 81-106.

[19] On the seriousness of the issue concerning the global public debt, see UN Global Crisis Response Group, *A World of Debt. A Growing Burden to Gobal Prosperity*, July 2023.

[20] G20, Paris Club, *Debt Service Suspension Initiative for Poorest Countries: Term Sheet*. The DSSI was subsequently extended until December 31, 2021 (see Paris Club, *Final Extension of the Debt Service Suspension Initiative (DSSI)*, April 13, 2021).

[21] See IMF, WB, *Joint IMF-WBG Staff Note: Implementation and Extension of the Debt Service Suspension Initiative*, DC2020-0007, October 16, 2020.

[22] This expression indicates the countries that are eligible for IDA subsidized loans and that can use the IMF subsidized credit line called "Poverty Reduction and Growth Facility" (PRGF).

involve the private sector, although private creditors represent the main debt holders of many developing countries.

In November 2020, also due to the limits of the DSSI, the finance ministers and central bank governors of the G20 announced the Common Framework for Debt Treatments Beyond the DSSI, a joint action of the G20 countries and the Paris Club which provides coordinated and simplified treatment for the debt of more than 70 States. However, this strategy has also had a limited success and according to the general opinion a reform of the Common Framework is required[23].

Finally, as regards international trade, it is generally acknowledged that significant innovations must be introduced in the World Trade Organization (WTO) system. The necessary changes certainly concern, as it is well known, the dispute settlement mechanism. However, it also appears essential to allow this Organization to play a greater role in the adoption of rules that promote fair trade[24] and to ensure more significant negotiating power to developing countries.

So far, WTO negotiations have essentially focused on trade liberalization, without giving due consideration to the SDGs or aspects such as decent employment, food security, and a balanced use of natural resources. Instead, it is necessary to adopt new rules for global trade, which allow us to promote sustainable development and favor international trade relations guided by principles that guarantee an alignment between trade and sustainability.

In the vibrant discussions of the 12th WTO Ministerial Conference held in Geneva from June 12-17, 2022, the collective determination to shape international trade relations became evident: on that occasion the Agreement on Fisheries Subsidies was concluded, which is fundamental for the implementation of the SDG 14 ("Life

[23] See K. Georgieva, C. Pazarbasioglu, *The G20 Common Framework for Debt Treatments Must Be Stepped Up*, in *IMF Blog*, December 2, 2021; *IMF Annual Report 2022: Crisis Upon Crisis*, Washington DC, 2022, p. 18; L. Jensen, *Avoiding "Too Little Too Late" on International Debt Relief*, October 2022, p. 4.

[24] See, B.M. Hoekman, P.C. Mavroidis, *Preventing the Bad from Getting Worse: the End of the World (Trade Organization) As We Know It?*, *EUI Working Papers* , RSCAS 2020/06.

below water" – Conserve and sustainably use the oceans, seas and marine resources for sustainable development). This agreement announces a progress towards ocean sustainability by banning harmful fisheries subsidies and, consequently, avoiding the disappearance of fish stocks. The treaty at issue represents the first fully met SDG and the first one achieved thanks to a multilateral agreement. Furthermore, this is the first WTO agreement regarding the environment and the first broad multilateral treaty on ocean sustainability.

New proposals to deepen the link between trade and SDGs could come from the 13th Ministerial Conference, which will take place on February 26-29, 2024, in Abu Dhabi[25].

### 4. *Possible guidelines for the reform of economic international organizations*

As a matter of fact, the above-mentioned initiatives represent only the first step towards the implementation of a new model of global economic governance. Indeed, the implementation of the SDGs as well as the establishment of a more equitable and fairer world order require a deep reform of the existing global economic governance.

The reform of global economic governance must occur in light of the objective of sustainable and shared growth.

Embarking on this shared premise, three operational directives emerge, guiding us collectively toward a redefined global economic governance: the reduction of the debt burden, accompanied by the introduction of new mechanisms and principles regarding debt restructuring; the increase of sustainable finance; the improvement of the international trade system.

These criteria have been recently confirmed in the Declaration adopted on occasion of the SDG Summit in September 2023,

[25] The possible WTO contribution to the achievement of the SDGs is highlighted in a recent WTO report submitted to the UN High-level Political Forum on Sustainable Development: see WTO, *WTO's Contribution to Attaining UN Sustainable Development Goals: 2023 Update to the High-Level Political Forum*, Geneva, 2023.

which emphasizes the need, in particular, of the following actions: to improve the international debt mechanisms, providing support for eligible vulnerable countries and strengthening the coordination among creditors; to support a reform of the international financial architecture in order to promote investments for the achievement of SDGs and to face global challenges; to urge multilateral development banks (MDBs) to mobilize and provide additional financing to support developing countries to achieve the SDGs; to promote a universal, rules-based, non-discriminatory, open, fair, inclusive, equitable and transparent multilateral trading system, with the WTO at its core, which could contribute to the achievement of the SDGs[26].

A future reform should take place on the basis of the following guidelines: the promotion of sustainable development and the protection of human rights as inspiring criteria for the reform of economic international organizations; the promotion of sustainable development and the protection of human rights as guiding principles of the activities of economic international organizations; the adoption of a global decision-making process with a broader vision; the measurement of development on the basis of sustainability, equity and human rights.

### 4.1. *The promotion of sustainable development and the protection of human rights as inspiring criteria for the reform of economic international organizations*

Most of the proposals to reform multilateral institutions made in recent years concern the possibility of making these organizations more effective through the introduction of new management systems, better coordination, as well as more rigorous audit and evaluation procedures. These proposals often focus on increasing seats on boards of directors, but more rarely take into consideration the ways in which the multilateral system could guarantee greater protection

[26] See *Political Declaration Adopted at the High-level Political Forum on Sustainable Development (HLPF), Under the Auspices of the General Assembly in September 2023*, para. 38 (t).

of human rights and the promotion of sustainable development. On the contrary, future institutional reforms should start precisely from the need to ensure an alignment between these objectives and the changes to be made, in terms of structures, resources and capabilities, in multilateral institutions.

In this regard, it appears essential to formally include in the mandate of economic international organizations, in addition to economic purposes, the objective of sustainable and inclusive development, without disparities and inequalities.

It would also be necessary to provide for an evaluation of IFIs lending agreements by development agencies, aimed at assessing the impact of such agreements on public spending by States on essential public goods such as health, education, and the creation of jobs. At the same time, development proposals approved at multilateral level should also be subject to scrutiny by all interested parties. Finally, multilateral organizations should put in place greater cooperation and effective coordination to work coherently for human rights and sustainable development. To this end, the UN Economic and Social Council (or a new body to be established) could coordinate the UN system and economic international organizations, in particular the Bretton Woods institutions, with the aim of achieving the SDGs.

### 4.2. *The promotion of sustainable development and the protection of human rights as guiding principles of the activities of economic international organizations*

In the perspective of a profound reform of the multilateral economic governance, the promotion of sustainable development and the protection of human rights should be definitively assumed as guiding principles of the activities of economic international organizations.

Thus, the promotion of sustainable development and the safeguarding of human rights must evolve into the very essence, the foundational bedrock, of our collective multilateralism, also concerning macroeconomic cooperation, development, international finance, and international trade.

Consequently, as regards economic international organizations, all decisions, programs, resources, measurement indicators, and accountability mechanisms *must* be inspired by the aforementioned principles.

Defining economic development strategies in the light of the protection of human rights and the promotion of sustainable development involves overcoming a merely "incremental" perspective of growth, aiming for a systemic transformation that includes new variables.

More specifically, IFIs should prioritize macroeconomic policies that promote "non-economic values", such as decent work for all. This could include introducing a global minimum wage based on the inflation rate, rather than merely establishing a poverty threshold[27].

Every form of external development financing should be guided more by the principles of promoting sustainable development and protecting human rights than by macroeconomic conditionalities.

By virtue of this new approach, MDBs (and, in general, IFIs), as well as debt restructuring systems, should favor the so-called "fair and responsible lending". Such an orientation is clearly accepted in the Principles on Promoting Sovereign Lending and Borrowing[28], from which emerges the idea of a co-responsibility of the debtor and

[27] See SDG 8. Also the proposed World Bank Group Strategy in October 2013 for the four main agencies of the Group (IBRD, IDA, IFC, and MIGA), for example, merely identifies two main objectives: to achieve the overcoming of extreme poverty, which means the reduction of the percentage of the population that lives on less than US$1.25 a day at 3% by 2030; to promote shared prosperity, which means developing 40% income growth in every developing country.

[28] UNCTAD, *Principles on Promoting Responsible Sovereign Lending and Borrowing*, 2012. These Principles arise from the initiative promoted by the United Nations Conference on Trade and Development (UNCTAD) to develop a set of rules on responsible financing, following the serious global financial crisis of 2008-2009, which highlighted the inadequacies and asymmetries of the financial market. In 2009, UNCTAD set up a group of experts, which proposed a first version of the Principles in May 2011, then modified and adopted in the consolidated version at the XIII session of the Conference, which took place in Doha on April 21-26, 2012. The value of this instrument, which has a non-binding nature, lies not so much in codifying the international rules on the topic but in organizing the basic principles and best practices pertaining to the sovereign financing in a systematic and coherent way, according to a holistic approach to debt regulation which is intended as applicable to all sovereign borrowers and lenders, both private and public (States or international organizations).

the creditor in protecting the public interests of the citizens of the former[29]. These Principles also state that, in the event that a State is unable to repay its debt, all lenders have a duty to act in good faith and in a cooperative manner in order to reach a new agreement which allows the debt restructuring in short time and in an efficient and fair way[30].

The UNCTAD initiative, which arose from the need to promote the prevention and resolution of debt crises as well as the maintenance of financial stability at a national and international level, is linked to the adoption of the UN Secretary-General Report on the external debt sustainability and development[31] in 2010, which expresses concern about the possible consequences of excessive indebtedness on the growth of the least developed countries and the most vulnerable low- and middle-income countries[32].

Therefore, from the prism of applying more equitable principles and a "rights-based approach", an attempt is being made to develop specific rules aimed at strengthening the so-called "shared responsibility" of debtors and creditors, who should also be equally represented in governance systems and decision-making bodies. Consequently, the idea of a co-responsibility of creditors and debtors in ensuring "responsible" financing and in preventing sovereign debts from becoming unsustainable is gradually getting established.

However, according to the UN Secretary-general, a better international management of debt issues would require two actions: to

---

[29] See, in particular, Principle 1 and Principle 8.

[30] See, in particular, Principles 7 and 15.

[31] See *External Debt Sustainability and Development - Report of the Secretary-General*, A/65/155, July 21, 2010.

[32] Recognizing the high cost of debt crises and expressing the desire for a greater stability within the international financial system, the Report urges the adoption of "rule-based procedures" for sovereign debt, together with more data and research to allow the establishment of early warning systems meant to mitigate the hypotheses of default and to guarantee a more ample transparency in international debt negotiations. *Ibidem*, paragraphs 72-73. See also the General Assembly Resolution *Basic Principles on Sovereign Debt Restructuring Processes*, A/RES/69/319, September 10, 2015, which identifies nine fundamental principles to be applied in the restructuring of sovereign debt: sovereignty; good faith; transparency; impartiality; equitable treatment of creditors, sovereign immunity; legitimacy; sustainability; and respect for majority decision in restructuring processes.

reduce debt risks and enhance sovereign debt markets to support SDGs; to enhance debt crisis resolution through the establishment of a debt workout mechanism supporting the Common Framework, which should lead, in the future, to a sovereign debt authority[33].

Finally, it is necessary to change the rules that govern international trade and investments, in order to promote the creation of industries and jobs that are not only compatible with the objective of sustainable development but also functional to it. To this aim, the provisions of international trade agreements and investment treaties need to be reviewed through a transparent process characterized by a broad participation of the various stakeholders and greater involvement of the private sector to facilitate new policies and regulations in support of human rights and the SDGs[34].

### 4.3. *The adoption of a global decision-making process with a broader vision*

An aspect linked to what was stated previously is the necessity of a broader vision on the part of economic international organizations, whose decision-making process should increasingly aim at the creation of global collective goods. This requires States to accept a new conception of their sovereignty, which no longer serves only the national interest but the collective global interests of all peoples.

In particular, MDBs are called to move beyond their traditional financing approach to address global challenges[35]. The WB, for ex-

[33] See UN, *Reforms to the International Financial Architecture, Our Common Agenda Policy Brief 6*, May 2023, pp. 12-13.

[34] On this topic, see L. Johnson, L. Sachs. N. Lobel, *Aligning International Investment Agreements with the Sustainable Development Goals*, in *Columbia Journal of Transnational Law*, 2019, pp. 58-120; L. Rees-Evans, *The Protection of The Environment in International Investment Agreements: Recent Developments and Prospects for Reform*, in *European Investment Law and Arbitration Review*, 2020, pp. 357-391.

[35] It is worth nothing that, on June 22-23, 2023, the French government convened the Summit for a New Global Financial Pact in Paris, in order to define the foundations for a renewed international financial system which allows countries to reduce poverty while combating climate change and preserving biodiversity at the same time.

ample, which represents the main organization for development financing, should focus its activities increasingly on the financing of "global public goods", such as a healthy climate and biodiversity, thus abandoning the usual loan model based on the financing of given national programs in favor of a broader approach that can contribute to the safeguarding of global public goods[36].

In this context, the UN Secretariat suggested the following actions: to significantly augment development lending and improve terms of lending; to modify the business models of MDBs in light of their impact on SDGs and to take more advantage of private finance for SDG impact; to largely increase climate finance, while ensuring additionality; to better use the system of development banks to increase lending and SDG impact; to ensure that the poorest can continue to benefit from the MDB system[37].

A recent Independent High-Level Expert Group on Climate Finance report affirms that developing countries' external climate finance needs are $1 trillion per year by 2030[38]. MDBs could play a pivotal role for climate finance[39]. Indeed, the WB evolution process has been determined by the need to direct its financing model towards global challenges like climate change and pandemic prevention, without limiting itself to its traditional mission of fighting poverty.

---

[36] In this context, the ongoing transformation of the WB Group's mission is significant (see WB, *Evolving the World Bank Group's Mission, Operations, and Resources: A Roadmap*). See also Development Committee (Joint Ministerial Committee of the Boards of Governors of the Bank and the Fund on the Transfer of Real Resources to Developing Countries), *Ending Poverty on a Livable Planet: Report to Governors on World Bank Evolution*, DC2023-0004, September 28, 2023. It must also be added that MDBs should intervene more in favor of middle-income countries: these States are not able to benefit from the subsidized loans provided for low-income States but, at the same time, are not in a position to obtain loans on advantageous terms on international markets. For middle-income States, in fact, subsidized financing for climate change mitigation could be fundamental, allowing them, for example, to reduce the consumption of fossil fuels.

[37] See UN, *Reforms to the International Financial Architecture, Our Common Agenda Policy Brief 6*, May 2023, pp. 15-20.

[38] See *Finance for Climate Action Scaling up Investment for Climate and Development*, Report of the Independent High-Level Expert Group on Climate Finance, November 2022.

[39] See C. Humphrey, *Financing the Future Multilateral Development Banks in the Changing World Order of the 21st Century*, Oxford, Oxford University Press, 2022.

Nevertheless, expanding the mandate of MDBs necessitates a substantial rise in their financial capacity, which could be achieved through a capital increase by shareholders, better utilization of their balance sheets, or even the involvement of private capital[40].

Reports by the G20 Independent Expert Group on Strengthening MDBs defined a roadmap for different reforms, including capital increases for the MDBs[41]. Indeed, in 2023, the WB and Asian Development Bank expanded their balance sheets, improving their lending capacity. However, MDBs capital increases are hindered by advanced economies, which propose private capital mobilization as an alternative.

### 4.4. *To measure development on the basis of sustainability, equity and human rights*

Finally, a fundamental innovation should be to measure development on the basis of sustainability, equity and human rights.

The measurements of the increase in development, which are the basis of the decisions adopted by multilateral institutions, are often based on limited parameters of a strictly economic nature. This could compromise not only the prospects for sustainable development but also the effectiveness of the action of these organizations. In fact, when the topic of development is addressed, the debate generally revolves merely around the issues of reducing poverty and increasing production and consumption. On the contrary, we need more complete measurements of a country's growth, in which sustainable development is the inspiring criterion and determines the planning and use of resources. In this sense, the economic analyses that guide the

[40] The Sharm el-Sheikh implementation plan, with the conclusions of the 27th Conference of the Parties (COP27) of the United Nations Framework Convention on Climate Change (UNFCCC), indicates a financing gap of six trillion US dollars by 2030 (see UNFCCC, *Sharm el-Sheikh Implementation Plan*, Decision -/CP.27, November 20, 2022).

[41] See, for instance, the report of the Independent Expert Group commissioned by the Indian G20 Presidency, *Strengthening Multilateral Development Banks, The Triple Agenda, Mechanisms, Mandates, Finance*, Report of The Independent Experts Group, June 30, 2023.

work of such organizations should include the impact of any activity on the promotion of human rights and sustainable development.

This new approach is based on a holistic conception of development, deriving from the gradual integration into the concept of economic development of the necessary protection of human rights. This conception has determined the emergence of a "rights-based approach to development" and the related right to development. This broad concept of development, which results in particular from the Declaration on the Right to Development, adopted by the UN General Assembly in 1986[42], is now generally accepted. It is founded on the premise that human rights and human development are global objectives that affect all actions with an international impact, including national economic policies. Consequently, the measurement of development must comprise indicators relating to human rights, as well as social and environmental progress, in addition to economic growth.

This type of measurement, therefore, is not limited to taking into consideration the parameters usually applied (average income, aggregate GDP…) but it also encompasses the costs of economic development, such as damage to the environment, the spread of jobs at poverty wages as well as the people's inability to access healthcare following their loss of productivity.

Therefore, economic international organizations must resort to new methodologies for measuring well-being and new indicators, allowing the evaluation of real inequalities and the connection of the various dimensions of the quality of life. Through this new approach, it becomes possible to measure the consequences of different forms of discrimination on people.

Measurement of development must integrate economic and environmental sustainability, monitoring present conditions with a consideration of reasonably predictable future outcomes. In this framework, consumption and production patterns must be evaluated in light of the need for a balance between human well-being as well as the availability and state of ecological resources.

---

[42] See the General Assembly Resolution *Declaration on the Right to Development*, 41/128, December 4, 1986.

## 5. *Some concluding remarks*

The integrated nature of the SDGs demands a global response and a renewed commitment to multilateralism.

However, the shortcomings of the current international architecture and its inability to support long-term stable financing for the SDGs (including investments in education, health, and social protection) impose a radical process of transformation of the existing organizations. The achievement of the Sustainable Development Agenda targets and of the Paris Agreement[43] commitments appears extremely difficult if huge resources will not be addressed rapidly towards the world's most vulnerable economies. The failure of this aim would represent a systemic threat to the multilateral system itself, creating divergences, geoeconomic fragmentation, and geopolitical crises across the world.

In the current instability of the global context, a reformed multilateral system represents the only inclusive vehicle for promoting domestic and global welfare. Therefore, new rules and new tools must be introduced to allow a sustainable and inclusive growth.

Economic international organizations should be able to play a proactive role in the achievement of the SDGs and the realization of human rights. For this purpose, an overall and profound reform of the current institutions is required, passing through a more inclusive, representative, and more effective global economic governance.

More than 20 years after Monterrey Consensus[44] on Financing for Development, an important step to relaunch the multilateralism towards a democratic economic governance could be represent-

[43] The Paris Agreement was concluded among the States parties to the UNFCCC on December 12, 2015, at the end of the 21st Conference of the Parties (COP21) of the UNFCCC. It requires Contracting Parties to limit global temperature rise to below 2 degrees Celsius, preferably to 1.5 degrees, compared to pre-industrial levels (Article 2).

[44] The International Conference on Financing for Development was held in Monterrey on March 18-22, 2002. The Conference adopted the "Monterrey Consensus", which embraced the principle of a holistic and integrated approach to the multidimensional nature of the global development issues. The Consensus launched the Financing for Development follow-up process.

ed by the UN fourth Financing for Development Conference (UN FfD), which will take place in Spain in 2025. Indeed, the FfD process allows all States to participate on an equal basis in defining a framework for global finance in compliance with sustainable development, climate change, and human rights commitments.

# RENEWABLE ENERGY COMMUNITIES: A TOOL OF THE ENHANCEMENT OF THE TERRITORY, BUSINESSES AND CITIZENS

*Emanuela Rassu*

## 1. *Introduction*

The urgency to achieve decarbonization has never been more pronounced, especially as the world grapples with the far-reaching impacts of climate change. In this pressing context, European member states have undertaken ambitious commitments to reduce greenhouse gas emissions, aiming for climate neutrality and sustainable energy practices by 2050.

The quest for cleaner energy aligns with the European Union's resolute commitments outlined in initiatives like the Green Deal. These commitments not only seek to reduce emissions but also underscore the importance of decentralized, community-driven solutions for energy production and consumption.

This chapter delves into the critical role that Renewable Energy Communities (RECs) play in this larger narrative. As legal doctrines increasingly scrutinize new and sustainable urban governance models and their relation with traditional territorial entities[1], RECs emerge as dynamic entities that can redefine the dynamics between citizens, businesses, and municipalities. Their significance lies not

[1] G. Pavani, S. Profeti, C. Tubertini, *Le città collaborative ed eco-sostenibili. Strumenti per un percorso multidisciplinare*, Bologna, Il Mulino, p. 13.

only in contributing to the broader European goals for decarbonization but also in fostering an environment where communities of people actively participate and benefit from sustainable energy practices.

In particular, as a tool for facing energy poverties, they encourage the creation of an ecosystem of socio-economic welfare, also thanks to the auxilium of remarkable incentivisation policies[2], where the specific involvement of public bodies represents a turning point that sees the transition of local authorities from mere "service providers" to active players in the production and consumption of clean energy, capable of integrating these activities among the functions of general public interests.

While RECs offer promising avenues for sustainability, the paper does not shy away from addressing the challenges embedded in the Italian regulatory landscape. It navigates through constitutional considerations, the balancing act of multilevel governance, and administrative intricacies, shedding light on the hurdles that must be overcome to fully realize the potential of RECs in Italy.

In essence, this chapter seeks to unravel the intricacies of achieving decarbonization through the lens of RECs, emphasizing their role in aligning with sustainability goals while navigating the legal, social, and economic challenges unique to the Italian context. By doing so, it aspires to contribute to a comprehensive understanding of the transformative power of Renewable Energy Communities in the pursuit of a cleaner, more sustainable future.

Furthermore, the aim is to analyse how Renewable Energy Communities improve the development of territories through the creation of an urban ecosystem of clean energy production in which

[2] Considering the Italian case, the implementing decree 199/21 focuses on two measures: an incentive tariff on renewable energy produced and shared and a non-repayable grant. Beneficiaries are small projects, with a capacity of up to 1 MW, and can access the programme on a first-come, first-served basis. The scheme provides an incentive tariff on the amount of electricity consumed by end customers and renewable energy communities paid over a 20-year period. This measure, with a total budget of EUR 3.5 billion, will be financed through a levy on the electricity bill of all consumers. The official decree is still waiting to be published in the gazette, however the text approved by the European Commission is already available.

companies, people and public entities can have environmental, social and economic sustainability.

## 2. *Energy supply and efficiency: definitions and regulations*

Energy supply and efficiency have an important place in the public policy agenda of States, especially for those most developed that must improve the research to "ensure access to affordable, reliable, sustainable and modern energy for all"[3], more than ever in the context of the crisis caused by the conflict between Russia and Ukraine; energy sovereignty and the need to meet the energy needs of individual European countries have led to the need – given Europe's heavy dependence on Russian gas – to invest more in renewables according to a logic of proximity, of subsidiarity starting with the citizens, who are seen as the new interpreters of energy policy.

Then, the significance of energy efficiency is also linked to commercial, industrial competitiveness and energy security benefits, as well as increasingly to environmental benefits such as reducing $CO_2$ emissions.

In the European context, energy supply has been one of the issues at the centre of European Union policies since the very beginning[4].

With the Green Deal, the European Union is among the first international organisations to make a concrete commitment to energy production from renewable sources, whose main objectives for 2030 are to reduce greenhouse gas emissions by 55% compared to 1990s levels and to achieve climate neutrality by 2050. It represents in terms of broadness of initiatives and involved resources the biggest and best ambitious European Union intervention to pursue the

[3] UN Sustainable Development Goal no. 7.

[4] Starting with principle of "solidarity between Member States" in the adoption of "measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products, notably in the area of energy" of article 122, and article 194 of the Treaty of Functioning of the European Union that declares that "Union policy on energy shall aim, in a spirit of solidarity between Member States, to: (a)ensure the functioning of the energy market; (b)ensure security of energy supply in the Union".

environmental and climate objectives. The de-carbonization of the energetic system is considered fundamental to pursue the climate goals[5].

Finally, the Repower EU has, as a specific objective, the pursuit of energy independence through the integration of special chapters in the National Recovery Plans in response to the energy crisis.

Indeed, the order to contribute to the realisation of European programmatic commitments, Italy has drawn up the Integrated National Energy and Climate Plan for the years 2021-2030, which provides for instruments and actions of a heterogeneous nature. The policies put in place at both the European and national levels rekindled debates that had their origins in the early 1990s, in which it became imperative to rethink how the means adopted had worked so far, and possibly to study new ones.

However, while there are many actions taken towards greater energy sustainability, there is agreement in the doctrine that there is no clear and precise legal definition of what is meant by energy supply and energy efficiency[6], let alone whether these terms are enriched with the adjective "sustainable".

As for the concept of "environment"[7], the legal definition of energy ends up constituting a set of specific and technical elements that are difficult to translate into generical and abstract rules. The uncertainty of the legal definition of energy reflects the variability of

---

[5] P. Brandino, *Introduzione*, in E. Bruti Libertati M. De Focantis, A. Travi (a cura di), *L'attuazione dell'European Green Deal – I mercati dell'energia e il ruolo delle istituzioni e delle imprese*, pp. XVII ff.

[6] About the inhomogeneity and asymmetry of the energy efficiency regulation, see P. Bilancia (a cura di), *La regolazione dei mercati di settore tra autorità indipendenti nazionali e organismi europei*, Milano, Giuffrè, 2012, pp. 1-274, cited by R. Miccú, M. Bernardi, *Premesse ad uno studio sulle* Energy communities: *tra governance dell'efficienza energetica e sussidiarietà orizzontale*, in *Federalismi*, 2022, 4, p. 604.

[7] E.g., in Italy the elaboration of the concept of environment is to be ascribed to the Constitutional Court in the first place, which, however, has increasingly outlined the unity and primacy of the environment as a constitutional value, the precise definition of which has ended up being in most cases a wrapping-up of various notions or branches of environmental protection, from protection against pollution, to waste management, to the right to an healthy environment. For deeper comprehension, see Italian Constitutional Court, judgements. no. 151/86, 152/86, 210/87, 641/87, 800/88, 1031/88, 324/89, 437/91.

the approaches of the various sciences and the plurality of solutions of the various theories within them; the strong ideological and political emotionalism prevalent around the concept of energy (and of clean or sustainable or renewable energy); the development in practice of groups and structures carrying differentiated, often contradictory and conflicting interests.

That as always underscores the issue of elaborating a comprehensive and unitary legal framework, increasing the fragmentation of regulation in a context where energy governance is physiologically multi-level.

When it comes to the concept of sustainability or sustainable development, the concept of energy production has to be understood under the purposes of the Brundtland Commission Report, which means that it has to "[meet] the needs of the present without compromising the ability of future generations to meet their own needs".

Then, the adjective "sustainable" associated with energy indicates a role in guiding the actions and policies to be adopted, which lend themselves well to being declined according to ESG[8] sustainability criteria, where the "Environmental" component responds to the environmental impact of the plants, the "Social" element is constituted by the inclusion of resources and people in the territory in which production is rooted. At the same time, the "Governance" part includes the processes that regulate the same production and distribution. So, "When we talk about sustainable energy, we are referring to renewable sources[9] and the value they assume in terms of less impact on the environment, involvement

[8] An acronym coined in 2004 by James Gifford, head of sustainable&impact advisory at Credit Suisse, it is used in the economic/financial field to indicate risks/opportunities linked to environmental, social and governance factors; For a deeper understanding of the origins and implications of the acronym, see E. Pollman, *The making and Meaning of ESG*, European Corporate Governance Institute - Law Working Paper No. 659, 2022, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4219857.

[9] R. Santi, *Energia e ambiente*, in B. Caravita, L. Cassetti, A. Morrone (a cura di), *Diritto dell'ambiente*, Bologna, 2016, p. 243, explain that "Renewable energies are understood to be those forms of energy that by their intrinsic characteristic regenerate at least as fast as they are consumed or are not 'exhaustible' on the human time scale".

of local resources, less dependence on foreign sources and market accessibility"[10].

The Renewable Energy Communities were regulated for the first time in 2018 with the RED II 2018/2001/EU directive intending to promote the creation of autonomous legal entities that allow public, private and small-medium enterprises to associate to produce, share, and consume energy from renewable sources while bringing environmental, social and economic benefits. The particularity of this configuration is the possibility of managing autonomously not only electricity but also heat and gas, provided they are produced from renewable sources.

Furthermore, Renewable Energy Communities have the opportunity to carry out ancillary activities to the sole production of energy from renewable sources, among which the most current concerns the installation of charging stations for electric mobility. This means creating an ecosystem through which to promote a considerable variety of sustainability actions that can lead to improved sustainable development goals such as responsible consumption and production, the creation of "sustainable cities and communities" and "build resilient infrastructure, promote inclusive and sustainable industrialization and foster innovation".

## 3. *The role of consumers in the energetic transition*

The ecological restructuring of the economy requires a change in consumption production patterns, i.e. the production of environmentally responsible trade and environmentally conscious consumption[11].

Being able to say that energy efficiency links the achievement of economic goals to the pursuit of both environmental and social goals, it has been pointed out that to reduce the information asym-

[10] S. Maglia, *Diritto Ambientale, alla luce del T.U ambientale e delle novità 2011*, Assago, Ipsoa, 2011, p. 267.

[11] V. Pepe, *Le "comunità energetiche" come nuovi modelli giuridici di sviluppo sostenibile. Prime note sull'esperienza francese*, in *Ambientediritto.it*, 2022, 3, p. 4.

metries affecting the energy efficiency market on the demand side, attention must be shifted from the instruments to the players. In this sense, it should be noted that thanks to technological progress and greater awareness of good energy-saving practices, the consumer seems to be more aware and attentive, so that, by reducing the space of information asymmetry, he has gained an extraordinary centrality in demand management[12]. The adoption of virtuous and energy-efficient behaviour is not only a social value but has also an economic function because of the freedom of choice of consumers. The consumer is offered not only more information but also more tools to aggregate his or her energy supply and demand, thus promoting horizontal relations in which information asymmetries are reduced and the consumer's capability and empowerment are strengthened through the functionalisation of their actions[13].

With the figure of the prosumer[14], the distinction between producer and consumer becomes blurred, and the proactive role of the consumer – to be promoted in a logic of horizontal subsidiarity – is strongly confirmed. Furthermore, taking into account the regulation of the incentives disbursement, strictly related to the activity of sharing energy between the members of the REC, makes the presence of mere consumers fundamental in the configuration of the REC, which will have to be organised in such a way that whenever there is excess production of energy concerning the needs of prosumers, there is at the same time a consumer using that energy. This also means it is not so easy to create speculative activities around RECs, but also that in this sense the consumer has the responsibility to be an active part of the process, from which arises the advantage of contributing significantly to decision-making processes,

---

[12] R. Miccú, M. Bernardi, *Premesse ad uno studio sulle* Energy communities: *tra governance dell'efficienza energetica e sussidiarietà orizzontale*, in *Federalismi*, 2022, 4, p. 613.

[13] T. Perillo, *Il ruolo del cittadino europeo nell'era del Green Deal*, in A. Buonfrate, A. Uricchio (a cura di), *Trattato breve del diritto dello sviluppo sostenibile*, pp. 417 ff.

[14] The first definition of "prosumer" was that of "subject who is at the same time productor and final client of electric energy": All. A delibera ARERA 18/05/2012, 188/2012/E/com, as amended and supplemented by resolution 20/02/2014, 59/2014/E/com and resolution no. 11/12/2014, 605/2014/E/com.

from the management of plants intended for the energy community to the management of the incentives. This model plays a significant role in the energy transition path, re-proposing an idea of decentralised production that minimises energy dispersion and simultaneously makes members of the community protagonists, with particular attention to the role of consumers.

## 4. *Renewable Energy Communities and ESG activities*

Energy supply and efficiency are not relevant only in terms of Climate Change actions, and ecological and energetic transition, but also as regards the achievement of well-rounded sustainability.

Companies, to remain competitive in the market, adopt strategies and policies to increase their sustainability indexes according to ESG criteria[15], where, among other things, a lower percentage of companies adopt solutions aimed at energy efficiency and the reduction of electricity consumption, even lower if one considers those that use renewable energy sources to reduce their consumption[16].

Renewable Energy Communities help to meet these needs, expressing the idea of "sustainable energy" that was mentioned in the previous pages, an example of an "Environmental constitutional State "in Actions""[17] that gives benefits as: a) bill savings: the more energy is self-consumed directly, the more the costs of the variable components of the bill (energy share, grid charges and related taxes) are reduced; b) gain on energy produced: producing energy with a photovoltaic system can be a source of income thanks to incentive mechanisms, that are territorially differentiated[18]; c) tax benefits

[15] M. Fortis, *Le imprese energetiche e la sostenibilità*, in E.B. Liberati, M. De Focantis, A. Travi (a cura di), *L'attuazione dell'European Green Deal. I mercati dell'energia e il ruolo delle istituzioni e delle imprese*, Associazione Italiana di Diritto dell'Energia - Annual Conference, Milan, 10 February 2022, p. 33.

[16] ISTAT, *Pratiche sostenibili nelle imprese nel 2022 e nel 2023-2025*.

[17] V. Pepe, *Le "comunità energetiche" come nuovi modelli giuridici di sviluppo sostenibile. Prime note sull'esperienza francese*, in *Ambientediritto.it*, 2022, 3, p. 16.

[18] North: 0,119 euro/Kwh shared; Centre: 0,115 euro/Kwh shared; South: 0,110 euro/Kwh shared.

(deductions or super depreciation): recovery of 50% of the realisation costs for private individuals who install a photovoltaic system on the roof of a building. For companies, there is a super depreciation of 130% of the investment value.

In Italy, the Renewable Energy Communities attract the attention of multiple market players, including large companies, which aim to increase their ESG rating through them, also to comply with the forthcoming regulations implementing the European directives on Corporate Social Responsibility and European Sustainability Reporting Standards.

## 5. *Challenges and perspectives in the Italian regulation*

Having clarified the opportunities in terms of sustainable development that renewable energy communities can offer, it is necessary to look at the aspects of their development on Italian territory, focusing here on the legal issues that may favour or hinder their establishment.

In the context of energy production from renewable sources, the first profile of law that is involved is the constitutional one, which is expressed in the relationship between relevant values such as environmental protection and landscape protection. The introduction in the third paragraph of Article 9 of the Constitution of the protection of the environment jointly with that of the landscape, as well as the inclusion of "environmental value" as a criterion for the orientation of private economic initiative, in Article 41, could lead to a new approach in the assessment of the balance of guaranteed values. This is because, although renewable energy sources represent an opportunity to reduce $CO_2$ emissions into the atmosphere and contribute to European clean energy production targets, at the same time, to guarantee a satisfactory production capacity, the plants need space, with the consequent and still unavoidable impact on the landscape.

The location of renewable energy sources plants in the middle of the environment-landscape dichotomy is not new to the legal de-

bate[19], indeed the conflicting relationship between the two values has often been manifested in the issue of granting authorisations for the construction of energy production plants from renewable sources; however, the greater need for energy independence and consequent supply, due above all to the current geopolitical context, could lead to a rethinking of the role of renewable energy in the protection of the artistic and cultural heritage, in a certain sense envisaging a recessive role of the latter.

A second knot under the constitutional profile can be found under the aspect of multilevel governance between State and Regions, where the location and construction of production plants are once again placed at the crossroads between State legislative powers on the environment and energy[20] and the concurrent regional competence envisaged in the energy field.

Ever since the amendment of the fifth Title of the Constitution, which provided for the indication among the matters of concurrent competence of "the activity of production, transport and national distribution of energy", the Constitutional Court has played the role of substitute Legislator in resolving conflicts of attribution between State and Regions[21].

In this sense, constitutional jurisprudence has shown an orientation inclined to censure those regional initiatives that introduce absolute or generalised bans capable of preventing any installation based on a generic presumption of landscape protection.

---

[19] L. Ferraro, *Costituzione, tutela del paesaggio e fonti di energia rinnovabili*, in L. Chieffi, F. Pinto (a cura di), *Governo dell'energia dopo Fukushima*, Editoriale Scientifica, 2013, 3, pp. 209-235; C. Battiato, *Regioni ed energie rinnovabili: ancora una volta la scure della Corte costituzionale si abbatte su norme regionali relative alla localizzazione di impianti di energia da fonti rinnovabili*, in *Consulta online*, 2014; C. Pellegrino, *Ambiente ed Energia: la Corte costituzionale conferma i suoi orientamenti e il suo ruolo di supplenza ermeneutica*, in *Le Regioni*, 2019, 3, pp. 843 ff.; A. Colavecchio, *Il "punto" sulla giurisprudenza costituzionale in tema di impianti da fonti rinnovabili (nota a Corte Cost., 22 dicembre 2010, n. 366)*, in *Rivista quadrimestrale di diritto dell'ambiente*, 2011, 1, pp. 100 ff.

[20] G. Vivoli, *Transizione energetica e fonti rinnovabili: vecchi contenziosi, nuovo quadro normativo, riforma costituzionale e attuale scenario ambientale e geopolitico*, in *Camminodiritto.it*, 2022, 8, https://rivista.camminodiritto.it/public/pdfarticoli/8696_8-2022.pdf.

[21] Italian Constitutional Court, judgements no. 166/2008, 282/2008, 119/2010, 124/2010, 85/2012, 224/2012, 119/2014.

From this orientation, one can deduce the particular favour given to renewable sources, expressive of a public interest that aims not only to safeguard environmental interests but also landscape values[22].

And yet, by the requirements placed on the table in the National Recovery Plan, a significant turning point can already be seen in the way the national legislator interprets its role (and that of the Regions) on the subject of renewable energy sources (RES): this is the case of the recently updated Guidelines[23] for the authorisation of plants from renewable sources, following which the establishment of homogeneous principles and criteria for the identification of surfaces and areas suitable and not suitable for the installation of RES plants is referred to the competent ministries.

The notable change of step consists in the positive definition of areas suitable for the establishment of plants, subverting the paradigm – before the update – according to which there was a presumption of unsuitability by generalised protection of the landscape. On the wave of this innovation, and in light of the expected results in terms of energy production from renewable sources, a survey of the production capacity to be achieved respectively for each regional territory could be envisaged at the state planning level, with the possible consequence that the Regions – when integrating the ministerial decrees for the identification of areas – could no longer focus on the protection of the landscape, but rather on the need to meet energy requirements. A symptom of this possible perspective is the fear of the national legislator of regional protectionism, recognisable in the clarification that the non-inclusion of an area among those suitable is not a sufficient element to consider it unsuitable for planning purposes[24].

---

[22] G.D. Comporti, *Energia, ambiente e sviluppo sostenibile*, p. 708.

[23] The so-called *Testo Integrato dell'Autoconsumo Diffuso* (TIAD), implementing the legislative decrees no. 199/21 and 210/21 in the field of renewable energy communities, citizen energy communities, groups of self-consumers of renewable energy acting collectively, groups of active customers acting collectively, individual self-consumers of renewable energy "at a distance" with a direct line, individual self-consumers of renewable energy.

[24] G. Vivoli, *Transizione energetica e fonti rinnovabili: vecchi contenziosi, nuovo quadro normativo, riforma costituzionale e attuale scenario ambientale e geopolitico*, in *Camminodiritto.it*, 2022, 8.

A further profile of law in close connection with the one outlined above is the administrative one, especially concerning the simplification procedures of the authorisation regimes: like other reform actions of the National-Recovery-Plans season[25], to ensure the increase in the share of energy produced from renewable sources, simplification is the first element that is taken into account.

Through it, the vision of the role of the public administration changes, from being a regulating authority to a performance body[26]; a particularly significant example can be seen in the introduction of the "result principle" in the new Italian code of public contracts[27]. The issue of simplifications brings with it the question of balancing interests, because if on the one hand, there is the risk of sacrificing a balance between the principles at stake in virtue of the swift realisation of the set objectives[28], on the other hand, the inertia of a "defensive administration" jeopardises the investments made available for the relaunch of the territories.

The focus, therefore, lies in the identification of the borderline beyond which one is, indeed, in the presence of an arbitrary and unreasonable sacrifice of constitutionally relevant interests.

## 6. *Public participation, horizontal subsidiarity and shared administration*

Finally, one prospect for development at the level of Italian legislation could be seen in the way local authorities participate in these entities, especially as prosumers. The opportunity was mentioned in

[25] F.S. Marini, *Il Piano Nazionale di Ripresa e Resilienza, fra semplificazione normativa e amministrativa*, in D. De Lungo, F.S. Marini (a cura di), *Scritti costituzionali sul Piano Nazionale di Ripresa e Resilienza*, pp. 195 ff.

[26] *Ibidem*.

[27] Article 1, Legislative Decree no. 36/2023.

[28] Taking into account the Guidelines mentioned before about the installation of RES plants, always G.D. Comporti, *Energia, ambiente e sviluppo sostenibile*, emphasises that "from the premise that the high level of administrative decentralisation must not be a constraint on efficiency or an element of undesirable inhomogeneity, but rather become a resource for the benefit of operators and an element of greater closeness of the assessment to the characteristics of the territory".

the Covenant of Mayors and in particular in the Sustainable Energy Action Plan, within the four areas in which regional and local governments can implement appropriate energy efficiency measures as well as renewable energy projects[29].

Given the natural propensity of local authorities, and in particular of the municipality, to intercept new needs or new legal instruments or innovative solutions, they represent the most suitable place for the implementation of energy efficiency policies, therefore their participation can contribute to promoting general public interests in the activity of the Renewable Energy Communities to generate environmental, social and economic benefits for the collectivity, bearing in mind that the participation of authorities must be subject to the rules laid down in the Legislative Decree no. 175/2016[30]. Public shareholding must satisfy the constraint of inherent public interest prescribed by Article 4 of the mentioned law, according to which shareholdings cannot be acquired in companies "whose object is the production of goods and services that are not strictly necessary for the pursuit of their institutional purposes".

A further obstacle in this regard is the advice of the Court of Auditors, which is called upon to express an opinion on the conformity of the deliberative acts of the participation under the Legislative Decree 175/2016; in this regard, it is already possible to mention the different advice of territorial sections of the Court, where in some case of an adverse opinion was issued recognising a public interest in energy production that can be ascribed to the legislation such that the establishment of a company or the mere participation is justifiable[31], while another had stated positive advice because the constitution of a company ensure the correct participation of the administration while pursuing the institutional purposes related to the activities of the Renewable Energy Community[32].

---

[29] E. Ferrero, *Le smart cities nell'ordinamento giuridico*, in *Foro amministrativo*, 2015, 4, pp. 1278 ff.

[30] F. Cusano, *L'efficienza energetica nel quadro della transizione ecologica*, in *Rivista quadrimestrale di diritto dell'ambiente*, 2022, 2, p. 175.

[31] Corte dei Conti, Sez. Toscana, deliberation no. 77/2023/PASP.

[32] Corte dei Conti, Sez. Friuli Venezia Giulia, deliberation no. 52/2023/PASP.

A new perspective in the energy field related to public participation could be seen in the so-called "shared administration", a set of tools already adopted in multiple cases when taking into consideration the eco-cities[33]. These tools differentiate both from the classical "command and control" approach of public administration to managing public interests and the typical forms of externalisations and public-private partnerships because they start from the assumption of the voluntary initiative of private citizens[34], which fits perfectly with the requirements for incorporation and participation in RECs.

[33] G. Pavani, S. Profeti, C. Tubertini, *Le città collaborative ed eco-sostenibili. Strumenti per un percorso multidisciplinare*, Bologna, Il Mulino, pp. 65 ff.

[34] *Ibid.*, it is explained that the shared administration represent a "fourth model of the administrative activity" after the authoritative one, the consensual activity and the private law activity, citing as an example the definition given by the jurisprudence of the Italian Civil Court of Cassation (Cass. Civile, Sez. I. sent. 15595/2014): "the spontaneous initiative of citizens, families, associations and communities in the performance of activities of a typical nature and referable exclusively to those subjects, in which the local authority has no right to intervene, and to which it can contribute in various ways, including through the provision of subsidies, on the basis of an assessment of the need for the service or activity to be able to continue for the benefit of the relevant community […] has nothing in common with the provision of services of general interest which may be provided in the form of an undertaking, and is therefore unrelated to the direct or indirect procurement of those services by public bodies".

# SESSION V

# SUSTAINABLE DEVELOPMENT AND THE MULTILATERAL TRADE SYSTEM

# ADDRESSING THE ENVIRONMENTAL EXTERNALITIES OF THE EU BIOFUEL POLICY AND INTERNATIONAL TRADE RULES (MALAYSIA VS EU - DS600). SOME INDICATIONS FOR AUTONOMOUS TRADE-RELATED CLIMATE MEASURES

*Davide Grespan**

## 1. *Introduction: the facts of the case, the overarching arguments of Malaysia and the EU*

The panel report in *DS600 EU and Certain Member States – Palm Oil (Malaysia)*[1] is attracting the attention of international trade lawyers because it deals with the question of the WTO compatibility of measures adopted by the EU to fight climate change, which affect international trade ("autonomous trade related climate measures"). The theme is certainly not new, but it is extremely topical given the climate breakdown and biodiversity collapse the world is witnessing and the fact that the EU has made the fight against climate (and therefore de-carbonisation of its economy) one of its political priorities[2].

The objective of this paper is to give the reader a succinct description of the panel's findings on a limited number of legal issues

---

* The information and views set out in this article are those of the author and do not necessarily reflect the official opinion of any EU Institution.

[1] This panel report was adopted by the Dispute Settlement Body on 26 April 2024.

[2] Article 2(1) of Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 (OJ L 243, 9.7.2021, p. 1).

relevant for the above-mentioned question and add a few comments. Given the space available it would be impossible to give an exhaustive description of the panel report.

First, however, it is necessary to provide some background as outlined in the panel report.

This dispute concerns the EU legal framework for renewable energy laid down, in the first place, by the second iteration of the Renewable Energy Directive ("RED II"[3]). That framework establishes a global target for the use of renewable energy for the EU[4] and a transport sector target for renewable energy[5]. In that respect, precise rules set out to which extent different types of renewable energy (including biofuels – i.e. liquid fuel for transport produced from biomass) are eligible to meet the transport sector target.

Reducing the greenhouse gas intensity of the energy used to perform transport is a way to reduce transport emissions. Biofuels are one of the alternative energy carriers available that offer the potential to reduce the greenhouse gas intensity of fuel[6]. According to the EU, the use of biofuels may reduce greenhouse gas emissions ("emissions") provided their direct and indirect emissions are lower than those produced by the fossil fuels they replace. Indeed, biofuels

[3] In particular, Directive (EU) 2018/2001 of 11 December 2018 on the promotion of the use of energy from renewable sources ("RED II") (OJ L 328, 21.12.2018, p. 82); Commission Delegated Regulation (EU) 2019/807 of 13 March 2019 supplementing Directive (EU) 2018/2001 of the European Parliament and of the Council as regards the determination of high indirect land-use change-risk feedstock for which a significant expansion of the production area into land with high carbon stock is observed and the certification of low indirect land-use change-risk biofuels, bioliquids and biomass fuels (the "Delegated Regulation") (OJ L 133, 21.5.2019, p. 1); Report from the Commission […] on the status of production expansion of relevant food and feed crops (the "Status Report") (COM/2019/142 final).

[4] The overall share of energy to be obtained from renewable sources in the Union's gross final consumption of energy must be of at least 32% by 2030.

[5] Member States must set an obligation on fuel suppliers to ensure that the share of renewable energy within the final consumption of energy in the transport sector is at least 14% by 2030.

[6] IPCC, *Climate Change 2007: Mitigation. Contribution of Working Group III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change*, edited by B. Metz, O.R. Davidson, P.R. Bosch, R. Dave, L.A. Meyer, Cambridge, United Kingdom and New York, NY, Cambridge University Press, 2007, p. 13.

are expected to be a major contributor towards reducing emissions in the EU transport sector[7].

The EU distinguishes between "conventional" (or "first generation") and "advanced" (or "second generation") biofuels. "Conventional biofuels" are fuels that have been derived from food and feed crops, such as starch, sugar and vegetable oil. "Advanced biofuels" are fuels produced from a wide array of different feedstock, such as municipal solid wastes.

As global demand for agricultural commodities continues to grow (more than agricultural productivity), increased demand for conventional biofuels within the EU further contributes to increasing the global demand for these commodities. Biofuels crops demand is associated with a risk of land-use change or ""LUC", because conventional biofuels need agricultural land to be produced.

LUC can be defined as the change from one land use category to another[8] and it can be both "direct" and/or "indirect".

In the context of biofuel policies, direct land-use change ("DLUC") occurs when the land use category changes for the purposes of crop production (e.g. from forest to biofuel crop production). In the EU legal framework, the sustainability and GHG emissions saving criteria are intended to address the direct change of use for land with high carbon stock or high biodiversity value for the production of biofuels[9].

Where demand for feedstock used to produce biofuels increases, and that increase in demand cannot be met through yield in-

---

[7] E.g. Communication from the Commission, *A European Strategy for Low-Emission Mobility*, 20.07.2016, COM(2016) 501 final, {swd(2016) 244 final}.

[8] Panel report, para. 2.79. The IPCC land used categories are "forest land, cropland, grassland, wetlands, settlements, other lands", IPCC, *Climate Change and Land: an IPCC special report on climate change, desertification, land degradation, sustainable land management, food security, and greenhouse gas fluxes in terrestrial ecosystems* ("IPCC report *Climate Change and Land*"), edited by P.R. Shukla, J. Skea, E. Calvo Buendia, V. Masson-Delmotte, H.-O. Pörtner, D. C. Roberts, P. Zhai, R. Slade, S. Connors, R. van Diemen, M. Ferrat, E. Haughey, S. Luz, S. Neogi, M. Pathak, J. Petzold, J. Portugal Pereira, P. Vyas, E. Huntley, K. Kissick, M. Belkacemi, J. Malley, in press, 2019, p. 817.

[9] Eligibility towards the EU renewable energy targets is categorically excluded by the sustainability criteria when the feedstock is produced on land which previously was categorised as high carbon stock or highly biodiverse.

creases, existing agricultural land used to produce commodities for non-fuel demand may be used to produce biofuel feedstock instead. In other words, biofuel feedstock may displace production for other purposes, notably food (of note, that the crop produced in a given parcel may remain the same – but it may be used to satisfy biofuel demand rather than food demand). Some of this displacement ultimately may lead to conversion of land elsewhere into agricultural land in order to address food demand. Indirect land-use change or "ILUC" refers to the situation when non-agricultural land is brought into agricultural production as a consequence of land previously being used for non-fuel demand being diverted to the production of feedstock used for biofuels[10]. Because agricultural commodities are traded on a global scale, also ILUC is a global phenomenon that is transmitted through global markets for agricultural commodities and as such may occur anywhere in the world[11].

When biofuel crop production leads to the extension of agricultural land into areas with high carbon stock such as forests, wetlands and peatlands (whether directly or indirectly) this may cause the release of GHG emissions ($CO_2$ stored in trees and soil) of such a magnitude that it negates any emission savings from the use of biofuels instead of fossil fuels[12]. Moreover, this may cause a severe loss of biodiversity.

DLUC emissions are calculated in accordance with a methodology set in RED II on the basis of international standards. ILUC emissions instead cannot be determined with the same methodology, because they are indirect and therefore cannot be observed or measured directly. Likewise, existing modelling of ILUC emissions provides highly variable results[13].

Therefore, the EU developed a new approach to estimate the risk of ILUC emissions resulting from increased EU demand for bi-

[10] RED II, recital 81. "For example, if agricultural land is diverted to biofuel production, forest clearance may occur elsewhere to replace the former agricultural production", p. 817.

[11] Panel report, para. 7.524.

[12] Delegated Regulation, recital 2.

[13] The Status Report, II; Commission Staff Working Document, section 2.4, SWD(2012) 343 final, 17 October 2012, https://climate.ec.europa.eu/system/files/2016-11/swd_2012_343_en.pdf.

ofuels. That approach seeks to identify which crop, if demand were further stimulated, would be likely to give rise to crop expansion into types of land associated with such high levels of emissions that any unit of biofuel produced from that crop would not give rise to lower emissions compared to the replaced fossil fuel[14]. This approach is based on observed crop expansion and takes into account the known characteristics of certain types of land as well as the characteristics (yield and by-products) of individual crops[15]. The EU assessed the expansion of each biofuel crop area on the basis of both a review of the scientific literature, and a geospatial modelling approach based on satellite observations[16].

The EU approach translates into the high "ILUC-risk formula", which is designed to determine the degree of ILUC-risk for each individual biofuel crop using as proxy the observed share of a crop's production area expansion into land with high carbon stock, adjusted for productivity[17]. According to the high ILUC-risk formula, currently only palm oil classifies as high ILUC-risk.

At the same time, the EU recognised that in particular circumstances, specific consignments of the same crop may be produced in conditions that avoid displacement effects and can therefore be certified as "low ILUC-risk biofuel". Biofuels certified as low ILUC-risk are not subject to the limitations imposed on high ILUC-risk biofuels.

Because the production of conventional biofuels causes LUC, RED II encourages a gradual shift in the transport sector away from those biofuels. It does so, *inter alia*, by setting a maximum share of the renewable energy target in the transport sector to which conventional biofuels may contribute ("7% maximum share") and by capping and progressively reducing to zero the contribution of high ILUC-risk biofuels to the transport renewable energy target ("cap and phase-out").

Malaysia challenged the 7% maximum share, the cap and phase out, as well as the low ILUC-risk biofuel notion and certification

[14] Panel report, paras. 7.552-7.556.
[15] Panel report, paras. 7.521-7.522.
[16] Status Report, III.2.
[17] Panel report, para. 7.507 and RED II, recital 81.

procedure. Malaysia also challenged some of the measures adopted by a couple of EU Member States (France and Lithuania) in connection with the above EU legal framework. Malaysia alleged the violation of a panoply of WTO rules, under the GATT, the TBT and the SCM Agreement some of which are the expression of the fundamental tenants of the WTO system.

A number of overarching arguments run through Malaysia individual challenges: such as the argument that the EU measures are a form of disguised protectionism intended to shelter domestic biofuel's crops producers from international competition given that the EU does not produce any palm oil[18], or the theme that the EU measures are extraterritorial and have no connection with the EU's jurisdiction[19]. Other general arguments appear to be that the EU measures addressing ILUC are not based on international standards and in any event lack a proper scientific foundation, the data used in the high ILUC-risk formula are outdated and biased against palm oil and, in any event, the implementing rules are defective and make it impossible to obtain the low ILUC-risk certification.

Also with regard to the EU, it is possible to point out to some overarching defensive arguments, such as that the measures are origin neutral and not *de facto* discriminatory, they are not a technical regulation within the meaning of the TBT Agreements and they are necessary to fight climate change, biodiversity destruction and protect EU public morals.

## 2. *Preliminary legal considerations: the qualification of the challenged measures as technical regulation under the WTO Agreement on technical barriers to trade*

Some preliminary considerations of the panel deserve to be recalled. In particular, the panel's conclusion that the low ILUC-risk certification operates as an exemption from the cap and phase out and therefore must be taken into account in the assessment of the

[18] Panel report, section 7.1.2.3.3.4.
[19] Panel report, para. 7.192.

latter under different legal claims[20]. The panel reaches that conclusion because the two measures together define the overall scope of the cap and phase out, because they are contained in the same article of RED II and because the low ILUC-risk certification (the exemption) would not be needed if a biofuel were not classified as high ILUC-risk in the first place[21].

The panel then deals with the threshold questions of whether the 7% maximum share and the cap and phase are technical regulations and therefore fall within the purview of the TBT Agreement. The panel finds that they are both technical regulations. The panel explains that term product characteristics has been understood to cover any objectively definable features, qualities, attributes, or other distinguishing mark of a product, that the technical regulation must lay down[22]. However, with regard to the question of whether the cap and phase out "lays down product characteristics" it concludes that the measure is a technical regulation on the basis of some characteristics (the quality of being produced from a specific crop, i.e. the feedstock or raw material from which the biofuels are obtained)[23], which are not determinative (or only in part) for the application of the cap and phase out to those products. Indeed, it cannot be disputed that cap and phase out applies only insofar any particular biofuel is (i) produced from a specific crop, (ii) which is classified as high ILUC-risk[24]. However, the panel itself considers that the high ILUC-risk criteria "do not, in and of themselves, relate to any intrinsic or extrinsic characteristic of the biofuels produced

[20] Panel report, paras. 7.30 and 7.31.

[21] Panel report, para. 7.32. See also paras. 7.33 and 7.34 for additional arguments.

[22] Panel report, para. 7.96.

[23] Panel report, para. 7.103 and 7.104 "The quality of being produced from a specific crop is thus the product characteristic that ultimately dictates the application of the high ILUC-risk cap and phase out to a particular group of biofuels". The same reasoning applies to the 7% maximum share (paras. 7.99 and 7.112).

[24] "Article 26(2) identifies the products to which this requirement applies by reference to a defining product characteristic, namely being produced from 'food and feed crops for which a significant expansion of the production area into land with high-carbon stock is observed'. It is the presence of this characteristic that determines the applicability of the requirement at issue" (panel report, para. 7.113).

from feedstocks"[25]. It would appear therefore that by focussing on one of the product characteristics, which is necessary but not sufficient for the application of the cap and phase out, the panel avoids the question of whether the notion of technical regulation covers non-product specific process and production methods.

## 3. *The panel assessment of the EU biofuel discipline under the provisions of article 2 of the TBT Agreement*

Having found that both measures are technical regulations, the panel then starts examining one by one the multitude of claims raised by Malaysia under the TBT Agreement. I will focus on the panel findings under Articles 2.4, 2.2 and 2.1 TBT.

### 3.1. *Article 2.4 of the TBT Agreement*

Article 2.4 requires WTO Members to use relevant international standards as basis for their technical regulations except when they would be ineffective or inappropriate means for the fulfilment of the legitimate objective pursued. Malaysia relied on four ISO standards which provide for an LCA-based quantification of biofuels' emissions, while excluding ILUC from the LCA methodology[26]. Malaysia interpreted this exclusion as a prohibition to include ILUC in any regulatory approach before any procedure has been agreed internationally[27]. However, based on the text of those standards, the panel rejects Malaysia's argument and concludes that none of the standards invoked precludes a national regulator from addressing ILUC through its own approach. Rather those standards do not address indirect effects of biofuel production, such as ILUC[28]. As a consequence, the panel concludes that the standards invoked are not "relevant" within the meaning of Article 2.4 TBT. Indeed, to be relevant

[25] Panel report, para. 7.104.
[26] Panel report, paras. 7.156 and 7.158.
[27] Panel report, paras. 7.161-7.156.
[28] Panel report, paras. 7.166-7.179.

a standard must "relate to the challenged prescription or requirement itself, not just the product scope or general subject-matter of the measure at issue"[29], i.e. the standard must address the matter addressed by the challenged measures, namely the taking into account of ILUC effects[30]. It follows that "the absence of international harmonization does not mean that countries are prevented [by Article 2.4 TBT] from taking action and developing their own approaches to issues of concern"[31], even though those approaches are not per se exempted from other WTO disciplines, such as Articles 2.2 and 2.1 TBT.

### 3.2. *Article 2.2 of the TBT Agreement*

As we will see, the panel's analysis under Article 2.2 is influenced by its findings under Article 2.4 TBT. The panel explains that Article 2.2 TBT requires technical regulations not to be more restrictive than necessary to fulfil a legitimate objective. It is therefore essential to determine what is the objective pursued by the contested measure and whether it is legitimate. If so, the panel can then assess whether the measure is necessary: first by conducting a "relational analysis" i.e. weighting and balancing (i) the trade restrictiveness of the measure; (ii) the risk of non-fulfilment; (iii) the degree of contribution made to the objective; and then by conducting a "comparative analysis" of the challenged measure against reasonable available alternatives, apt to make an equivalent contribution to the objective, but which are less trade restrictive[32].

The EU argued that the challenged measures pursue the composite objective of mitigating climate change, preserving biodiversity, and addressing the associated moral concerns of the EU public[33], whereas Malaysia argued that the stated objective of the specific measures is to limit "GHG emissions by limiting direct and indirect

[29] Panel report, paras. 7.184.
[30] Panel report, para. 7.185.
[31] Panel report, para. 7.188.
[32] Panel report, paras. 7.199-7.1201.
[33] Panel report, para. 7.206.

land use change" and the actual objective is protectionism in the cover of environmental protection[34].

The panel starts by observing that nothing dictates the level of specificity at which a measure's objective must be defined. Whilst the text of Article 2.2 TBT gives examples of general legitimate objectives, in a number of cases under Articles 2.2 TBT, and XX GATT, panels focused on the immediate objective of the measure[35]. Several considerations plead for the latter approach. For instance, if the objective is identified at a very high level of generality, it may not be meaningful to discern the nature and gravity of "the risks that non-fulfilment [of the legitimate objective] would create" and it would be difficult to define the degree of contribution of the measure to that objective[36]. Furthermore, "a narrower and more specific formulation of the objective by reference to the specific measure at issue will narrow the range of measures that might validly be considered as "alternatives"[37]. The panel therefore takes the approach of a narrow definition and finds that the measures' objective is limiting the risk of ILUC-related emissions associated with crop-based biofuels[38]. The panel adds that it will need to assess how that objective is related to the values protected by Articles 2.2 TBT and XX GATT[39].

In addition, while it admits that a measures can pursue different and even competing objectives[40], the panel finds that to solve the present dispute it is not necessary to consider whether the measures pursues the protection of biodiversity and EU public morals as separate objectives because these objectives are interlinked[41]. To reinforce this finding, the panel blames the EU for not having explained whether there could be any alternative measures capable of making different contributions to the three objectives identified by the EU[42].

---

[34] Panel report, para. 7.192.
[35] Panel report, paras. 7.221 and 7.223.
[36] Panel report, paras. 7.222 and 7.224.
[37] Panel report, para. 7.228.
[38] Panel report, para. 7.233.
[39] Panel report, paras. 7.230-7.231.
[40] Panel report, paras. 7.236-7.237.
[41] Panel report, paras. 7.239-7.239.
[42] Panel report, para. 7.241.

However, there is little doubt that it is not for the EU to demonstrate the existence of measures alternative to the ones challenged[43]. Finally, the panel finds that Malaysia has not substantiated its assertion that the measures' actual objective is protectionism in the cover of environmental protection[44].

Having identified the objective, the panel then assesses whether it is legitimate. It starts with a section on the relationship between the legitimate objectives specified in Article 2.2, the Preamble to the TBT Agreement, and Article XX. This section clearly bears witness to the panel's intention to devise an analytical framework (if not a legal standard) applicable both under Articles 2.2 TBT and XX GATT[45]. Indeed, the panel notes that the concept of legitimate objective under Article 2.2 TBT must be read harmoniously with values protected by Article XX GATT[46] and, even though conservation of exhaustible natural resources is not explicitly mentioned in the TBT Agreement (unlike in Article XX(g) GATT), that agreement refers to protection of the environment[47]. The challenged measures relate to the conservation of an exhaustible natural resource (high carbon stock land) and avoiding emissions that would be released by the destruction of that natural resource is related to the conservation of a wide range of exhaustible natural resources that are threatened by increased GHG emissions and climate change[48]. On that basis, the panel concludes that the objective pursued by the challenged measures falls within the scope of Article XX(g) GATT and 2.2 TBT. In substance, the panel stresses the connection between conservation exhaustible of natural resources, fighting climate change and environmental protection.

---

[43] WT/DS363/AB/R Appellate Body Report, China – Publications and Audiovisual Products, para. 319, WT/DS/332/AB/R Appellate Body report, Brazil – Retreaded Tyres, para. 156.

[44] Panel report, paras. 7.243-7.266.

[45] This is also visible in other parts of the report, for instance para. 7.202 and 7.1079 and 7.1080 where the panel finds that Article XX(g) and (b) GATT as well as Article 2.2 TBT despite the different wording require "a genuine relationship of ends and means between the objective pursued and the measure at issue".

[46] Panel report, para. 7.271.

[47] Panel report, para. 7.275.

[48] Panel report, para. 7.276.

The panel then adds that the challenged measures may also be justified on the basis of the objective of protecting human, animal or plant life and health, which is referred both in Article XX GATT and 2.2 TBT. Indeed, "global warming and climate change pose one of the greatest threats to life and health on the planet"[49].

However, before reaching a definitive conclusion, the panel feels the need to deal with some of the overarching arguments of Malaysia. The first argument that the panel dismisses is that the very objective of the measures – i.e. limiting the risk of ILUC-related emission associated with crop-based biofuels – is at odds with the relevant international standards. The panel recalls its findings under Article 2.4 TBT described above[50].

The second argument is that the stated objective is not "legitimate" because ILUC can neither be observed nor measured and therefore it poses a theoretical or hypothetical risk. The panel considers that the regulating Member should demonstrate that the risk is not purely hypothetical and that the crucial question is whether the EU had a reasonable basis to conclude that increasing demand for crop-based biofuels increases the risk of ILUC-related emissions[51]. The panel finds that there is a probable risk that increased biofuel demand increases the risk of ILUC emissions as this is the logical corollary of known facts which are not contested by Malaysia, i.e. that increased demand for crop based biofuels cannot be met solely by increased productivity and thus necessarily implies an expansion into non-agricultural land or in existing agricultural land at the expenses of other cultivation for other purposes[52]. The scientific literature and the IPCC report on Climate Change and Land confirms the existence of a causal relationship between biofuel production as a whole and ILUC effects and ILUC modelling studies seem to corroborate that conclusion, regardless of the difficulties in quantifying ILUC emissions[53].

---

[49] Panel report, para. 7.281.
[50] Panel report, paras. 7.286-7.290.
[51] Panel report, paras. 7.292-7.294.
[52] Panel report, paras. 7.297-7.303.
[53] Panel report, paras. 7.304-7.308.

The third argument is about extraterritoriality and it relates to the consideration that ILUC risk would arise essentially outside of the EU where agriculture activities are mostly expected to expand. Therefore, the EU would be regulating emissions occurring outside its territory. The panel starts by noting that none of the objectives listed in Articles 2.2 TBT or XX GATT imply a jurisdictional or territorial limitation and past rulings suggest that Article XX GATT or the TBT Agreement may be invoked to protect interests situated outside the territory of the regulating Member. Second, it adds that "[c]limate change is inherently global in nature. Therefore, there is a nexus between EU territory and the objective of limiting the risk of ILUC-related GHG emissions"[54]. Third, the panel clarifies that the measures seek to regulate to what extent crop based biofuels can be counted towards the EU renewable energy targets and ultimately they regulate EU demand for those biofuels[55]. In practice, the panel provides three lines of reasoning to reject the criticism of extraterritoriality, each of which could have been sufficient in itself.

Having concluded that the objective pursued by the measures is legitimate, the panel embarks in the relational analysis.

As a first step, it notes that for the purposes of demonstrating the trade-restrictiveness of a measure, under Article 2.2 TBT and Article XX GATT, is sufficient that the measure has "a limiting effect on international trade", irrespective of whether the market for biofuels exists only because the government created it[56], and without considering the effects on trade between all WTO Members, in all products that are the subject of the technical regulation[57]. The panel then concludes that the measures are trade restrictive by design because they establish a limitation on the total quantity of crop-based biofuels that are eligible to count towards the EU trans-

---

[54] Panel report, para. 7.314. See also *International Legal Expert Group on Trade-Related Climate Measures and Policies*, 2023. *Principles of international law relevant for consideration in the design and implementation of trade-related climate measures and policies*, Report of an International Legal Expert Group, Forum on Trade, Environment, & the SDGs (TESS), p. 18.

[55] *Ibid*.

[56] Panel report, paras. 7.327-7.329.

[57] Panel report, para. 7.332.

port target[58]. It is noticeable that the panel does not qualify the degree of trade restrictiveness of each measure. It only acknowledges that the maximum share is less trade restrictive than the cap and phase out[59].

Second, the panel choses to assess the "risk of non-fulfilment" in qualitative terms and it does not consider necessary to quantify that risk or its degree of probability. It concludes that the "risks that non-fulfilment [of the objective] would create" are that GHG emissions savings resulting from the promotion of conventional biofuels are partially undermined, or even completely negated, by their ILUC-related GHG emissions[60].

Third, on the basis of the AB report in *Brazil-Retreaded tyres*, the panel considers that to assess the degree of contribution of the measures to the objective, the relevant standard is whether the measures are apt to make a material contribution to the objective, and a contribution exists when there is a genuine relationship of ends and means between the objective pursued and the measure at issue. It notes that by design the measures limit EU demand of all crop based biofuels and especially of those with a high ILUC risk, and therefore they are apt to make a material contribution to the objective. The panel also notes that there is a direct correlation between the trade restrictiveness and their aptitude to contribute to the objective, implying perhaps that those two aspects balance each other[61]. Interestingly, the panel notes that the fact that the measures focus only on a relatively narrow aspect of the problem of emissions, and are directed only at the European Union's own demand and consumption of biofuels does not affect the degree of contribution. Indeed, "in the context of global issues like climate change and GHG emissions the assessment of whether a single measure taken by a single Member is apt to make a material contribution to its objective cannot be directed at the global impact of the measure in quantitative terms"[62]. Rather, because the measures seek to correct a negative externality

[58] Panel report, para. 7.333.
[59] *Ibid*.
[60] Panel report, paras. 7.334-7.342.
[61] Panel report, paras. 7.343-7.348 and 7.358.
[62] Panel report, para 7.357.

of the EU policy of promoting biofuels it is to be expected that the measures' contribution will be limited to that specific element[63].

The panel then recalls that in every case where a WTO adjudicator concluded that the measure was apt to make a material contribution, it also preliminary concluded that the measure was necessary[64]. Accordingly, it reaches the same preliminary finding in this case[65], suggesting that only the "degree of contribution" step really matters in the relational analysis.

With regard to the comparative analysis the panel begins by observing that the alternative measures proposed by Malaysia should seek to limit the risk of ILUC emissions associated with crop-based biofuels, rather than being complementary measures, since under Articles 2.2 TBT and XX GATT a Member may take more than one measure at the same time to fulfil the same objective[66]. Then the panel states that "[a]n alternative measure is […] one that either could not co-exist with a challenged measure as it currently stands, or that could co-exist but whose implementation alongside the challenged measure would negate or render redundant or immaterial the contribution that the challenged measure is apt to make to its objective"[67]. To the contrary, a complementary measure could coexists and would not negate the contribution of the challenged measure. The panel finds that four measures proposed by Malaysia are unrelated to the specific objective pursued by the challenged measures and therefore are complementary rather than alternative[68], the fifth measure would not make an equivalent contribution because it is not based on a good indicator of ILUC risk[69], and the sixth is only indirectly related to the specific objective pursued and would need to be adopted by all countries in the world to be effective[70].

---

[63] Panel report, para 7.358.
[64] Panel report, para 7.363.
[65] Panel report, para 7.364.
[66] Panel report, paras. 7.372-7.373.
[67] Panel report, para. 7.374.
[68] Panel report, paras. 7.377, 7.380, 7.3383, 7.391.
[69] Panel report, paras. 7.386, 7.387.
[70] Panel report, paras. 7.394-7.395.

In summary, even if the panel lays down its own general definitions of alternative and complementary measures, those definitions appears unnecessary in the present case. Indeed, if the proposed alternatives are not pursuing the same objective (they are unrelated to it), or do not make an equivalent contribution to it (as the panel finds), then by definition they cannot demonstrate that the challenged measures are more trade restrictive than necessary, regardless of whether they are complementary or alternative.

### 3.3. *Article 2.1 of the TBT Agreement*

Article 2.1 TBT implements in the context of technical regulations the national treatment and the most-favoured nation treatment obligation. Malaysia claimed that the cap and phase out violates both obligations. The panel analytical framework reflects the existing case law that evolved towards a two-step analysis: (i) whether the technical regulation modifies the conditions of competition to the detriment of imported products vis-à-vis like products of domestic origin and/or like products originating in any other country; and (ii) whether such detrimental impact stems exclusively from a legitimate regulatory distinction[71].

With regard to the first step, the panel finds that palm oil based biofuels are like other crop based biofuels and the challenged measure *de facto* has a detrimental impact on like imported product[72].

With regard to the second step, the panel indicates that it needs to consider the design, structure and operation of the distinction to assess its a priori legitimacy and then whether it has been applied in an even handed manner, or it constitute arbitrary or unjustifiable discrimination[73]. In this assessment, the panel will have to consider the scientific underpinning of the concept of ILUC and high IL-

[71] Panel report, paras. 7.403-7.405.

[72] Panel report, paras. 7.408-7.494. This part of the panel report concerned with the notion of de facto discrimination would deserve an in depth examination, but this goes beyond the objective of this paper. (e.g. compare para. 7.405, with 7.486, 7.487 and 7.488)

[73] Panel report, paras. 7.495-7.4500.

UC-risk. The panel explains the standard of review of scientific evidence that will guide its analysis[74]. Its task is not to attempt to resolve scientific debates on the basis of the evidence submitted by the parties. "Rather, the Panel must determine whether, considering the entirety of the evidence, there is a reasonable basis for the regulatory distinction drawn by the high ILUC-risk cap and phase-out and the manner in which it is applied"[75]. The panel recalls that in evaluating the relevance and probative value of scientific evidence it may consider: (i) whether such evidence comes from a qualified and respected source; (ii) whether it has the necessary scientific and methodological rigor to be considered reputable or legitimate science; and (iii) whether the reasoning articulated on the basis of the scientific evidence is objective and coherent. If those conditions are met, the panel [and the regulating member] may rely on evidence reflecting a minority scientific opinion. It follows that it is not sufficient for the complainant to simply put forward a different scientific opinion or point out some imperfections in the approach adopted by the regulating Member[76].

Having clarified the above, the panel finds that the high ILUC-risk formula leads to a regulatory distinction connected with the risk of ILUC-related emissions[77]. In particular, the observed share of a feedstock's production area expansion into land with high carbon is a reasonable proxy of the risk of ILUC emissions[78]. Even if the formula is not perfect, the TBT Agreement does not require WTO Members to regulate only where perfect data is available, otherwise Members would be deprived "of the right to regulate risks that do not lend themselves to quantitative analysis, or which are not sufficiently studied, even though such risks constitute a genuine cause of concern"[79].

---

[74] The panel stresses that its approach is inspired by the Panel Reports, *Australia – Tobacco Plain Packaging (footnote 776).*

[75] Panel report, para. 7.504.

[76] Panel report, paras. 7.502-7.503.

[77] Panel report, paras. 7.507-7.510.

[78] Panel report, paras. 7.517-7.525.

[79] Panel report, para. 7.527.

Because it is uncontested that agricultural expansion triggered by ILUC can occur anywhere[80], the panel rejects also Malaysia's argument that the EU global approach to ILUC risk[81] is arbitrary because it ignores specific country conditions. The panel stresses that the relevant condition in this respect is the degree of ILUC risk posed by the global expansion of the biofuel feedstock production area. The country specific approach that was followed in prior cases is not applicable here because it disregard that the concept of ILUC-risk is global in nature[82].

However, the panel finds that the cap and phase out has not been applied in an even-handed manner in two respects.

First, the measure was deploying its effect already as of 2022 "on the basis of data covering the 2008-2016 period, which had not been updated. During that time, new data may have become available that might have required adjustments to the operation of the measure and its application to any specific crop"[83]. While the EU legislation required an updated of the data by 2021, this did not take place. The panel thus finds that "insofar as the review of data used as basis for the classification of feedstock(s) as high ILUC-risk is not undertaken in a regular and timely manner, the measure cannot be said to be applied in an even-handed manner"[84].

Second, the panel also finds some defects in the design and implementation of the low ILUC-risk certification. The fact that the certification is valid only for 10 years discriminates perennial crops (i.e. palm oil) vis-à-vis annual crops. Moreover, several of the low ILUC-risk criteria were formulated in an overly vague manner in RED II and could not apply in practice. Therefore, the panel finds that the defects in the low ILUC-risk certification imply that the cap and phase out do not stem exclusively from a legitimate regulatory distinction.

This conclusion is predicated on the panel's introductory finding that the high ILUC-risk cap and phase out must be assessed to-

[80] Panel report, para. 7.524.
[81] The Delegated Regulation, recital 10.
[82] Panel report, para. 7.535.
[83] Panel report, para. 7.570.
[84] Panel report, para. 7.571.

gether with the low ILUC-risk certification. However, given that in the panel's own view, the high ILUC-risk regulatory distinction is based on a valid proxy (indicative of the global ILUC-risk of a given biofuel crop), from a purely logical viewpoint it is difficult to understand how that distinction would necessarily require the very existence of an operational low ILUC-risk certification in order to be applied even-handedly. Consequently, it would be difficult to understand how any defect of the low ILUC-risk certification may affect the legitimacy of that distinction.

The panel assessment of the challenged measures under the GATT repeats essentially the above described analysis insofar as national treatment, most favoured nation clause and justification under Article XX GATT are concerned[85] and the same goes for the GATT claims against the French measure challenged by Malaysia. With regard to the latter measure, Malaysia raised also a number of claims based on the SCM Agreement. The panel findings under those claims would deserve a detailed analysis, notably, as regards the normative benchmarks to assess whether the measure implies a financial contribution[86], the notion of income support[87], and the assessment of adverse effect and serious prejudice[88]. Again, this exercise goes beyond the objective of this paper.

## 4. *Conclusions*

A few points can be drawn from this panel report with regard to autonomous trade related climate measures.

First, the panel accepts that the absence of an international standard relevant to address the issue at stake per se does not prevent a WTO Member from addressing a given environmental issue through regulation. This holds true also if the risk addressed does not lend itself to precise quantification, insofar as that risk is not theoretical.

---

[85] Panel report, sections 7.1.5.2, 7.1.5.3, 7.1.5.5.
[86] Panel report, paras. 7.13097-7.1346.
[87] Panel report, paras. 7.1348-7.1357.
[88] Panel report, paras. 7.1390-7.1415.

Second, such regulation does not need necessarily to be based on perfect and undisputable data. It is sufficient for it to rely on a body of reputable scientific evidence, showing that there is a reasonable basis for the regulation.

Third, regulatory measures adopted to reduce the risk of emissions can be justified under the TBT Agreement and GATT as necessary to protect life and health of humans, animals and plants and as related to the conservation of natural resources.

Fourth, climate change is inherently global in nature and therefore affects each WTO Member. Therefore, measures seeking to reduce the risk of emissions have a sufficient connection with a regulating Member, notably when that Member regulates its internal demand and consumption of a product.

Fifth, when the risk that a Member wants to address is evolving over time, the regulating Member should base its measures on up to date data and keep those data under periodic review. Any exception to the regulation should be defined precisely and should be operational, as any defect in the exception may affect the regulation itself.

Sixth, when the risk that a Member seeks to address is global in nature, that Member is entitled to take a global approach (not a country specific one).

Finally, it should be recalled that one of the panellist issued a separate opinion. Based on a different evaluation of the evidence on the record, that panellist concludes that the high ILUC-risk cap and phase out includes an element of protectionism and therefore is fundamentally inconsistent with Article 2.2 and 2.1 of the TBT Agreement and Article XX GATT[89].

[89] Panel report, paras. 7.1439-7.1459.

# E-COMMERCE AND SUSTAINABILITY: AN OVERLOOKED NEXUS

*Victor do Prado and Yanis M. Bourgeois*

## 1. *Introduction*

While Members of the World Trade Organization (WTO) are still implementing outcomes reached at the Twelfth Ministerial Conference (MC12) held in June 2022, the WTO Director General emphasized the need to discuss the future of trade. The DG believes this future to be "services, digital, and green"[1]. Indeed, the future of trade will unavoidably be shaped by various forces such as the digital evolution, the ever-growing importance of the services sector and a set of environmental, health and social imperatives. XXI$^{st}$ century trade is fundamentally more complex than that of the XX$^{th}$ century, which mainly revolved around goods and services crossing borders. Economic integration has progressively deepened including on issues that go beyond trade in goods and services. The deeper the trade agreement, the more it touches upon areas such as environmental protection, labor standards, intellectual property, consumer protection, the movement of people, technology, financial assistance and human rights.

[1] WTO Website, News Item, *DG Okonjo-Iweala: Let WTO be an institution people can trust to deliver in difficult times*, 6 October 2022, https://www.wto.org/english/news_e/news22_e/gc_06oct22_e.htm (accessed on 5 January 2023).

Among all the sectors of the economy, e-commerce is the one that arguably best symbolizes the multi-faceted nature of today's trade[2]. E-commerce relates to goods, both tangible and intangible. Buying a physical book online and its electronic equivalent – the e-book – are both examples of e-commerce. E-commerce also relates to services, whether these are postal, transport and logistics services to deliver a digitally ordered good, or whether these are purely online services (e.g., telecommunications, social media, banking platforms, insurance, buying plane or concert tickets, etc.). E-commerce can be embodied by different interactions, including Business-to-Business, Business-to-Consumer, Consumer-to-Business, Consumer-to-Consumer or Business-to-Government. E-commerce also relates to intellectual property (IP) matters. IP is the main component of value in many online transactions, including software, music, films, videogames, training modules and education. IP is essential to enable e-commerce and the systems that allow the Internet to operate, such as software, designs, networks, etc., which are often protected by IP rights. E-commerce has thus become ubiquitous, cutting across all aspects of trade.

In recent years, however, one aspect seems to be overlooked: e-commerce from a *sustainability* perspective. There seems to be little, if any work covering the actual link between e-commerce and sustainability, the latter term being important not only from an economic perspective, but also – and mainly – with respect to environment, society, development concerns or resilience in the face of crises. This is crucial in light of the United Nations (UN) 2030 Agenda for sustainable development and its Sustainable Development Goals (SDGs). This paper aims to shed light on the relationship between e-commerce and sustainability, and proposes some concrete actions to help stimulate future discussion. For the purposes of this paper, the focus is placed on the environment and development dimensions of sustainability in e-commerce.

[2] The WTO's 1998 Work Programme on Electronic Commerce has defined electronic commerce for the purpose of WTO discussions as "the production, distribution, marketing, sale or delivery of goods and services by electronic means". See WTO Document: WT/L/274.

In December 2022, the Director-General welcomed the ongoing work among a subset of WTO Members on trade and environmental sustainability:

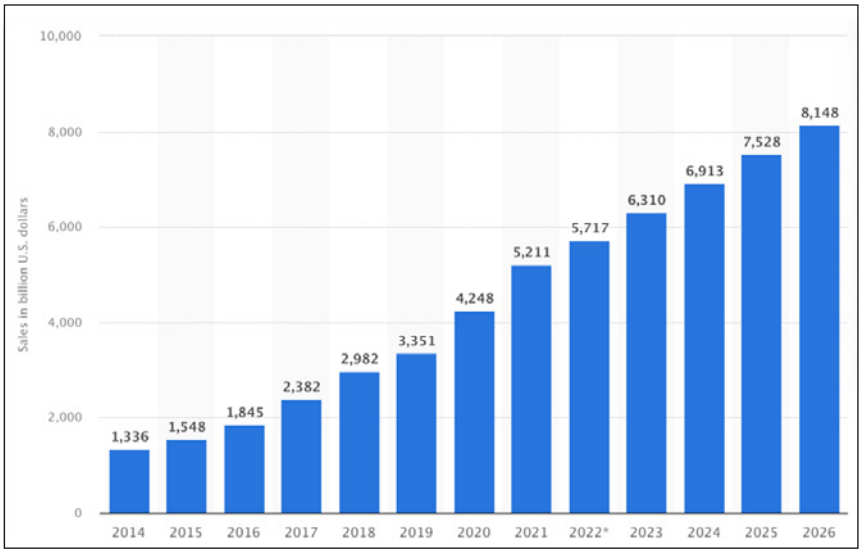
> These Trade and Environmental Sustainability Structured Discussions are a trailblazer at the WTO. You are searching for practical solutions and concrete actions to catalyze the trade and environment agenda. You are breaking down silos and cooperating across traditional structures and fields of expertise to find solutions to global problems[3].

Yet, fully catalyzing the trade and environment agenda cannot be accomplished without shedding more light on the nexus between e-commerce and sustainability. This is all the more important as e-commerce has shown sustained growth in the past 20 years. Since the COVID-19 pandemic, the acceleration of the digitalization of the economy has been staggering, and consequently so has the uptake of e-commerce. This trend is likely to continue, with some estimates forecasting a 50 percent growth for global retail e-commerce sales from 2021 to 2026 (Fig. 1). In addition, the rise of e-commerce is correlated to that of the Internet; and the pandemic also played a role. Since 2019, more than 1 billion people are estimated to have come online (Fig. 2). Close to 70 percent of the world population is now using the internet, a feat which is bound to raise challenges from a sustainability viewpoint. As such, it is rather unlikely that e-commerce's impressive growth will suddenly stop in the near future, especially when considering its yet untapped potential. The digital divide is still a reality, and entire regions and markets are yet to be fully "e-commerce ready". In fact, in *Brazil – Taxation (EU)*[4], the WTO dispute settlement panel considered that "bridging the digital divide, social inclusion and access to information" are a "reasonably important policy objective"

[3] WTO Website, News Item, *Members take stock of sustainability discussions, signal priorities for concrete action*, 2 December 2022, https://www.wto.org/english/news_e/news22_e/tessd_02dec22_e.htm (accessed on 5 January 2023).

[4] See DS472: Brazil – Certain Measures Concerning Taxation and Charges, WTO document WT/DS472/R - WT/DS497/R, paragraphs 7.563 and 7.592.

in the assessment of the importance of the public moral general exception under GATT Article XX(a), while also noting that "the importance of the MDGs[5] should not be understated".




* From this year onwards, figures are forecasts. Includes products or services ordered using the internet via any device, regardless of the method of payment or fulfillment; excludes travel and event tickets. 2014 to 2020 data are from earlier reporting.

Fig. 1. Retail e-commerce sales worldwide from 2014 to 2026 (in billion U.S. dollars)[6].

[5] The UN Sustainable Development Goals (SDGs) build on the Millennium Development Goals (MDGs), and replaced them in 2015. Unlike the MDGs, however, the SDGs cover every country in the world.

[6] S. Chevalier, *Retail e-commerce sales worldwide from 2014 to 2026*, in *Statista.com*, July 2022, https://www.statista.com/statistics/379046/worldwide-retail-e-commerce-sales/ (accessed on 5 January 2023).

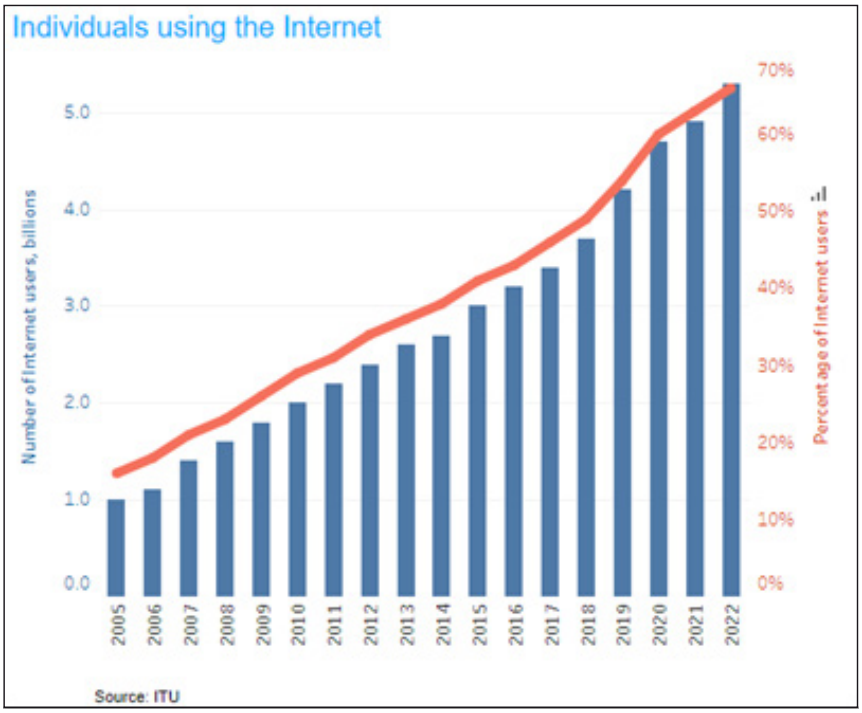



Fig. 2. Individuals using the Internet[7].

## 2. *The e-commerce opening and regulating agenda at the WTO: shedding light on sustainability*

Work on e-commerce at the WTO is ongoing under two distinct tracks: a multilateral and a plurilateral one. In both tracks, there have not been any clear indications of the willingness by Members to discuss the link between e-commerce and sustainability in a structured manner. However, one may sporadically find a few dots to connect in relation to this issue in Members' statements made during meetings. There have also been some discussions in other international organizations and in academia. Additionally, certain propos-

[7] International Technology Union, *Statistics. Individuals using the Internet*, https://www.itu.int/en/ITU-D/Statistics/Pages/stat/default.aspx (accessed on 5 January 2023).

als in ongoing negotiations in the WTO point, albeit indirectly, to a relation between e-commerce and sustainability.

### 2.1. *The multilateral track*

The multilateral track dates back to 1998, when Members adopted a Declaration on Global Electronic Commerce[8] at the Second WTO Ministerial Conference. This Declaration calls for (i) the establishment of a Work Programme on Electronic Commerce and (ii) a provisional moratorium on customs duties on electronic transmissions ("the moratorium"). Both the Work Programme and the moratorium have been regular features of Ministerial Conferences. The latest decision on the Moratorium and Work Programme was adopted at MC12 in June 2022[9]. It calls for the reinvigoration of the Work Programme based on the 1998 mandate and "particularly in line with its development dimension", and also extends the moratorium until MC13.

The moratorium has been continuously renewed by Members since 1998, in spite of its provisional character. From 2017 onwards, discussions on the moratorium have intensified with increasing concerns being expressed by some Members on the lack of clarity relating to its scope, definition and impact. In particular, since 2018, India and South Africa, supported by other Members, have submitted a paper on the need to rethink the moratorium, arguing that the realities prevailing in the 1990s – when Members first agreed to a temporary moratorium – have significantly changed. According to these Members, there is a need to re-examine the implications of the moratorium, particularly from a development standpoint[10]. Since then, the focus of Members' discussions on the mora-

[8] WTO Document: WT/MIN(98)/DEC/2.

[9] WTO Document: WT/MIN(22)/32; WT/L/1143.

[10] See, for instance, WTO Documents: WT/GC/W/798 and WT/GC/W/833 (communications by India and South Africa).

See also, United Nations Conference on Trade and Development (UNCTAD), *Rising Product Digitisation and Losing Trade Competitiveness*, 2017, https://unctad.org/en/PublicationsLibrary/gdsecidc2017d3_en.pdf (accessed on 5 January 2023).

See also, UNCTAD, *Growing Trade in Electronic Transmissions: Implications for the South*, UNCTAD research document n. 29, 2019.

torium have largely been on assessing its impact and scope, in particular regarding potential government revenue implications associated with the non-imposition of tariffs on electronic transmission; its impact on domestic digital industrialization, especially for developing countries; and the technical feasibility of imposing customs duties on electronic transmissions. While the sustainability aspect of this discussion seems to be absent, it is possible to pinpoint a few issues of relevance. Work by the Organisation for Economic Co-operation and Development (OECD) and submissions by a group of Members led by Switzerland note that the process of digitalization can reduce the overall costs of production and remove transportation of certain products[11]. Although no explicit link is made, one can see the potential relevance of this element from a sustainability viewpoint. For instance, what is the sustainability impact of incentivizing electronic transmissions of products (e.g., an e-book) compared to their non-digitized equivalent (e.g., a physical book)? In 2010, transportation, a pivotal sector in trade and e-commerce, already caused more than 20 percent of global energy-related carbon emissions. Transportation emissions are bound to increase in the future[12]. Consequently, there is a strategic interest in discussing the role of electronic transmissions from a climate-change angle. Should the list of digitized and digitizable products grow as the digital economy develops, how would this impact the relationship between e-commerce and sustainability? In addition, there is surely value in discussing more thoroughly the impact of 3D printing technologies, for example, beyond the concerns raised by some Members

[11] See WTO Document: WT/GC/W/799/Rev.1 (communication by Australia, Canada, Chile, Colombia, Hong Kong, China; Iceland, Republic of Korea, New Zealand, Norway, Singapore, Switzerland, Thailand and Uruguay).

See also A. Andrenelli, J. López González, *Electronic transmissions and international trade – shedding new light on the moratorium debate*, *OECD Trade Policy Papers*, n. 233, OECD Publishing, Paris, 13 November 2019, http://dx.doi.org/10.1787/57b50a4b-en (accessed on 5 January 2023).

See also OECD trade policy brief, *Shedding new light on the debate about duties on electronic transmissions*, December 2019, https://issuu.com/oecd.publishing/docs/shedding_new_light_on_the_debate_about_duties_on_e (accessed on 5 January 2023).

[12] Intergovernmental Panel on Climate Change (IPCC), *AR5 Climate Change 2014: Mitigation of Climate Change*, 2014, p. 603.

about it potentially replacing a significant portion of cross-border physical goods trade in the coming decades[13].

In the context of the Work Programme, four bodies were instructed to explore the relationship between existing WTO agreements and e-commerce under the overview of the General Council. These are the Councils for Trade in Goods (CTG), Services (CTS) and Trade-Related Aspects of Intellectual Property (TRIPS), as well as the Committee on Trade and Development (CTD)[14]. Each of these bodies is mandated to explore specific issues under their respective purview. For instance, the CTD is tasked to examine the effects of e-commerce on the trade and economic prospects of developing countries, notably of their small- and medium-sized enterprises, among other topics. A "reinvigoration" of the work under the Work Programme based on the 1998 mandate was decided by the Membership at MC12 in 2022 and MC11 in 2017. The extent to which this work will be reinvigorated largely depends on the Members' submissions, proposals and discussions. In this sense, a Facilitator – Ambassador Usha Chandnee Dwarka-Canabady of Mauritius – was appointed to coordinate the discussions on the Work Programme and the moratorium ahead of MC13. Under this facilitator-led process, several Dedicated Discussions have been organized to delve deeper into specific e-commerce related topics identified by Members. At the time of drafting this paper, Members had submitted and discussed several ideas which touch upon various topics such as consumer protection in e-commerce, the development dimension including bridging the digital divide, further discussions on the moratorium, digital industrialization, legal and regulatory frameworks, as well as e-commerce-related technology transfer[15]. As men-

[13] WTO Document: WT/GC/W/833, (communication by India and South Africa).

[14] WTO Document: WT/L/274.

[15] See, for instance, WTO Documents: WT/GC/W/855/Rev.1 (communication by Australia, Canada, Chile, Colombia, Costa Rica, Guatemala, Hong Kong, China; Republic of Korea, Mexico, New Zealand, Norway, Peru, the Philippines, Singapore, Switzerland, Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Thailand, the United Kingdom, Ukraine and Uruguay) and WT/GC/W/857 (communication by India). More submissions are available in the *Documents* section of the WTO's E-commerce Work Programme webpage, available at: https://

tioned above, the reinvigoration of the Work Programme mandated by Ministers at MC12 must be done "particularly in line with its development dimension"; and the work accomplished since then has indeed kept development at its core. The Facilitator-led process and its series of Dedicated Discussions have provided an opportunity for Members to share relevant experiences regarding domestic practices or trade agreements, as well as challenges and opportunities on issues which have not necessarily been on the WTO's multilateral e-commerce agenda.

For the e-commerce and sustainability angle to be fully covered, however, the environmental component should also be addressed. The issue of e-commerce and environment seems to be largely missing and the only references to sustainability in the discussions held these past years seem to focus on "how digital trade can be a valuable tool for Members' economic growth" or "sustainable cooperation". There is clearly room for further addressing the links between e-commerce and sustainability in this context.

With respect to multilateral discussions in other WTO bodies, on some rare occasions, Members have made reference to e-commerce in the Committee on Trade and Environment (CTE), which is not one of the bodies with a mandate under the Work Programme on Electronic Commerce. While there is no specific agreement dealing with the environment, WTO rules allow Members to adopt – under certain conditions – trade-related measures aimed at protecting the environment. There is no structured discussion as such in this forum on e-commerce and sustainability, but some relatively recent statements are worth highlighting. In March 2020, the Group of Least Developed Countries (LDC), represented by Chad, noted that "environmental issues were cross-cutting issues affecting many areas, including […] e-commerce"[16]. Notably, the

www.wto.org/english/tratop_e/ecom_e/ecom_work_programme_e.htm (accessed on 16 August 2023). See also, for a recap of the first Dedicated Discussion which focused consumer protection, the following link: WTO, *Members' discussion on e-commerce work programme highlights importance of consumer protection*, 26 January 2023, https://www.wto.org/english/news_e/news23_e/ecom_26jan23_e.htm (accessed on 16 August 2023).

[16] WTO Document: WT/CTE/M/68, p. 31.

LDC Group was in favor of such a cross-cutting discussion and wished to see the environment dimension become a "priority in all relevant WTO agreements". The following year, Canada reported to the broader Membership on a multi-stakeholder workshop held in the midst of the pandemic under the title "E-commerce and Climate Change in the COVID-19 Era: A game changer for the green economic recovery?"[17]. These observations are pertinent to the debate and can be summarized in three points. First, digital technologies have both direct and indirect effects on carbon emissions. While the direct effects are quite clear (e.g., the energy needed to power data centers), the effects of digitalization on other sectors and activities (e.g., transport and packaging) are rather complex. Second, efforts to quantify e-commerce's carbon footprint ought to bear in mind the "substitution effect", i.e., by asking what would happen in the absence of e-commerce. For instance, would the increase in energy use and emissions from more last-mile delivery be offset by the reduction of customers having to drive to shops? Third, as relevant discussions on the nexus between trade and climate change proceed at the WTO, development considerations should remain central. Canada and France, who had co-organized this event in partnership with the International Chamber of Commerce (ICC), expressed their readiness to organize future events and explore relevant issues relating to the environment dimension of trade.

It would also be useful to connect the dots with respect to other relevant bodies at the WTO, and with other international organizations. For instance, in March 2023, the WTO Committee on Technical Barriers to Trade (TBT) provided a forum for Members to engage in a thematic session on the regulation of plastics where they discussed standards and technical regulations that could contribute to addressing climate change challenges[18], and also raised specific

[17] WTO Document: WT/CTE/M/70, pp. 29-30. The recording of the event is available at: https://www.youtube.com/watch?v=DPcAgJX7Nl4 (accessed on 5 January 2023).

[18] WTO, *Members share experiences on environmental regulations, standards for climate and plastics*, 10 March 2023, https://www.wto.org/english/news_e/news23_e/tbt_10mar23_e.htm (accessed on 30 March 2023).

trade concerns[19] with respect to a variety of product areas, including electrical and electronic equipment. Furthermore, within the Facilitator-led process under the Work Programme, Members have also repeatedly emphasized the importance of using the WTO's convening power to enhance collaboration with other stakeholders, including other international organizations and business. In that regard, a workshop with relevant international organizations was held in June 2023 and focused on some of the specific topics covered in the Dedicated Discussions[20]. This allowed WTO Members to hear from these institutions on their work on various e-commerce topics and on programmes aimed at helping developing economies benefit from digital trade. Below, this paper sets out concrete suggestions to further enhance multistakeholder cooperation on e-commerce and sustainability, including its environmental component.

### 2.2. *The plurilateral track*

Since 2017, subsets of WTO Members have been advancing work in a "less-than-multilateral" setting on certain issues they consider essential for the XXI[st] century trade landscape. Discussions have been advancing on electronic commerce; investment facilitation for development; on micro, small and medium-sized enterprises (MSMEs); on trade and gender; on domestic regulation in services trade; and, more recently on trade and environmental sustainability as well as plastics trade and plastics pollution. Even if these plurilateral initiatives are open to all members, the number of participants in each one is different, and each is at a different stage of progress in discussions. It should also be noted that, thus far, not every initiative has spelled out the objective of agreeing on new rules to be incorporated into the WTO framework.

[19] Members may use multilateral settings such as the TBT Committee to raise trade concerns with respect to specific measures adopted by other Members which may affect their trade. These discussions may be helpful in mitigating trade tensions through dialogue among Members.

[20] WTO, *DG Okonjo-Iweala: E-commerce has emerged as major force in global economic output, trade*, 2 June 2023, https://www.wto.org/english/news_e/news23_e/ecom_02jun23_e.htm (accessed on 16 August 2023).

Within the Joint Statement Initiative (JSI) on electronic commerce, co-convened by Australia, Japan and Singapore, 89 Members are seeking to "achieve a high standard outcome that builds on existing WTO agreements and frameworks with the participation of as many WTO members as possible"[21]. They are currently negotiating a new set of rules on the basis of a draft consolidated negotiating text[22]. The proposals in the draft are generally inspired by Members' experiences in domestic regulation on e-commerce or by language taken from their Free Trade Agreements containing e-commerce provisions. Since their launch in January 2019, the negotiations have reached an advanced stage, with a high degree of convergence achieved on several provisions. The co-conveners are considering how to accelerate the pace of negotiations with the aim of "reaching substantial conclusions" in 2023[23].

With respect to e-commerce and sustainability, there are no explicit references or draft provisions covering this issue within the e-commerce JSI. Still, some elements are worth highlighting. First, a draft Preambular language proposes to reaffirm Members' right to regulate to achieve "legitimate policy objectives" such as "the protection of human, animal or plant life or health, social services, public education, safety, the environment including climate change", among others[24]. Several Members have also noted that they would expect security, general and prudential exceptions to apply in the JSI. At this stage of the negotiations, however, further discussions are still needed on the scope of the agreement and general provisions including the preamble, definitions and exceptions. Second, some of the articles – whether finalized or still subject to negotiations – may be relevant in the context of e-commerce and sustainability talks, even if no such link has yet been clearly established by participants

[21] As of February 2023, the number of participants is 89, accounting for over 90 percent of global trade.

[22] At the time of writing this paper, the latest revision of the text was circulated in August 2023 in WTO Document: INF/ECOM/62/Rev.4.

[23] WTO, *E-commerce negotiators vow to intensify work in coming year*, 1 December 2022, https://www.wto.org/english/news_e/news22_e/ecom_02dec22_e.htm#:~:text=At%20their%20last%20meeting%20of,bridge%20differences%20on%20text%20proposals (accessed on 5 January 2023).

[24] WTO Document: INF/ECOM/62/Rev.4, p. 50.

in their discussions. One such example is the issue of "unsolicited commercial messages," commonly known as spam. Among the environmental costs mentioned in UNCTAD's 2022 Outcome Report on its E-commerce Week, there is a reference to the impact of spam e-mails and related carbon dioxide ($CO_2$) emissions[25]. Within the JSI on e-commerce, participants have agreed on a specific provision on the issue of unsolicited commercial messages[26]. The aim of this provision is to minimize the amount of spam messages in e-commerce. This is interesting not only from a consumer trust angle, but such regulations may also lead to positive outcomes for the environment, when examined through an e-commerce and sustainability lens. Under such a lens, one may also analyze the sustainability impact of other provisions in these negotiations, such as paperless trading, electronic contracts as well as open government data. One should also bear in mind the impact of existing trade agreements (whether regional or bilateral), which may contain relevant e-commerce provisions that are bound to have a positive impact from a sustainability perspective. Third, as mentioned above, the WTO Director-General sees the Trade and Environmental Sustainability Structured Discussions (TESSD) as a pioneer initiative to search for more concrete actions to drive the trade and environment agenda. As of December 2022, 74 Members are participating in these discussions, representing around 85 percent of world trade. TESSD participants shared a Ministerial Statement in December 2021[27] in which they note ongoing efforts to "address and promote dialogue and information sharing at the WTO" on a variety of issues where trade, environmental and climate policies intersect, including on "facilitating access to green technology". They also agreed to "[i]dentify and compile best practices, as well as explore opportunities for voluntary actions and

[25] UNCTAD, *2022 Outcome Report: Data and Digitalization for Development*, 16 September 2022, p. 20, https://unctad.org/system/files/information-document/eWeek-2022-Outcome-Report-FINAL.eng_.pdf (accessed on 5 January 2023). Gerry McGovern cites estimates of 120 trillion spam emails sent every year, creating around 36 million tons of $CO_2$ emissions.

[26] WTO, *E-commerce negotiations: Members finalise 'clean text' on unsolicited commercial messages*, 5 February 2021, https://www.wto.org/english/news_e/news21_e/ecom_05feb21_e.htm (accessed on 5 January 2023).

[27] WTO Document: WT/MIN(21)/6/Rev.2.

partnerships to ensure that trade and trade policies are supportive of and contribute to […] promoting and facilitating access to environmental goods and services, including encouraging the global uptake of new and emerging low-emissions and other climate-friendly technologies". At a 2022 end-of-year stocktake meeting, participants reported on ongoing work and signalled relevant priorities for concrete action[28]. Summaries of these discussions have been shared[29]. Although no explicit mention of e-commerce is made, they report on experience sharing exercises and discussions relating to e-waste and electronics. Finally, one could examine potential synergies with the Informal Dialogue on Plastics Pollution and Environmentally Sustainable Plastics Trade, which seeks to complement discussions in the CTE and in other relevant fora[30].

## 3. *Charting a path forward for e-commerce and sustainability*

The previous section illustrated the institutional potential of the WTO to shed more light on the topic of e-commerce and sustainability. For this issue to advance in a meaningful manner, efforts should first be made to work across silos and bridge certain political differences between Members. In addition, efforts should not limit themselves to the WTO, given that e-commerce and sustainability transcends disciplinary and organizational boundaries. Creating the requisite conditions for a comprehensive examination of e-commerce and sustainability requires a multistakeholder approach. Finally, measuring e-commerce has been a difficult task these past years and is a challenge that remains to be fully addressed. This is also an issue which requires attention, in order to allow for sound policy-making including from a sustainability viewpoint.

---

[28] WTO, *Members take stock of sustainability discussions, signal priorities for concrete action*, 2 December 2022, https://www.wto.org/english/news_e/news22_e/tessd_02dec22_e.htm (accessed on 5 January 2023).

[29] WTO Document: INF/TE/SSD/R/14.

[30] See, WTO, *Plastics pollution and environmentally sustainable plastics trade*, https://www.wto.org/english/tratop_e/ppesp_e/ppesp_e.htm (accessed on 30 March 2023).

### 3.1. *Connecting the dots and building bridges at the WTO*

At the Twenty-Seventh United Nations Conference on Climate Change (COP 27) in Sharm el-Sheikh, Egypt, the WTO presented its flagship publication: The World Trade Report (WTR)[31]. The 2022 edition of the report focuses on climate change and international trade, and underscores the role trade can play in acting as a cornerstone for climate action. The WTO Secretariat's role as a knowledge and research hub on issues relating to international trade was highlighted. This is one area where the organization can take certain initiatives without necessarily requiring a formal decision by Members. In this publication, there is a paragraph on the potential role of digital services in the reduction of carbon emissions (e.g. teleconferencing may reduce demand for business-related flights) as well as a footnote which raises the issue of improving energy efficiency in data centers to contribute to "low-carbon digitalization"[32]. Past World Trade Reports have also touched upon issues relating to e-commerce and sustainability. However, coverage of this relation remains sparse, which makes it more difficult to have a comprehensive understanding of the topic. For example, WTR 2018 delved into how digital technologies are transforming global commerce, including e-certification and electronic traceability of agricultural products or how digital technologies may help farmers in risk mitigation through tools such as weather information services[33]. It also refers to studies which highlight challenges pertaining to data centers' energy consumption[34]. A first suggestion would be for the WTO Secretariat to undertake further research

[31] WTO, News Item, *Trade must be a cornerstone of climate action, urges World Trade Report released at COP27*, 7 November 2022, https://www.wto.org/english/news_e/news22_e/publ_07nov22_e.htm (accessed on 5 January 2023).

[32] WTO, *World Trade Report 2022: Climate Change and International Trade*, 2022, p. 111 and p. 115, https://www.wto.org/english/res_e/booksp_e/wtr22_e/wtr22_e.pdf (accessed on 5 January 2023).

[33] WTO, *World Trade Report 2018: The future of world trade: How digital technologies are transforming global commerce*, 2018. See for instance p. 81 and p. 161, https://www.wto.org/english/res_e/publications_e/world_trade_report18_e.pdf (accessed on 5 January 2023).

[34] WTO, *World Trade Report 2018*, p. 100.

on e-commerce and sustainability by examining the issue via a one-stop approach, for instance through a publication or via a dedicated web portal, which may include a space for suggestions from academics and practitioners.

Beyond the role of the Secretariat, Members also have a role to play in building bridges between discussions on e-commerce and those on sustainability within the organization. The first part of the paper showed that, as of early 2023, these two issues were still being discussed in silos, despite their many links. In the future, the synergies between the TESSD, the Informal Dialogue on Plastics Pollution and the e-commerce initiatives could be further exploited. Multilateral discussions within the Work Programme on Electronic Commerce as well as with respect to the moratorium may also play a part in examining the link between e-commerce and sustainability. Throughout these exchanges, particular attention should be placed on relevant opportunities and challenges faced by developing and least developed countries. Adding new topics within the multilateral framework might also be difficult, given the mandate Members agreed to in 1998, a mandate which does not mention the environment perspective but places emphasis on the development aspect of e-commerce. Such challenges must be borne in mind. Nonetheless, one cannot dissociate environmental and development concerns. There is certainly room for a Member (or a group of Members) sharing a communication within the E-commerce Work Programme on the importance of the sustainability aspect of e-commerce – similar to what Canada has done within the CTE. Another route to discuss this topic would be within the plurilateral framework, albeit with a more limited – but still very relevant – number of participants. Although the TESSD and the Informal Dialogue on Plastics Pollution initiatives do not seem to be geared toward creating new rules for the time being – unlike their e-commerce counterpart – the inherent flexibility with which discussions are conducted within this setting should allow for space to discuss sustainability and e-commerce in a productive manner. Relevant new proposals may also be submitted within the e-commerce JSI, be it regarding a preambular/recognition language on this topic or as a standalone article. Ultimately, however, broader discus-

sions will be required with respect to how the JSI's legal architecture issue is handled. The question of how best to incorporate the negotiations' outcome into the WTO framework is still pending[35]. In addition, a group of non-participating Members have criticized the very nature of plurilateral initiatives and have stressed that the principle of consensus-based decision-making in the WTO ought to be respected[36]. That being said, WTO Members should share a common purpose on the twin objectives of (i) further opening and regulating e-commerce and (ii) using trade policy as a tool to mitigate climate change.

### 3.2. *Beyond the WTO: creating the conditions for a comprehensive examination of e-commerce and sustainability*

Connecting the dots and building bridges on this issue will be possible if the requisite conditions are in place for a comprehensive examination of the links between e-commerce and sustainability. A dedicated Task Force should be established with the aim of examining the relationship between e-commerce and sustainability, as well as discussing relevant policies and measures. Such a Task Force should be composed of different actors relevant in the discussion – without the formality of an institutional WTO body, and with flexible arrangements.

Given the breadth and complexity of issues that may be covered in a discussion of the links between e-commerce and sustainability, one cannot expect an international organization to act alone in the process of examining and mapping out such links. In fact, there is already a wide diversity of actors who contribute to advancing relevant work, albeit currently mostly in an isolated manner. There is merit in increasing opportunities for exchange of views and coordination where synergies are possible amongst those actors. This might re-

[35] With this in mind, JSI participants have been discussing a range of potential legal pathways, including via Annex 1 to the Marrakesh Agreement; Annex 4; scheduling; and GATS Articles V and VII.

[36] WTO Document: WT/GC/W/819/Rev.1 (communication by India, Namibia and South Africa).

quire increased procedural flexibility at the WTO, in the sense that opportunities must be given to raise new trade topics for the organization to remain fit-for-purpose by addressing 21st century realities. While this does not necessarily have to entail new commitments to be negotiated and adopted by Members, it will maximize the role of the WTO as a forum to exchange views and experiences and coordinate the work of various organizations. This is where the convening power of the WTO Director General may come into play i.e., to invite key actors to take part in multistakeholder discussions. In a first stage, this Task Force on E-commerce and Sustainability may include the WTO, UNCTAD, the OECD, the World Bank and the International Telecommunications Union (ITU). Subsequently, other actors may be called in to advance work on specific questions in their respective purview.

Tab. 1. Non-Exhaustive List of Potential Actors to Kick-start Discussions on E-commerce and Sustainability.

| Institution(s) | Relevant Work on E-commerce and Sustainability |
|---|---|
| **CITES** | The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) has a role to play. The joint publication with the WTO entitled "Enhancing Cooperation for Sustainable Development" clearly highlights the mutually supportive role that global trade and environmental regimes can play in fulfilling common objectives such as sustainability[37]. A typical example would be the role played by real-time data flows and e-permits which make it easier to detect potentially illegal or unsustainable trade in wildlife. |
| **ICC** | In 2021 the International Chamber of Commerce (ICC) published a report with the ambition to define and set common standards for sustainable trade and trade finance[38]. Synergies with the e-commerce sector may be worth exploring, as well as the role played by digitalization to effectively implement the framework. |

[37] CITES and the WTO, *Enhancing Cooperation for Sustainable Development* (2015), https://www.wto.org/english/res_e/publications_e/citesandwto15_e.htm (accessed on 31 March 2023).

[38] See, for instance, a 2022 review of the programme which was launched in September 2021. ICC, *ICC Standards for Sustainable Trade and Sustainable Trade Finance*, November 2022, https://iccwbo.org/content/uploads/sites/3/2022/11/icc-standards-for-sustainable-trade-trade-finance-wave-1-framework-nov22-vcompressed.pdf (accessed on 5 January 2023).

| | |
|---|---|
| **IMF, OECD and WTO** | The International Monetary Fund (IMF) and the OECD, together with the WTO, have carried out extensive work on the issue of measuring digital trade. Discussions regarding the measure of e-commerce are ongoing, as illustrated by the joint publication by these three organizations[39]. There is an increasing need to address existing statistics-related challenges pertaining to e-commerce that may ultimately also have an impact on the advancement of work on sustainability. |
| **ITC** | The International Trade Centre (ITC) has been working with businesses and governments on solutions to help address challenges faced by small companies in developing and least developed countries when it comes to participating in, and benefiting from, e-commerce. Among its many relevant activities, the ITC's e-commerce platform provides as set of useful tools including informative dashboards on e-commerce marketplace characteristics, cost calculators and sales tracking tools, sharing of best practices, among others[40]. |
| **ITU** | The ITU has developed international standards contributing to the environmental sustainability of the ICT sector, as well as other industry sectors applying ICTs as enabling technologies to increase efficiency and update their service offer. Recent activities by the ITU have focused on the environmental implications of 5G networks[41], as well as the assessment and measurement of the environmental efficiency of AI, data centers and emerging technologies[42]. More specifically, ITU-T Study Group 5 on Electromagnetic fields (EMF), environment, climate action, sustainable digitalization and circular economy may provide some insight on relevant standards or guidelines under works. Additionally, the ITU/UNESCO Broadband Commission for Sustainable Development has previously worked on the link between ICT and climate action[43]. |

[39] OECD, IMF and WTO, *Handbook on Measuring Digital Trade (Version 2)*, 2023, https://www.oecd.org/sdd/its/handbook-on-measuring-digital-trade.htm (accessed on 15 August 2023).

[40] ITC, *E-commerce*, https://intracen.org/resources/tools/e-commerce (accessed on 31 March 2023).

[41] See, for instance, ITU, *Setting Environmental Requirements for 5G*, https://www.itu.int/en/ITU-T/climatechange/Pages/ictccenv.aspx (accessed on 5 January 2023).

[42] See, for instance, ITU, *Working Group 2: Assessment and Measurement of the Environmental Efficiency of AI and Emerging Technologies*, https://www.itu.int/en/ITU-T/focusgroups/ai4ee/Pages/WG2deliverables.aspx (accessed on 5 January 2023).

[43] See, for instance, Broadband Commission for Sustainable Development, *The Broadband Bridge: Linking ICT with Climate Action for a Low-Carbon Economy*, April 2012, https://www.broadbandcommission.org/publication/the-broadband-bridge/ (accessed on 5 January 2023).

| | |
|---|---|
| **UNCITRAL** | The United Nations Commission on International Trade Law (UNCITRAL) plays a key role in developing a cross-border legal framework for the facilitation of international trade and investment. With this objective in mind, it helps prepare and promote the use and the adoption of certain instruments – legislative or non-legislative – in a number of key areas of commercial law. UNCITRAL Working Group IV focuses on e-commerce, and has contributed to the development of several Model Laws which are factored in by many governments in the development of their domestic legal frameworks. Typical examples include the 1996 Model Law on Electronic Commerce, the 2001 Model Law on Electronic Signatures, and the 2016 Model Law on Electronic Transferable Records. |
| **UNCSTD** | The United Nations Commission on Science and Technology for Development (CSTD) is a subsidiary of the UN Economic and Social Council (ECOSOC). UNCTAD services the CSTD, which holds an annual intergovernmental session for discussion on timely and pertinent issues affecting science, technology, and development. The draft resolutions that the CSTD prepares for ECOSOC cover a range of issues, including internet access, ICTs, and technologies relevant in achieving UN SDGs, including mitigating and adapting to climate change[44]. |
| **UNCTAD** | The work by UNCTAD is of specific interest, considering their expertise and events they have organized, including during the 2022 E-commerce Week. During one of the sessions on "Global and regional trade negotiations on e-commerce: What is at stake for development?", one of the key recommendations made was for multilateral institutions, including UNCTAD, to contribute to "developing and implementing national strategies and a regulatory framework on digitalization and data for sustainable development"[45]. |
| **UN EMG** | The United Nations Environment Management Group (EMG) which consists of several agencies, programmes and organs of the United Nations, has published report on the UN's System-wide Response to Tackling E-waste[46]. Subsequently, several organizations signed a Letter of Intent in 2018 as a basis for collaboration and coordination |

[44] UNCTAD, *Commission on Science and Technology for Development*, https://unctad.org/topic/commission-on-science-and-technology-for-development (accessed on 5 January 2023).

[45] UNCTAD, *2022 Outcome Report: Data and Digitalization for Development*, 16 September 2022, p. 18, https://unctad.org/system/files/information-document/eWeek-2022-Outcome-Report-FINAL.eng_.pdf (accessed on 5 January 2023).

[46] UN Environment Management Group, *United Nations System-wide Response to Tackling E-waste*, 2017, https://unemg.org/images/emgdocs/ewaste/E-Waste-EMG-FINAL.pdf (accessed on 5 January 2023).

| | |
|---|---|
| | on system-wide support for e-waste management and the creation of an E-waste Coalition[47]. After a dedicated discussion on this topic, *the WTO could even envisage joining the E-waste Coalition which already brings together ten other international organizations*, thus giving it a leading role in addressing one of the major environmental challenges linked to e-commerce and sustainability. |
| **World Bank** | The World Bank has accomplished relevant research on e-commerce, including analytical studies that attempt to bring more evidence to bear on the discussion about its development benefits[48]. It has also endeavored to advance work on the measurement e-commerce through research and by suggestions some ways forward in terms of generating an increased supply of policy-relevant data and analysis[49]. |
| **WCO** | The World Customs Organization (WCO) has also accomplished pertinent work on e-commerce. It developed a Framework of Standards on Cross-Border E-Commerce in 2018, which it updated in 2022. This Framework "sets forth the principles and the standards the implementation of which will ensure that Customs support the growth of cross-border E-Commerce, while ensuring national safety and security and contributing to the facilitation of legitimate trade"[50]. |

[47] Letter of Intent, *Paving the way for Coordination and Collaboration on UN System-wide Support for E-waste Management*, March 2018, https://unemg.org/wp-content/uploads/2019/07/FINAL_Letter-of-Intent-E-waste_WSIS_2019.pdf (accessed on 5 January 2023). Signatories include the International Telecommunications Union, United Nations University, United Nations Industrial Development Organization, United Nations Environment Programme, the Secretariat of the Basel, Rotterdam and Stockholm, Conventions, International Labour Organization, United Nations Human Settlements Programme, International Trade Centre, United Nations Institute for Training and Research, and the World Health Organization.

[48] World Bank and Alibaba Group, *E-commerce Development: Experience from China: Overview*, Washington, D.C.: World Bank Group, 2019, https://documents.worldbank.org/en/publication/documents-reports/documentdetail/823771574361853775/overview (accessed on 5 January 2023).

[49] M.J. Ferrantino, E.E. Koten, *The Measurement and Analysis of E-Commerce: Frameworks for Improving Data Availability*, Washington, World Bank Group, 2019, http://documents.worldbank.org/curated/en/927771578286460819/The-Measurement-and-Analysis-of-E-Commerce-Frameworks-for-Improving-Data-Availability (accessed on 5 January 2023).

[50] WCO, *Framework of Standards on Cross-Border E-Commerce*, June 2022 edition, https://www.wcoomd.org/-/media/wco/public/global/pdf/topics/facilitation/activities-and-programmes/ecommerce/wco-framework-of-standards-on-crossborder-ecommerce_en.pdf (accessed on 31 March 2023).

| | |
|---|---|
| **WEF** | The World Economic Forum (WEF) could be called in to share insights on initiatives that are relevant to the e-commerce and sustainability discussion. This may include shedding light on elements contained in the 2022 joint WTO-WEF "TradeTech" publication, such as the benefits linked to digital identity and traceability of physical and digital products for sustainability purposes, as well as other practical solutions to advance inclusive growth and sustainable development in digital trade[51]. |
| **WIPO** | World Intellectual Property Organization (WIPO) has done pertinent work, including via its Global Challenges programme, which brings together a variety of stakeholders to explore issues related to green technologies and the environment. For instance, it hosts the WIPO Green platform aimed at promoting innovation and diffusion of green tech and analyzing IP-related issues to facilitate international policy dialogue[52]. It also includes a digital database of more than 120,000 green technologies in sectors such as energy, water and transportation. Moreover, WIPO launched its Green Technology Book in 2022, a publication which examines concrete solutions for climate change adaptation[53]. Inviting WIPO to present relevant work may add value to any future event to be organized on e-commerce and sustainability. |
| **WMO** | Discussions with the World Meteorological Organization (WMO) may also be pertinent, given their role in exploring new technologies and their relevance for public weather services including via the use of AI approaches. For example, the Extraordinary World Meteorological Congress held in 2021 approved the WMO Unified Data Policy Resolution with a view strengthen the world's weather and climate services through a systematic increase in observational data and data products from across the globe[54]. This is an important feat given the surging demand for weather, climate and water monitoring and prediction data to support essential services needed by multiple sectors, in the face of climate change, the increasing frequency and impact of extreme weather, and implications for food security. |

[51] WTO and WEF, *The Promise of TradeTech: Policy Approaches to Harness Trade Digitalization*, 2022, p. 42, https://www.wto.org/english/res_e/booksp_e/tradtechpolicyharddigit0422_e.pdf (accessed on 5 January 2023).

[52] WIPO, *WIPO GREEN – The Marketplace for Sustainable Technology*, https://www3.wipo.int/wipogreen/en/ (accessed on 5 January 2023).

[53] WIPO, *Green Technology Book 2022 Solutions for climate change adaptation*, WIPO Publications, https://www.wipo.int/en/green-technology-book/ (accessed on 5 January 2023).

[54] See, for instance, WMO, *WMO Unified Data Policy Resolution (Res.1)*, https://public.wmo.int/en/our-mandate/what-we-do/observations/Unified-WMO-Data-Policy-Resolution (accessed on 5 January 2023).

| | |
|---|---|
| **WSC** | The World Standards Cooperation (WSC) is a high-level collaboration between the **IEC** (International Electrotechnical Commission), **ISO** (International Organization for Standardization) and **ITU** (International Telecommunication Union), with the aim of preserving their common interests in strengthening and advancing the voluntary consensus-based International Standards system. Much of what is done under the umbrella of the WSC and its members has a relevance to the digital landscape. Such cooperation has resulted in various standards. For instance, the MPEG which has contributed to the development of standards for coded representation of digital audio, video, 3D Graphics and genomic data. |

As the above table shows (Tab. 1), e-commerce and digitalization are cross-cutting in nature and have already involved a variety of actors. They interact with various sectors, which makes it complex, at first, to identify what the relation between e-commerce and sustainability may entail in terms of trade rules. As such, it may be helpful within this multistakeholder Task Force to start defining the contours of what e-commerce and sustainability may encompass. The table below (Tab. 2) is a non-exhaustive list of topics that have been raised in various fora and may be addressed by a Task Force. The interest of such a Task Force would therefore also be to better coordinate action among international actors on these issues, and avoid duplication of work, defining which institution might be more competent to address individual issues under their respective ambit.

Tab. 2. Potential Topics to Fuel Discussions on E-commerce and Sustainability.

| Item | Topic |
|---|---|
| **1.** | **Climate, energy and e-commerce**, including a potential cost-benefit examination of both the direct and indirect effects of e-commerce related activities on the environment, bearing in mind e-commerce's substitution effect. This may include specific discussions on energy consumption and greenhouse gas emissions resulting from (i) data centers, (ii) technologies such as blockchain and 3D printing, and (iii) specific online activities such as electronic messaging (including spams) and digital entertainment (including streaming services and videogames). This may also include a discussion on the link between electronic transmissions and the environment, bearing in mind their impact on transportation and production networks, as well as energy consumption. |
| **2.** | **Crises and e-commerce**, including the role played by e-commerce in sustainably responding to the COVID-19 pandemic to enable access to certain critical goods. |

| | |
|---|---|
| **3.** | **Data**, including how facilitating access to and reuse of data can contribute to achieving sustainability objectives. This may cover the potential for high-value environmental data to help stimulate the creation and diffusion of value-added digital products and services. |
| **4.** | **Development-related issues**, including the opportunities, challenges and needs of developing and least developed countries linked to e-commerce and sustainability. More specifically, discussions could focus on how relevant international organizations may unite their forces to help build the necessary capacity for these countries to develop key digital infrastructure and better harness new digital realities. |
| **5.** | **E-agriculture**, including (i) how digital tools and processes such as the use of artificial intelligence, information and communication technologies (ICTs), e-certification, electronic traceability of products can contribute to a more sustainable agriculture and help combat food insecurity and (ii) its role in driving economic growth, raising incomes and improving livelihoods among rural communities, and ultimately its contribution to the achievement of relevant UN SDGs. |
| **6.** | **E-government**, including how simplified electronic processes, ICTs and a paperless trading environment may enhance governments' ability to fulfil their sustainability objectives. |
| **7.** | **E-health**, including how healthcare practices supported by electronic processes and communication may enhance the ability of health systems to fulfil their sustainability objectives. |
| **8.** | **E-learning, remote working and tele-working**, including whether they can contribute to shaping a more sustainable future and how they can be relevant to fulfilling UN SDGs. |
| **9.** | **E-waste**, including the sustainability impact of encouraging the production of products with longer life-cycles and recycling, as well as how this can be relevant to fulfilling UN SDGs. |
| **10.** | **Emerging technologies** in areas related to e-commerce and sustainability, including on the 5$^{th}$ generation of mobile networks (5G), 3D printing technology, artificial intelligence (AI), blockchain, the Internet of Things (IoT), quantum information technologies, among others. In particular, there may be considerations to be made on the use such technologies for a more efficient management of resources and control greenhouse gas emissions. |
| **11.** | **Measures, policies and standards** adopted by Members and other international institutions, and their relationship with e-commerce and sustainability. This could, for instance, entail discussions on standards adopted under the WSC, UNCITRAL or WCO, among others, and their relevance to e-commerce and sustainability. One may also wish to hold discussions on the link between carbon taxes and e-commerce, such as (i) whether the products targeted by those taxes (e.g., plastics and certain metals) ultimately have an impact on e-commerce activities, and (ii) whether there is an optimal sharing of data to help track and reduce the carbon footprint of targeted products. |
| **12.** | **Retail e-commerce**, including ways to ensure a more sustainable global value chains whilst satisfying consumer demand. |

Increased coordination amongst international actors resulting from the work undertaken by this Task Force would pave the way for more concrete policies to be discussed – and eventually negotiated – by governments. One could conceptualize a set of policy discussions on e-commerce's developmental and environmental aspects, as twin sustainability objectives.

## 4. *Policy considerations for an e-commerce and sustainability package (ESP)*

The WTO DG stressed that "[a]n open, transparent, rules-based trading system remains crucial for driving economic development and addressing global problems like climate change"[55]. These overarching principles must remain central to any policy discussion on e-commerce and sustainability. The elements below may be considered with a view to creating a comprehensive e-commerce and sustainability package (ESP).

### 4.1. *An agreement on e-commerce: a catalyst for sustainability*

The first step to an ESP would be an Agreement on E-commerce, which can act as a catalyst for sustainability. It is difficult to envisage the promotion of economic development and environmental sustainability in and through e-commerce without having a basis to work on in the first place. Indeed, if e-commerce is to work for development and for the environment, there must *a priori* be work on how it can be opened and regulated. This is in line with the practice of progressively deepening trade relations among Members, beyond traditional trade issues such as trade in goods and services.

Enabling the advancement of negotiations on e-commerce within the JSI – including on a framework governing data-related issues – would provide participants with a common basis on which

[55] Ngozi Okonjo-Iweala interviewed by Anne O. Krueger, *The Trade Agenda Today*, Project Syndicate, 30 September 2022, https://www.project-syndicate.org/onpoint/trade-after-pandemic-russias-war-in-ukraine-by-ngozi-okonjo-iweala-and-anne-o-krueger-2022-09 (accessed on 30 January 2023).

they can collectively advance regarding the e-commerce and sustainability agenda. As the WTO DG put it, these "negotiations are breaking new ground worldwide in that they are the first initiative to bring so many members to the negotiating table on such a comprehensive list of e-commerce-related issues"[56]. Despite the ambitious objective set to substantially conclude their negotiations by the end of 2023, an important step would logically remain if the initiative is to effectively address e-commerce from a sustainability angle. Members would need to assess further how e-commerce can facilitate or undermine sustainability objectives, and consequently what sort of trade policies would be required to enhance the facilitation or avoid the undermining. This could be done through recognition statements, as well as enhanced commitments balanced by adequate exceptions/flexibilities. In addition to the development side of sustainability within the negotiations, participants should look into concrete environmental aspects of their work. As highlighted above in this paper, this may include references to the environmental impact of disciplines such as spam, paperless trading, or open government data, as well as working across silos by leveraging the TESSD initiative to feed into the e-commerce and sustainability discussions.

### 4.2. *Beefing up the development toolbox in the context of e-commerce*

Development is a core feature of the 1998 Work Programme on E-commerce. In fact, WTO Members were tasked to take into account "the economic, financial, and development needs of developing countries" when examining trade-related issues relating to global electronic commerce[57]. On top of ongoing multilateral discussions, efforts should continue with a view to encouraging non-participating WTO Members – mostly developing countries and LDCs – to join the JSI negotiations. Achieving universality in the JSI should be

[56] WTO, *Co-convenors of e-commerce negotiations review progress, reflect on way forward*, 6 July 2023, https://www.wto.org/english/news_e/news23_e/jsec_06jul23_e.htm (accessed on 16 August 2023).

[57] See WTO Document: WT/L/274.

the aim, and different levels of commitment and obligations could be envisaged. Development and environment are issues which transcend borders and thus require collective action. To support developing countries, the co-conveners of the initiative, together with Switzerland, have launched in 2022 an "E-commerce Capacity Building Framework" which brings together a range of capacity building efforts to support developing and least developed Members' participation in the e-commerce JSI, including funding for training and technical assistance[58]. Technical assistance is critical, but additional support is required through other means. Work must continue to advance other aspects of development, such as accepted timeframes and flexibilities for the implementation of targeted articles; an incentive which may help attract further developing country participation (lacking especially among African Members) within the JSI. On a more general note, throughout their discussions at the WTO, Members have been identifying several other tools that may help trade – especially in the context of e-commerce – maximize its contribution to development. This includes providing sufficient policy space, technology transfer, preferential market access, and Aid for Trade.

- With respect to *policy space*, this issue is of particular relevance to the moratorium discussion. The belief expressed by some developing countries here is that such policy space would allow the imposition of duties in certain circumstances, so as to alleviate concerns *vis à vis* the potential loss of government revenue associated with the non-imposition of tariffs on electronic transmission and help bolster domestic digital industries. However, a discussion on the moratorium and sustainability would be incomplete without further consideration of its potential environmental effects. This is discussed further below.

- With respect to *technology transfer*, leveraging existing commitments under the TRIPS agreement is crucial. As part of the latter's objectives, developed economies ought to provide incentives for their businesses to promote the transfer of technology to LDCs, so as to enable their diffusion and dissemination. The importance

[58] WTO, *E-Commerce JSI co-convenors announce capacity building support*, https://www.wto.org/english/tratop_e/ecom_e/jiecomcapbuild_e.htm (accessed on 30 January 2023).

of intellectual property matters cannot be overstated when it comes to addressing the digital divide and climate change. Relevant discussions have been held in the WTO, but also in other for a such as the UN Framework Convention on Climate Change (UNFCCC), and WIPO[59]. Still, many countries continue to find it difficult to take advantage of technology transfer. Given today's sustainability challenges, there is merit in exploring ways to further operationalize technology transfer, including in the context of e-commerce.

- *Market access* negotiations have been described as a "challenging" area by JSI's co-conveners, including due a lack of clarity at the current stage on legal architecture, which was elaborated on above[60]. However, the co-conveners stressed that "the initiative needs to address market access issues in order to achieve a high standard outcome […] [and] should continue to give attention to developing countries which are facing challenges related to capacity building and the digital divide"[61]. In addition, questions relating to the 1996 Information Technology Agreement (ITA), its 2015 Extension (ITA II) and potential next steps may also come into play in the e-commerce and sustainability discussion. This is further detailed below.

- In 2022, e-commerce put forward as a top *Aid for Trade* priority among both recipients and donors, which may be explained as a result to the COVID-19 pandemic[62]. Emphasis could be placed on further linking e-commerce and sustainability, especially with its environment aspect, given that environmentally sustainable growth is another clear priority in Aid for Trade. This linkage may help better integrate e-commerce and sustainability into Aid for Trade, help

---

[59] See, for instance, WTO, *Climate change and TRIPS*, https://www.wto.org/english/tratop_e/trips_e/cchange_e.htm (accessed on 30 January 2023). See also, WTO, *Technology Transfer*, https://www.wto.org/english/tratop_e/trips_e/techtransfer_e.htm (accessed on 30 January 2023).

[60] WTO, *E-commerce negotiations: Members finalise 'clean text' on unsolicited commercial messages*, 5 February 2021, https://www.wto.org/english/news_e/news21_e/ecom_05feb21_e.htm (accessed on 30 January 2023).

[61] WTO, *Co-convenors of e-commerce negotiations: We are heartened by progress made so far*, 16 March 2021, https://www.wto.org/english/news_e/news21_e/ecom_16mar21_e.htm (accessed on 30 January 2023).

[62] WTO, *Aid for Trade Global Review: Empowering Connected, Sustainable Trade*, 2022, https://www.wto.org/english/tratop_e/devel_e/a4t_e/a4tpublicationgr22_e.htm (accessed on 30 January 2023).

make up for the paucity of relevant data on this topic, help raise awareness among policymakers and improve impact assessments.

Overall, it is essential for Members to keep a common mindset with respect to this development toolbox. Some of the abovementioned flexibilities are not meant to become blanket exceptions, they must rather be targeted according to each participant's relevant needs. In addition, these flexibilities are not to remain *ad vitam aeternam*, they should be temporary. The end goal should remain to allow every participant to take part in the multilateral trading system under the same rules once their respective development level and domestic conditions allow it to be the case. Furthermore, helping developing and least developed countries build up their digital infrastructure would benefit developed economies too; they would trade with more resilient trading partners and have access to markets that still remain untapped.

### 4.3. *Considering electronic transmissions' potential for the environment*

Members may wish to consider whether it is worth making the moratorium on customs duties on electronic transmissions an environmental incentive. As mentioned above, no explicit reference has yet been made in WTO discussions regarding the link between facilitating electronic transmissions and the environmental benefits this would induce, given that production and transport costs associated with digitized good are significantly diminished or even rendered irrelevant. The following policy question should thus be raised: where relevant, is there merit in promoting electronic transmissions in lieu of traditional physical goods trade, including by continuing the practice of not imposing customs duties? For example, this would mean a more explicit promotion of trade in digital versions of products, to the detriment of their physical equivalents. This could also entail the adoption of policies to promote the use of 3D printing technologies and services, given their potential to supersede a portion of cross-border physical goods trade in the future. Such policy questions may also be raised within the plurilateral track, given that the JSI negotiations also cover an article on customs duties on electronic transmis-

sions. Nevertheless, the sustainability perspective would be flawed if its development aspect is omitted. Several developing countries continue to express major concerns especially regarding the moratorium's impact on government revenue; concerns which are exacerbated by the development of 3D printing. As such, these Members have expressed need to preserve policy space, including to build up their domestic digital industries. An adequate balancing act is required between openness of trade in electronic transmissions and the concrete elements needed for developing and least developed countries to fully reap the benefits of the digital economy. Some of these elements have been detailed further above in the development toolbox section.

### 4.4. *A Broader and deeper information technology agreement*

There is merit in considering a broader and deeper reduction and elimination of tariffs on IT products, i.e. by encouraging more participants to undertake commitments and by increasing product coverage. The 1996 Information Technology Agreement (ITA) and its 2015 Expansion both aim at eliminating tariffs on a selection of IT products, on a Most-Favored-Nation (MFN) basis. Eighty-two WTO Members – representing about 97 percent of world trade in IT products – are ITA signatories. There are 55 Members participating in the ITA Expansion (ITA II), accounting for 90 percent of world trade in this additional list of 201 products. However, some big players are missing. India, for instance, is an ITA participant but has decided, for the time being, not to participate in ITA II. Efforts to convince certain Members, including India, Indonesia, Ukraine, Gulf Cooperation Council countries[63] to join should continue. At the same time, some Members have been raising the question of expanding the coverage. Indeed, at an ITA Symposium organized by the WTO in 2021 to celebrate the agreement's twenty-fifth birthday, a session on the future of the ITA saw panellists take the floor on this issue[64]. Many

[63] Bahrain, Kuwait, Oman, Qatar, the Kingdom of Saudi Arabia and the United Arab Emirates.

[64] WTO, *ITA Symposium: 25 Years of the Information Technology Agreement*, 16 and 17 September 2021, https://www.wto.org/english/tratop_e/inftec_e/ita_symp_sep21_e.htm (accessed on 30 January 2023).

global tech industry associations are supportive of the prospect of an ITA III[65], noting the benefits associated with the extension to emerging technologies. In turn, the idea is that ITA III would be a major contribution to bridging the digital divide, helping address climate change, making supply chains more resilient, as well as promoting and facilitating remote healthcare, working and learning solutions. While the ITA's main focus is on tariff elimination, attention must also be placed on non-tariff measures (NTMs) on IT products given their potential trade-distorting effects. The WTO ITA Committee – which is in charge of administering the ITA and its Expansion – may also hold consultations on such NTMs[66].

Tab. 3. Summary of Key Elements for a Balanced E-commerce and Sustainability Package (ESP).

| | |
|---|---|
| o | An Agreement on E-Commerce and a Data Framework. |
| o | Achieving universality within the future Agreement on E-commerce. |
| o | Continuing to aim for the achievement of high standard disciplines. |
| o | Shedding light on the environment aspect of the moratorium and of other negotiated disciplines, including but not limited to spam, paperless trading and open government data. |
| o | A development package which may be composed of: (i) targeted special and differential treatment, including policy space on the issue of the moratorium; (ii) technical assistance and capacity building framework; (iii) further operationalizing technology transfer where appropriate; (iv) improving market access conditions, especially for LDCs, and; (v) increasing the linkage between e-commerce and sustainability as a priority in the context of Aid for Trade. |
| o | Going broader and deeper with respect to the Information Technology Agreement, including by (i) inviting Members to join ITA I and ITA II, (ii) considering the added value of negotiating an ITA III and insisting on the importance of the MFN benefits it may bring across the board. |

[65] See, *Global Tech Industry Calls for Another Ambitious Expansion of ITA to Address Sweeping Global Challenges*, May 2022, https://www.semiconductors.org/wp-content/uploads/2022/05/ITA3-Global-Industry-Statement-May-2022.pdf (accessed on 30 January 2023). See also, J. Neuffer, *Time to Expand the ITA Again*, in *Semiconductor Industry Association Blog*, 16 May 2022, https://www.semiconductors.org/time-to-expand-the-ita-again/ (accessed on 30 January 2023).

[66] See WTO Document: JOB/TBT/224/Rev.1, paragraphs 4.2 to 4.6.

## 5. *Conclusion*

Although the development side of sustainability is at the core of existing work on e-commerce at the WTO, the environmental dimension has largely been overlooked. Yet, Members already have a good basis to start from. In that regard, the aim should be to connect the dots and build bridges between existing bodies and mechanisms, be it multilaterally (e.g., what role for the CTE and other relevant bodies?) or plurilaterally (e.g., what synergies may be exploited between TESSD and the E-commerce JSI?). In addition, the convening powers of the DG may be used to create a multistakeholder Task Force in charge of examining the relationship between e-commerce and sustainability, as well as discussing relevant policies and measures. Table 1 and 2 provide an indicative list of actors and issues to kickstart discussions which would help shed light on emerging topics, facilitate coordination between various actors, diminish the risk of duplication of work, and may even pave the way for more concrete policies to be discussed/negotiated. This paper also highlighted a set of policy considerations for a comprehensive e-commerce and sustainability package (ESP), which are summarized in Table 3. First, it is difficult to envisage the promotion of economic development and environmental sustainability without an Agreement on E-commerce with as many Members as possible, which would also cover data-related issues. Efforts are ongoing within the JSI in this respect. Second, beefing up the development toolbox in the context of e-commerce is essential. However, elements contained in that toolbox must remain temporary, targeted flexibilities rather than blanket exceptions, bearing in mind Members' respective development levels and constraints. Third, as part of market access discussions, making the ITA broader and deeper is another important step towards achieving sustainability objectives in the context of e-commerce. Finally, more light should be shed on the environmental aspects of the moratorium, as well as other relevant topics, including those negotiated within the JSI.

SESSION VI

# SUSTAINABLE DEVELOPMENT, FTAS AND THE EU

# LABOUR STANDARDS IN INTERNATIONAL TRADE LAW: A HISTORICAL OVERVIEW

*María Moreno Sancho*

## 1. *Introduction*

The United States (U.S.) and the European Union (EU) have recently imposed trade-restrictive measures to guarantee the protection of labour standards in exporting countries[1]. Notwithstanding it is not a new trend in the history of trade relations, labor standards have been barely invoked to restrain trade during the GATT/WTO era. As a matter of fact, labour standards were intrinsically related to the origins of the multilateral trading system. Due to political reasons and arguably historical accidents, the current legal framework governing the multilateral trading system omits any reference to labour standards. On account of the recent trends to restrain trade on the basis of labour standards, a historical overview on the relationship between labour standards and the multilateral trading system is found pertinent. For this reason, the first part of this paper explores the use of labour standards in some of the most relevant trade-restrictive policies recently undertaken by the U.S. and the EU, while the second part offers a historical overview of the incorporation of provisions on labour standards in multilateral trade agreements.

[1] "Fair Labour Standards", "Labour Standards", "International Labour Organization Standards" and "Worker Rights" will be synonymously used here.

## 2. *Labour Standards as a Protectionist Device in the XXI Century*

For decades, labour standards have been included in some bilateral and regional trade agreements, e.g., NAFTA/USMCA[2], or EU trade agreements[3]. Nevertheless, labour standards have also been incorporated in domestic legislation providing for the imposition of unilateral trade-restrictive measures, such as anti-dumping and countervailing duties, or a prohibition of imports. This section describes the most relevant legislation in this regard enacted by the U.S. and the EU.

### 2.1. *Import prohibitions on the basis of labour standards*

The U.S. has enacted legislation to prohibit imports from China's Xinjiang region through the enactment of the Uyghur Forced Labor Prevention Act. Meanwhile, the EU is developing the Due Diligence Directive, which would restrict imports on the basis of forced labour or other human rights violations that occur in the global value chains.

---

[2] While the North American Free Trade Agreement (NAFTA) contained a side agreement on labour, the United States of America, Mexico, and Canada (USMCA) contains a chapter (23) on labour provisions, which constitute the strongest provisions on labour in a trade agreement. It mandates parties to prohibit the importation of goods produced under forced or compulsory labor. Labour requirements have also been included in the determination of the origin of products (e.g., to export vehicles under preferential treatment, a labour value content of 40% for passenger vehicles or 45% for light trucks must be met. This includes a minimum of $16/hour on the production wage rate). USMCA Chapter on Labour, viewed at: https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/23-Labor.pdf. USMCA Appendix to Annex 4-B, Provisions Related to the Product-Specific Rules of Origin for Automotive Goods. viewed at: https://commerce.gov.in/wp-content/uploads/2022/06/04B-AN_1.pdf.

[3] EU trade agreements with the following countries include Trade and Sustainable Development chapters: Canada; Central America; Colombia, Peru, and Ecuador; Georgia; Japan; Moldova; Singapore; South Korea; Ukraine; United Kingdom; and Vietnam. It is also the case of agreements awaiting ratification (with Chile, China, Mercosur and Mexico) and those currently under negotiation (with Australia, Indonesia and New Zealand). EU Commission website, viewed at https://policy.trade.ec.europa.eu/development-and-sustainability/sustainable-development/sustainable-development-eu-trade-agreements_en.

### *A. U.S. Uyghur Forced Labor Prevention Act*

The U.S. has enacted The Uyghur Forced Labor Prevention Act to prohibit imports from China's Xinjiang region produced with forced labour[4]. The prohibition on imports "mined, produced or manufactured wholly or in part" with forced labour was already provided under the U.S. Tariff Act of 1930[5]. The Uyghur Forced Labor Prevention Act was enacted to ensure that China "does not undermine the effective enforcement" of such prohibition. The Act entrusts the Forced Labor Enforcement Task Force with the development of a strategy to enforce the mentioned prohibition. It includes the elaboration of lists on entities involved in the "mine, produce, or manufacture wholly or in part" of products with forced labour, as well as lists on such products[6]. The U.S. Customs and Border Protection includes a list of International Standards from the International Labour Organization, as well as from other International Organizations[7].

### *B. EU Directive on Corporate Due Diligence and Corporate Accountability*

The EU Commission proposed the Directive of the European Parliament and the Council on Corporate Due Diligence and Corpo-

---

[4] U.S. Public Law 117 - 78 - An act to ensure that goods made with forced labor in the Xinjiang Uyghur Autonomous Region of the People's Republic of China do not enter the United States market, and for other purposes, 23 December 2021, 135 Stat. 1525-1532. U.S. Government Information website, viewed at: https://www.govinfo.gov/app/details/PLAW-117publ78.

[5] Section 307 of the Tariff Act of 1930, under the rubric *Convict-made goods; importation prohibited*, states: "All goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part in any foreign country by convict labor or/and forced labor or/and indentured labor under penal sanctions shall not be entitled to entry at any of the ports of the United States, and the importation thereof is hereby prohibited, and the Secretary of the Treasury is authorized and directed to prescribe such regulations as may be necessary for the enforcement of this provision". It has been in force since 1932. 19 U.S. Code 1307, U.S. Government Information website, viewed at: https://www.govinfo.gov/app/details/USCODE-2011-title19/USCODE-2011-title19-chap4-subtitleII-partI-sec1307/summary.

[6] *The Uyghur Forced Labor Prevention Act Entity List* is published in the U.S. Federal Register and under the U.S. Department of Homeland Security website (https://www.dhs.gov/uflpa-entity-list).

[7] U.S. Customs and Border Protection website information, viewed at: https://www.cbp.gov/node/375773/printable/print.

rate Accountability (hereinafter, Due Diligence Directive)[8]. If adopted by the EU Council and Parliament, it would permit to restrain imports on the basis of forced labour or other human rights violations that occur in the international value chains. Prior to the final draft of the Proposal, the EU Parliament resolved that operators must provide evidence that products placed in the internal market are in conformity with, *inter alia*, "human rights criteria" under the Due Diligence Directive. Furthermore, it has called for "complementary measures such as the prohibition of the importation of products related to severe human rights violations such as forced labour or child labour"[9].

The final draft of the Proposal states that it is aimed at, *inter alia*, "play an essential role in tackling the use of forced labour the global value chains". To this end, according to the EU Commission, it "will effectively prohibit the placing on the Union market of products made by forced labour, including forced child labour", covering domestic as well as imported products, and combining "a ban with a robust, risk-based enforcement framework"[10]. The Proposal enlists Human Rights and Fundamental Freedoms Conventions, including ILO Conventions and Declarations[11].

### 2.2. *Labour standards in anti-dumping and countervailing proceedings*

Furthermore, the EU has included in its Anti-dumping and Anti-Subsidy Regulations the possibility to take into account la-

[8] Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM(2022) 71 final, 23 February 2022.

[9] Section 10 of the EU Parliament Resolution with recommendations to the Commission on the Directive of the European Parliament and of the Council on Corporate Due Diligence and Corporate Accountability, 10 March 2021, viewed at https://www.europarl.europa.eu/doceo/document/TA-9-2021-0073_EN.html#title2.

[10] Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM(2022) 71 final, 23 February 2022, p. 7.

[11] Annex to the Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM(2022) 71 final, 23 February 2022, p. 4.

bor conditions in the determination of dumping and injury on alleged dumped and subsidized imports from countries it considers as non-market economies (e.g., China, Vietnam and Kazakhstan). Interestingly, the use of labour standards to justify the imposition of anti-dumping and anti-subsidy (countervailing) duties was already used by some countries before the enactment of the GATT in 1947, when the use of anti-dumping duties to offset other forms of dumping other than price dumping was definitely rejected.

### *A. Labour standards in last EU Anti-dumping and Anti-subsidy Regulations*

The EU has included in its Anti-dumping Regulation the possibility to take into account labor conditions in the determination of dumping and injury on imports from countries it considers as non-market economies[12], e.g., China and Vietnam[13]. This permits the EU Commission to disregard actual prices and costs of production in the exporting country, resulting in higher margins of dumping (i.e., exceed of the normal value over the export price), or in the mere existence of dumping otherwise absent. The determination of injury to the EU industry is based on an artificial creation of it by adding actual or future costs for compliance with ILO Conventions.

When determining dumping (i.e., the normal value exceeds the export price), the EU Anti-Dumping Regulation permits (the EU Commission) to disregard prices and costs in the exporting country in cases where "significant distortions" exists in that country. In such case, the normal value can be constructed with costs of production and sale in a third country with an "adequate level" of, *inter alia*, social protection[14]. Furthermore, when determining injury to the EU industry, actual or future costs of production in the EU industry

[12] EU Regulation 2016/1036 on protection against dumped imports from countries not members of the European Union (codification). OJEU L 176, 30 June 2016, p. 26. EU Regulation 2017/2321, amending EU Regulations 2016/1036 and 2016/1037. OJEU L.338, 19 December 2017, p. 2.

[13] As well as Albania, Armenia, Azerbaijan, Belarus, Georgia, Kyrgyz Republic, Moldova, Mongolia, North Korea, Tajikistan, Turkmenistan and Uzbekistan. OJEU, L 176, 30.6.2016, p. 26.

[14] EU Regulation 2017/2321, amending EU Regulation 2016/1036 and 2016/1037. OJEU L.338, 19 December 2017, p. 3.

derived from ILO Conventions shall be taken into account when establishing the target price[15]. This consideration of labour standards costs when determining injury to the domestic industry has also been included in anti-subsidy (countervailing) investigations[16].

The EU Commission is entrusted with the elaboration of reports in which it assesses the existence of market distortions in a certain sector or country[17]. The assessment includes, *inter alia*, labour standards, which are covered under some ILO Conventions[18]. Moreover, the EU Commission should initiate (also ex officio) interim reviews, in cases where the EU industry faces an increase in costs due to, *inter alia*, higher social standards. The interim review could result in the withdrawal of the undertaking in force in cases where the exporting country withdraws from those ILO Conventions[19].

### *B. Labour protection in U.S. Anti-dumping and Countervailing Duty Laws*

Similarly, the U.S. Department of Commerce has proposed to enact "Regulations Improving and Strengthening the Enforcement of Trade Remedies Through the Administration of the Antidumping and Countervailing Duty Laws". Through the proposed rule, labour and human rights protection in foreign countries is included in subsidy, countervailing and anti-dumping proceedings[20]. Due to the impact of the lack of enforcement of labour and human rights standards in (lower) foreign prices[21], the proposed rule adds provisions

---

[15] EU Regulation 2018/825, amending EU Regulations 2016/1036 and 2016/1037. OJEU L.143, 7 June 2018, p. 6.

[16] *Ibid.*, at p. 13.

[17] *Ibid.*, at p. 10.

[18] Annex Ia of EU Regulation 2018/825, amending EU Regulations 2016/1036 and 2016/1037. OJEU L.143, 7 June 2018, p. 18.

[19] See *supra* note 19, at p. 2.

[20] U.S. Federal Register, Vol. 88, No. 89, 9 May 2023, pp. 29850-29878, viewed at: https://www.federalregister.gov/documents/2023/05/09/2023-09052/regulations-improving-and-strengthening-the-enforcement-of-trade-remedies-through-the-administration.

[21] "This would allow companies to avoid paying costs associated with preventing or mitigating such adverse labor and human rights impacts and thereby reduce their costs of production". A footnote to the statement reads "See United Nations Human Rights Office of the High Commissioner, The Corporate Responsibil-

on subsidization and particular market situation, as well as amends existent countervailing and anti-dumping provisions.

With respect to subsidies, not collecting or forgoing due fees, fines or penalties, including costs associated with the implementation or enforcement of labour and human rights protection laws would be considered a "financial contribution"[22]. The proposed regulation considers such government inaction a countervailable subsidy. Therefore, in countervailing proceedings, labour and human rights protection will be included in the determination of the subsidization. In particular, prices derived from "weak, ineffective, or nonexistent" labour or human rights protection, will be excluded from the analysis (i.e., determination of the subsidy)[23]. In this analysis, the "government price" is normally compared to a "market-determined price"[24]. Under the new provision, the "market-determined price" is constructed when determining the subsidy.

Concerning anti-dumping proceedings, labour and human rights protection are proposed to be included in the determination of dumping. More particularly, prices derived from "weak, ineffective, or nonexistent" protection of, *inter alia*, labour and human rights in non-market economies would be disregarded to determine the normal value. Therefore, the normal value would be construct-

---

ity to Respect Human Rights (2012), at 5 and 40; and International Labor Organization, The benefits of International Labour Standards, https://www.ilo.org/global/standards/introduction-to-international-labour-standards/the-benefits-of-international-labour-standards/lang--en/index.htm. [https://www.ilo.org/international-labour-standards/benefits-international-labour-standards]". *Ibid.*, at p. 29859.

[22] Provision § 351.529 (a) reads: "Financial contribution. When determining if a fee, fine, or penalty that is otherwise due, has been forgone or not collected, within the meaning of section 771(5)(D)(ii) of the Act, the Secretary may conclude that a financial contribution exists if information on the record demonstrates that payment was otherwise required and was not made, in full or in part". *Ibid.*, at pp. 29859, 29878.

[23] Provision 351.511 (a)(2)(v) states: "Exclusion of certain prices. In measuring the adequacy of remuneration under this section, if parties have demonstrated, with sufficient information, that certain prices are derived from countries with weak, ineffective, or nonexistent property (including intellectual property), human rights, labor, or environmental protections, and that the lack of such protections would likely impact such prices, the Secretary may exclude those prices from its analysis". *Ibid.*, at p. 29878.

[24] *Ibid.*, at p. 29859.

ed based on the prices of a third ("surrogate") country, which must include "a significant input or labor"[25]. Moreover, a new regulation is proposed to determine a "particular market situation" in the exporting country[26], which includes information on, *inter alia*, labour and human rights protection[27]. The existence of "particular market situation" permits to construct the normal value[28]. Under the new

[25] Provision § 351.408 (d) (2) reads as follows: "Requirements to disregard a proposed surrogate value based on weak, ineffective, or nonexistent protections. For purposes of paragraph (d)(1)(ii) of this section, the Secretary will only consider disregarding a proposed market economy country value as a surrogate value of production if the Secretary determines the following:

(i) The proposed surrogate value at issue is for a significant input or labor;

(ii) The proposed surrogate value is derived from one country or an average of values from a limited number of countries; and

(iii) The information on the record supports a claim that the identified weak, ineffective, or nonexistent property (including intellectual property), human rights, labor, or environmental protections undermine the appropriateness of using that value as a surrogate value". *Ibid.*, at p. 29875.

[26] A definition of particular market situation is absent under both Article VI of the GATT and the WTO Anti-dumping Agreement. Provision § 351.416 (a) reads: "In general. A particular market situation is a distinct circumstance or set of circumstances that does the following, as determined by the Secretary:

(1) Prevents a proper comparison of sales prices in the home market or third country market with export prices and constructed export prices; or

(2) Distorts the cost of production of the merchandise subject to an investigation, suspension agreement, or an antidumping duty order". *Ibid.*, at p. 29875.

[27] Provision § 351.416 (d) (2) (v) "A determination that a market situation exists such that the cost of materials and fabrication or other processing of any kind does not accurately reflect the cost of production in the ordinary course of trade […] Information the Secretary may consider in determining the existence of a market situation. In determining whether a market situation exists in the subject country such that the cost of materials and fabrication or other processing does not accurately reflect the cost of production in the ordinary course of trade, the Secretary may consider all relevant information placed on the record by interested parties, including, but not limited to, the following […] (v) Information that property (including intellectual property), human rights, labor, or environmental protections in the subject country are weak, ineffective, or nonexistent, those protections exist and are effectively enforced in other countries, and that the ineffective enforcement or lack of protections may contribute to distortions in cost of production of subject merchandise or prices or costs of a significant input into the production of subject merchandise in the subject country". *Ibid.*, at pp. 29875-29876.

[28] According to Article 2.2 of the WTO Anti-dumping Agreement, which reads: "When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country, such sales do not permit a proper comparison, the margin of

proposed regulation, the construction of the normal value will be permitted in cases of (foreign) governmental inaction to protect labour or human rights.

### *C. Labour standards in anti-dumping proceedings prior to the GATT*

Before the enactment of the GATT in 1947, anti-dumping was used to offset "social dumping" by some countries. In 1924, Austria targeted goods that had been produced under excessive working hours. In 1931, Argentina also imposed anti-dumping duties on forced labour and low wages imports. In 1935, Cuba similarly penalized low-wage imports[29]. In 1934, Spain provided for the imposition of anti-dumping duties in cases where lower prices were caused by the breach of international labour regulations, particularly those concerning wages and working hours[30]. Unfavourable labour conditions in the exporting country were also used in anti-subsidy (countervailing) investigations by one country, Czechoslovakia, in 1926[31].

During the discussions of the Preparatory Committee of the GATT and the International Trade Organization (ITO) Charter, some countries suggested considering the imposition of anti-dumping duties to offset other forms of dumping other than price dumping (i.e., exchange, freight and social). This suggestion arose from complaints against alleged Japanese low prices "because of low labour standards, exchange manipulation, and the use of subsidies"[32]. While Australia proposed to include a new paragraph permitting to

---

dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits".

[29] S. Charnovitz, *The influence of international labour standards on the world trading regime. A historical overview*, in *International Labour Review*, 1987, 126(5), pp. 565-584 at 576-577.

[30] Spanish Decree by the Minister of Industry and Commerce, R. Samper Ibañez, 10 March 1934. N. Alcalá-Zamora y Torres, Gaceta de Madrid, n. 72, 13 marzo de 1934, pp. 1952-1953, viewed at: https://www.boe.es/gazeta/dias/1934/03/13/pdfs/GMD-1934-72.pdf.

[31] See *supra* note 24.

[32] U.N. document E/PC/CII/54, 16 November 1946, p. 3.

offset the other three forms of dumping in case of injury to the domestic industry[33], other countries, including the U.S., had opposed it from the first session[34]. Following debates on the subject, the proposal was rejected by both the Drafting Committee[35], and the Technical Sub-Committee[36]. It was definitely decided that Article VI of the GATT could not be invoked to offset exchange, freight or social dumping, but merely price dumping. Therefore, GATT Contracting Parties and WTO Members had not used labour standards in anti-dumping proceedings until the recent trends.

The propensity to use labour standards as a trade-restrictive device makes it pertinent to look back at the origins of the multilateral trading system, which began with proposals for a multilateral trade agreement at the League of Nations Conferences. During the interwar period, these proposals were developed through years of work by key experts such as Keynes. They constituted the legal basis for the drafts of the ITO Charter, which included provisions on labour standards. Unfortunately, the ITO Charter never entered into force and labour standards have not been incorporated under the World Trade Organization (WTO) Agreements.

## 3. *Labour standards in multilateral trade agreements*

The GATT/WTO framework does not relate to labour, except Article XX (e) of the GATT, which permits the adoption of measures relating to products of prison labor. Nevertheless, the relationship between trade enhancement and labour standards has been considered essential in major multilateral agreements since the Treaty of Versailles in 1919, which created the International Labour Or-

[33] "Any Member maintaining restrictions on forms of dumping other than 'price dumping', e.g., freight dumping or dumping by means of depreciation of currency, shall only impose such dumping duties where it has determined after enquiry that the method and extent of dumping against which action is taken is such as to injure or threaten to injure an established domestic industry". U.N. document E/PC/T/34, 5 March 1947, p. 13.

[34] See *supra* note 27.

[35] U.N. document E/PC/T/C,6/55, 5 February 1947, p. 22.

[36] See *supra* note 28.

ganization (ILO). Provisions on fair labor standards were incorporated in the ITO Charter.

### 3.1. *League of Nations Conferences*

The League of Nations World Economic Conference of 1927 concluded that the main obstacles to an economic revival following the First World War had been "the hindrances opposed to the free flow of labour, capital and goods"[37]. Therefore, it recommended the Economic Organisation of the League of Nations to extend international trade "on an equitable basis" while taking into consideration "the just interests of producers and workers in obtaining a fair remuneration and of consumers in increasing their purchasing power"[38]. In order to undertake this enquiry, it was suggested to consult with, *inter alia*, the ILO[39]. It is worth noting that the first Director of the ILO, A. Thomas, declared in 1930:

"What a strange idea […] to find a contradiction between the "labour protectionism" of the International Labour Office and the theory of free or freer trade for which the League stands. You talk of labour protectionism. Yet surely the attempt at nationalistic labour protectionism is in contradiction with the attempt to secure common labour standards which we are pursuing here"[40].

At the League of Nations Monetary and Economic Conference, held in London in 1933, the U.S. presented a proposed agreement for substantially reducing trade-restrictive barriers. Bilateral and multilateral trade agreements were encouraged not to introduce direct or indirect obstacles to trade[41]. Nevertheless, some exceptions

---

[37] League of Nations document C. E. I. 44 (1), 3 June 1927, p. 13.

[38] "The Conference took as its central problem the question of how costs could be reduced without injury to the consumer or the worker". *Ibid*. at p. 11.

[39] "The Economic Organisation of the League of Nations should endeavour to promote international agreements with regard to the terms, methods and scope of industrial statistics employed, and should collate the information provided as to raw materials, production, etc., the International Labour Office dealing with wages, hours, employment, etc.". *Ibid*. at p. 30.

[40] A. Thomas, *International Social Policy*, 1948, p. 114.

[41] League of Nations document C. 435. M. 220. 1933. II. [Conf.M.E.22(l).], 27 July 1933, pp. 40-43.

and reservations were also suggested to be included in the agreement. The proposed exceptions permitted the "exclusion of products of convict or forced labour" (nowadays established under Article XX (e) of the GATT), as well as the imposition of measures for, *inter alia*, the protection of health, plants, animals; offsetting dumped or subsidized imports; and preventing an excessive increase of imports of particular commodities[42]. The latter was conceived to offset a governmental emergency action to raise wages, shorten hours and improve labour conditions, resulting in costs and prices increase[43]. This exception would later be known as the safeguard measure, established under Article XIX of the GATT. Yet, it was initially suggested to protect the improvement of labour conditions in the importing country.

### 3.2. *Proposals for an International Trade Organization*

The outbreak of World War II frustrated the aims of the League of Nations Economic Committee, whose powers and functions would be transferred to the United Nations Economic and Social Committee (U.N. ECOSOC) in 1945[44]. During the interwar period[45], the U.S. and the U.K. reached a Mutual Aid Agreement stating their

[42] *Ibid.* at p. 42.

[43] *Ibidem*.

[44] The United Nations Charter final draft was presented at the San Francisco Conference (in April-June 1945; following Conferences at Bretton Woods in July 1944, at Dumbarton Oaks in August-October 1944, and at Yalta in February 1945) and after being ratified by members, it came into force on 24 October 1945. United Nations website information, viewed at: https://www.un.org/en/sections/history-united-nations-charter/1945-san-francisco-conference/index.html.

[45] In the Atlantic Charter in 1941, the U.S. (President F.D. Roosevelt) and the U.K. (Prime Minister W. Churchill) pledged "to further the enjoyment by all states […] of access, on equal terms, to the trade and to the raw materials of the world which are needed for their economic prosperity; [and] bring about the fullest collaboration between all nations in the economic field with the object of securing, for all, improved labor standards, economic advancement, and social security". Fourth and fifth clauses of the Atlantic Charter, Joint declaration by the President of the United States and the Prime Minister of the United Kingdom, 14 August 1941. U.S. Library of Congress website, viewed at: https://www.loc.gov/law/help/us-treaties/bevans/m-ust000003-0686.pdf.

intention not to burden trade as well as promoting world-wide economic relations. To this end, both countries began conversations (open to other like-minded countries) aimed at the following economic objectives: elimination of discriminatory treatment in the international trade, reduction of tariffs and other barriers to trade, as well as the establishment of domestic and international measures to expand "production, employment, and the exchange and consumption of goods, which are the material foundations of the liberty and welfare of all peoples"[46].

Experts from the U.K., including Keynes and Meade, and the U.S., including Hawkins and White, worked together on proposals for the creation of economic institutions that would grant world-wide economic and financial stability and prosperity[47]. Following the creation of the International Monetary Fund and the World Bank at Bretton Woods, the U.S. proposed to hold a U.N. conference to create an International Trade Organization (ITO). The U.S. presented the Proposal for the Expansion of World Trade and Employment in 1945[48], which asked for cooperation to obtain and maintain full employment and for the expansion of world trade[49].

Cooperation between trade and employment was considered indispensable to create an economic environment propitious for the maintenance of peaceful international relations[50]. "Trade connects employment, production and consumption and facilitates all three. Its increase means more jobs, more wealth produced, more goods to be enjoyed"[51]. The U.S. proposal recognized that while measures aiming at expanding trade are essential to contribute "to maximum

---

[46] Article VII of the Anglo-American Mutual Aid Agreement, viewed at: https://avalon.law.yale.edu/wwii/angam42.asp#art7.

[47] U.S. Department of State Office of the Historian, Bretton Woods-GATT, 1941-1947, viewed at: https://history.state.gov/milestones/1937-1945/bretton-woods.

[48] U.S. Department of State, Proposal for Expansion of World Trade and Employment, 1945, viewed at: http://www.worldtradelaw.net/misc/ProposalsForExpansionOfWorldTradeAndEmployment.pdf.download.

[49] U.S. Department of State, Proposals for Expansion of World Trade and Employment, 1945, p. 7.

[50] *Ibid.*, at p. 8.

[51] *Ibid.*, at p. 2.

levels of employment, production and consumption"[52]; "high and stable levels of employment are a necessary condition for an enlarged volume of trade"[53]. Therefore, it sought to prevent countries from taking measures "likely to create unemployment in other countries"[54]. It was also recognized that seeking "employment by prohibiting imports or by subsidizing exports would be harmful and self-defeating". In this line, domestic programs aimed at expanding employment were required to be consistent with the realization of "the purposes of liberal international agreements and compatible with the economic well-being of other nations"[55].

### 3.3. *The Charter for an International Trade Organization, 1948*

The United Nations endeavored to harmonize policies regarding trade and employment[56]. To this end, the U.N. ECOSOC called for a conference to draft a charter for an institution for trade[57], designed to stand beside the already existing organizations "dealing with currency, investment, agriculture, labor, and civil aviation"[58]. Based on the U.S. Suggested Charter of 1946[59], U.N. delegations worked on drafting a multilateral agreement to enhance both trade and employment. The U.S. Suggested Charter incorporated provisions on employment under its Chapter III (Articles 3-7), which included pronouns on the relation of employment to purposes of the ITO; general undertakings to promote full employment; avoidance of certain employment measures; as well as consultations and exchange of information on matters relating to employment.

The U.N. Preparatory Committee met in four sessions between 1946 and 1948, which culminated in the International Conference

---

[52] *Ibid.*, at p. 10.
[53] *Ibid.*, at p. 9.
[54] See *supra* note 48.
[55] See *supra* note 49.
[56] *Ibid.*, at p. 1.
[57] U.N. ECOSOC Resolution 13, U.N. document E/22, 18 February 1946.
[58] See *supra* note 45, at p. 7.
[59] U.S. State Department, Suggested Charter for an International Trade Organization of the United Nations, September 1946. U.S. Publication 2598. Commercial Policy Series 93.

on Trade and Employment. The four U.N. conferences to draft the GATT and ITO Charter were held as follows:

1. First session of the Preparatory Committee, in London, from 15 October to 26 November 1946.

2. Drafting Committee of the Preparatory Committee, in Lake-Success, New York, from 20 January to 25 February 1947.

3. Second Session of the Preparatory Committee, in Geneva, from 10 April to 30 October 1947. It culminated with the signature of the GATT[60].

4. Conference on Trade and Employment, in Havana from 21 November 1947 to 24 March 1948[61]. It concluded with the signature of the ITO Charter[62].

At the end of the Geneva Conference, on 30 October 1947, twenty-three (23) nations[63] signed the Final Act of the GATT[64], which was applied by a Protocol of Provisional Application from 1 January 1948[65]. It consisted of the provisions on commercial policy designed to be part of the ITO Charter. Following the fourth (and last) session, the actual Conference on Trade and Employment, held

---

[60] U.N.T.S., Vol. 55, pp. 188-316, viewed at: https://treaties.un.org/doc/Publication/UNTS/Volume%2055/v55.pdf.

[61] J. Jackson, *The Jurisprudence of GATT & the WTO*, 2000, p. 22; J. Jackson, *World Trade and the Law of GATT (A Legal Analysis of the General Agreement on Tariffs and Trade)*, 1969, p. 42.

[62] United Nations Conference on Trade and Employment, Held at Havana, Cuba, From November 21, 1947, to March 24, 1948 – *Final Act and Related Documents*. U.N. document E/CONF.2/78, 24 March 1948, viewed at: https://www.wto.org/english/docs_e/legal_e/havana_e.pdf.

[63] "The Governments of the Commonwealth of Australia, the Kingdom of Belgium, the United States of Brazil, Burma, Canada, Ceylon, the Republic of Chile, the Republic of China, the Republic of Cuba, the Czechoslovak Republic, the French Republic, India, Lebanon, the Grand-Duchy of Luxemburg, the Kingdom of the Netherlands, New Zealand, the Kingdom of Norway, Pakistan, Southern Rhodesia, Syria, the Union of South Africa, the United Kingdom of Great Britain and Northern Ireland, and the United States of America", U.N.T.S., Vol. 55, p. 188, 30 October 1947; U.N. document E/PC/T/214. Rev.1, (Corr.1, 10 October 1947) p. 1.

[64] Final Act adopted at the conclusion of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment. Signed at Geneva, on 30 October 1947. U.N.T.S., Vol. 55, pp. 188-193. U.N. document E/PC/T/214.Rev.l. (Corr.1, 10 October 1947).

[65] U.N.T.S., Vol. 55, p. 308.

in Havana from 21 November 1947 until 24 March 1948[66], the ITO Charter was signed by 53 countries and an Interim Commission for the ITO (ICITO) was established to bring the ITO into force[67].

Besides the chapter on commercial policy, the ITO Charter included chapters on Employment and Economic Activity; Economic Development and Reconstruction; Restrictive Business Practices; Inter-Governmental Commodity Agreements; the International Trade Organization; Settlement of Differences; and General Provisions. Within the Chapter on Employment and Economic Activity (Articles 2-7), under the rubric "Fair Labour Standards" Article 7 mandated the Member States to take into account "the rights of workers under inter-governmental declarations, conventions and agreements" as well as consulting and cooperating with the International Labour Organisation. It provided for the elimination of unfair labour conditions, which hinder international trade, and the "achievement and maintenance of fair labour standards related to productivity", hence improving wages and working conditions[68].

The objective of agreeing to the creation and design of a multilateral trade organization was achieved. Notwithstanding the ITO was signed by fifty-three (53) countries, it was not ratified by U.S. Congress and never came into existence[69]. The GATT Review Session in 1954-1955 introduced into the GATT some of the changes made on the provisions on commercial policy of the ITO Charter at the Havana Conference (that had not been incorporated in GATT in 1948)[70]. Therefore, the 1947 GATT became the legal framework of international trade rules. Nevertheless, the 1947 GATT was only

---

[66] J. Jackson, *The Jurisprudence of GATT & the WTO*, 2000, p. 22; J. Jackson, *World Trade and the Law of GATT (A Legal Analysis of the General Agreement on Tariffs and Trade)*, 1969, p. 42.

[67] U.N. document E/CONF.2/78, 24 March 1948, pp. 5-7.

[68] *Ibid.*, at pp. 15-17.

[69] J. Jackson, *Restructuring the GATT System*, 1990, p. 12.; J. Jackson, *The World Trading System*, p. 38.

[70] The GATT Review Session in 1954-1955 was additionally seen as an occasion to draft a charter for a simpler organization, the Organization for Trade Cooperation; however, it resulted in a second failed attempt at the U.S. Congress. J. Jackson, *World Trade and the Law of GATT* (*A Legal Analysis of the General Agreement on Tariffs and Trade*), 1969, pp. 50, 51. GATT documents L/261-69; L/189, 1954.

intended as an interim appointment with a limited number of trade provisions necessary to await the ITO, which included provisions on labour standards.

Notwithstanding the U.S. proposed to incorporate provisions on "worker rights" before the Uruguay Round[71], which concluded with the establishment of the World Trade Organization in 1994, labour standards were not incorporated under WTO Agreements. In its declaration, the U.S. reminded that the preamble of the GATT, which provides that "trade and economic endevour should be conducted with a view to raising standards of living, ensuring full employment", evolves from the ITO Charter commitment of eliminating "unfair labour conditions"[72].

## 4. *Conclusion*

The current prominence of labour protection in exporting countries is often accompanied by trade protectionism. While it is not a new phenomenon, recent trends in the U.S. and EU trade-restrictive legislation tilt towards labour. The historical overview of labour standards in the origins of the multilateral trading system suggests attaining consistency between labour protection and trade liberalization policies[73]. Accordingly, the incorporation of labor standards into the WTO Agreement is hereby proposed in order to prevent WTO Members from using labour as a protectionist device while guaranteeing the multilateral enforcement of labour standards. Hence, the use of unilateral trade-restrictive measures to protect labour standards should be prohibited. As suggested by the League of Nations in 1927, consultation and cooperation with the ILO would be essential for this much-needed multilateral endeavour.

---

[71] GATT document PREP. COM(86)W/43, 25 June 1986.

[72] *Ibid.*, p. 2.

[73] "By opening a more extensive market for whatever part of the produce of their labour may exceed the home consumption, it encourages them to improve its productive powers, and to augment its annual produce to the utmost, and thereby to increase the real revenue and wealth of the society". A. Smith, *The Wealth of Nations*, [1776], Electric Book Company, 2000, p. 582.

# CIVIL SOCIETY ENGAGEMENT WITH ACCOUNTABILITY MECHANISMS OF MULTILATERAL DEVELOPMENT BANKS: A CRITICAL EXAMINATION OF THE FOLLOW-UP PHASE

*Giulia Ciliberto**

## 1. *Introduction*

In the 1980s, two parallel phenomena occurred: the rise of a wealth of critiques against the environmental and social impacts of projects sponsored by multilateral development banks (MDBs)[1], on the one hand, and the emergence and affirmation of the principle of sustainable development, on the other. In this context, the 1992 Rio Earth Summit steered a new era of participation for civil society in the international arena[2], which was matched with the establish-

* This study was carried out also within the RETURN Extended Partnership and received funding from the European Union Next-GenerationEU (National Recovery and Resilience Plan – NRRP, Mission 4, Component 2, Investment 1.3 – D.D. 1243 2/8/2022, PE0000005).

[1] For the purpose of this paper, the term multilateral development banks (MDBs) refers to: i) the World Bank, as the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA) ii) the International Finance Corporation (IFC) and the Multilateral Investment Guarantee Agency (MIGA); iii) four regional multilateral development banks, notably the European Bank for Reconstruction and Development (EBRD), the African Development Bank, the Asian Development Bank and the Inter-American Development Bank.

[2] United Nations Conference on Environment and Development (UNCED), 3-14 June 1992, Rio de Janeiro. The Rio Conference led to two main outcomes. The first is the adoption of three soft-law instruments, notably: i) the Rio Declaration on Environment and Development; ii) the Non-legally binding authoritative statement of principles for a global consensus on the management, conservation and sustain-

ment of the first citizen-driven internal accountability mechanism (IAM) at MDBs: the World Bank's Inspection Panel. Since 1993, other MDBs with both universal and regional mandate set up their IAM[3]. These mechanisms allow individuals who have been, or are likely to be, harmed by an MDB-sponsored project to voice their concerns about the bank's compliance with its own environmental and social policies and procedures. The establishment of IAMs aims to partly fill the remedial gap resulting from the MDBs' jurisdictional immunity before national courts and tribunals, since these mechanisms provide a direct channel for the potentially affected population[4]. Notwithstanding these progresses towards transparency, participation, and accountability, IAMs are still to some extent toothless means to ensure that MDBs-sponsored projects meet the terms of sustainable development.

Against this backdrop, the paper aims to detect the flaws that undermine the role that civil society may play before IAMs to foster MDB-sponsored projects' compliance with the principle of sustainable development. Following a short overview of the role of civil so-

---

able development of all types of forests (Forest Principles); iii) Agenda 21. The three instruments are gathered in the Report of the UNCED (UN Doc. A/CONF.151/26, vol. I). The second main outcome of the Conference is the opening for signature of two treaties, namely the Convention on Biodiversity (5 June 1992, entry into force 29 December 1993) 1760 UNTS 79 (CBD) and the UN Framework Convention on Climate Change (9 May 1992, entry into force 21 March 1994) 1171 UNTS 107 (UNFCCC). On the 1992 Rio Earth Summit, see e.g., P.-M. Dupuy, J.E. Viñuales, *International Environmental Law*, Cambridge, CUP, 2018[2], pp. 13 ff.

[3] The scope of this paper does not cover all the IAMs members of the independent accountability mechanisms network (IAMnet). Rather, the paper considers six IAMs, specifically: i) the Accountability Mechanism of the World Bank (IRBD and IDA); ii) the Compliance Advisor Ombudsman (CAO) of the IFC-MIGA; iii) the Independent Project Accountability Mechanism (IPAM) of the EBRD; iv) the Independent Review Mechanism (IRM) of the African Development Bank; v) the Accountability Mechanism of the Asian Development Bank; vi) the Independent Consultation and Investigation Mechanism (ICIM) of the Inter-American Development Bank. On the IAMnet, see e.g., R.M. Lastra, M. Bodellini, *Independent Accountability Mechanisms Network (IAMnet)*, in H. Ruiz-Fabri (ed.), *Max Planck Encyclopedia of International Procedural Law*, 2022.

[4] R.E. Bissell, S. Nanwani, *Multilateral Development Bank Accountability Mechanisms: Developments and Challenges*, in *Central European Journal of International and Security Studies*, 2009, pp. 154 ff., p. 160. On jurisdictional immunities of international organizations, see also E.C. Okeke, *Jurisdictional Immunities of States and International Organizations*, Oxford, Oxford University Press, 2018.

ciety in the establishment and subsequent reforms of IAMs (Section 2), it highlights the link between the creation and evolution of citizens-driven accountability mechanisms, on the one hand, and the affirmation of the "principle of environmental democracy" at the international level, on the other (Section 3). Then, the paper takes into account the Compliance Advisor Ombudsman (CAO) of the International Finance Corporation and Multilateral Investment Guarantee Agency (IFC-MIGA) as a case study to highlight the shortcomings affecting the content and nature of the outcome of procedures before IAMs (Section 4). Brief concluding remarks follow (Section 5).

## 2. *The origin and reforms of internal accountability mechanisms: a sketch on the role of civil society*

The Word Bank was the forerunner of the MDBs' awareness towards the concerns related to sustainable development raised in the 1980s[5]. Remarkably, under the presidency of McNamara, in the 1970s the Word Bank adopted a series of sectoral policy papers featuring environment-related sections[6], alongside internal guidelines for its staff to consider and weigh environmental factors in the Bank-sponsored projects[7]. The Word Bank's environmental policies were amended, consolidated, and reissued during the 1980s[8]. This

[5] See e.g., B. Rich, *Mortgaging the Earth World Bank, Environmental Impoverishment and the Crisis of Development*, London, Routledge, 1994; *Financing Ecological Destruction, The World Bank and the IMF*, 1987, available at: https://timorarchive.ca/financing-ecological-destruction-the-world-bank-and-the-imf;isad?sf_culture=en.

[6] See e.g., the policy papers on rural development (1975), forestry (1978), agricultural land settlement (1978), and fisheries (1982). The policy papers are available at: www.worldbank.org (limited access).

[7] I.F. Shihata, *The World Bank and the Environment: A Legal Perspective*, in *Maryland Journal of International Law*, 1992, 1, p. 4.

[8] See e.g., Operational Manual Statement 2.36: Environmental Aspects of Bank Work, May 1984; Annex A to Operational Directive (OD) 4.00 on environmental issue, October 1989. On this issue, see M.A. Bekhech, *Some Observations Regarding Environmental Covenants and Conditionalities in World Bank Lending Activities*, in *Max Planck UNYB*, 1999, 287, pp. 290 ff.

attitude aligns with the increasing attention to the relationship between the protection of the environment, on the one hand, and economic and social development, on the other, as highlighted during the 1972 Stockholm Conference[9]. Following this Conference, six MDBs signed the 1980 Declaration of environmental policies and procedures relating to economic development[10] and started adopting environmental-related commitments, which were (to a certain degree) similar to the policies and guidelines endorsed by the Word Bank[11]. These environmental-related commitments were (and still are) embodied in internal rules, which operate exclusively within the specific MBD's framework and are meant to prevent and manage environmental and social impacts associated with investment lending[12].

The 1987 Brundtland Report recognized the "growing realization in […] multilateral institutions that it is impossible to separate economic development issues from environment issues"[13], and highlighted the crucial role that these institutions may play in supporting environmentally sound initiatives and programmes[14]. The Brundtland Report also endorsed the well-known definition of sustainable

[9] United Nations Conference on the Human Environment, 5-16 June 1972, Stockholm. The Stockholm Conference led to three main outcomes: i) the establishment of the UN Environment Programme (UNEP); the Stockholm Declaration; iii) the Action Plan for the Human Environment.

[10] Declaration of environmental policies and procedures relating to economic development, New York, 1st February 1980. The Declaration was signed by the African Development Bank, the Arab Bank for Economic Development in Africa, the Asian Development Bank, the Caribbean Development Bank, the Inter-American Development Bank, the World Bank, the Commission of the European Communities, the OAS, the UNDP and the UNEP.

[11] B.M. Rich, *The Multilateral Development Banks, Environmental Policy, and the United States*, in *Ecology Law Quarterly*, 1985, 681, pp. 710-712. These policies still differ substantially, as noted by M.M. Mbengue, S. de Moerloose, *Multilateral Development Banks and Sustainable Development: On Emulation, Fragmentation and a Common Law of Sustainable Development*, in *Law and Development Review*, 2017, 389, esp. pp. 404 ff.

[12] M.A. Bekhech, *Some Observations Regarding Environmental Covenants and Conditionalities in World Bank Lending Activities*, in *Max Planck UNYB*, 1999, 287, pp. 291-292.

[13] Report of the World Commission on Environment and Development (Brundtland Commission), *Our Common Future* (Brundtland Report), 1987, p. 19, para. 8.

[14] Brundtland Report, *ibidem*, p. 33, para. 77; p. 36, para. 99.

development as the ability "to meet the needs of the present without compromising the ability of future generations to meet their own needs"[15], and encouraged the involvement and participation of non-state actors (the scientific community, private and community groups, NGOs) in the transition process towards sustainable development[16]. At the verge of the 1990s it became clear that, even if during the past decades MDBs displayed openness towards environmental and social considerations[17], the negative impact of projects still constituted a matter of concern[18]. Notably, the affected population had no recourse to hold these institutions directly accountable for failure to comply with their internal environmental and social policies and standards.

The turning point for the establishment of citizen-driven IAMs at MDBs was the 1992 Rio Earth Summit. Besides building upon the 1987 Brundtland Report as for the formulation of the principle of sustainable development[19], the Earth Summit followed up the invitation to foster the involvement of non-state actors: representatives from NGOs and the private sector participated in the negotiations, on the one hand, and the Rio Declaration stated the well-known "principle of environmental democracy", on the other[20]. Therefore, in addition to the ongoing wealth of critiques against the environmental and social impact of MDBs-sponsored projects, two factors led to the creation of the World Bank's Inspection Panel: the emergence of a new concept of development, i.e. that of *sustainable* development, and the growing recognition of the importance of the role of civil society in the global governance[21].

---

[15] Brundtland Report, cit. *supra*, p. 24, para. 27.

[16] Brundtland Report, cit. *supra*, p. 36, para. 96; pp. 318 ff., para. 65 ff.

[17] E.g., the Word Bank adopted an operational directive on involuntary resettlement (Operational Directive (OD) 4.30 on involuntary resettlement, June 1990), thus broadening the scope of the factors to be weighed against economic development by including considerations on the social well-being of local communities.

[18] R. Marschinski, S. Behrle, *The World Bank: Making the Business Case for the Environment*, in F. Biermann, B. Siebenhüner (eds.), *Managers of Global Change. The Influence of International Environmental Bureaucracies*, 101, p. 102.

[19] Rio Declaration, Principles 3 and 4.

[20] P.-M. Dupuy, J.E. Viñuales, *International Environmental Law*, Cambridge, CUP, 2018², pp. 13-15.

[21] D. Clark, *Understanding the World Bank Inspection Panel*, in Id. *et al.*, *Demanding accountability: civil society claims and the World Bank Inspection Pan-*

The 1993 creation of the Inspection Panel inspired the establishment of IAMs at other MDBs, although each with its own scope, structure, and procedure[22]. Despite their differences, these mechanisms pursue the common purpose of providing "recourse for citizens and communities adversely affected by IFI-funded projects, particularly in instances when IFIs are alleged to have failed to follow their own social and environmental safeguard policies, guidelines, standards, or procedures"[23]. Moreover, IAMs operate impartially and independently of MDBs' management[24] – although banks' management plays a role in the overall procedures before these mechanisms (e.g., in preparing the Action Plan detailing corrective measures).

Limitations experienced in implementing these mechanisms' mandates have led to significant changes in their original institutional structure and functions[25], together with a sophistication of

---

*el*, Lanham-Boulder-New York-Oxford, Rowman & Littlefield Publishers, 2003, 1, pp. 2 ff.; R.E. Bissell, S. Nanwani, *Multilateral Development Bank Accountability Mechanisms: Developments and Challenges*, in *Central European Journal of International and Security Studies*, 2009, pp. 156 ff.; F. Seatzu, *Il Panel di ispezione della Banca mondiale. Contributo allo studio della funzione di controllo nelle banche internazionali di sviluppo*, Torino, Giappicheli, 2008, pp. 49 ff. On the role of civil society in the global economic governance, see e.g., R.H. Wade, *Accountability Gone Wrong: The World Bank, Nongovernmental Organisations and the US Government in a Fight over China*, in *New Political Economy*, 2009, 25, pp. 26-27. On the World Bank' Inspection Panel see also e.g., F.I. Shihata, *The World Bank Inspection Panel*, Oxford, Oxford University Press, 1994.

[22] R.E. Bissell, *Origin and Evolution of International Accountability Mechanisms*, in O. McIntyre, S. Nanwani (eds.), *The Practice of Independent Accountability Mechanisms (IAMs). Towards Good Governance in Development Finance*, Leiden-Boston, Brill-Nijhoff, 2019, 5, pp. 11-12; E.C. Okeke, *Assessing the Accountability Mechanism of Multilateral Development Banks Against Access to Justice: The Case of the World Bank*, in *King's Law Journal*, 2023, 425.

[23] K. Lewis, *Citizen-Driven Accountability for Sustainable Development: Giving Affected People a Greater Voice – 20 Years On*, June 2012, 1, available at: www.inspectionpanel.org.

[24] E.C. Okeke, *Assessing the Accountability Mechanism*, pp. 440 ff.; R.E. Bissell, *Origin and Evolution of International Accountability Mechanisms*, pp. 7-8.

[25] R.E. Bissell, *Origin and Evolution of International Accountability Mechanisms*, pp. 12 ff. Due to the impossibility of providing a comprehensive overview of the evolution of each IAM in the present paper, we refer to the following encyclopedia entries and scholarly works: R.E. Bissell, S. Nanwani, *Multilateral Development Bank Accountability Mechanisms*, pp. 160 ff.; M. Tignino, *Inter-American Development Bank Independent Consultation and Investigation Mechanism*,

environmental and social safeguard policies[26]. This process of reform was triggered by civil society, which confirmed its increasingly influential role at the international level[27]. Currently, even if each IAM still preserves its peculiar features[28], all of them perform a double-accountability function. The first is a problem-solving (or dispute resolution) function, which has a consultative nature and aims at finding an agreement between the complainants and the MDB, usually through the appointment of mediators. The second is a compliance review function, which relies on investigation and inspection. Some IAMs perform an advisory function as well – such as the CAO of the IFC-MIGA[29].

---

in H. Ruiz-Fabri (ed.), *cit.*, 2018; Y. Wong, *Inspection Panel: World Bank*, in Id., 2019; S. Park, *Accountability Mechanism: Asian Development Bank*, *ivi*, 2019; F. Loureiro Bastos, *Accountability Mechanisms: European Bank for Reconstruction and Development*, *ivi*, 2020; L.C. Reif, *Compliance Advisor Ombudsman (CAO) of the International Finance Corporation and the Multilateral Investment Guarantee Agency*, *ivi*, 2020; D. Bradlow *et al.*, *African Development Bank Independent Recourse Mechanism*, *ivi*, 2023; F. Seatzu, *Du Panel d'inspection de la Banque mondiale au Mécanisme de responsabilisation de la Banque mondiale: vraie réforme ou faux-semblant?*, in *Journal du droit international*, 2021, 1303.

[26] On the increasing "sophistication and coverage" of environmental and social policies of MBDs, see e.g., O. McIntyre, *Development Banking ESG Policies and the Normativisation of Good Governance Standards: Development Banks as Agents of "Global Administrative Law"*, in K. Wendt (ed.), *Responsible Investment Banking: Risk Management Frameworks, Sustainable Financial Innovation and Soft Law Standards*, Springer International, Cham, 2015, 143, pp. 145 ff.

[27] R.E. Bissell, S. Nanwani, *Multilateral Development Bank Accountability Mechanisms*, pp. 158-159; R.H. Wade, *Accountability Gone Wrong: The World Bank, Nongovernmental Organisations and the US Government in a Fight over China*, in *New Political Economy*, 2009, 25, pp. 26-27.

[28] E.g., IAMs differ on eligibility requirements, as noted in D. Pauciulo, *Remarks on the Practice of Regional Development Banks' (RDBs) Accountability Mechanisms and the Safeguard of Human Rights*, in G. Adinolfi *et al.* (eds.), *International Economic Law. Contemporary Issues*, Cham-Torino, Springer-Giappichelli, 2017, 23, pp. 29 ff.

[29] On the IAMs functions, see e.g., J.A.P. Lorenzo, *Accountability Mechanisms of Multilateral Development Banks and the Law of International Responsibility*, in *International and Comparative Law Quarterly*, 2024, 209, pp. 222 ff. In 2023, the World Bank Dispute Resolution Service closed its first two cases concerning projects sponsored in Nepal and Uganda: Case No. 21/04/DRS, Notice of Dispute Resolution Agreement – NEPAL-NIETTP, 20 April 2023; Case No. 21/01-DRS, Notice of Dispute Resolution Agreement – Uganda: Second Kampala Institutional and Infrastructure Development Project (KIIDP-2), 31 May 2023.

Since the institution of IAMs, the potentially affected populations brought hundreds of cases before them, as confirmed by their annual reports[30]. Yet, notwithstanding their periodic remodelling, the effectiveness of these mechanisms still presents several shortcomings which, among other consequences, undermine the role of civil society as a performance evaluator of, and pull factor towards, sustainable development in global economic governance.

## 3. *The principle of public participation from the national level to global governance: the case of internal accountability mechanisms at multilateral development banks*

The involvement of civil society in the establishment of IAMs and in shaping their institutional evolution, alongside their engagement with these mechanisms as plaintiffs, constitutes one of the many indicators of the affirmation of the "principle of environmental democracy" on the international level.

In the well-known definition under Principle 10 of the Rio Declaration, three elements compose the principle of public participation in environmental matters: access to information, taking part in decision-making processes, and access to judicial and administrative proceedings (including remedial ones)[31]. Principle 10, as well as its

[30] The IAMs of the MDBs covered in this paper publish annual reports of submitted, pending and closed cases before IAMs. Reports are available on their respective websites.

[31] Rio Declaration, Principle 10: "Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided". On the principle of public participation in environmental matters, see e.g., J. Ebbesson, *The Notion of Public Participation in International Environmental Law*, in *Yearbook of International Environmental Law*, 1997, 51; Id, *Principle 10: Public Participation*, in J.E. Viñuales (ed.), *The Rio Declaration on Environment and Development: A Commentary*, Oxford, Oxford University Press, 2015, 287; M.

more detailed codification[32], focuses on public participation at the *national* level: it identifies standards and criteria to be implemented by States in their domestic jurisdiction in relation to private individuals and organizations[33]. During the last decades, the involvement of civil society in global governance has been increasingly institutionalized[34], including with regard to the regulation of economic activities in light of environmental concerns – i.e., in promoting sustainable development. Notably, the "principle of environmental democracy" gained parallel importance and implementation at the *international* level[35], where it concerns the relation between international organizations, on the one hand, and private parties, on the other.

These considerations apply to MDBs as well. In fact, engagement with civil society may be construed as an integral element of their commitment to sustainable development. As recalled in the previous section, to this end, MDBs have adopted and refined substantial rules

---

Alberton, *Public participation in environmental decision-making in the EU and in China: the case of environmental impact assessment*, Baden-Baden, Nomos, 2014.

[32] UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) (25 June 1998, entry into force 31 October 2001); Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazú Agreement) (4 March 2018, entry into force 22 April 2021).

[33] See e.g., S. Kravchenko, *The Aarhus Convention and Innovations in Compliance with Multilateral Environmental Agreements Compliance Mechanisms*, in *Colorado Journal of International Environmental Law and Policy*, 2007, 1, in which the author recognizes that the Aarhus convention "focuses exclusively on obligations of the nations to their citizens and nongovernmental organizations", thus pinpointing the *domestic* dimension of the principle of environmental democracy.

[34] Scholte identified several forms of direct and indirect participation of civil society in global governance, such as "accreditation, membership of government delegations, policy consultations, seats on official committees and boards, evaluation exercises, and actual global regulation itself" and "via other sites such as governments, political parties, and the mass media", or by open opposition "through street demonstrations and other acts of resistance". As for MDBs, it is possible to recall, e.g., accreditation at the Annual and Spring Meetings of the World Bank. J.A. Scholte, *Relations with Civil Society*, in J. Katz Cogan *et al.* (eds.), *The Oxford Handbook of International Organizations*, Oxford, Oxford University Press, 2016, 712, pp. 715-716.

[35] J. Ebbesson, *Public Participation*, in L. Rajamani, J. Peel (eds.), *The Oxford Handbook of International environmental Law*, Oxford, Oxford University Press, 2021², 351, esp. pp. 363 ff.

(namely, environmental and social safeguards) and have established and reformed procedural instruments (the IAMs)[36]. Environmental and social safeguard policies envisage – *inter alia* – the first two components of the principle of participation. These require information disclosure on environmental aspects of the MDB-sponsored project to affected people, with the aim of conducting meaningful consultation. The concerns expressed by the affected population should be duly taken into account in decision-making, such as project design and mitigation measures[37]. IAMs, for their part, receive complaints from individuals and organizations who have been (or are likely to be) harmed by the contested project, thus providing a venue to challenge the MDBs' conduct *vis-à-vis* their internal rules.

Notwithstanding the progress towards transparency, participation, and accountability, there are still flaws that undermine the role that civil society may play in fostering banks' compliance with the principle of sustainable development. Their engagement suffers limitations already at the stage of project design, approval, and implementation: the adverse impact of MDBs-sponsored activities frequently occurs in remote areas, where local communities may encounter some difficulties in accessing sufficiently detailed information about both the project and the environmental and social safeguards of the sponsoring bank. This circumstance undermines their participation in the decision-making process as well[38]. Moreover, the functioning of IAMs is negatively affected by exogenous and endog-

[36] MDBs established more recently embody their commitment to sustainable development in their instituting instruments: see e.g., EBRD, Agreement Establishing the European Bank for Reconstruction and Development (29 May 1990, entry into force 28 March 1991), Art. 2(1)(vii).

[37] On information disclosure, meaningful consultation and participation in the decision-making process, see D.D. Bradlow, M.S. Chapman, *Public Participation and the Private Sector: The Role of Multilateral Development Banks in the Evolution of International Legal Standards*, in *Erasmus Law Review*, 2011, 91; R.E. Bissell, *Origin and Evolution of International Accountability Mechanisms*, p. 7; M. McDonagh, *Evaluating the Access to Information Policies of the Multilateral Development Banks*, in O. McIntyre, S. Nanwani (eds.), *The Practice of Independent Accountability Mechanisms (IAMs). Towards Good Governance in Development Finance*, Leiden-Boston, Brill-Nijhoff, 2019, p. 134.

[38] R.E. Bissell, *Origin and Evolution of International Accountability Mechanisms*, pp. 12 ff.

enous factors[39]. Exogenous factors encompass the risk of retaliation, which may dissuade potentially affected individuals from engaging with IAMs (either by not submitting a claim or by withdrawing from the procedure pending the assessment of their case)[40]. Endogenous factors affect four phases: i) eligibility of claims; ii) dispute resolution service (or problem solving); iii) compliance review; iv) the outcome of these procedures and their follow-up.

In greater detail, MDB's systems generally require direct or personal (potential) harm as an *eligibility* condition[41], which may limit the possibility for individuals or civil society organizations to activate the mechanism[42]. Moreover, IAMs' operational policies explicitly acknowledge the possibility that plaintiffs submit similar or identical requests before more than one IAM, if the project is spon-

[39] For an overview of these factors, see e.g., *ibidem*.

[40] See e.g., Human Rights Watch, *At Your Own Risk: Reprisals against Critics of World Bank Group Projects*, 2015, available at: www.hrw.org; OHCHR, *Roundtable of Multilateral Development Banks and Independent Accountability Mechanisms*, 2019, available at: www.ohchr.org; Coalition for Human Rights in Development, *Wearing blinders: How development banks are ignoring reprisal risks*, 2022, available at: https://rightsindevelopment.org. MDBs introduced policies and guidelines to prevent and manage threats and reprisals against (perspective) plaintiffs. See e.g., K. Ramachandra, *Civil Society in the Independent Accountability Mechanism Community of Practice*, in O. McIntyre, S. Nanwani (eds.), *The Practice of Independent Accountability Mechanisms (IAMs)*, 291, p. 300; R. Thapa, *Safeguarding communities' right to be heard without fear of retaliation*, 2023, available at: https://accountability.worldbank.org/.

[41] J.A.P. Lorenzo, *Accountability Mechanisms of Multilateral Development Banks and the Law of International Responsibility*, p. 240. An exception to this general rule is provided e.g., in EBRD's system, whose IAM accepts requests submitted by organizations that are not directly or personally affected by a project.

[42] This difference was evident in the compliance review of the project *North-South Corridor in Georgia*, which was sponsored by both the EBRD and the Asian Development Bank. National Trust of Georgia, an organization not directly affected by the project, submitted a request to the IAMs of both banks: the one before the EBRD's IAM was declared eligible, whilst the other was rejected. Eventually both IAMs reviewed the compliance of the project, following the submission of the request before the Asian Development Bank's IAM by an organization representing affected communities. The two IAMs coordinated their investigations (e.g., joint interviews) and reached a similar conclusion: the project was not in compliance with the respective environmental and social policy and procedure. Still, a cautious approach is due. ADB, Case 2021/1, North-South Corridor (Kvesheti-Kobi) Road Project (Loan No. 3803); EBRD, Case 2020/1, North-South Corridor (Kvesheti-Kobi) Road Project.

sored by more than one bank. Even if in this specific circumstance operational policies require IAMs to coordinate, to the extent possible, with the IAM of the co-financier, this situation may lead to conflicting outcomes[43]. Regarding *dispute resolution*, the risk of asymmetry between the parties during the design of the dispute resolution method and its implementation may impinge upon the conscious participation of plaintiffs[44]. Even if IAMs envisage training sessions with potentially affected populations, a few hours of training are clearly insufficient to provide know-how comparable to that of the bank's staff (e.g., in the case of indigenous people, who will likely not be familiar with mediation). Moreover, agreements are usually confidential, a circumstance that precludes the assessment of the fairness of their content[45]. Concerning *compliance review*, the political organ of some MDBs may overturn the IAM's decision to perform an investigation[46], which *de facto* deprives the IAM of its competence on the matter.

With regard to the *outcome and follow-up phase*, flaws relate to their operational policies, the practice of the political organs of MDBs, and the approach of national courts[47]. According to operational policies, the final investigation reports of IAMs are not binding upon the political organs of MDB: the remedial measures included thereby are mere suggestions that political organs may or may not uphold. In fact, in their monitoring reports, IAMs occasionally express their concerns that the actions performed are not sufficient

[43] See e.g., World Bank, *Accountability Mechanism. Operating Procedures*, December 5, 2022 (re-issued with procedural clarification March 6, 2023), para. 10.2-10.3. See also *ibidem* the *North-South Corridor in Georgia* case.

[44] J.A.P. Lorenzo, *Accountability Mechanisms of Multilateral Development Banks and the Law of International Responsibility*, pp. 225-226. Usually, organizations help potentially affected communities to build their cases: see e.g., K. Ramachandra, *Civil Society in the Independent Accountability Mechanism Community of Practice*, p. 301.

[45] J.A.P. Lorenzo, *Accountability Mechanisms of Multilateral Development Banks and the Law of International Responsibility*, pp. 227.

[46] See e.g., IFC/MIGA Independent Accountability Mechanism (CAO) Policy, 2021, para. 107-111, available at: www.cao-ombudsman.org; Policy of the Independent Consultation and Investigation Mechanism of the ICC, 2021, para. 43(a), available at: https://mici.iadb.org/.

[47] For further references on these aspects, see next Section.

to address the non-compliance findings, with particular regard to remedial measures. Concerning monitoring, these processes may last several years. This circumstance runs contrary to the need to adopt timely measures to the benefit of the environment and the plaintiffs. This element is particularly crucial, also considering that submitting a claim has no suspensive effect on the implementation of the contested projects. Moreover, IAMs may close the monitoring processes even if the measures identified in the action plan are not fulfilled, as provided for in the Policy of the IFC's CAO. Furthermore, if a finding of non-compliance is not properly addressed by remedial actions, unsatisfied plaintiffs usually cannot submit a claim before national courts due to the jurisdictional immunity of MDBs – unless the bank waives its immunity or an exception to the immunity exists[48]. The next Section takes into account the famous *Jam et al. v. IFC* as a case-study to highlight the flaws of the outcome and follow-up stage before MDBs' IAMs.

### 4. *Compliance Advisor Ombudsman (CAO) of the IFC-MIGA: a case study of shortcomings at the follow-up phase*

According to its Policy, the IFC's CAO completes its compliance investigation by submitting the final report to Management, which prepares an Action Plan that details corrective measures. These measures may address either all or some non-compliance findings outlined in the CAO's report. If the IFC's Board approves the Action Plan, the CAO monitors its implementation. The Policy does not establish a maximum length of the monitoring stage, which may last several years – to the detriment of effectiveness. The CAO closes the compliance monitoring processes in two cases: a) where the commitments enshrined in the Action Plan have been fulfilled; b) when such commitments have not been fulfilled and there is no reasonable expectation of further actions to address non-compliance find-

[48] E. Gaillard, I. Pingel-Lenuzza, *International Organizations and Immunity from Jurisdiction: To Restrict or to Bypass*, in *International and Comparative Law Quarterly*, 2002, 1, p. 3.

ings[49]. The possibility of closing the monitoring phase even if the Action Plan has not been implemented represents a serious limit to the effectiveness of the CAOs' mandate. Even accepting that the CAO and the IFC's political organs are not vested with enforcement powers, closing the follow-up stage under this circumstance prevents the adoption of softer deterrence and compliance tactics, such as "naming and shaming".

Besides the shortcomings already detectable from the operation policy, the famous *Jam et al* case helps us highlight additional flaws. In the case at hand, the IFC financed the building of a power plant in India ("Tata Mundra" project). Affected populations submitted a claim before the CAO, which, in 2013, issued a final investigation report attesting that the IFC violated several of its environmental and social policies[50]. The Management drafted an Action Plan, approved by the Board[51]. In its two monitoring reports (2015 and 2017), the CAO expressed its concerns that the actions performed were not sufficient to address the non-compliance findings, with particular regard to the remedial measures[52]. Due to such failures, the plaintiffs filed a complaint before US courts in the *Jam et al. v IFC* case. As is well-known, the US Supreme Court clarified that the IFC is "not absolutely immune from suit" under US law – namely, the 1945 International Organizations Immunities Act (IOIA)[53].

---

[49] IFC/MIGA Independent Accountability Mechanism (CAO) Policy, para. 112-146.

[50] CAO Audit of IFC Investment in Coastal Gujarat Power Limited, India, August 22, 2013. The report is available at: https://www.cao-ombudsman.org.

[51] Statement by Jin-Yong Cai regarding CAO Audit of Tata Mundra, received by CAO: 11/25/2013. The statement, which includes the Action Plan, is available at: https://www.cao-ombudsman.org.

[52] Monitoring of IFC's Response to: CAO Audit of IFC Investment in Coastal Gujarat Power Limited, India, January 14, 2015; Second Monitoring Report of IFC's Response to: CAO Audit of IFC Investment in Coastal Gujarat Power Limited, India, February 2, 2017. Both reports are available at: https://www.cao-ombudsman.org.

[53] Supreme Court of the United States of America, *Jam v. International Finance Corporation*, 139 U.S. 759 (2019), February 27th, 2019, p 15. On *Jam et al. v. IFC*, see e.g., E. Chukwuemeke Okeke, *Unpacking the "Jam v. IFC" Decision*, in *Diritti umani e diritto internazionale*, 2020, 297; P. Rossi, *The International Law Significance of "Jam v. IFC": Some Implications for the Immunity of International Organizations*, in *ivi*, 305; A. Viterbo, A. Spagnolo, *Of Immunity and Accountabil-*

This piece of legislation provides that international organizations "shall enjoy the same immunity from suit […] as is enjoyed by foreign governments"[54]. The Supreme Court clarified that IOIA grants immunity as foreign states currently enjoy (i.e. restrictive immunity), as codified in the 1976 Foreign States Immunity Act (FSIA). Thus, IFC is subject to suit with respect to its commercial activities which have a sufficient nexus to the United States[55]. The case was remanded to the District Court for further proceedings consistent with the Supreme Court's opinion. In its 2020 ruling, the District Court concluded that the plaintiffs failed to show that their lawsuit was based upon activities carried on, or performed in, the United States – i.e., the plaintiffs failed to sufficiently substantiate that the contested conduct had a sufficient nexus to the USA. Thus, the District Court upheld the immunity of the IFC[56]. Remarkably, after 10 years from the approval of the Action Plan, the case is still under the CAO monitoring process.

The *Jam et al.* case pinpointed a major flow on access to justice in cases of violation of MDBs' own environmental and social safeguards. As is well-known, access to justice "has acquired a variety of meanings"[57]. The notion encompasses the right to seek and obtain

---

*ity of International Organizations: A Contextual Reading of "Jam v. IFC"*, in *ivi*, 319; F. Lusa Bordin, *To what immunities are international organizations entitled under general international law? Thoughts on* Jam v IFC *and the "default rules" of IO immunity*, in *Questions of International Law*, 2020, 5; Y. Okada, *The immunity of international organizations before and after* Jam v IFC*: Is the functional necessity rationale still relevant?*, in *ivi*, 2020, 29.

[54] International Organizations Immunities Act (IOIA), Public Law No. 79-291, 59 Stat. 669 (1945) (22 U.S.C. 288 ff.).

[55] Supreme Court of the United States of America, *Jam v. International Finance Corporation*, pp. 14-15.

[56] District Court, District of Columbia, *Jam et al. v. International Finance Corporation*, No. 2015-0612 (D.D.C. 2020), February 14th, 2020. This conclusion was further confirmed in United States Court of Appeals, District of Columbia Circuit, *Jam et al. v. International Finance Corporation*, No. 20-7092 (D.C. Cir. 2021), July 6th, 2021. The US Supreme Court turned down the plaintiffs' petition to consider the case again: US Supreme Court, No. 21-995 (2022), April 25th, 2022. A different, although related, issue concerns jurisdiction, i.e. the identification of the competent court. This topic is outside the scope of the present paper.

[57] F. Francioni, *The Rights of Access to Justice under Customary International Law*, in Id., *Access to Justice as a Human Right*, Oxford, Oxford University Press, 2007, 1.

remedy for grievances through bodies (such as tribunals, quasi-judicial mechanisms, administrative institutions, arbitration, and tribal courts that apply local customary laws)[58], on condition that these bodies "provide fair and impartial justice in a way that is equivalent to that provided by remedies that are *stricto sensu* judicial"[59].

Remedy includes a wide range of measures, such as apologies, restitution, rehabilitation, prevention of harm, and compensation[60]. Corrective measures identified under the Action Plan fall under this broad definition. Still, even assuming that IAMs are independent and impartial[61], *de facto* fairness may be called into question due to the power imbalance between the parties of the process[62]. Therefore, doubts arise as to the "equivalent remedy" condition, also taking into account the failure to enforce the Action Plan and the excessive length of the procedure, which jeopardise the effectiveness of the CAO's compliance review[63].

---

[58] V. Shikhelman, *Access to Justice in the United Nations Human Rights Committee*, in *Michigan Journal of International Law*, 2018, 453, p. 457. See also E.C. Okeke, *Assessing the Accountability Mechanism*, *cit.*, p. 440; Aarhus Convention, Art. 9; European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European law relating to access to justice*, Publications Office of the European Union, Luxemburg, 2016, p. 16.

[59] F. Francioni, *The Rights of Access to Justice under Customary International Law*, p. 5.

[60] See e.g., Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (UN Doc. A/RES/60/147, 21 March 2006), para. 19 ff; Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework (UN Doc A/HRC/17/31, 21 March 2011), unanimously endorsed by the UN Human Rights Council (UN Doc. A/HRC/RES/17/, 16 June 2011), Commentary on Access to Remedy, Section III, para. 25.

[61] E.C. Okeke, *Assessing the Accountability Mechanism*, pp. 440 ff.

[62] T. Holmström, *Guide for Independent Accountability Mechanisms on Measures to Address the Risk of Reprisals in Complaint Management: A Practical Toolkit*, 2019, available at: www.cao-ombudsman.org. The study was commissioned by the Independent Consultation and Investigation Mechanism (the Inter-American Development Bank's IAM) following a consultation with the IAM Working Group on Retaliation.

[63] R.E. Bissell, *Origin and Evolution of International Accountability Mechanisms*, pp. 8-9. For a similar conclusion on the failure to meet the "equivalent remedy" condition, see e.g. A. Viterbo, *Immunità dalla giurisdizione della Banca mondiale e diritto di accesso al giudice*, in *Diritti umani e diritto internazionale*, 2018, 397, pp. 417 ff.

The assessment of MDBs' IAMs against access to justice, in light of the "Tata Mundra" project and *Jam v. IFC* cases, leads to the conclusion that these mechanisms may not provide a degree of protection that is equivalent to that of judicial remedies. This conclusion might bear a consequence on the jurisdictional immunity of MBDs before national courts, at least in those legal systems which makes upholding immunity conditional on the availability of alternative dispute resolution mechanisms[64]. The case-law of international and national courts acknowledges a "right to access to justice" exception to the jurisdictional immunity of international organizations if the persons concerned may not resort to reasonable alternative means to protect their rights[65]. This approach requires a balancing exercise among competing interests, namely the right to justice, on the one hand, and the independent function of international organizations, which underpins their jurisdictional immunity before domes-

[64] As noted by Okeke (E.C. Okeke, *Assessing the Accountability Mechanism*, p. 439), some courts do not require such condition to uphold jurisdictional immunity. On the "alternative resolution mechanism" condition, see e.g. B. Bonafè, *L'esistenza di rimedi alternativi ai fini del riconoscimento dell'immunità delle organizzazioni internazionali: la sentenza della Corte suprema olandese nel caso delle Madri di Srebrenica*, *in Rivista di diritto internazionale*, 2012, p. 826; M. Buscemi, *Illeciti delle Nazioni Unite e tutela dell'individuo*, Napoli, Editoriale Scientifica, 2020, pp. 195-201.

[65] See e.g., the case-law of the European Court of Human Rights on Article 6 of the European Convention on Human Rights (e.g., *Waite and Kennedy v. Germany*, App. No. 26083/94, decision of 18 February, 1999; *Prince Hans-Adam II of Liechtenstein v. Germany*, App. No. 42527/98, decision of 12 July 2001; *Chapman v. Belgium*, App. No. 39619/06, decision of 5 March 2013). For an exception, see *Stichting Mothers of Srebrenica and Others v. the Netherlands*, App. No. 65542/12, Decision of 11 June 2013; for a comment, see M.I. Papa, *Immunità delle Nazioni Unite dalla giurisdizione e rapporti tra CEDU e diritto delle Nazioni Unite: la decisione della Corte europea dei diritti umani nel caso dell'Associazione Madri di Srebrenica*, in *Diritti umani e diritto internazionale*, 2014, 27. As for national case law, see among others the approach of Argentinian courts (*Cabrera v Comisión Técnica Mixta de Salto Grande*, 305 *Fallos de la Corte Suprema* 2150, 5 December 1983; *Fibraca Constructora v Comisión Técnica Mixta de Salto Grande*, 316 *Fallos de la Corte Suprema* 1669, 7 July 1993; *Duhalde v Organización Panamericana de la Salud–Organización Mundial de la Salud-Oficina Sanitaria Panamericana*, D.73.XXXIV, 322 *Fallos de la Corte Suprema* 1905, 31 August 1999. On the case-law of Argentina, see R. Pavoni, *Human Rights and the Immunities of Foreign States and International Organizations*, in E. De Wet, J. Vidmar (eds.), *Hierarchy in International Law: The Place of Human Rights*, Oxford, Oxford University Press, 2012, 71, p. 99.

tic courts, on the other. In particular, jurisdictional immunity cannot result in the infringement of the very essence of the right to access a court. Consequently, international organizations (including MBDs) may be subject to suit with respect to their commercial activities, if they fail to provide alternative remedies to affected people. The opposite conclusion would amount to a denial of justice.

However, we should be cautious in overlooking the recent trends towards the relevance of a (possible) "right to access to justice" exception, since it has not gained widespread consensus. Thus, the number of forum States where plaintiffs may submit claims against MDBs' failure to implement corrective measures is limited to those where the exception applies, provided that there is a sufficient nexus to the forum State.

## 5. *Brief concluding remarks*

Civil society has greatly contributed to aligning MDBs' mandates with sustainable development. Organizations triggered the adoption of environmental and social safeguard policies and the institutions of citizen-driven accountability mechanisms, alongside ushering their reforms. Their involvement in such an institutional framework may be deemed as one of the many elements towards a wider scope of the "principle of environmental democracy", which covers interactions at both the national and international levels. Notwithstanding this undeniable progress the role of civil society as a performance evaluator of, and pull factor towards, sustainable development in global economic governance, still suffers from several shortcomings. A sketch of the IAMs main features, together with the analysis of a case-study, unveiled these flaws. In particular, the operating policy and functioning of these mechanisms failed to properly fill the remedial gap resulting from the MDBs' jurisdictional immunity before national courts. The lack of effectiveness shown in the case concerning the "Tata Mundra" project before the CAO is a blatant example of this protection void. The possibility to resort to national courts as *extrema ratio* encounters several obstacles as well, due to the limited application of the "right to access to justice"

exception to the jurisdictional immunity of international organizations, alongside the need for a sufficient nexus between the MDBs' contested conduct and the forum State – as required by the US Supreme Court in the *Jam et al v. IFC* case.

Against this backdrop, reinforcing the effectiveness of IAMs' alternative means of dispute resolution appears as the desirable solution in the short term. This process of review should involve the civil society, so as to consider their inputs in how to best reform operating policy in order to ensure that MDBs-sponsored projects achieve development without environmental and social harm.

# SUSTAINABLE DEVELOPMENT CHAPTERS IN TRADE AGREEMENTS: THE EMERGENCE OF A GOVERNING PRINCIPLE?

*Emily Reid**

## 1. *Introduction*

The current combination of climate, weather and conflict related global challenges means that the imperative to deliver on the UN sustainable development goals (the goals) has never been greater. Yet, having passed the mid-point of Agenda 2030, the chances of achieving the goals by 2030 appear bleak. This chapter is premised on a view that the current context, exacerbated by the lack of progress on the goals thus far, requires that all available avenues and potential mechanisms should be used to progress the pursuit of the goals. The chapter therefore evaluates the role of trade in delivery of the goals, and its corollary, the role of sustainable development in shaping trade cooperation.

The proliferation of sustainable development chapters in trade agreements raises questions relating to their significance, status and effect: do these chapters indicate that sustainable development should now be recognised as an underlying governing principle of trade relations? Or are they little more than social-greenwash. To answer this question the first part of this paper locates the analysis in the context of the United Nation's evaluation of the state of pro-

* I am grateful to Lauren Andrews, who provided valuable research assistance for this paper.

gress towards the goals and examines the inter-relationship of trade cooperation and sustainable development, focusing in particular upon the role, or potential role of trade cooperation as an instrument in the pursuit of sustainable development and the goals. This lays the foundations for the normative claim that sustainable development *ought* to be a governing principle of trade cooperation.

The second part of the paper provides a high-level overview and analysis of the emergence and typical features of sustainable development chapters. This will feed into an analysis in the third part of the substance and effect of sustainable chapters, and the contribution these make or should make sustainable development. This part highlights the distinction between the potential effect of substantive commitments, in contrast to the potential effect of the chapters' institutional and oversight (process related) innovations. The final part of the paper provides brief conclusions regarding the extent to which these chapters deliver on the normative claim advanced in the first part, that sustainable development ought to be a governing principle of trade cooperation.

## 2. *The role of trade cooperation in the pursuit of the sustainable development goals?*

The goals were adopted nearly a decade ago, recognising the challenge faced in achieving sustainable development. The contemporary context, however, is of ever more frequent extreme weather-related events, conflict, and instability, the consequences of which are variously environmental, social, and economic, but invariably devastating. This gives the universal commitment to pursuit of the goals an urgency that goes well beyond that known even at the time of their adoption.

### 2.1. *Sustainable development, fragmentation, and integration*

At its three-dimensional essence the commitment to sustainable development recognises that there is an inherent inter-relationship between economic, social and environmental interests: that pursuit

and protection of one cannot be sustained without the others[1]. The commitment to delivering "sustainable development", manifest in the adoption of the goals, thus requires that its three dimensions be considered and pursued together, reinforcing the need for not only green, but also just transition.

The fragmented structure of international law, however, means that economic, environmental and social interests are predominantly regulated in silos: trade law, environmental law, labour law and human rights law. Although the specifics vary, each specialised regime has relatively little consideration of wider interests other than in some instances as exceptions, such as GATT Article XX. There is recognition and consideration of binary interactions: for example, "trade and labour standards", "trade and environment" or "trade and development". But regulation addressing the triangulated interaction of economic, environmental and social interests is lacking. The seminal WTO trade-environment dispute, *US-Shrimp*[2], is focussed upon the GATT compliance of a national environmental measure. A very real question concerning the social (and economic) consequences of the environmental measure upon affected fishing communities was outside the scope of consideration. While the GATT general exceptions have been interpreted to include environmental measures, and the WTO recognises the need for special and differential treatment for developing countries, there is a lack of regulatory means by which effectively to tie these two considerations together. This is striking given the potentially significant impact of national environmental measures upon communities in developing and least developed states, as on the facts of *US-Shrimp*.

Adding to the limitations of the current international legal architecture and regulatory regimes, the status of "sustainable development" remains contested: it is variously viewed as a concept, an

[1] Articulated as three "interdependent and mutually reinforcing pillars of sustainable development" Johannesburg Declaration on Sustainable Development, Article 5. https://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POI_PD.htm# (accessed on 1st March 2024).

[2] DS58: *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds58_e.htm (accessed on 1st March 2024).

objective and in some instances a principle[3]. This leads in turn into questions regarding the nature and even existence of its normative effect. There is, however, some recognition that even if there is no consensus around the substantive normative effect of sustainable development, it has weight as a process, or as characterised by Lowe, an interstitial norm[4]. This could lend itself to application as a governing principle, which is the normative claim at the heart of this paper.

### 2.2. *Agenda 2030 and the sustainable development goals: a programme in peril*

Despite the fanfare accompanying the adoption of the goals, the UN 2023 special report of progress at the mid-point of Agenda 2030 makes for sobering reading. It observes that:

> Delivering change at the speed and scale required by the Sustainable Development Goals demands more than ever before from public institutions and political leaders. It requires bold decisions, [including] the transfer of resources from one sector to another, the *creation of a new regulatory environment*, the appropriate deployment of new technologies, the *advancement of longer-term holistic perspectives, the mobilizing of a wide range of actors* and the *capacity to advance disruptive change while strengthening trust and social cohesion* (emphasis added)[5].
>
> Recognising the challenge inherent in this, the report notes that these "constitute a set of demands for which contempo-

[3] See among others V. Barral, *Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm*, in *European Journal of International Law*, 2012, 23(2), pp. 377-400; J.E. Viñuales, *Sustainable Development*, in L. Rajamani, J. Peel (eds.), *The Oxford Handbook of International Environmental Law*, Oxford University Press, 2nd ed., 2019.

[4] See among others Lowe, *Sustainable Development and Unsustainable Arguments*, in A. Boyle, D. Freestone (eds.), *International Law and Sustainable Development: Past Achievements and Future Challenges* (1999), at 19; V. Barral, *Sustainable Development in International Law*, *ibid*.; J.E. Viñuales, *Sustainable Development*, *ibid*.

[5] UN, *The Sustainable Development Goals Report Special edition*, 2023, at p. 48 available at https://unstats.un.org/sdgs/report/2023/ (accessed on 1st March 2024).

> rary governance systems were not built. It is essential therefore to take action to equip governance systems for transformation[6].

Progress on the achievement of the goals has been disappointing, particularly since the pandemic. The principle underlying Agenda 2030 was "leave no one behind" – highlighting the need for "just transition". Without significant, renewed effort this, and the broader achievement of the goals, will be no more than a pipe dream. In this context, sustainable development as an instrument of economic governance might appear to be a stretch.

In the face of this lack of progress on the goals, and in the light of the contemporary context which renders pursuit of the goals all the more important, all potential avenues must now be explored. This includes examining how trade cooperation can contribute. Yet given the international legal architectural and regulatory limitations outlined above, the claim that trade cooperation may or should have a substantive role to play in supporting or catalysing progress towards the achievement of the goals, never mind that sustainable development is or should be a governing principle of trade cooperation, requires to be substantiated. One question arising is what the inclusion of sustainable development chapters in free trade agreements means for the relationship between trade cooperation and sustainable development? What role does it suggest for trade cooperation in the pursuit and achievement of the goals. As a corollary, does it indicate that sustainable development is, or is on the way to becoming, a governing principle of trade cooperation. To contextualise these questions, attention now turns specifically to Goal 17, Partnerships for the Goals.

### 2.3. *Sustainable development Goal 17: the role of trade and of the WTO*

The connection between the three dimensions of sustainable development, has been noted above and highlighted above in reference to *US-Shrimp*. Substantively, UNSDG 17 *Partnerships for the*

[6] *Ibid.*

*Goals*, explicitly recognises the role of (fair) trade in the achievement of the goals:

"the Global Goals can only be met if we work together. International investments and support is needed to ensure innovative technological development, fair trade and market access, especially for developing countries. To build a better world, we need to be supportive, empathetic, inventive, passionate, and above all, cooperative".

To support this, the trade targets of Goal 17 include the promotion of a "universal, rules-based, open, non-discriminatory and equitable multilateral trading system under the World Trade Organization, including through the conclusion of negotiations under its Doha Development Agenda" (Target 17.10) a focus on increasing exports from developing states (17.11) and securing market access for least developed countries through the removal of trade barriers (17.12).

The WTO itself has recognised both its role specifically, and the role of trade more generally in meeting the goals[7] and it reports annually to the UN High-level Political Forum (UNHPF) on Sustainable Development[8]. Specifically with regard to Goal 17, it (the WTO) "recognizes the need to work in partnership with other international organizations and development partners to improve the capacity of developing economies and least-developed countries (LDCs) to participate more fully in international trade"[9].

It is worth also noting, however, that beyond the trade context, the targets of Goal 17 include systemic targets: including "policy coherence" for sustainable development (17.14) and, recognising each country's policy autonomy regarding poverty eradication and sustainable development. (17.15). In addition, targets relating to "multi-stakeholder partnerships" include the "[enhancement of] the

[7] https://www.wto.org/english/thewto_e/coher_e/sdgs_e/sdgs_e.htm (accessed on 1st March 2024).

[8] See for example the 2023 update, *The WTO's contribution to attaining the UN Sustainable Development Goals: 2023 update to the High-Level Political Forum*, available at: https://www.wto.org/english/res_e/booksp_e/un_hlpf23_e.pdf (accessed on 1st March 2024).

[9] *Ibid.* at p. 30.

global partnership for sustainable development" (17.16) and the encouragement and promotion of "effective public, public-private and civil society partnerships […]".

In the light of the conclusion in the 2023 UN Report on the SDGs, that the achievement of the goals will require "the *creation of a new regulatory environment*, the appropriate deployment of new technologies, the *advancement of longer-term holistic perspectives, the mobilizing of a wide range of actors*" it is clear that attention must be given to these systemic and multi-stakeholder targets, including looking at the role of trade and trade cooperation beyond the WTO context.

### 2.4. *The role of trade beyond Goal 17*

The role of trade and its potential contribution to the achievement of the goals is explicitly recognised not only in Goal 17, but also in SDG 8 *Decent work and economic growth* (target 8a requires increased aid for trade, specifically through the Enhanced Integrated Framework for Trade-related Technical Assistance to Least Developed Countries) and Goal 10 *Reduce Inequality within and among countries*. The WTO's 2021 report to the UN HPF, however, crucially notes that trade's contribution to Goal 10: has to be qualified by recognition that trade has the capacity to increase inequality as well as to reduce it[10]. Potentially partially mitigating this, Goal 10.a. targets the implementation of special and differential treatment consistent with WTO rules.

A cursory review of the WTO's annual reports for the UNHPF confirms the contribution of trade to the achievement of each of the UNSDGs. This should not be surprising, given the three dimensions of sustainable development. It is worth noting, however, that the WTO's 2021 report recognises, in respect of Goals 12 and 13, the connection between trade as a contributor to the achievement of the

[10] *WTO Contribution to the 2021 High Level Political Forum*, 2021, available at https://www.wto.org/english/thewto_e/coher_e/sdgs_e/wtoachsdgs_e.htm (accessed on 1st March 24).

goals and the WTO's own objectives, as set out in the Preamble to the WTO Agreement:

> […] raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, 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 and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development[11].

It is indeed striking that the WTO's objectives are cast in social, environmental and economic terms, reflecting earlier articulations of "sustainable development"[12] and seemingly foreshadowing the Johannesburg characterisation of the "three pillars" of sustainable development[13].

### 2.5. *The inter-relationship between trade and the sustainable development goals*

The WTO thus has clearly recognised and articulated both the role of trade in the pursuit of the goals, and its (the WTO's) own role in securing this. It has furthermore recognised its potential role working in partnership with others in pursuit of the goals, for example through the establishment, together with UNCTAD and the ITC, of the SDG Trade Monitor[14]. The role of trade, however, goes

[11] Preamble, *Agreement Establishing The World Trade Organization*, https://www.wto.org/english/docs_e/legal_e/04-wto.pdf (accessed on 1st March 2024).

[12] Notably the Brundtland definition, *Report of the World Commission on Environment and Development: Our Common Future*, http://www.un-documents.net/our-common-future.pdf (accessed on 1st March 2024).

[13] Much more could be said about the activities of the WTO in support of the goals, and its environmentally focussed activity but this is beyond the scope of the present chapter, which is concerned with the role of trade more generally in the pursuit of the goals, and the significance of "sustainable development" in shaping trade cooperation.

[14] https://sdgtrade.org/en.

beyond the role of the WTO and even beyond the role of the WTO in partnership with others.

Trade relations, and their supporting frameworks for cooperation thus *ought* to be fully utilised as an instrument for the delivery of the goals.

Moreover, the intrinsic links between trade and sustainable development, and, crucially, the capacity of trade to not only support but also to undermine the achievement of the goals, combined with countries' commitment to Agenda 2030 and to the achievement of the goals, means that not only should trade cooperation be fully employed in the pursuit of "sustainable development", but sustainable development *ought* to be recognised as a governing principle of trade relations.

This is certainly an argument which can be made with regard to the WTO and its legal order, in the light of first the overlap between the WTO objectives, sustainable development and the goals and secondly the specific recognition both by the UN and WTO itself, of the role of the WTO in the delivery of the goals. Questions remain, however, about whether such an argument can be made about the broader context of trade and trade cooperation.

Given the contested nature of "sustainable development" and the soft law character of the goals, it might be argued that "ought" is doing a lot of work in the claim that sustainable development "ought" to be a governing principle of trade cooperation. This argument would reflect ongoing questions about the *nature* or even existence of the normative effect of "sustainable development". Despite those questions it is, as noted above, increasingly recognised that there is a normative dimension to sustainable development, albeit that this its nature may be process-related rather than substantive[15]. On a practical level it is, therefore, worth examining the significance and implications of the inclusion of "sustainable development" chapters in trade agreements in order to evaluate whether this development indicates that sustainable development **is** emerging as a governing principle of trade cooperation, at least in some contexts.

[15] Above note 5.

## 3. *Beyond the WTO: sustainable development chapters in trade agreements*

The inclusion of environmental, labour and human rights commitments in trade agreements has been occurring in one form or another for more than three decades. The EU, for example, has included human rights as an essential element of development cooperation agreements since the fourth Lomé Convention (1989)[16]. NAFTA, 1994 was particularly innovative with regard to environmental cooperation provisions and has been credited as the starting point for the inclusion of "sustainability" provisions in trade agreements[17]. The question of the scope and definition of "sustainable development" or "sustainability" is clearly relevant to pinpointing the origin of the development of sustainable development provisions in trade agreements. Currently, however, sustainable development is typically recognised as encompassing chapters and provisions relating to environment, labour, human rights, and cooperation and technical assistance[18]. Since the adoption of the goals such provisions have proliferated. In some instances, particularly in the case of EU bilateral agreements, these are now contained within what are explicitly framed as "sustainable development" parts or chapters[19].

Sustainability commitments now frequently explicitly include provision for the engagement of private sector and civil society actors and stakeholders. This is not only consistent with Goal 17 but also supports the "mobilization of a wide range of actors" called for by the 2023 report. Similarly, there are a number of elements and characteristics of sustainable development chapters, particularly

[16] Article 5. Art. 6 also provided for priority for environmental protection. Fourth ACP-EEC Convention signed at Lomé on 15 December 1989, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A21991A0817%2801%2.

[17] For a concise overview see https://www.iisd.org/system/files/publications/nafta-environmental-record-commentary.pdf (accessed on 1st March 2024).

[18] See UN ESCAP, *Handbook on Negotiating Sustainable Development Provisions in Preferential Trade Agreements*, 2021, at p. 11.

[19] See *inter alia*, *EU-South Korea Free Trade Agreement*, chapter 13, *Trade and Sustainable Development*. (The EU-Korea Agreement was the first of what have been recognised as a new generation of EU trade agreements, including the sustainable development chapter).

concerning implementation and oversight frameworks, which mean that they can contribute to the new regulatory environment and governance systems identified as essential in order to deliver the goals by 2030. To this extent trade cooperation can be seen to have a role to play in the delivery of the sustainable development goals.

Yet, scrutiny of practice in this field exposes multiple issues which bring into question whether sustainable development chapters are realising their potential to support the achievement of the goals; as an instrument of just transition (greening trade, leaving no one behind); and whether sustainable development is indeed recognised as a governing principle of trade relations.

### 3.1. *The sustainable development chapters – analytical overview*

In order to answer these questions this part provides a high-level overview of key features of sustainable development chapters in selected bilateral and multilateral trade agreements. This provides the basis for a preliminary evaluation of the impact of sustainable development chapters, in particular with regard to the extent to which sustainable development chapters are realising their potential as an instrument in support of the achievement of the goals, and whether this practice might signify the emergence of sustainable development as a governing principle, shaping and/or underpinning trade relations[20]. The overview presented here reflects conclusions drawn from a sample of trade cooperation agreements, including bi-lateral and multi-lateral agreements, between a range of partners drawn from both developed and developing countries[21].

Recognising the key role of the EU and North America in driving the inclusions of human rights, labour and environmental provisions in trade agreements the focus and sample works outwards

[20] This snapshot overview will highlight questions to be addressed in order to provide a definitive conclusion on the significance of these chapters, and whether they are realising their potential. Addressing these questions is beyond the scope of the current chapter.

[21] This sample is part of a large-scale project entailing a more comprehensive review of the sustainability commitments in bi and multi-lateral cooperation agreements.

from EU and US/North American agreements. The spill over effects from these states' agreements to relations between third states is also, however, clearly of interest. Bilateral agreements involving other developed and developing states have also been examined, including some agreements among exclusively developing states.

The sample review carried out supports a preliminary conclusion that the proliferation of sustainable development chapters is principally contained within agreements between developed states, and between developed and developing states. There is significantly less evidence at this stage of inclusion of sustainable development chapters in agreements between exclusively developing countries. The African Free Trade Agreement, for example, does not include sustainable development commitments[22].

As indicated above, the US and EU have been active in this field for three decades. As a party to NAFTA, Canada has also had long involvement in sustainability provisions in trade agreements. In recent years, however, Canadian bilateral agreements have contained some interesting developments, including a deepening focus upon indigenous peoples' rights[23]. Canada can clearly be seen therefore to be operating autonomously in this context rather than simply rolling out from its original NAFTA commitments. Canada is likely to have been influential in shaping CPTPP, which in turn informs its members' bilateral relations.

While sustainable development chapters are increasingly included in agreements between developed states and some developing states, this is by no means uncontroversial or invariably welcome: the complexities and sensitivities of this are demonstrated by the experience of the EU-Mercosur negotiations in 2023-24.

One factor which should be noted is the capacity for a development initiated by one state to have a domino effect feeding in-

[22] Agreement Establishing The African Continental Free Trade Area, https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf (accessed on 1st March 24).

[23] E.g. Chapter 25 of the 2023 Canada-Ukraine Free Trade Agreement, https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ukraine/text-texte/2023/toc-tdm.aspx?lang=eng (accessed on 1st March 2024).

to future agreements concluded by its partner states. All states are of course bound by all their commitments at once[24]. Therefore the commitments of the UK with the EU, such as non-regression in environmental and labour standards, apply to the UK at all times. As a consequence, from a competitive perspective and setting aside any question of values, the UK has an interest in building non-regression and equivalent standards into its agreements with other partners: the UK would not want to find itself at a competitive disadvantage with other states if these partners can lower, or maintain lower standards while the UK is tied, through its commitment in the UK-EU PCA, to maintain its standards.

On the other hand, while this might be expected to be a driver for consistency in terms of substantive content, this is balanced by the fact that the content of agreements reflects what could be agreed between parties. Each party may have not only different levels of ambition in this field, but also different priorities: whether environmental, climate, labour, gender or indigenous rights[25]. The UK's agreements with Australia and New Zealand are a clear demonstration of the compromise entailed in negotiating sustainable development commitments in trade cooperation agreements. As Australia and New Zealand are both members of CPTPP and the UK is committed to accession to CPTPP, it might have been anticipated that these agreements would be substantively very similar. In fact, however, they have distinct sustainable development commitments reflecting different levels of commitment to prioritisation of environment and labour. Furthermore, the sustainable development commitments in both are less than those contained in the UK-EU PCA.

A further factor which cannot be ignored when seeking to draw conclusions about the importance individual states ascribe to sustainable development commitments, is that the bargaining strength of each state varies in each instance according to which partner state or states are involved, inevitably impacting in turn upon the sub-

[24] Under the principle *pacta sunt servanda*.

[25] Chile for example has given greater focus to labour provisions than environmental.

stantive content of agreements. Again, this can be seen in the variety of commitments included in agreements concluded by the UK. Drawing all of these factors together, it is unsurprising that there is seeming substantive inconsistency in state practice.

### 3.2. *Substance and effect of the sustainable development chapters*

One consistent feature that can be observed is that the commitments in sustainable development chapters typically reaffirm existing commitments of the relevant parties such as the Paris Agreement or ILO Declaration, rather than the parties creating new substantive obligations. Use of universal existing commitments as reference points in this way has the benefit of mitigating the suggestion of an imposition of values and suggests at least the potential for some very high-level consistency. Underlying these chapters is commitment to fostering dialogue and cooperation, through reaffirmation of existing commitments, rather than pursuing the establishment of new commitments.

In evaluating the effect of sustainable development chapters it is crucial to distinguish formal legal effect from the broader influence they may have. The very inclusion of sustainable development chapters in trade agreements has an impact. Not least, there is a snowball effect of inclusion: as this becomes more prevalent, it creates a culture whereby these chapters will become more common still. Their force and effect is also liable to develop incrementally. Australia provides a clear example of evolution in even a single country's practice having moved from a position of initial resistance to the inclusion of climate or human rights commitments in trade agreements[26] to including sustainable development chapters in its agreements with Peru[27], South

[26] See further E. Reid, *Balancing Human Rights, Environmental Protection and International Trade*, Hart, 2015, re Australia's resistance to the inclusion of human rights conditionality in negotiations with the EU during the 1990s, and also comments by Australian PM, Scott Morrison, September 2021, https://edition.cnn.com/2021/09/09/business/australia-uk-trade-climate-intl/index.html.

[27] Chapters 18 (Labour) and 19 (Environment) Texts of all Australia's in force free trade agreements are available at: https://www.dfat.gov.au/trade/agreements/in-force (accessed on 3rd March 2024).

Korea[28] and the UK[29] although both the substance and formal effect of these varies.

The agreements with Peru and Korea preclude recourse to their dispute settlement provisions for issues arising in respect of the sustainable development chapters, instead providing only for cooperation and consultations. The more recent UK-Australia Agreement does provide for recourse to dispute settlement, with regard to both the labour and environment chapters in the event that consultation and dialogue fails to reach a solution[30]. The UK-New Zealand Agreement similarly provides for recourse to dispute settlement with regard to both labour and environment where agreement cannot be reached through consultation and cooperation[31]. Incremental shifts in the depth and strength of undertakings entered into are therefore apparent, but it cannot be said that there is a single, consistent, direction of travel. Although there are, as noted, instances in which sustainable development chapters are subject to binding dispute settlement and therefore a degree of legal enforceability, there is a greater tendency to make use of cooperative, consultative proceedings.

### 3.3. *Implementation and oversight*

The gains for sustainable development arising from the substantive commitments entered into in sustainable development chapters are limited by both the lack of consistency of content, and the tendency to reaffirm existing commitments rather than create new commitments. There are, however, a number of innovations with regard to implementation and oversight of sustainable development commitments which seek to engage stakeholders and civil society. These provisions have the potential to have a significant impact on operationalisation of substantive commitments, and on the capacity for sustainable development to be seen to shape and indeed govern

[28] Chapters 17 (Labour) and 18 (Environment), *ibid*.
[29] Chapter 21 (Labour) and 22 (Environment), *ibid*.
[30] Articles 21.16.9 and 22.26 respectively.
[31] Article 22.26.2(environment) and 23.22 (Labour).

trade cooperation. Two innovations which are potentially of particular importance, and therefore highlighted here, are the "Domestic Advisory Groups" and the USMCA Rapid Response Mechanism.

### 3.4. *The Domestic Advisory Groups*

Domestic Advisory Groups (DAGs) bring together independent civil society representatives of employers, trade unions and other stakeholders, comprising a balance of business, labour/social and environment expertise and interest. These groups are tasked with providing independent advice and recommendations to Governments regarding the implementation and operationalisation of sustainable development commitments contained in trade agreements. The first instance of DAGs was in the EU-South Korea Agreement, and these have now become a standard feature of the EU's trade agreements whereby parties commit to the establishment of a DAG and to supporting regular joint dialogues or civil society forums between the respective parties' DAGs. The UK-EU PCA therefore includes provision for a Domestic Advisory group, as do the UK's other rollover agreements[32]. It is notable that the remit of the DAGs under the EU-UK Agreement extends over the entire PCA, whereas the original and still typical model was for the DAG's remit to be limited to the sustainable development chapters. The UK has also included varying levels of provision for joint dialogue between UK and partner civil society, trade union and business stakeholders in its new post-Brexit agreements. Following the typical model, the remit of these (with the exception of the UK-EU Agreement) is restricted to the sustainable development chapters of the relevant agreements. In addition, it is worth highlighting that the agreement with Australia, notable for being the UK's first post-Brexit new (not "rolled over") trade agreement, includes provision for separate consultative mechanisms related

[32] "Rollover Agreements" is the term used for the Agreements the UK entered into, replacing those it had participated in as an EU member, and incorporating them into UK bilateral agreements with the relevant partner state. For example, the UK Japan and UK-Canada Agreements.

to matters relating to the labour[33] and environment[34] chapters, as does the UK agreement with New Zealand. It remains to be seen whether this separation will have significant practical implications, but on its face, this undermines the capacity to respond to the inter-related nature of the relationship between trade, environmental protection, and social development, reverting to a more siloed approach. In practice the UK has brought the UK-Australia agreement within the remit of its existing DAG, which covers economic, labour and environmental interests and therefore maintains a holistic overview of the sustainable development chapters, at least from the UK side.

On paper, the DAGs formalise the engagement or "mobilisation" of civil society to ensure oversight of the implementation of sustainable development chapters. In practice their activity and consequently their impact is undermined by lack of resource, and a lack of feedback loop[35]. This means that as innovative as the DAGs are, they have not yet fulfilled their potential either as a means by which to support the operationalisation and implementation of sustainable development commitments, or in terms of being able to consistently hold governments to account.

### 3.5. *USMCA Rapid Response Mechanism*

The USMCA "Facility Specific Rapid Response Mechanism" (RRM) provides for swift government action in the event of "a good faith basis belief that workers at a Covered Facility are being denied the right of free association and collective bargaining"[36]. Significantly, any interested party can petition the Government if they have credible evidence of a denial of relevant rights. While the DAGs might be struggling to realise their potential, the RRM

[33] Article 21.15

[34] Article 22.18.

[35] D. Martens, D. Potjomkina, J. Orbie, *Domestic Advisory Groups in Eu Trade Agreements. Stuck at the Bottom or Moving up the Ladder*?, Friedrich Ebert Stiftung, November 2020.

[36] USMCA Article 31-A.2.

is already building evidence of some demonstrable impact: the US has invoked the RRM 19 times since 2021: 14 of these cases have been resolved or concluded through remediation, benefitting 27000 workers[37]. If it is not possible to resolve the violation of rights through remediation, penalties can be imposed directly upon the specific company in issue until a resolution is achieved. In the event of disagreement between the two Governments, either can request a panel to review the issue. The capacity under the RRM to specifically sanction behaviour and practices at an individual facility is both innovative and potentially highly effective. The RRM usefully leverages the competitive desirability of levelling the playing field to provide a mechanism by which to ensure agreed standards are upheld and specific breaches are addressed. One question is whether an equivalent process could be set up through which to respond to for example violations of environmental protection commitments. The respective bargaining strength of the parties in the USMCA is, however, a distinct factor which cannot be ignored in evaluating the potential transferability of such a mechanism to other fields or agreements between other parties.

A further development to note as best practice concerns the engagement with international organisations such as the ILO, particularly in the context of provision of technical assistance. This is consistent with Goal 17 – *Partnerships for the goals* as well as with mobilization of a wide range of actors. It is also important because technical assistance is key to the imperative to "leave no one behind" and the engagement of international actors should help mitigate risks of developed states doing to developing states.

[37] US TR, *Fact Sheet: The USMCA Rapid Response Mechanism Delivers for Workers*, Feb 9, 2024, available at: https://ustr.gov/about-us/policy-offices/press-office/press-releases/2024/february/fact-sheet-usmca-rapid-response-mechanism-delivers-workers. See further C.P. Bown, K. Claussen, *The Rapid Response Labour Mechanism of the US-Mexico-Canada Agreement*, Peterson Institute for International Economics Working paper, No. 23/9, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4627560. (While the present analysis focuses on the US-Mexico RRM, there is also a Canada-Mexico RRM).

## 4. *Conclusions*

In terms of consistency, the potential persuasive effect of sustainable development chapters is evident, it would be difficult however to substantiate a consistent normative effect. Sustainable development chapters have clear potential as an instrument to support the pursuit of the achievement of the goals and there is some evidence that where they exist, these chapters are indeed playing a role in the pursuit of the goals.

The innovative institutional and procedural processes highlighted above are far from perfect in their operation, yet the underpinning engagement with civil society and stakeholders, and the establishment of specific procedures such as the RRM, are consistent with addressing the need for innovative regulatory mechanisms and mobilization of a wide range of actors, highlighted in the UN sustainable development 2023 special report. In this respect, therefore, there is provision within sustainable development chapters of bilateral trade agreements which manifests some of the innovation called for by the UN in its 2023 report.

If these provisions were effectively operationalised, they would have the capacity to contribute to trade cooperation playing the role it ought to in the pursuit of the sustainable development goals. The lack of resource to secure the effectiveness of some of the innovations, including the DAGs, creates, however, a risk of slippage towards what could be perceived as "social greenwashing". This is something all parties should look to guard against. As noted above, rapid progress towards the achievement of the goals is an imperative. Sustainable development chapters have the potential to contribute to this and there is some evidence that in places they are (e.g. the USMCA RRM).

This chapter, however, is not only concerned with the role trade cooperation plays in the pursuit of sustainable development. It also makes a key normative argument that sustainable development itself ought to be a governing principle of trade cooperation. The high-level overview provided above demonstrates that despite the increasing prevalence of sustainable development chapters, it cannot yet be convincingly claimed that sustainable development is a governing

principle of trade cooperation. Sustainable development is undoubtedly having some impact upon the shape of trade cooperation in some contexts. It is clear, however, that its impact is far from universal: there is work to be done regarding both the consistency of provisions included, and also the parties engaged in bringing sustainable development considerations into trade cooperation. Positively, it can be observed that there is some evidence of recognition that trade cooperation should be shaped by the needs of sustainable development, and that this together with the near universal commitment to the UNSDGs provides the basis for further incremental progress. There is, however, a long way to go, and little time to get there.

# SOME REMARKS ON REFERRING TO INTERNATIONAL CSR STANDARDS IN "NEW GENERATION" EU PTAS

*Niccolò Lanzoni*

## 1. *Introduction*

This contribution offers some remarks on the references to Corporate Social Responsibility (CSR) within "new generation" Preferential Trade Agreements (PTAs)[1] to which the European Union (EU) is a party. Increasingly, in accordance with the sustainability objectives guiding the EU's external action[2], which also shape its common commercial policy[3], these PTAs refer to international CSR standards, often as outlined in specific soft law instruments. This trend, which runs parallel to the EU's internal regulatory action on corporate sustainability[4], raises some questions regarding the legal

[1] PTAs are here understood as reciprocal trade agreements between two or more partners which do not necessarily belong to the same region and providing preferential market access. In the language of the World Trade Organization (WTO) such agreements are often called Regional Trade Agreements, despite the fact that some-times they relate to very distant partners (whereas "PTAs" tend to refer to nonreciprocal preferential schemes). For a definition of "new generation" PTAs, see below.

[2] See Articles 3(5) and 21(2)(d) of the Treaty on European Union.

[3] See Article 207(1) of the Treaty on the Functioning of the European Union. See also, recently, Court of Justice of the European Union, Joined Cases C-779/21 P and C-799/21 P, Judgment of the Court (Grand Chamber) of 4 October 2024, para. 133.

[4] See, recently, Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 (Corporate Sustainability Due Diligence Directive)

value and practical effects of these references. This brief contribution aims to outline the scope of the debate, address these questions, and consider some broader implications for the evolving nature of the legal concept of (international) CSR.

## 2. *CSR and its evolving nature*

The concept of CSR was first developed within the fields of economics and social sciences[5], and is rooted in economic, ethical, and social considerations[6]. Fundamentally, CSR contrast with Milton Friedman's view that the "one and only one social responsibility of business [is] to use its resources and engage in activities designed to increase its profits"[7]. Instead, CSR is based on the premise that companies are integral parts of the communities in which they operate[8]. As such, when making decisions, they have an inherent duty to adhere to minimum environmental, social, and governance standards, duly considering the interests of a broad range of stakeholders beyond just their shareholders, including employees, suppliers, customers, communities, and the environment.

Far from reflecting any form of "socialist view"[9], CSR is an expression of what John Ruggie, former Special Representative of the United Nations (UN) Secretary-General on human rights and trans-

---

and Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 (Corporate Sustainability Reporting Directive).

[5] See the seminal H.R. Bowen, *The Social Responsibilities of the Businessman*, New York, 1953.

[6] F. Wettstein, *The History of 'Business and Human Rights' and Its Relationship with Corporate Social Responsibility*, in S. Deva, D. Birchall (eds.), *Research Handbook on Human Rights and Business*, Cheltenham/Northampton, 2020, p. 23, pp. 32-33.

[7] M. Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, in *New York Times*, 13 September 1970.

[8] It could also be argued that the Friedman's doctrine embodies a narrow perspective on CSR, while today's CSR is understood in a broader sense, L. Matthews, C. Ingram, *Corporate Social Responsibility*, in L. Matthews, L. Bianchi, C. Ingram (eds.), *Concise Encyclopaedia on Corporate Social Responsibility*, Cheltenham/Northampton, 2024, p. 43, pp. 46-50.

[9] As M. Friedman argued, *The Social*, cit.

national corporations, refers to as the post-war "embedded liberalism compromise", that is "a grand social bargain whereby all sectors of society agreed to open markets […] but also to contain and share the social adjustment costs that open markets inevitably produce"[10]. This approach is seen as beneficial not only for contributing towards the objective of sustainable development[11], but also for the long-term profitability of corporate operations[12].

The *legal* concept of CSR was initially developed at the domestic level, especially in the United States, on the basis of the demand for companies to act responsibly within their local jurisdiction[13]. Economic globalisation and the cross-border activities of multinational companies subsequently catalysed the translation of CSR in the lexicon of international law[14]. These phenomena, which accelerated significantly in the aftermath of the Cold War, weakened the foundations of the post-war economic compromise[15]. In this context, CSR progressively evolved from being a domestic concept to becoming an international force aimed at addressing the resulting governance gaps and contributing to a "re-embedded form of liber-

---

[10] J.G. Ruggie, *Taking Embedded Liberalism Global: The Corporate Connection*, in D. Held, M. Koening-Archibugi (eds.), *Taming Globalization: Frontiers for Governance*, Cambridge, 2003, p. 93, p. 94.

[11] M. Chi, *Integrating Sustainable Development in International Investment Law: Normative Incompatibility, System Integration and Governance Implications*, London/New York, 2018, p. 101.

[12] The "instrumentalization" of CSR as "management-driven and corporate-determined policies that are designed to assist the corporation's business" (R. McCorquodale, *Corporate Social Responsibility and International Human Rights Law*, in *Journal of Business and Ethics*, 2009, 87, p. 391) highlights its compatibility also with neoliberal thought, often summarised under the concept of Corporate Social Performance, S. Vallentin, D. Murillo, *Ideologies of Corporate Responsibility: From Neoliberalism to "Varieties of Liberalism"*, in *Business Ethics Quarterly*, 2022, 32, pp. 650-653.

[13] The early days of CSR are identified during the 1950s, see M.A. Latapí Agudelo, L. Jóhannsdóttir, B. Davídsdóttir, *A Literature Review of the History and Evolution of Corporate Social Responsibility*, in *International Journal of Corporate Social Responsibility*, 2019, vol. 4, pp. 3-5.

[14] H.S. Dashwood, *The Rise of Corporate Social Responsibility as a Global Norm Informing the Practices of Economic Actors*, in H. Hansen-Magnusson, A. Vetterlein (eds.), *The Rise of Responsibility in World Politics*, Cambridge, 2020, p. 169.

[15] Ruggie, *Taking*, cit., p. 94.

alism"[16]. Thus, since the mid-1990s[17], corporations have been asked more and more "to undertake a wide range of functions and responsibilities which it had previously been unimaginable to entrust to them"[18].

The growing relevance of CSR beyond national borders goes hand in hand with the progressive evolution of its legal nature. Traditionally, CSR reflects behaviour by corporations that merely goes beyond what is legally required[19]. It is, by definition, voluntary, and its typical instruments are those of self-regulation, including unilateral commitments, programs, strategies, and codes of conduct[20]. Over time, however, CSR has gradually shifted away from its original notion of "corporate philanthropy"[21]. As multinational corporations expanded their cross-border activities and gained more power, they began to challenge states' ability to regulate such activities and meet their international obligations in areas such as labour and human rights, and environmental protection[22]. Consequently, CSR, to paraphrase Friedman and Friedrich von Hayek, started to act as a "slippery slope" leading to a more powerful normativization of corporate conduct[23]. Today, this vision is well-established under international law. As the international investment tribunal in *Urbaser v. Argentina* noted, "international law accepts corporate social respon-

---

[16] Vallentin, Murillo, *Ideologies*, cit., p. 640.

[17] See the well-known speech by the UN Secretary-General Kofi Annan to the World Economic Forum, *Secretary-General Proposes Global Compact on Human Rights, Labour, Environment, in Address to World Economic Forum in Davos*, press release SG/SM/6881, 1 February 1999.

[18] P. Alston, *The "Not-a-Cat" Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?*, in ID. (ed.), *Non-State Actors and Human Rights*, Oxford, 2005, p. 3, p. 7.

[19] J. Paterson, *Corporate Governance and Corporate Social Responsibility*, in I. Bantekas, M.A. Stein (eds.) *The Cambridge Companion to Business & Human Rights Law*, Cambridge, 2021, p. 65, p. 82.

[20] S. Bijlmakers, *Corporate Social Responsibility, Human Rights, and the Law*, Oxford/New York, 2019, pp. 22-23.

[21] P. Muchlinski, *Multinational Enterprises and the Law*,[3] Oxford, 2021, p. 555.

[22] E. Svilpaite, *International Corporate Social Responsibility Standards: Imposing or Imitating Business Responsibility in Lithuania?*, in A. Peters *et al.* (eds.), *Non-state Actors as Standard Setters*, Cambridge, 2009, p. 431, p. 433.

[23] Quoted in Vallentin, Murillo, *Ideologies*, cit., pp. 647-648.

sibility as a standard of crucial importance for companies operating in the field of international commerce"[24]. Similarly, the Institut de Droit International (IDI) has recently emphasised that states and international organisations "*shall make sure* that corporations *respect* corporate social responsibility"[25].

### 3. *The codification and standardisation of CSR in soft law instruments*

Despite its decades-long growth in importance at the international level, there is still no single, universally accepted legal definition of CSR[26]. In this regard, CSR has been criticised for being "vague"[27], and "imprecise"[28], an "umbrella term" employed both with regard to the decision-making processes it involves and the outcomes of these processes[29].

It is precisely to avoid that the term CSR ended up meaning "different things to different people"[30] that, starting in the 1970s, international institutions began efforts to reverse the process of standard-setting de-monopolisation in favour of private parties' self-reg-

---

[24] *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award (8 December 2016), para. 1195.

[25] Article 19 of Resolution of 4 September 2021, *Human Rights and Private International Law*, p. 7.

[26] See the definition of CSR provided by the EU (COM(2011) 681 final, 25 October 2011, *A renewed EU strategy 2011-14 for Corporate Social Responsibility*, p. 6), the ILO (GB.295/MNE/2/1, March 2006, *InFocus Initiative on Corporate Social Responsibility (CSR)*, p. 1), the United Nations Industrial Development Organisation (at www.unido.org/our-focus-advancing-economic-competitiveness-competitive-trade-capacities-and-corporate-responsibility-corporate-social-responsibility-market-integration/what-csr#:~:text=What%20is%20CSR%3F,and%20interactions%20with%20their%20stakeholders) and the OECD, *Corporate Social Responsibility: Partners for Progress*, Paris, 2001, p. 13.

[27] Paterson, *Corporate*, cit., p. 81.

[28] R. Mullerat, *International Corporate Social Responsibility: The Role of Corporations in the Economic Order of the 21st Century*, Amsterdam, 2010, p. 12.

[29] Zerk, *Multinationals*, cit., p. 31.

[30] D. Crowther, L. Rayman-Bacchus, *Introduction*, in L. Rayman-Bacchus, D. Crowther (eds.), *Perspectives on Corporate Social Responsibility*, London/New York, 2004, p. 1, p. 2.

ulation by codifying and standardising CSR policies[31]. These efforts have been pursued mainly through the adoption of soft law instruments, giving rise to what is today known as the "business and human rights" discipline[32]. As is well-known, soft law instruments exist "in the twilight" between law and politics[33]. While not legally binding[34], they have a normative character and are a key element of international governance[35]. Their legal effects are usually highlighted and elaborated upon before international and domestic courts[36]. Soft law instruments concerning CSR include the Ten Principles of the UN Global Compact of 1999[37], the UN Guiding Principles on Business and Human Rights of 2011[38], the International Labour Organisation (ILO) Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy of 1977 (updated in 2022)[39], and the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises on Responsible Business Conduct of 1976 (updated in 2023)[40].

The use of soft law instruments for establishing international rules traditionally offers several advantages over binding instruments,

---

[31] See E. Kocher, *Private Standards in the North – Effective Norms for the South?,* in *Non-state*, cit., p. 409, p. 410.

[32] See L. Chiussi Curzi, C. Malafosse, *A Public International Law Outlook on Business and Human Rights*, in *International Community Law Review*, 2022, 24, and L. Chiussi Curzi, *General Principles for Business and Human Rights in International Law*, Leiden/Boston, 2021.

[33] O. Schachter, *The Twilight Existence of Non-binding Agreements*, in *American Journal of International Law*, 1977, vol. 71, p. 296.

[34] For the sake of convenience, the notions of "soft law instruments" and "non-binding instruments" will be employed here interchangeably.

[35] On soft law in general, see m. Eliantonio, E. Korkea-aho, U. Mörth (eds.), *Research Handbook on Soft Law*, Cheltenham/Northampton, 2023.

[36] In the field of CSR see, for instance, Inter-American Court of Human Rights, Judgment of 15 July 2020 in the case *Employees of the Fireworks Factory of Santo Antônio de Jesus and their Families v. Brazil* and *Milieudefensie et al. v. Royal Dutch Shell* (Court of Appeals of the Hague, Judgment of 12 November 2024).

[37] At https://unglobalcompact.org/what-is-gc/mission/principles (Global Compact).

[38] HR/PUB11/04, 2011 (UNGP).

[39] *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*,[6] Geneve, 2022 (ILO Tripartite Declaration).

[40] *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct*, Paris, 2023 (OECD Guidelines).

most notably treaties[41], including faster negotiations and adoption and a lower risk of fragmentation, as their content is not subject to reservations and does not need to be transposed into domestic law[42].

Moreover, soft law instruments are particularly well-suited to "(re-)embed corporate responsibilities in international principles, global governance regimes, multistakeholder initiatives, and deliberative democratic processes"[43]. Firstly, their non-binding-yet-persuasive authority makes them an appropriate tool for containing voluntary standards possessing normative value[44]. Secondly, their effectiveness increases as the number of subjects that subscribe to them increases, which in turn encourages other subjects to do the same[45]. This "network effect" is consistent with the shared objective, not only of civil society, but also of corporations and their home states, to establish clear expectations and internationally recognised benchmarks for responsible corporate behaviour[46]. Finally, besides addressing states[47],

---

[41] For the difficulties in negotiating a treaty on business and human rights, see C. Macchi, *A Treaty on Business and Human Rights: Problems and Prospects*, in J.L. Cernic, N. Carrillo-Santarelli (eds.), *The Future of Business and Human* Rights, Cambridge, 2018, p. 63, pp. 76-81.

[42] A. Boyle, *Soft Law in International Law-Making*, in M. Evans (ed.), *International Law*[5], Oxford, 2018, p. 119, pp. 122-123.

[43] Vallentin, Murillo, *Ideologies*, cit., p. 653. It is no coincidence that John Ruggie, a proponent of returning to the embedded liberalism compromise through the tool of CSR, played a prominent role in launching the UN Global Compact and developing the UN Guiding Principles.

[44] See P. Muchlinski, *Corporate Social Responsibility*, in P. Muchlinski, F. Ortino, C. Schreuer (eds.), *The Oxford Handbook of International Investment Law*, Oxford, 2008, p. 637, p. 652.

[45] B.H. Druzin, *Why does Soft Law Have any Power Anyway?*, in *Asian Journal of International Law*, 2017, 7, p. 364.

[46] Since the adoption of CSR policies typically entails increased costs, which in the short to medium term may result in competitive disadvantages, the international standardisation of CSR is considered strategic for promoting a level playing field and curbing scenarios where companies may gain competitive edge by engaging in misleading CSR practices designed to appease public opinion without genuinely addressing social or environmental issues. Moreover, the international standardisation of CSR allows companies to better anticipate and take advantage of fast changing societal expectations and operating conditions.

[47] For instance, the UNGP, the ILO Tripartite Declaration and, to a lesser extent, the OECD Guidelines. The duties may also go beyond those related to CSR. However, the present analysis focuses on the legal value and effects of EU TAs' references to these instruments only in relation to CSR.

these soft law instruments directly address the companies themselves, requiring them to align their activities with expected "social norms" in the form of specific standards. These instruments may also be drafted in consultation with corporate actors. Such circumstances enhance both legitimacy and accountability, favouring greater adherence to international CSR standards.

## 4. *Drafting techniques for including CSR concerns in EU PTAs*

Reflecting the growing urgency to align trade objectives with the protection of human rights and the environment, since the 2000s – and increasingly over the past decade due to the deadlock reached by the WTO member states in the "Doha Round" negotiations –[48] CSR has been referenced in so-called "new generation" PTAs. These agreements, "in addition to the classical provisions on the reduction of customs duties and of non-tariff barriers to trade in goods and services", contain "provisions on various matters related to trade, such as intellectual property protection, investment, public procurement, competition and sustainable development"[49].

Although many PTAs today refer to international CSR standards[50], the EU, in accordance with its statutory obligations[51], stands out for having played a pivotal role in promoting the inclusion of such standards in PTAs as part of its broader strategy to mainstream sustainable development and responsible business practices into its trade policy with the aim of contributing to the steering of globalisation towards social and environmental objectives[52].

---

[48] See G. Venturini, *La struttura istituzionale dell'OMC*, in ID. (a cura di), *L'Organizzazione Mondiale del Commercio*[3], Milano, 2015, p. 3, pp. 20-21.

[49] As defined by the Court of Justice of the European Union, Opinion 2/15 (*Free Trade Agreement with Singapore*) of 16 May 2017, para. 17. See, in general, G. Adinolfi (a cura di), *Gli accordi preferenziali di nuova generazione dell'Unione europea*, Torino, 2021.

[50] As of 2021, there were about seventy PTAs that refer to CSR, Monteiro, *Buena Vista: Social Corporate Responsibility Provisions in Regional Trade Agreements*, *Staff Working Paper ERSD-2021-11*, 2021, p. 1.

[51] See above.

[52] See, most recently, COM(2022) 409 final, 22 June 2022, *The Power of Trade Partnerships: Together for Green and Just Economic Growth*.

References to CSR international standards within EU PTAs have been achieved through different drafting techniques. These references are seldom found in the preamble of the PTA, which provides valuable context for the interpretation of that PTA[53], also constituting "a principal and natural source from which indications can be gathered of [its] objects and purposes"[54]. For example, the preamble of the 2016 CETA states that 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"[55].

More commonly, references to CSR are included in provisions contained in the operative part of the PTA, usually, though not exclusively, in specific chapters dedicated to sustainable development. The earlier EU PTAs which mention the concept of CSR do not provide a definition or reference international standards[56]. For instance, Article 13.6(2) of the 2011 EU-Korea FTA, the first new generation PTA concluded by the EU following the European Commission's 2006 Communication "Global Europe"[57], states that "the Parties shall strive to facilitate and promote trade in goods that contribute to sustainable development, including […] those involving corporate social responsibility and accountability"[58]. In the absence

[53] Article 31(2) of the Vienna Convention on the Law of Treaties (VCLT).

[54] ICJ, Judgment of 12 November 1991 in the case *Concerning the Arbitral Award of 31 July 1988*, Dissenting Opinion of Judge Weeramantry, I.C.J. Reports, 1991, p. 130, p. 142.

[55] The 2016 Comprehensive Economic and Trade Agreement between the EU and Canada (CETA) also includes a reference to international CSR standards in its operative part, Article 22.3(2)(b).

[56] The first EU reference to CSR is to be found in the Joint Declaration on Guidelines for Investors, developed parallel to the 2003 Association Agreement between the EU and Chile, which states that "the Parties remind their multinational enterprises of their recommendation to observe the OECD Guidelines for Multinational Enterprises, wherever they operate".

[57] COM(2006) 567 final, 4 October 2006.

[58] See also Articles 196(2)(d) of the 2008 Economic Partnership Agreement between the EU and CARIFORUM, 271(3) of the 2012 Trade Agreement between the EU and Colombia, Peru, and Ecuador (EU-Colombia, Peru and Ecuador TA) and 41(2)(b) of the 2013 Association Agreement between the EU and Central America Association Agreement.

of a definition or further references, where the parties to the PTA have endorsed one or more soft law instruments concerning CSR after the PTA has been concluded, these instruments may come into play to confirm the common intention of the parties regarding the content of CSR[59].

More recently, EU PTAs have generally referred to "principles and guidelines" of CSR that are internationally recognised and/or have been endorsed by the parties – which would normally encompass the international CSR standards included in the aforementioned soft law instruments due to their widespread recognition. These references are typically accompanied by mentions to one or more specific soft law instruments[60]. It is doubtful whether such a specific reference legally add anything to that of the more open-ended renvoi to the internationally recognised principles of CSR, apart from highlighting the relevance of certain instruments for the parties[61]. The UNGP[62], the OECD Guidelines[63], the OECD Due Diligence Guid-

[59] Likely pursuant to Articles 31(3)(b) and/or 32 of the VCLT. International case law is not conclusive as to whether, based on an arguably *contra litteram* interpretation, non-binding instruments fall within the scope of Article 31(3)(c), according to which a treaty is to be interpreted in the light of "any relevant *rules* of international law *applicable* in the relations between the parties", see A.J. Zimmermann, N. Jauer, *Possible Indirect Legal Effects of Non-legally Binding Instruments*, *KFG Working Paper Series No. 48*, 2021, pp. 12-13.

[60] For instance, Articles 34(3) of the 2024 Sustainable Investment Facilitation Agreement between EU and Angola (EU-Angola SIFA), 12.11(4) and 13.10(c) of the 2019 Free Trade Agreement between the EU and Singapore (EU-Singapore FTA) and 16.5 of the 2018 Economic Partnership Agreement between the EU and Japan (EU-Japan EPA). The content of specific soft law instruments is also likely to substantiate the adoption of CSR "best business practices", see Article 271(3) of the EU-Colombia, Peru and Ecuador TA.

[61] N. Bernasconi-Osterwalder, *Inclusion of Investor Obligations and Corporate Accountability Provisions in Investment Agreements*, in J. Chaisse, L. Choukroune, S. Jusoh (eds.). *Handbook of International Investment Law and Policy*, Singapore, 2021, p. 463, p. 467.

[62] For instance, Articles 19.12(2)(a) of the 2022 Free Trade Agreement between the EU and New Zealand (EU-New Zealand FTA) and 406(2)(b) of the 2020 Trade and Cooperation Agreement between the EU and the United Kingdom (EU-UK TCA).

[63] For instance, Articles 406(2)(b) of the EU-UK TCA, 88 and 276(e) of the 2021 Comprehensive and Enhanced Partnership Agreement between the EU and Armenia and 13.10(2)(e) of the 2019 Free Trade Agreement between the EU and Viet Nam.

ance for Responsible Business Conduct[64], the ILO Tripartite Declaration[65], and the Global Compact[66] are the most frequently mentioned soft law instruments. International sector-specific guidelines in the area of CSR and responsible business conduct, such as those relating to trade in raw materials and energy goods or agriculture, may also be referenced[67].

## 5. *Referring to international CSR standards: Legal value…*

The references made by EU PTAs to international CSR standards raise questions about the legal value of such renvoi. Considering that these standards are typically identified with those found in widely recognised soft law instruments, the issue shifts to the nature and effects of a binding instrument's reference to non-binding ones.

In principle, drawing from Jorge Viñuales' lexicon, references in PTAs to soft law instruments concerning CSR may be categorised as "anchor provisions", that is treaty provisions that incorporate or in some other way give legal effect to standards or norms that would not otherwise be binding or have the same or any legal effect upon the parties to the treaty or the subjects to which they are directed[68]. However, there do not appear to be any "secondary rules"[69] that de-

---

[64] Articles 13.14(d) of the EU-New Zealand FTA and 34(3) of the EU-Angola SIFA.

[65] For instance, Articles 148(3) of the EU-Kazakhstan Economic Partnership and Cooperation Agreement (EU-Kazakhstan EPCA), 422 of the EU-Ukraine Association Agreement (EU-Ukraine AA) and 35 and 367(e) of the EU-Moldova Association Agreement.

[66] For instance, Articles 19.12(2)(a) of the EU-New Zealand FTA, 406(2)(b) of the EU-UK TCA and 12.11(4) of the EU-Singapore FTA.

[67] Articles 19.12(3) of the EU-New Zealand FTA, 25.4(c) of the CETA and 148(3) of the EU-Kazakhstan EPCA.

[68] J.E. Viñuales, *Investor Diligence in Investment Arbitration: Sources and Arguments*, in *Review-Foreign Investment Law Journal*, 2017, 32, pp. 352, 355-356.

[69] "Secondary rules" are understood here within a broad "Hartian" frame as those rules that do not regulate conduct (primary rules), but that structure the functioning of the legal system, including the relationships and modes of interaction between different types of rules and between different types of "law". See H.L.A. Hart, *The Concept of Law*,[3] Oxford, 2012, pp. 79-82.

fine the legal value of the "rule referencing"[70] made by PTAs to international CSR standards to be found in non-binding instruments[71]. Consequently, any assessments of this kind require a case-by-case analysis, with particular attention to the language used and the common intention of the parties.

The provision of a treaty – or any other binding instrument –[72] can convert a non-binding instrument into a binding one with respect to the parties to that treaty[73]. Conventional practice, however, does not provide many examples. Article 3(2) of the 1995 WTO Agreement on the Application of Sanitary and Phytosanitary Measures establishes a presumption that sanitary and phytosanitary measures taken by WTO members conform to the Agreement itself and the 1994 General Agreement on Tariffs and Trade if they align with international standards, guidelines, or recommendations set by certain external bodies through non-binding instruments[74]. The WTO Appellate Body has clarified that, formally, this provision does not "transform those standards, guidelines and recommendations into

[70] That is, the "'sourcing' of soft law norms from external institutional fora, that is, exogenously", M.E. Footer, *The (Re)Turn to "Soft Law' in Reconciling the Antinomies in WTO Law*, in *Melbourne Journal of International Law*, 2010, 11, p. 266.

[71] The "internalisation" of international CSR standards into the text of the PTA through reference to internationally recognised and/or party-approved principles and guidelines or specific soft law instruments may play a role in the "contextual" interpretation of the PTA.

[72] See G. Adinolfi, *Soft Law in International Investment Law and Arbitration*, *The Italian Review of International and Comparative Law*, vol. 1, 2021, p. 93.

[73] A. Wawryk, *Regulating Transnational Corporations Through Corporate Codes of Conduc*t, in J.G. Frynas, S. Pegg (eds.), *Transnational Corporations and Human Rights*, Cheltenham/Northampton, 2003, p. 53 p. 56. Non-binding instruments can become hard law also through incorporation by states in their domestic law or reference into binding private agreements, D.L. Shelton, *Soft Law*, in D. Armstrong (ed.), *Routledge Handbook of International Law*, Oxford/New York, 2009, p. 69, p. 74.

[74] These external bodies are the Codex Alimentarius Commission, the International Office of Epizootics, and the Secretariat of the International Plant Protection Convention in collaboration with regional organisations working within the framework of the International Plant Protection Convention, Annex A, Article 3(a)-(c). For matters not covered by the above organisations, appropriate standards are those promulgated by other relevant international organisations open for membership to all members, as identified by the Committee, Article 3(d). See also Article 2(6) of the 1995 WTO Agreement on Technical Barriers to Trade.

binding norms"[75]. However, by setting these international standards effectively as benchmarks against which domestic regulations are to be assessed, Article 3(2) has indeed been interpreted by scholars as *de facto* converting the relevant non-binding instruments into binding ones for WTO members, at least to the extent that the latter must adhere, at a minimum, to these standards if they wish to avoid legal challenges in dispute resolution[76].

However, no EU PTA includes any provision converting non-binding instruments concerning CSR established by international organisations or other external bodies into binding instruments for the subjects to which these instruments are addressed.

Firstly, to the best of the author's knowledge, no EU PTA directly requires companies operating within the parties' territory/jurisdiction to align their conduct with international CSR standards, not even in the form of an obligation of conduct[77], unlike certain International Investment Agreements that impose similar obligations on foreign investors when operating in the host state[78].

Secondly, no PTA requires that the parties *shall make sure* that corporations operating within their territory/jurisdiction *respect* CSR policies aligned with international standards[79]. Indeed, such an obligation would appear incompatible with the voluntary nature of CSR[80]. Instead, the EU PTAs require that the parties "promote"[81],

---

[75] Appellate Body Report, *EC–Measures concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, AB-1997-4 (16 January 1998), para. 165.

[76] M.G. Desta, *GATT/WTO Law and International Standards: An Example of Soft Law Instruments Hardening Up?*, in K. Bjorklund, A. Reinisch (eds.), *International Investment Law and Soft Law*, Cheltenham, Northampton, 2012, p. 148, pp. 152, 187.

[77] This observation is without prejudice to any matters concerning the direct effects of such hypothetical provision within the parties to the PTA.

[78] For instance, Articles 15(1) of the 2019 Brazil-United Arab Emirates Agreement on Cooperation and Facilitation of Investment and 24(2) of the 2016 Morocco-Nigeria Bilateral Investment Treaty.

[79] In contrast with what the IDI suggests, see above.

[80] Some PTAs explicitly state that the adoption of such standards by companies must occur on a voluntary basis, see Articles 12.11(4) of the EU-Singapore FTA and 22.3(2) of the CETA.

[81] For instance, Article 406(2)(b) of the EU-UK TCA.

and/or "encourage"[82], the adoption of international CSR standards by the companies operating within their territory/jurisdiction[83]. The parties may also be required to "facilitate" and "promote" trade in goods that are subject to CSR schemes[84], or to "commit to" cooperate at the international level to engage in awareness rising[85] and to promote good practices in the field of CSR[86].

To be sure, as also emphasised by the panel of experts established under Article 13.15 of the EU-Korea FTA in the *Korea Labour Commitments* case[87], employing a similar hortatory language, centred on terms such as "promote"[88], even when introduced by a modal verb suggesting a lower level of obligation – such as "will" instead of "shall" –, or verbs like "commit to", does not diminish the normative value of these commitments[89]. It rather implies a positive obligation of conduct on the parties, which does not allow for inaction or minimal efforts[90]. This confirms that provisions establishing obligations of "best endeavours" for the parties to the PTA concerning trade and sustainable development, including those regarding the promotion of CSR, cannot be characterised as "soft provisions",

[82] For instance, Article 422 of the EU-Ukraine AA.

[83] The use of the term "jurisdiction", in addition to or instead of "territory", suggests that the promotion of CSR should also encompass the operations of companies conducted beyond the territorial boundaries of the parties, even though it has been noted that the extraterritorial application of CSR standards should be approached with caution, see F. Romanin Jacur, *Corporate Social Responsibility in Recent Bilateral and Regional Free Trade Agreements: An Early Assessment*, in *European Foreign Affairs Review*, 2018, 23, pp. 474-475.

[84] For instance, Articles 293(3) of the EU-Ukraine AA and 13.6(2) of the EU-Korea FTA.

[85] For instance, Article 349 of the EU-Georgia Association Agreement.

[86] For instance, Articles 13.14(d) of the EU-New Zealand FTA, 16.12(e) of the EU-Japan EPA and 12.11(4) of the EU-Singapore FTA.

[87] Report of the Panel of Experts (20 January 2021). For an analysis of the case, see Baroncini, *La strategia dell'Unione Europea per il contenzioso internazionale sul libero scambio*, *Diritto comunitario e degli scambi internazionali*, vol. 61, 2022, pp. 21-28.

[88] *Korea Labour Commitments*, cit., para. 132.

[89] At least in the absence of specific evidence showing the agreement of the parties to convey such a meaning (in accordance with Article 31(4) of the VCLT), *ibidem*, paras 126-127 and 268-269.

[90] *Ibidem*, paras 135 and 272-277.

meaning obligations with such a low normative threshold as to make them, in practice, almost impossible to breach[91].

### 6. *…and practical effects*

Regarding the practical effects of referencing international CSR standards into PTAs, it could be argued that these references increase the likelihood of such standards being implemented[92]. This is because, even though obligations concerning CSR are currently formulated at the level of the parties to the PTA, such references constitute a clear acknowledgment that private economic actors play a fundamental role in promoting sustainable development and will be held accountable for failing to do so. In other words, through the reference made by the PTA, such CSR policies have been "grounded"[93]. Thus, whether or not they feel compelled, corporations might find it strategic to adhere to the international standards endorsed by the parties where they operate[94]. In fact, such practice benefits corporations themselves by promoting the creation of a level playing field and curbing race-to-the-bottom scenarios fuelled by the need to catch up with competitive disadvantage[95]. A recent study has indeed shown that the conclusion of PTAs that include CSR commitments, even if at the parties' level, might result in an increase in the number of companies operating within the territory/jurisdiction of that parties that adopt the relevant international CSR standards[96]. This

---

[91] R.R. Baxter, *International Law in "Her Infinite Variety"*, in *International and Comparative Law Quarterly*, 1980, vol. 29, p. 550.

[92] E. van der Zee, *Incorporating the OECD Guidelines in International Investment Agreements: Turning a Soft Law Obligation into Hard Law?*, *Legal Issues of Economic Integration*, vol. 40, 2013, p. 52.

[93] "Many companies and private regulatory initiatives can no longer use labour, environment and human rights standards as mere window dressing. They are expected to report and provide reliable accounts of policies actually implemented on the ground", J.-C. Graz, *Grounding the Politics of Transnational Private Governance*, *New Political Economy*, 2022, 27, p. 2.

[94] Peels *et al.*, *Corporate*, cit., p. 16.

[95] See also above, fn. 43.

[96] L.A. Dau *et al.*, *Does Global Citizenship Stimulate Corporate Citizenship?*, in *Journal of International Business Policy*, 2022, 5, pp. 328-352.

dynamic enhances the network effect of the directly/indirectly referenced CSR soft law instruments, potentially encouraging companies outside the territory/jurisdiction of the parties to the PTA to subscribe to them and conform to the relevant standards and policies.

In addition, the availability of mechanisms for the submission and assessment of sustainable development-related concerns regarding the implementation or enforcement of PTAs, also under the form of dispute settlement procedures established by the PTA itself[97], contributes to the strengthening of the practical effects of CSR provisions. Recently, for instance, CNV Internationaal, a Dutch non-governmental organisation representing unions from Colombia and Peru, filed a complaint under the EU-Colombia, Peru, and Ecuador TA with the Single Entry Point of the European Commission[98]. The complaint alleged violations by Colombia and Peru of their obligations to promote sustainable development in their trade relations, including the obligation under Article 271(3) to encourage best business practices related to CSR[99]. The complaint led to a diplomatic dialogue between the EU and Peru, resulting in the publication of a list of technical cooperation activities aimed at ensuring respect for labour rights[100].

Similarly, the creation of "civil society fora" by the PTA, facilitating dialogue and engagement between different stakeholders on matters related to trade and sustainable development, may also lead to a more effective implementation of CSR-related commitments[101].

---

[97] For instance, Article 13.15 of the EU-Korea FTA.

[98] Complaint 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 International to Chief Trade Enforcement Officer CTEO (17 May 2022).

[99] *Ibidem*, p. 8. This provision mentions CSR without providing a definition or making specific reference to generally recognised international standards or any specific soft law instrument. On the interpretation of the CSR concept in light of these standards and practices, see section 4 above.

[100] At https://policy.trade.ec.europa.eu/news/eu-and-peru-agree-cooperation-activities-ensure-respect-labour-rights-2024-03-20_en. Discussions with Colombia are ongoing to establish a similar technical cooperation program.

[101] For instance, Article 22.5 of the EU-Canada CETA.

## 7. *Concluding remarks and broader implications of referring to international CSR standards in EU PTAs*

In conclusion, referencing non-binding instruments into (EU) PTAs does not automatically render such instruments binding or make their content obligatory for the parties/subjects addressed, unless accompanied by specific provisions[102]. Indeed, the "double soft references"[103] to CSR characterising EU current trade practice leave little room to argue for the direct creation of binding corporate obligations to comply with international CSR standards through the renvoi operated by the PTA.

At the same time, the repeated references to international CSR standards in EU PTAs elevate the normative status of such standards and help strengthen the network effect of the (directly or indirectly) referenced soft law instruments, also beyond the parties to the PTA[104]. Moreover, such references are not without practical effects, particularly when mechanisms are in place for the submission and assessment of CSR-related concerns regarding the implementation or enforcement of the PTA.

From a broader perspective, referencing international CSR standards in (EU) PTAs represents a step towards limiting the autonomy associated with voluntary standard-setting by corporations[105], especially against the backdrop of the growing power of such companies and their impact, both as potential infringers and promoters, on human and labour rights and the environment[106]. This prac-

---

[102] N. Bueno, A.Y. Vastardis, I.N. Djeuga, *Investor Human Rights and Environmental Obligations: The Need to Redesign Corporate Social Responsibility Clauses*, in *Journal of World Investment & Trade*, 2023, 24, p. 202.

[103] Understood both as the obligation on the parties to the PTA of (only) best endeavours to promote CSR policies, and the still formally voluntary character of CSR, R. Peels *et al.*, *Corporate Social Responsibility in International Trade and Investment Agreements: Implications for States, Business, and Workers*, *ILO Research Paper No. 16*, 2016, p. 11.

[104] Given the EU's soft power and global influence in international trade, other parties could be encouraged to subscribe to the same or other CSR soft law instruments, or even to follow the EU conventional practice by referencing such instruments in their PTAs.

[105] Kocher, *Private*, cit., p. 412.

[106] Romanin Jacur, *Corporate*, cit., p. 472.

tice highlights the progressive shift in the perception of (international) CSR, moving along a "slippery slope" towards redefining its legal nature as an increasingly normative framework grounded in the legitimate expectations of the international community, civil society and economic actors. It is perhaps no coincidence that the EU's strategy of using its trade policy to promote the adoption of international CSR standards at the national level among a diverse group of contracting parties coincided with the revision of its former definition of CSR, removing the express element of voluntariness[107].

[107] Compare COM(2011) 681 final, 25 October 2011, cit., p. 6 with COM(2001) 366 final, 18 July 2001, p. 1.

# PROMOTING SUSTAINABILITY THROUGH DISPUTE SETTLEMENT. THE FIRST PRACTICE IN THE NEW EU TRADE AGREEMENTS

*Elisa Baroncini*

## 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. At the bilateral level, the EU pursues its trade agenda of openness, sustainability and assertiveness[2] through the new generation of trade agreements (TAs) – free trade agreements (FTAs) or preferential trade agreements (PTAs) – furthered by the EU within the "Global Europe: Competing in the World" strategy[3], significantly enhanced and most authoritatively consolidated with the enter into force of the Lisbon Treaty. The new EU

[1] A/RES/70/1, *Transforming our World: the 2030 Agenda for Sustainable Development*, Resolution adopted by the General Assembly on 25 September 2015.

[2] 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.

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

TAs carry out the common commercial policy in alignment with the values of the EU international action codified in Articles 3, para. 5, and 21 of the TEU. They are thus among the most innovative and relevant tools in the field of International Economic Law, where trade and investments are reconceived to be major drivers of sustainability, in line with the UN approach of the 2030 Agenda[4], recently reaffirmed in the Pact for the Future[5].

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), and the scope of these chapters is continually expanding. For instance, since 2019 TSD Chapters have included a provision specifically devoted to trade and climate change, where the Parties reaffirm their commitment to "effectively implement the UNFCCC [6] and the 2015 Paris Agreement [7] […] includ[ing] the obligation to refrain from any action or omission which materially defeats the object and purpose of the Paris Agreement"[8]. The new EU TAs

[4] See paras. 67-68 of the UN 2030 Agenda.

[5] 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 para. 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*" (para. 10 of the Pact for the Future, emphasis added).

[6] *United Nations Framework Convention on Climate Change*, New York, 9 May 1992, *United Nations Treaty Series*, Vol. 1771, p. 107.

[7] UNFCCC, Decision 1/CP.21 (2016), Adoption of the Paris Agreement (FCCC/CP/2015/10/Add.1).

[8] 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,

also generate additional sustainability sections, such as those on trade and gender equality and women's economic empowerment[9]. 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. Private parties are also significantly empowered in the new EU PTAs through the increasing references to corporate social responsibility found in the preambles and specific provisions of those treaty instruments[10].

Recently, the EU has activated the bilateral dispute settlement mechanisms (DSMs) of the new TAs. The reports issued so far[11] 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

---

and the Republic of Kenya, member of the East African Community, of the other part, *OJEU* L, 2024/1648, 1.7.2024).

[9] Cf. e.g. Article 19.4 of the EU-New Zealand FTA (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 (Interim Agreement on Trade between the European Union and the Republic of Chile, *OJEU* L, 2024/2953, 20.12.2024).

[10] See e.g. the Preamble of the EU-Canada Comprehensive Economic and Trade Agreement (CETA) (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 (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).

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

Free Trade Agreement[12]. 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.

## 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, while the models of the new EU TAs are significantly more structured. The recent DSMs vary depending on the type of obligations they address. If the disputes involve trade liberalization rules, the dispute settlement mechanism tends to be more assertive while constantly looking for a diplomatic solution to the case. When dealing with complaints related to the TSD chapters, most trade agreements advance an inclusive and informed process. Such a promotional approach also contemplates an adjudicatory phase, nevertheless privileging dialogue and cooperation for the capacity building of the defending party on environmental and social standards.

The DSM handling grievances concerning free trade rules for goods and services is similar to the WTO proceedings. Hence, the disputants have first to enter into good faith consultations, and if those fail, the complaining party may ask for the establishment of an arbitration panel of independent experts. The adjudicators have to interpret the TAs provisions "in accordance with customary rules of interpretation of public international law, including those codified in the Vienna Convention on the Law of Treaties"[13]; and the final panel report has to outline "findings of fact, the applicability of the relevant provisions and the basic rationale for any

[12] 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.

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

findings and recommendations"[14]. 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"[15]. It is also important to emphasize that WTO rules take precedence over the EU TAs' obligations. The bilateral trade agreements, in fact, state that "nothing in [the TAs] require […] [the Parties] to act in a manner inconsistent with their obligations under the WTO Agreement"[16]. 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]"[17]. 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"[18]. 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.

There are three primary differences between the EU TAs dispute settlement rules and the multilateral trading system, designed to en-

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

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

[16] 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.

[17] 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.

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

hance the efficacy and efficiency of the bilateral mechanisms: there is no appellate stage; panel reports are immediately binding, being absent a political-institutional route, similar to the approval by the WTO Dispute Settlement Body, for their formal adoption; and the possibility of submitting *amicus curiae* briefs to the arbitration panel is explicitly allowed. 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"[19]. 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"[20]. 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"[21].

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"[22]. 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"[23]. 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,

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

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

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

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

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

*including* the communications of the Domestic Advisory Groups"[24], 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"[25]. 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]"[26]. Likewise, the intergovernmental body has to "endeavour to agree on a resolution of the matter"[27], 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[28]. 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[29]. 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"[30]. To achieve such coherence, both the Parties and the panel "can" or "should seek information and advice" from those organisations or bodies[31]. In the adjudicatory phase, information and ad-

[24] Article 13.14, para. 1 of the EU-Korea FTA.
[25] Article 13.14, para. 2 of the EU-Korea FTA.
[26] Article 13.14, para. 3 of the EU-Korea FTA.
[27] *Ibid*.
[28] See Article 13.14, para. 4 of the EU-Korea FTA.
[29] See e.g. Article 13.15 of the EU-Korea FTA.
[30] Article 13.14, para. 2 of the EU-Korea FTA.
[31] See Articles 13.14, para. 2, and 13.15, para. 1 of the EU-Korea FTA.

vice 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"[32].

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[33]. The very recent EU-New Zealand FTA thus extends the possibility to apply trade sanctions if a contracting party does not adhere to a panel report finding it has a) seriously infringed the ILO fundamental principles and rights at work, or b) failed "to comply with obligations that materially defeat the object and purpose of the Paris Agreement on Climate Change"[34]. Of course, sanctioning a country that struggles to respect core values may predictably not improve the respect of those values. Therefore, constant dialogue in common bodies and with all the interested actors should be maintained in the daily management of the EU TAs, making all the required efforts to avoid complaints, or, when engaged in a dispute, observe a constructive approach to achieve a fair solution. The option to suspend concessions in TSD complaints should be considered as an *extrema ratio* looming at the horizon.

---

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

[33] COM(2022) 409, *The Power of Trade Partnerships: Together for Green and Just Economic Growth*, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Brussels, 22.6.2022, pp. 11-12.

[34] COM(2022) 409, 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'"[35]. 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"[36].

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 extending the definition of worker to self-employed, dismissed and unemployed persons; recognizing trade unions also having independent or not

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

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

working people among their members; and allowing 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"[37], the Panel considered that the Korean practice was lengthy, its efforts were "less than optimal", and that there was "still much to be done"[38]. Nevertheless, the group of experts overall concluded that Korea made "tangible, though slow, efforts"[39], 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)[40] because "it was not related to a product that 'is being imported' (given the time lapse between the determination, provisional measure, and definitive measure); and […] it exceeded 'what is necessary to remedy or prevent the serious injury or disturbances'"[41].

## 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,

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

[38] *Korea - Labour Commitments* Panel Report, para. 291.

[39] *Korea - Labour Commitments* Panel Report, para. 287.

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

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

promoting the EU TAs' enforcement to give credibility to the new ambitious tools in the context of constant cooperation and involvement of stakeholders and civil society in their implementation. In the present section of the chapter, attention will be devoted to the contributions given within the panel proceedings to the "sustainability revolution"[42] of the new EU TAs.

### 4.1. Amicus curiae *and domestic advisory groups*

As already reported, the importance of the contribution of stakeholders, more generally of any interested subject, has been expressly highlighted and acknowledged in the text of the new EU TAs. The practice of the three panels established thus far is aligned with this clear institutional policy choice on the participation of civil society through *amicus curiae* submissions in the proceedings[43]. 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"[44] 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[45], and presenting the *amici*, their interest in participating to the complaint, and their source of financing.

---

[42] This expression is borrowed from Claussen, Vidigal (eds.), *The Sustainability Revolution in International Trade Agreements*, Oxford, 2024.

[43] 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.

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

[45] 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*, at p. 2.

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"[46]. Instead, in *Korea – Labour Commitments*, six institutions and 22 individuals presented *amicus curiae* briefs[47]. Even if the Group of experts did not summarize the content of each submission, they considered them with "full regard"[48] and underlined their relevance, in particular of the *amicus* briefs filed by trade unions, to assess the scope and application of some parts of the contested Korean legislation[49]. 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[50]. 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

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

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

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

[49] 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'".

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

evidence brought by the disputants as "competing"[51], 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"[52], the Panel urged both disputants to clarify this particular EU claim following up on the obligations they have under Article 13.12 of the EU-Korea FTA to designate domestic "contact point[s] with the other Party for the purpose of implementing this Chapter" and establish the DAGs "with the task of advising on the implementation" of TSD provisions. The Group of Experts thus recommended that the question on the Korean discipline for setting up trade unions "be referred to [the] consultative bodies established under Article 13.12 of the EU-Korea FTA for *continued consultations*"[53]. 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 keep on 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 con-

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

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

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

nection with trade between the EU and Korea […]'"[54]. 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: the duty to respect the fundamental rights and principles at work recalled by the 1998 ILO Declaration and its Follow-up, along with the commitment to ratify the fundamental ILO Conventions extend beyond any potential trade impact on the EU-Korea relationship. The Panel considered that Article 13.4.3 "falls within the '(e)xcept as otherwise provided' clause of Article 13.2.1"[55]. 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"[56]. 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 of those agreements, thus promoting a new evolving concept of trade:

> […] the Parties have drafted the Agreement in such a way as to create a strong connection between the promotion and attainment of fundamental labour principles and rights and trade. The various international declarations and statements referred to in the EU-Korea FTA […] have been referenced by the Parties to show that decent work is at the heart of their aspirations for trade and sustainable development, with the "floor" of labour rights an integral component of the system they commit to maintaining and developing. In the Panel's view, *national measures implementing such rights are therefore inherently related to trade as it is conceived in the EU-Korea FTA*[57].

---

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

[55] *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).

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

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

Korea also contended that the TSD Chapter was not legally binding[58], the 1998 ILO Declaration recalled in Article 13.4.3 "may not, as a matter of law, impose any binding obligations on ILO members"[59], and "the term 'will' in the last sentence of Article 13.4.3 […] is 'more akin to a declaration of intent than an obligation'"[60]. 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[61]. 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[62] generates "an obligation of 'best endeavours'", which means that "the standard against which the Parties are to be measured is higher than undertaking merely minimal steps or none at all, and lower than a requirement to explore and mobilise all measures available at all times"[63].

### 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 now defining the new EU TAs. This aligns with the findings of the Group of Experts in *Korea – Labour Commitments*, which identified the domestic sustain-

[58] See *Korea - Labour Commitments* Panel Report, para. 49.
[59] *Korea - Labour Commitments* Panel Report, para. 120.
[60] *Korea - Labour Commitments* Panel Report, para. 262.
[61] *Korea - Labour Commitments* Panel Report, para. 107.
[62] See *supra* the text of Article 13.4, para. 3 of the EU-Korea FTA reported in footnote 58.
[63] *Korea - Labour Commitments* Panel Report, para. 277.

ability measures related to environmental and social standards "inherently related to trade"[64].

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'"[65]. The adjudicators also remarked that EU "agreed […] that the preservation from extinction of any wood species is a legitimate interest of high importance"[66]. Furthermore, the Arbitration Panel qualified the TSD Chapter of the EU-Ukraine AA, i.e. Chapter 13, as "relevant context"[67] to interpret the provisions of Title IV of the AA on trade and trade-related matters, thus concluding that

> […] *the requirement to interpret Article 36 of the AA harmoniously with the provisions of Chapter 13* comports with admitting that a highly trade restrictive measure such as an export ban may still be found necessary within the meaning of Article XX(b) of the GATT 1994, as incorporated into Article 36 of the AA. The Arbitration Panel considers that *the provisions of Chapter 13* (*in casu*, Article 290 on the right to regulate and Article 294 on trade in forest products) *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

[64] *Korea - Labour Commitments* Panel Report, para. 95.
[65] *Ukraine – Wood Export Bans* Panel Report, para. 308.
[66] *Ibid.*
[67] *Ukraine – Wood Export Bans* Panel Report, para. 253.

> 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[68].

Likewise, in *SACU – Poultry Safeguards*, which was about the compatibility of some safeguard measures with the EU-SADC EPA, the Arbitration Panel clarified at the beginning of its findings that it "ha[d] taken note of the *objectives* of [the Economic Partnership Agreement] […] *in terms of sustainable development*", further spelling out that those purposes "ha[d] informed its analysis" of the complaint[69]. 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[70].

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"[71].

The highlighted sustainability approach in the two reports discussed above – formally developed under the standard dispute set-

---

[68] *Ukraine – Wood Export Bans* Panel Report, para. 332, emphasis added.
[69] See *SACU – Poultry Safeguards* Panel Report, para. 89, emphasis added.
[70] *SACU – Poultry Safeguards* Panel Report, para. 167, emphasis added.
[71] *SACU – Poultry Safeguards* Panel Report, para. 324, emphasis added.

tlement mechanism for the trade pillar of the new EU TAs- anticipated, was encouraged by, or perhaps inspired the debate which led to the 2022 Commission's communication "to further enhance the contribution of trade agreements to sustainable development"[72]. This policy document advocates for the "mainstreaming [of] TSD objectives throughout trade agreements"[73], 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. *Conclusions*

Our brief analysis reveals the very complex and challenging structure set up by the EU to reconceive trade agreements as a tool to enhance fairness and equilibrium, environmental protection and social progress while pursuing trade liberalization. The EU approach is in line with the sustainability nature also of the WTO[74], and it has

[72] COM(2022) 409, p. 1.

[73] COM(2022) 409, p. 7.

[74] 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).

been mirrored in the initial case law of the new EU TAs as the panels have correctly interpreted both trade and TSD rules.

The European Union places great importance on the support of civil society in promoting, monitoring, and enforcing trade agreements. One significant tool for this purpose is the Single Entry Point (SEP)[75]. According to its Operational 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[76]. Together with the traditional institutional actors in the governance of the global economy, stakeholders and civil society 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[77].

The wise strategy chosen by the EU in the first case law of the new EU TAs needs to be preserved as it contributed to achieving fair panel reports. Together with private parties, the EU should continue to promote sustainability in the global economy with a constructive 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.

---

[75] 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.

[76] 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.

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

# MAINSTREAMING SOCIAL SUSTAINABLE DEVELOPMENT OBJECTIVES IN EU FREE TRADE AGREEMENTS. POSSIBLE LEGAL IMPLEMENTATIONS IN THE CASE OF LABOUR STANDARDS

*Ilaria Colombo*

## 1. *Introduction*

In June 2022 the European Commission (hereafter the Commission) published its latest Communication The power of trade partnerships: together for green and just economic growth, also referred to as the New Action Plan[1]. The New Action Plan outlines the European Union's strategy for the upcoming years to enhance the role of the EU Free Trade Agreements (EU FTAs) in advancing sustainable development. It sets out several policy priorities and key action points to address, aimed at making the EU FTAs capable of champion sustainable trade as a whole[2]. Accordingly, the Communication proposes to strengthen the effectiveness of Trade and Sustainable Development chapters (TSDCs) through improved cooperation with trade partners and civil society[3], the introduction of country-specific sustainability commitments[4] and an enhanced monitoring stage[5]

[1] EU Commission, *The Power of Trade Partnerships: Together for Green and Just Economic Growth*, COM(2022)409 Final, June 2022. EU Commission, press release, *Commission unveils new approach to trade agreements to promote green and just growth*, June 2022, https://ec.europa.eu/commission/presscorner/detail/en/ip_22_3921 (last access 7 January 2024).

[2] *Ibid.*, p. 1.

[3] *Ibid.*, p. 5.

[4] *Ibid.*, p. 6.

[5] *Ibid.*, p. 8.

coupled with trade sanctions in case of serious violations of core TSDCs commitments[6]. In addition to that, the Commission noteworthy advances as policy priority the need to proactively mainstream sustainability considerations in different chapters of the EU FTAs beyond the TSDCs (hereafter policy priority)[7]. This paper argues the policy priority introduces a potential paradigm shift in the interplay among trade, economic growth, and sustainable development in the EU FTAs, signalling the growing recognition and integration of sustainable development within the trade governance realm.

At present, the policy priority has not yet been implemented in the EU FTAs and several questions remain open regarding its implementation. This paper seeks to operationalize the policy priority by selecting labour standards as sustainable development objective to promote, enhance and protect. This choice, as detailed further in this work, is grounded in the observation that the New Action Plan shows an asymmetry in favor of the environmental sustainability dimension, contrasting the core aim of the New Action Plan to support simultaneously *green* and *just* economic growth. The attempt to mainstream labour standards is then carried out in two EU FTAs chapters beyond the TSDCs, specifically the Digital Trade Chapters and the Public Procurement Chapters. Both chapters address valuable sectors that, up to now, have been relatively underregulated. This allows room for exploring prospects and limits in designing them in a manner that is more conducive to the advancement of labour standards.

To comprehend the innovative scope of the policy priority under scrutiny, the sections of this article are organized as follows. Section 2 provides an overview of selected Commission Communication related to the EU Trade policy and sustainability. The focus here is on the evolving sub-roles that have emerged in this context for EU FTAs. Section 3 delineates the policy priority of mainstreaming sustainability, as outlined in the New Action Plan. This section also highlights the imbalance favoring the environmental dimension over the social one. Section 4 operationalizes the policy priority in Digital Trade Chapters and Public Procurement Chapters. This sec-

[6] *Ibid.*, pp. 11-12.
[7] *Ibid.*, p. 7.

tion suggests the untapped potential in both chapters to promote, enhance and protect labour standards. However, changes both in terms of commitment and content would be required. Section 5 provides some concluding remarks by emphasizing the positive impact the policy priority implementation would bring on several levels.

## 2. *Sub-roles of EU FTAs through Commission communications on trade policy and sustainability*

The link between trade and labour is not new neither from a legal[8] nor from an economic perspective[9]. Despite being inherently interconnected in practice, the failure to include a social clause[10] in the General Agreement on Tariffs and Trade (GATT) in 1947 and then in 1994 has prevented the WTO system from addressing trade-related labour concerns[11]. Against this backdrop, the EU has

[8] United Nation Interim Commission For The International Trade Organization, *Havana Charter*, ch. II, 1948. S. Charnovitz, *The Influence of International Labour Standards on the World Trading Regime* in *International Labour Review*, International Labour Organization, 1987, p. 565.

[9] A.O. Sykes, *The Law and Economics of International Trade Agreements*, Edward Elgar Publishing, 2023, pp. 20 ff. A. Blackett, *White Paper on Trade and Labour Standards: Sustaining Social Regionalism through Multilateralism*, 2023, p. 4.

[10] G. Marceau, *Trade and Labour*, in D.L. Bethlehem (ed.), *The Oxford handbook of international trade law*, Oxford University Press, 2009, pp. 541 ff. For an overview of the arguments and States pro and against the intriduction of a social clause in the GATT see Internationale Arbeitsorganisation, *Handbook on Assessment of Labour Provisions in Trade and Investment Arrangements*, International Labour Organization, 2017, pp. 19 ff.; R. Wolfrum, P. Stoll, H. Hestermeyer, *Article XX. General Exceptions [Introduction]*, in *WTO - Trade in Goods*, Brill Nijhoff, 2009.

[11] WTO Ministerial Conference, *Singapore Ministerial Declaration*, WT/MIN (96)/DEC 1996. The Declaration reads: "We renew our commitment to the observance of internationally recognized core labour standards. The International Labour Organization (ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them. We believe that economic growth and development fostered by increased trade and further trade liberalization contribute to the promotion of these standards. We reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low wage developing countries, must in no way be put into question. In this regard, we note that the WTO and ILO Secretariats will continue their existing collaboration", para. 4.

a long history of including social clause in its FTAs and Generalized Systems of Preferences[12]. Since the EU-Korea FTA, all its FTAs have been containing a standard TSDC, including both labour and environmental provisions. That sustainable development is an objective of the EU Trade Policy has been confirmed by the European Court of Justice (ECJ) in Opinion 2/15[13]. The Court built upon the fact that the Treaty of Lisbon requires the EU to conform to the principles and objectives of the EU external actions[14] as defined in Article 21 TEU[15]. It follows that the EU is committed to promote the respect for human dignity, favor sustainable development in developing countries and contribute to preserve and improve the environment[16]. On the social dimension of sustainable development, the ECJ also highlighted that in defining and implementing its policies and activities the EU shall consider high level of employment and guarantee adequate social protection[17] and must contribute to free and fair trade[18]. On these legal premises, the Commission has delivered several Communications with the view to set the trajectory for the EU Trade Policy to include sustainable development in its action.

---

[12] B. Cooreman, G. Van Calster, *Trade and Sustainable Development Post-Lisbon*, in M. Hahn, G. Van Der Loo (ed.), *Law and Practice of the Common Commercial Policy, The First 10 Years after the Treaty of Lisbon*, Brill Nijhoff, 2021, p. 190.

[13] Court of Justice of The European Union, *Opinion 2/15*, 16 May 2017.

[14] Article 207(1) TFUE reads: "[…] The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action". *Opinion 2/15*, para. 142. M. Klamert, J. Tomkin, *The EU Treaties and the Charter of Fundamental Rights: A Commentary*, Oxford University Press, 2019, pp. 1590 ff.

[15] For a different opinion see Advocate General Sharpston Opinion, paragraph 495, in M. Cremona, *Shaping EU Trade Policy Post-Lisbon: Opinion 2/15 of 16 May 2017*, in *European Constitutional Law Review*, 2018, 14, pp. 242 ff.

[16] Respectively as set out in Articles 21(1), 21(2)(d), 21(2)(f) TEU.

[17] For an extensive analysis on the legal value of Article 9 TEU as horizontal provision see E. Psychogiopoulou, *The Horizontal Clauses of Arts 8-13 TFEU through the Lens of the Court of Justice*, in *European Papers - A Journal on Law and Integration*, 2022, 7. M. Klamert, J. Tomkin, *The EU Treaties and the Charter of Fundamental Rights: A Commentary*, Oxford University Press, 2019, pp. 377 ff.

[18] Article 3(5) TEU. *Opinion 2/15*, para 146; C. Beaucillon, *Opinion 2/15: Sustainable Is the New Trade. Rethinking Coherence for the New Common Commercial Policy*, *European Papers - A Journal on Law and Integration*, 2017, 2, pp. 823 ff.

The Communications under scrutiny in this paper reveal that the call to comprehensively include sustainable development considerations in EU FTAs was advocated closer in time to the Lisbon Treaty, but somewhat lost momentum subsequently. In fact, the Decent work for all Communication of 2006 proposed a multi-level strategy for the EU to foster the International Labour Organization (ILO) decent work agenda, combining economic competitiveness with social justice[19]. With specific regard to trade, the Commission expressed its interest in "developing methodologies for measuring how decent work [was] affected by trade liberalization"[20] and in taking into account social sustainability concerns through the recommendations of the Sustainable Impact Assessments (SIA) in negotiating trade agreements[21]. Moreover, this Communication made very clear that economic growth did not automatically entail job creation and improvement of labour standards, but decent work called for "consistent and global strategy [and required] patterns of development be modified"[22]. Nonetheless, when in 2010 the EU adopted the Trade, Growth and World Affairs strategy, although emphasizing the importance of sustainable development and labour standards in trade policy, the EU's approach moved towards the departure on the one hand – at the EU and Member States level[23] – the task of addressing the negative externalities produced by the trade liberalization on labour, while the EU Trade Policy should have primarily focused on promoting sustainable development and international la-

[19] Eu Commission, *Communication Promoting Decent Work for All*, COM (2006)249 Final, pp. 2-3.

[20] *Ibid.*, p. 5.

[21] *Ibid.*, p. 8.

[22] *Ibid.*, p. 3.

[23] An example is the European Globalization Adjustment Fund for Displaced workers (EGF). The EGF was created in 2007 by the EU to co-fund with EU Member States measures aim at helping displaced workers due to globalization. In 2009 it was enlarged to redundancies cause by the economic and financial crisis and recently extended to global economic shock and economic transitions. See Regulation (EU) 2021/691 of the European Parliament and of the Council of 28 April 2021 on the European Globalisation Adjustment Fund for Displaced Workers (EGF) and repealing Regulation (EU) No 1309/2013. For an evaluation of the EGF after 10 years, G. Claeys, A. Sapir, *The European Globalization Adjustment Fund: Easing the Pain from Trade?*, Bruegel, 2018.

bour standards with trade partners[24,25]. Although in the Trade for all communication in 2015 the Commission stressed the commitment to take into account potential social consequences when it came to negotiate the sectors to liberalize, transition periods or tariff quotas with trade partners[26] and more generally to consider sustainable development in "all relevant areas of FTAs"[27], the focus remained on the promotional role of the EU Trade Policy coupled with its defensive ones. The Communication expressed the crucial role of the EU trade policy in promoting and defending the European values[28], such as high social and environmental standards and respect for human rights[29], and made clear that the inclusion of TSDCs in the EU FTAs was a tool also to promote its value-based agenda, besides maximising the potential of trade to decent work and environmental protection[30].

This overview identifies a number of sub-roles assigned to EU Trade Policy over time. On the one hand, emphasis was placed on EU FTAs as a means for the EU to promote labour and environmental standards that are functional to the sustainable development of trade partners. On the other hand, however, the role of EU trade policy in

---

[24] EU Commission, *Communication Trade, Growth and World Affairs* COM (2010)612 Final, pp. 4-5, 8-10.

[25] Coherently, since the conclusion of the EU-Korea FTA in 2009, the EU has systematically introduced a standard set of labour provisions, together with environmental ones, into the Trade and Sustainable development chapters (TSDCs) in all the so-called New Generation of EU FTAs. With only few variations within the FTAs, TSDCs include commitments to respect International Labour Organization (ILO) fundamental principles of rights at work as set in the ILO Declaration of Fundamental Principles and Rights at work of 1998 and to make sustained efforts to ratify missing fundamental ILO Conventions. See EU-Korea FTA, 2011, ch. 13, EU-Canada Comprehensive Economic and Trade Agreement, 2017, ch. 22, EU-Singapore FTA, 2019, ch. 12, EU-Vietnam, 2020, ch.13, EU-UK Cooperation Agreement, 2021, ch. 8. J. Harrison M. Barbu, L. Campling, F.C. Ebert, *Labour Standards Provisions in EU Free Trade Agreements: Reflections on the European Commission's Reform Agenda*, in *World Trade Review*, 2019, 18, p. 635.

[26] *Communication Trade, Growth and World Affairs*, p. 11.

[27] *Ibid.*, p. 17. Unfortunately, the Communication did not offer any additional details. Nevertheless, it does indicate that a similar concept to mainstreaming sustainability was already present at that time, although only theoretically.

[28] *Ibid.*, p. 3.

[29] *Ibid.*, p. 25.

[30] *Ibid.*, p. 17.

defending European values and interests, was also prominent[31]. Indirectly then, the EU FTAs, and in particular the TSDCs, was seen as level the playing field tool, so to promote trade that is fair not only ethically but also economically[32]. However, what was lacking in this context was an active operational role for EU FTAs in fostering green and just trade autonomously, without primarily outsourcing the task of enhancing and protecting labour standards or addressing the negative externalities on the environment to other EU and Member States policies. The paper suggests instead that the policy priority introduced in the New Action Plan gears in this direction.

## 3. *The New Action Plan, mainstreaming sustainability, and labour standards*

As mentioned in the introduction[33], in June 2022 the Commission has published the New Action Plan[34] with the view to strengthen the ability of FTAs as a whole – and not just through their TSDCs – to champion sustainable trade[35]. Overall, the Communication's objec-

[31] *Labour Standards Provisions in EU Free Trade Agreements*, p. 12.

[32] *Trade and Sustainable Development Post-Lisbon*, p. 188. Article 3(5) TUE.

[33] See *supra* n. 1.

[34] *Communication The Power of Trade Partnerships: Together for Green and Just Economic Growth*, p. 1.

[35] In presenting this latest communication, the EU has taken into account the feedback gathered through a public consultation launched in 2021. This consultation was open to stakeholders and civil society, expressing concerns regarding the effectiveness of the EU TSDCs in bringing about substantial changes in sustainability, both within the EU and in third countries. See further in *Non-Paper from the Netherlands and France on Trade, Social Economic Effects and Sustainable Development*, 2020, https://www.tresor.economie.gouv.fr/Articles/73ce0c5c-11ab-402d-95b1-5dbb8759d699/files/6b6ff3bf-e8fb-4de2-94f8-922eddd81d08 (last access 7 January 2024). *Labour Standards Provisions in EU Free Trade Agreements*. M. Bronckers, G. Gruni, *Taking the Enforcement of Labour Standards in the EU's Free Trade Agreements Seriously*, in *Common Market Law Review*, 2019. M. Bronckers, G. Gruni, *Retooling the Sustainability Standards in EU Free Trade Agreements*, in *Journal of International Economic Law*, 2021, 24. S. Villani, *I capitoli in materia di sviluppo sostenibile negli accordi commerciali dell'Unione Europea: prove di rilevanza sistemica*, in *Rivista del commercio internazionale*, 2022, 3, p. 707; J.B. Velut, D. Baeza-Breinbauer, M. De Bruijne, E. Garnizova, M. Jones, K. Kolben, L. Oules, V. Rouas, F. Tigere Pittet, T. Zamparutti, *Comparative Analysis of Trade and*

tives aim to ensure that EU FTAs contribute to foster sustainability and boost green and just economic growth in full adherence with the Union's values and priorities and in concert with other relevant EU policy instruments, including the European Green Deal[36]. The promotional and defensive role of the EU Trade Policy do not cease, but the proposed policy priority of proactively mainstream sustainability in different parts of the FTAs[37] opens the door to the EU FTAs to become truly operational. According to the policy priority, without diminishing the right to regulate provisions provided in several FTAs chapters, sustainability considerations should be actively integrated[38]. Notably, with regard to the environmental side, the Commission offers specific key actions to undertake. It indicates to prioritize the market access of environmental goods and services needed for the green transitions, such as raw materials and energy goods, through the elimination of non-tariff barriers and the promotion of international standards on resource efficiency and renewable energy sources[39].

Regrettably, it does not offer the same treatment to the social dimension of sustainable development. The Commission simply encourages using non-discriminatory sustainability considerations in PPCs and commits to expand the scope of SIAs in order to both detect which provisions impact more on sustainability issues and where the FTAs are amenable to undergo a change to pursue sustainability objectives[40]. It is argued that this policy asymmetry is to be challenged, as it is contrary to the very essence of the New Action plan, which aims to foster just and green economic growth, and to what the EU Treaties provide for, in that there is no hierarchical relationship between social and environmental objectives[41]. This is

*Sustainable Development Provisions in Free Trade Agreements*, London School of Economics, 2022. *Open Public Consultation on the Trade and Sustainable Development (TSD) Review. Summary Report*, London School of Economics, 2021.

[36] *Communication The Power of Trade Partnerships: Together for Green and Just Economic Growth*, p. 1.

[37] *Ibid.*, p. 7.

[38] *Ibidem.*

[39] *Ibidem.*

[40] *Ibidem.*

[41] F. Costamagna, *Contrasto al cambiamento climatico e giustizia sociale nell'ordinamento dell'Unione europea*, Osservatorio Costituzionale, Associazione Italiana dei Costituzionalisti, 2023, 6, pp. 26-27.

not only critical for the protection and enhancement of social sustainability objectives *per se*, but since environmental and social concerns are intertwined[42], there is the ever-growing need to address both together in order to achieve results. In the attempt to guarantee due relevance to the social dimension of sustainable development, the paper tries to operationalize the policy priority selecting labour standards as a tool to achieve social sustainability[43].

In the following section labour standards mean provisions which address, directly or indirectly, workers' rights and working conditions as freedom of association, right to collective bargaining, health, and safety in the workplace as well as prohibition of discrimination, abolition of child labour and forced labour but also the prevention of job displacement effects. These standards aim at guarantee for both men and women jobs in conditions of freedom, equity, security, and human dignity as the notion of Decent Work by the ILO prescribes[44], and in line with the EU's objective to promote decent work worldwide also through the EU Trade Policy[45].

---

[42] See for instance in Eu Commission Directorate General For Employment, Social Affairs And Inclusion, *Employment and Social Developments in Europe 2019, Sustainable Growth for All: Choices for the Future of Social Europe*, EU Publications Office, 2018, pp. 80 ff. S. Dasgupta, N. Van Maanen, S. Gosling, F. Piontek, C. Otto, C. Schleussner, *Effects of Climate Change on Combined Labour Productivity and Supply: An Empirical, Multi-Model Study*, The Lancet Planetary Health, 2021, 5, p. 455; E. Pataut, S. Robin-Olivier, L. Vasseur, *White Paper the Future of Labour Law*, International Law Association, pp. 60 ff. International Labour Office, *Sustainable Development, Decent Work and Green Jobs: Fifth Item on the Agenda*, 2013, pp. 16 ff. TSDCs reads "sustainable development encompasses economic development, social development and environmental protection, all three being interdependent and mutually reinforcing". See for instance EU-New Zealand FTA (signed July 2023), Article 19.1(2).

[43] The notion of social sustainability is relatively new, and it does not have a clear-cut definition either at International or at European Level. Its presence in the policy and legal space has been emerging since the adoption on the UN Agenda 2030. See further in T. Novitz, *Social Sustainability, Labour and Trade: Forging Connections*, in M. Pieraccini, T. Novitz (eds.), *Legal Perspectives on Sustainability*, Bristol University Press, 2020, p. 166.

[44] International Labour Organization, *Report of the World Commission on the Social Dimension of Globalization, A Fair Globalization, Creating Opportunities for All*, International Labour Organization, 2004.

[45] EU Commission, *Communication Decent Work Worldwide for a Global Just Transition And a Sustainable Recovery* COM(2022)66 Final, 2022, p. 6.

## 4. *Operationalize the policy priority*

While their specific focuses differ, both Digital Trade chapters (DTCs) and Public Procurement chapters (PPCs) deal with contemporary aspects of global trade in increasing expansion. In the last two decades both areas have been lightly regulated at the multilateral level and so FTAs have become the relevant space to develop new provisions. In addition to that, the rules developed so far has been driven mainly by trade liberalization objectives, with the view to lower trade barriers, grant reciprocal market access and avoid discriminatory practices. While considerations regarding sustainability have only recently started to emerge, these chapters within the EU FTAs leave ample room to envision legal amendments aimed at mainstreaming social sustainability objectives. Following a brief exposition of the content for each of these chapters, the section will elucidate the challenges and opportunities in promoting, enhancing, and protecting labour standards.

### 4.1. *Digital trade chapters*

Despite the increasingly importance in today's global economy[46], digital trade[47] has been at the center of prolonged negotiation at the WTO in the pursue of a specialized agreement[48]. In this

[46] M. Burri, *The Impact of Digitalization on Global Trade Law*, in *German Law Journal*, 2023, 24, p. 551; The International Monetary Fund, The Organisation for Economic Co-Operation and Development, The United Nations, The World Bank and The World Trade Organization, *Digital Trade for Development*, WTO Publication, pp. 10 ff.

[47] In this paper digital trade means "trade that is digitally ordered and/or digitally delivered" as recently defined in The International Monetary Fund, The Organisation for Economic Co-Operation and Development, The United Nations, and The World Trade Organization, *Handbook on Measuring Digital Trade, Second Edition*, 2023, p. 5.

[48] Albeit it is generally recognized that GATT and GATS agreements can be applied to digital trade, the WTO initiated a work program on electronic commerce already in 1998. This effort has recently been revitalized through the Joint Statement Initiative on trade-related aspects of e-commerce, supported by a group of now 90 WTO Members. The ongoing negotiations are expected to conclude by early 2024. See WTO news, *Joint initiative on e-commerce*, 30 November 2023, https://www.wto.org/english/news_e/news23_e/jsec_30nov23_e.htm (last access 7 January 2024).

*vacuum*, countries have been using bilateral agreements to regulate digital trade issues, either with DTCs included in FTAs or more recently with the conclusion of FTA-related or standalone Digital Economic Agreements (DEAs)[49]. Compared to other global actors, the EU has engaged relatively later in defining provisions on digital trade beyond e-commerce[50]. Yet, from the outset, the EU has shown a distinctive focus on data protection and privacy in its DTCs, in line with the internal EU regulatory framework and policies on the matter[51]. The most recent FTAs concluded by the EU include both "first generation" and "second generation" of digital provisions[52]. The former pertain rules on e-commerce and related aspects to lower tariff and non-tariff barrier. The latter include rules on cross-border data flow, data protection and data localization requirements, with the aim to set ambitious standards in terms of secure transfer of data and to promote best practice in consumer and data protection[53].

As yet, EU DTCs do not contain "third generation" of digital provisions, addressing innovative topics such as, *inter alia*, Artificial Intelligence (AI)[54,55]. Although the EU has already expressed

---

[49] This section deals exclusively with DCTs in the EU FTAs, while drawing from foreign experiences in limited cases. For an overview of the most important and innovative DTCs and DEAs see further in *The Impact of Digitalization on Global Trade Law*, pp. 563 ff.

[50] *The Impact of Digitalization on Global Trade Law*, p. 568. E. Fahey, *The EU as a digital trade actor*, in D. Collins, M. Geist (eds.), *Research Handbook on Digital Trade*, Edward Elgar Publishing, 2023, p. 121.

[51] EU Commission, *Communication A European Strategy for Data* COM (2020)66 Final. Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 (General Data Protection Regulation, GDPR). Why the adoption of the GDPR is important for the EU digital trade policy on several levels, see in P. Sauve, M. Soprana, *The Evolution of the EU Digital Trade Policy*, in *The First 10 Years after the Treaty of Lisbon*, pp. 298 ff.

[52] This categorization is taken from R. Polanco, *Three generations of digital trade provisions in preferential trade agreements*, in *Research Handbook on Digital Trade*, p. 50.

[53] See EU-New Zealand FTA (signed July 2023), ch. 12, EU-Singapore FTA 2019, ch. 8, EU-Australia FTA (final text under negotiation) 2022, chapter *Digital Trade*.

[54] *Ibidem.*

[55] Singapore is a pioneer in the field of digital trade and in the introduction of specific AI-related provision in its trade agreement. See for instance Australia-Singapore Digital Economy Agreement 2020; Digital Economy Partnership Agreement

the intention to develop a human-centric approach to AI and digital trade[56], it is noteworthy that, at present, individuals in DTCs are considered and protected in their roles as consumers and holders of privacy and data protection rights, but not as workers. This absence appears in contrast with the growing acknowledgment on the adverse and transformative effects digitalization is having on jobs and labour standards[57]. In line with the New Action Plan main aim[58], trade should actively contribute to make this transition *just*, and incorporating social sustainable development objectives into DTCs appears fitting the purpose. In addition to dedicated articles on protection of personal data, privacy[59], and consumer trust[60], there is room to include provisions geared towards social sustainability, such as further detailing the right to regulate and introducing a provision on digital workers[61]. DTCs in EU FTAs comprise a broad non-exclusive list of legitimate policy objectives the parties maintain the right to regulate, but regrettably labour standards is not explicated, remaining unclear its legitimacy[62]. Moreover, the digitalization has created a new category of workers, the so-called digital workers, performing mostly through digital platforms. ILO fundamental rights at work

(DEPA) between Singapore, Chile and New Zealand 2021; UK-Singapore Digital Economy Agreement (DEA) 2022.

[56] EU Commission, *EU-US TTC Joint Roadmap on Evaluation and Measurement Tools for Trustworthy AI and Risk Management*, p. 10; EU-Singapore Digital Partnership Digital Trade Principle, 2023; EU Commission, press release, *The EU Artificial Intelligence Act Currently under Negotiations*, 9 December 2023, https://www.consilium.europa.eu/en/press/press-releases/2023/12/09/artificial-intelligence-act-council-and-parliament-strike-a-deal-on-the-first-worldwide-rules-for-ai/ (last access 7 January 2024).

[57] C. Lorraine, X. Shuting, A.P. Coutts, *Digitalization and Employment: A Review*, International Labour Organization, 2022; J. Bassen, *AI and Jobs: The Role of Demand*, Massachusetts National Bureau of economic research (2018); World Economic Forum, *Future of Jobs Report 2023*, World Economic Forum publication, 2023, p. 56; *Digital Trade for Development*, p. 45; EU Commission, *Communication Artificial Intelligence for Europe*, COM(2018)237 Final, 2018, p. 11.

[58] See *supra*, section 3.

[59] See for instance EU-New Zealand FTA, Article 12.5.

[60] *Ibid.*, Article 12.12.

[61] The same absence is registered in the US Trade Policy in J.B. Velut, *Enduring Disembeddedness? Labor Rights and Data Privacy in US Digital Trade Policy*, Politics and Governance, Cogitation Press, 2023, 11.

[62] EU-New Zealand FTA, Article 12.3.

included in the TSDCs appear inadequate to protect digital platform workers as they hold blurred position between self-employed and employee and they often lack a common employer[63]. This, in turn, has a detrimental effect on wages, social security and the exercise of the right to association and collective bargaining[64]. As the EU is currently negotiating a Directive on Platform Work to improve platform workers' labour conditions[65], – proposing, *inter alia*, a presumption of employment status, greater transparency and traceably to platforms and limiting the use of algorithmic management in decision-making and monitoring systems – the emerging regulatory principles provide a solid foundation for establishing a digital worker provision in DTCs.

### 4.2. *Public procurement chapters*

While DTCs are not explicitly highlighted in the New Action Plan for mainstreaming sustainability, PPCs are recognized as suitable candidates[66], acknowledging their potential to drive a green and just demand for goods and services[67]. Unlike DTCs, PPCs already incorporate discreet references to sustainable development. These references primarily draw upon provisions found in the plurilateral

---

[63] *Digitalization and Employment: A Review*, *op.cit.* p.16.

[64] Fairwork Project, *Fairwork Annual Report 2022: The Year in Review*, 2022.

[65] EU Commission, *Proposal for a Directive of the European Parliament and of the Council on Improving Working Conditions in Platfom Work*, COM(2021)762 Final, 2021. European Parliament, press release, *Platform Work: Deal on New Rules on Employment Status*, 13 December 2023, https://www.europarl.europa.eu/news/en/press-room/20231207ipr15738/platform-workers-deal-on-new-rules-on-employment-status (last access 7 January 2024).

[66] *Communication The Power of Trade Partnerships: Together for Green and Just Economic Growth*, p. 7.

[67] Worldwide, governments are estimated to allocate approximately 13% of their GDP to public procurement. In European Union countries, this percentage reaches 14%, equating to an annual value of 2 trillion euros, WTO news, *DG Okonjo-Iweala: We need to use every weapon in our arsenal to fight the climate crisis,* 4 December 2023, https://www.wto.org/english/news_e/news23_e/cop28_04dec23_e.htm (last access 7 January 2024). EU Commission, *Public Procurement*, https://single-market-economy.ec.europa.eu/single-market/public-procurement_en (last access 7 January 2024).

WTO Government Procurement Agreement (GPA)[68] and strive to introduce some aspects of the EU Directive on this matter[69]. The primary aim of PPCs is to increase opportunity for each party's supplier to engage in public procurement processes[70], by enhancing transparency in the procedures, expanding the procurement coverage[71], and guarantee national treatment to the goods, services, and suppliers of the other party[72].

Against this backdrop, the EU has progressively incorporated sustainability considerations into PPCs. In a first phase, PPCs allow a party to prepare, adopt or apply technical specifications to protect the environment[73] and to include as award criteria, together with standard "value for money" parameters, also environmental characteristics[74]. The analysis show two notable asymmetries. Firstly, environmental considerations were simply allowed, contrasting with the binding nature of commitments related to market access and non-discrimination. Secondly, the absence of social considerations was evident, with only environmental dimension being mentioned. On this point, noteworthy, the EU has recently changed course. The PPCs in the EU-UK Cooperation Agreement and in the EU-New Zealand FTA expand focus to encompass also social sustainability.

---

[68] WTO Government Procurement Agreement (GPA), 2012. Simultaneously, the WTO has initiated a Work Programme on Sustainable Procurement with the aim of exploring ways in which sustainable development could be more effectively integrated, Annex E, Appendix 2, of the decision on the outcomes of the negotiations under Article XXIV:7 of the Agreement on Government Procurement (GPA) WTO/GPA/113, 30 March 2012, p. 444. However, as of now, the Work Program has not yet produced a final report. WTO, Report of the Committee on Government Procurement, 2023, para 4.1.

[69] Directive 2014/24/Eu of The European Parliament and of The Council of 26 February 2014 on Public Procurement, Article 18.

[70] UK-EU Cooperation Agreement, Article 276.

[71] *Ibid.*, Article 277(2). For the different approaches the EU has advanced in expanding the coverage depending on the trade partner, see S. Woolcock, *Public Procurement in EU FTAs*, in *The First 10 Years after the Treaty of Lisbon*, pp. 15 ff.

[72] EU-Canada Comprehensive Economic and Trade Agreement, Article 19.4.

[73] *ivi* Article 19.9(6), EU-Colombia, Perù, Ecuador FTA, Article 181(6), EU-Singapore FTA, Article 9.9(9), EU-Vietnam FTA, Article 9.9(6). All these articles replicate Article X:6 WTO GPA.

[74] EU-Canada Comprehensive Economic and Trade Agreement, Article 19.9(9), EU-Singapore FTA Article 9.9(11). These articles replicate Article XV(5) GPA read in conjunction with Article x:9 GPA.

In both cases the parties allow their procuring entities to "take into account environmental, labour and social considerations provided that they are not discriminatory"[75]. The EU-UK Cooperation Agreement clearly states that these concerns can be considered throughout the procurement procedure[76]. This allows sustainability criteria to potentially enter both in the technical specification and in the evaluation, selection and award phases, strengthening the FTA capability to foster green and social public procurement. The EU-New Zealand FTA also adds that a party may "take appropriate measures to ensure compliance with its own and with international environmental, social and labour laws, regulations, obligations and standards […] provided that they are not discriminatory"[77]. While the change of course is indeed welcomed and serves as an example of mainstreaming sustainability beyond the TSDCs, there remains significant untapped potential for PPCs to further promote social procurement. These provisions do not bind procuring entities to include environmental, labour, and social considerations into their processes, leaving untouched the *de facto* hierarchy among sustainability and economic considerations (e.g., lowest-price criterion, most economically advantageous criterion). Additionally, the PPCs fails to substantiate the consideration amenable to be taken into considerations, but it is repeatedly stated that they cannot be discriminatory, without further specifications. This vagueness risks to be self-limiting. For instance, should it be deemed discriminatory if an EU procuring entity includes adherence to the future EU regulatory framework for digital platform workers as a technical specification when procuring an online consulting service? Potentially, any sustainability technical specification not based on *ex-ante* accepted standards by both parties would be considered discriminatory, because it *de facto* favors the national supplier to the detriment of the foreign

[75] UK-EU Cooperation Agreement, Article 285. EU-New Zealand, Article 14.2(5)(a).

[76] The same clarification does not occur in the EU-New Zealand FTA, although it did in the former negotiating draft, similar to the EU-Australia FTA text under negotiation, Public Procurement, X(2)(7).

[77] EU-New Zealand Fta, Article 14.2(5)(b). *Mutatis mutandi*, this provision is similar to the principles of procurement as set out in Article18(2) of the EU Directive on public procurement.

one[78]. To enhance the integration of social sustainability considerations within PPCs and effectively operationalize the role of EU FTAs in fostering just growth, it would be crucial to take a step forward. This involves making the inclusion of such considerations mandatory, outlining their content, and clarify the threshold for a sustainability consideration to be discriminatory.

## 5. *Concluding remarks*

The paper focused on the policy priority of mainstreaming sustainability beyond TSDCs. It sought to operationalize it by selecting labour standards as a social sustainable development objective to be mainstreamed into DTCs and PPCs. While the implementation is yet to be seen and hopefully welcomed in future EU FTAs, this paper highlights the potential for its realization. In the DTCs, the absence of considering individuals as workers, other than consumers and holder of data protection rights, was identified as a gap. The lack of explicit provisions for digital workers is an example, especially considering the transformative effects of digitalization on jobs. The PPCs already incorporate references to sustainable development, and the recent developments expanding the focus to include social sustainability were viewed positively. However, the paper highlighted the need to make the inclusion of sustainability considerations mandatory, to substantiate and define these considerations, and further refine the balance between sustainable development and the non-discrimination principle.

In a nutshell, mainstreaming sustainability means making space for sustainable development to shape the framework and the parameters within which trade should take place, rather than be confined to TSDCs. This potential paradigm shift would have indeed several positive outcomes. From an EU Trade Policy perspective, it would enable the EU FTAs to autonomously foster green and just econom-

[78] T. Martin, *Sustainability in the Public Procurement Chapters of Third Generation Free Trade Agreements of the European Union*, Institute of European Law Birmingham Law School, 2021, p. 5; *Public Procurement in EU FTAs* in *The First 10 Years after the Treaty of Lisbon*, p. 244.

ic growth. From an economic perspective, it is a sign of the growing recognition and integration of sustainable development within the trade governance. From a legal perspective, mainstream sustainable development beyond TSDCs supports its ongoing legal value recognition. It would mark its departure from being an exception or an objective, towards being a principle. As the interaction in the PPCs between sustainable development considerations and non-discrimination brings out, this potential paradigm shift will likely entail re-thinking the interplay between sustainable development and standard FTAs legal-economic underpinnings. Further legal research on re-building this interplay, as well as exploring additional areas in the EU FTAs suitable for mainstreaming sustainability, is crucial for advancing our understanding of how sustainable development, especially on its social side, can be integrated more comprehensively into EU FTAs.

# REMOVING THE BLINDFOLD: AN ANALYSIS OF THE PRACTICE OF THE CIVIL SOCIETY MECHANISM IN THE EU FTAS IN LIGHT OF THE EU-COLOMBIA FTA EXAMPLE

*Felipe Tomazini de Souza*

## 1. *EU-Colombia trade relations and the introduction of the TSD chapter*[1]

Until 2012, Colombia, among other Andean Community nations, benefited from preferential access to the European market through the General Scheme of Preferences (GSP). This access entailed the removal of tariff barriers in an asymmetrical manner, wherein the Andean countries were not obligated to reciprocate with similar concessions. However, the introduction of the new EU GSP Regulation in 2012 signalled, excluding Bolivia, that they would lose this preferential status[2]. The consequential loss of access to the GSP+ arrangement played a pivotal role in the negotiation rounds, ultimately resulting in the current Free Trade Agreement

[1] For a complete review of the emergence of the global Europe strategy and the change in the trade paradigm promotion, see: B.A.M. Araujo, *The EU Deep Trade Agenda: Law and Policy*, Oxford Studies in European Law, 2016; A.D. Casteleiro, *The European Union's Preferential Trade Agreements: Between Convergence and Differentiation*, *Yearbook of European Law*, 2023, pp. 1-33; K.N. Sophie Meunier, *The European Union as a conflicted trade power*, in *Journal of European Public Policy*, 2006, 13, pp. 906-25.

[2] A.D. Casteleiro, *The European Union's Preferential Trade Agreements: Between Convergence and Differentiation*, pp. 25-26; G.M. Durán, *Sustainable Development Chapters in EU Free Trade Agreements: Emerging Compliance Issues*, in *Common Market Law Review*, 2020, 57, pp. 1031-68.

(FTA) between the EU and Colombia. Celebrated under the "new generation" arrangement, this trade agreement marks its 10th year of provisional application in 2023.

A symbol of this generation of FTAs is the departure from an approach that considered sustainable development as a policy exception and trade constraint, often referencing Article XX of GATT. Instead, the chosen approach included a dedicated chapter for Trade and Sustainable Development (TSD Chapter), aligned with the EU's commitment to promoting sustainable development. While the content of these chapters is similar across different PTAs, its design is improving and follows a tailor-made logic.

The characteristics and capabilities of the partner country and the regulatory cooperation it aims to advance in the environment or labour field are relevant to its final text. In the present case, Colombia, as a developing country, faces different challenges than other partners, such as Korea, when dealing with a comprehensive trade agreement that includes advancements in regulatory cooperation. These challenges stem from developing nations' difficulties meeting higher international standards, demanding capacity and resource tasks, and a movement that may reduce their comparative advantages[3].

In the case of Colombia, which heavily relies on the export of primary goods, closely monitoring the TSD chapter implementation of the agreement is paramount. The increased trade that comes with such agreements can put additional stress on the production of mining and agricultural goods, which, in turn, can exacerbate already challenging environmental issues such as deforestation and water pollution. Additionally, Colombia faces labour concerns, particularly regarding the high levels of impunity related to labour-related crimes, which must be addressed to ensure that labour rights are adequately protected and enforced under the agreement[4].

[3] B.A.M. Araujo, *The EU Deep Trade Agenda: Law and Policy*.

[4] European Commission, *Ex post evaluation of the implementation of the Trade Agreement between the EU and its Member States and Colombia, Peru and Ecuador*, 2022.

## 2. *Civil society mechanisms in the EU-Colombia FTA*[5,6]

The TSD chapter introduced Civil Society Mechanisms (CSMs) to promote interaction with civil society and aid in monitoring the achievement of sustainable development goals through a democratic and inclusive governance process. As civil society may be the first to identify challenges and violations during treaty implementation, both mechanisms act as the eyes and ears on the ground, feeding the Committees with pertinent information.

To perform these activities, two categories of CSMs were introduced: Domestic Advisory Groups (DAGs) and Civil Society Forums (CSFs). Under the EU-Colombia Free Trade Agreement, DAGs were introduced by Article 281, presenting the mechanism as a consultation group formed by representatives of civil society with the ability to "submit opinions and make recommendations on the implementation of this title", later limiting the group's procedure and constitution to the partner's domestic law. Additionally, Article 282 presents the Civil Society Forums as a mechanism "to carry out a dialogue".

Drawing a clear line about the real function of each of these mechanisms is not as simple as one might think. The treaty text provides a simple and strict view of such mechanisms with a clear distinction between the functions of both mechanisms – one being consultative and the other for the promotion of dialogue. However, little is mentioned about how these interactions will be conducted and what objectives these tools are meant to achieve. As a result, the expectations of civil society[7], the studies being conducted on the matter[8], and the dis-

---

[5] D. Martens, D. Potjomkina, J. Orbie, *Domestic Advisory Groups in EU Trade Agreements - Stuck at the Bottom or Moving up the Ladder?*, Friedrich Ebert Stiftung, 2020, pp. 1-74.

[6] C.D.M.F.T. De Souza, *Interview about the 10th year of implementation of EU-Colombia FTA - With Colombian DAG Member*, 2023.

[7] F.T. de Souza, *Interview about the 10th year of implementation of EU-Colombia FTA - With Colombian DAG Member*; C. de P.P., D. Humanos, *Queja contra el gobierno peruano por falta de cumplimiento de sus compromisos laborales y ambientales previstos en el acuerdo comercial entre Perú y la Unión Europea*, 2017.

[8] L. Drieghe, D. Potjomkina, J. Orbie, J. Shahin, *Participation of Civil Society in EU Trade Policy Making: How Inclusive is Inclusion?*; D. Martens, D. Potjomkina, J. Orbie, *Domestic Advisory Groups In EU Trade Agreements - Stuck at the Bottom or Moving up the Ladder?*.

course produced by the EU Commission[9] present different and broader views about the functioning and purpose of these mechanisms.

As an example, while CSFs are designated as a dialogue mechanism in the treaty text, with no stipulated requirements for conducting these forums with stakeholders and left to the parties' discretion, a broader interpretation would argue for structuring it as a two-way dialogue, enhancing relations among the parties, rather than solely serving the purpose of instrumental legitimisation or information sharing. On the other hand, while the treaty text presents DAGs with a broader and more assertive function as an advising mechanism that "may" provide opinions and recommendations, indicating a monitoring function over treaty implementation, civil society desires more participation and the ability to influence policy changes[10].

On the other hand, experience has revealed that the functioning of CSMs across various agreements has also changed with time. In their early years, CSMs were primarily used to instrumentalise and legitimise agreements, meaning that meetings were held, but little else was accomplished. As time progressed, their ability to function as information-sharing and monitoring mechanisms improved, although problems persist and shall be addressed in the following sections. Nonetheless, some members of CSMs maintain the belief that these mechanisms cannot significantly impact policy change[11].

Regarding the composition of DAGs, there are typically two different provisions in the various EU FTAs. Some agreements require the establishment of new DAGs specifically for the agreement, while others allow for using existing mechanisms for civil society interaction. Irrespective of the approach specified in the agreement, two DAGs will be formed, one within the civil Society of the Europe-

[9] European Commission, *Tenth meeting of the EU-Andean Civil Society Forum*, 2023; European Commission, *The power of trade partnerships: together for green and just economic growthi*, 2022; European Commission, *Domestic Advisory Groups*, 2023.

[10] Aa.Vv., *The EU-Colombia/Peru/Ecuador Domestic Advisory Group*, 2023; L. Drieghe, D. Potjomkina, J. Orbie, J. Shahin, *Participation of Civil Society in EU Trade Policy Making: How Inclusive is Inclusion?*; European Commission, *The power of trade partnerships: together for green and just economic growth*.

[11] L. Drieghe, D. Potjomkina, J. Orbie, J. Shahin, *Participation of Civil Society in EU Trade Policy Making: How Inclusive is Inclusion?*.

an Union and the other composed of representatives of the third parties involved. Furthermore, DAG's composition should be balanced and reflect the three pillars of sustainable development[12]. This aimed composition provides a well-rounded and unbiased perspective on the agreement's implementation, allowing for meaningful engagement with stakeholders from these critical areas[13,14].

In contrast to the DAGs, Civil Society Forums distinguish themselves by their open and inclusive nature. CSFs are composed not only of government representatives and members of DAGs but also include the opportunity for other civil society representatives interested in monitoring the trade agreement.

While civil society participation is encouraged and integrated into various aspects of compliance monitoring, there is typically no formal requirement within trade agreements for the parties to follow up on the submissions made by civil society groups. If a violation is detected, the only available procedure to address it is for one of the State parties to initiate the dispute settlement procedure[15].

The following sections delve deeper into the analysis of the Colombian DAG, which is the outcome of an extensive research effort conducted in Colombia. Despite attempts to reach out to all DAG members, only one participant agreed to be interviewed and share insights into the current situation of the DAGs. The interview revealed a pervasive sense of scepticism and doubt regarding the mechanisms, with the interviewee going so far as to label them as

---

[12] This balanced composition is presented in the discourse of the European Commission, however in practice, such inclusive and broad composition has been problematic. L. Drieghe, D. Potjomkina, J. Orbie, J. Shahin, *Participation of Civil Society in EU Trade Policy Making: How Inclusive is Inclusion?*.

[13] European Commission, *Free trade agreement between the European Union and its Member States, of the one part, and the Republic of Korea*, 2011. See article 13.12 and 13.13; European Commission A*cuerdo comercial multipartes Unión Europea – Colombia, Ecuador y Perú viii subcomité de acceso a mercados video conferencia Lima*, 2021. See Article 281.

[14] Five possible constellations can be established among the Civil Society Mechanisms of an FTA. J. Orbie, D. Martens, L. Van Den Putte, *Civil society meetings in European Union trade agreements: features, purposes, and evaluation*, in *Centre for the Law of Eu External Relations (Cleer)*, 2016, 3, pp. 1-48, at pp. 13-15.

[15] European Commission, *Trade Agreement between the European Union and its Members States, on the one hand, and Colombia and Peru, on the other hand*, 2010, art. 283.

an illusion. Both the actual capacity and the underlying motives behind the creation of these mechanisms were questioned during the interview. This pessimistic viewpoint is not exclusive to the Colombian Domestic Advisory Group; it was already identified in previous studies[16].

### 2.1. *The devil is in the details: the DAG composition*

When we look at the provision presented in the FTA with Korea under article 13.12.4[17], we note that it requires establishing a new domestic advisory group for each side. Furthermore, it informs that the composition must compromise independent civil society representatives with a balanced participation that covers the three pillars of sustainable development (labour, environment, and business). In its turn, the FTA with Colombia presented the creation of a new DAG just as a subsidiary to the possibility of using other already established domestic committees or groups, limiting its consultation procedures and constitution to domestic law. In addition, the provision did not specify the need for the participants to be independent, which further overshadowed the process of the mechanisms[18].

Like a stone cast in a pond, the wording choice in the article provision caused waves of effects that undermined the practice of the partner countries' mechanisms with criticism and scepticism[19]. The

---

[16] D. Martens, D. Potjomkina, J. Orbie, *Domestic Advisory Groups In EU Trade Agreements - Stuck at the Bottom or Moving up the Ladder?*; CEDETRABAJO, *El TLC de Colombia con la Unión Europea Centro de Estudios del Trabajo*, 2021.

[17] European Commission, *Free trade agreement between the European Union and its Member States, of the one part, and the Republic of Korea*, Article 13.12.4.

[18] European Commission, *Acuerdo comercial multipartes Unión Europea – Colombia, Ecuador y Perú viii subcomité de acceso a mercados video conferencia Lima*, Article 281.

[19] G. Alarco, A.R. Cano, C. Castillo, E. FernÁndez, *¿Qué pasó a cinco años del TLC entre Perú y la Unión Europea ?*, 2018, *Red Peruana por una Globalización con Equidad*; Humanos, *Queja contra el gobierno peruano por falta de cumplimiento de sus compromisos laborales y ambientales previstos en el acuerdo comercial entre Perú y la Unión Europea*; D. Martens, D. Potjomkina, J. Orbie, *Domestic Advisory Groups In EU Trade Agreements - Stuck at the Bottom or Moving up the Ladder?*; A. Marx, B. Lein, N. Brando, *The protection of labour rights in trade agreements: The case of the EU-Colombia agreement*, in *Journal of World Trade*, 2016, 50, pp.

Colombian and Peruvian governments' obvious choice was to appoint existing structures inside their government to perform the role of DAGs. This choice proved problematic not only because of the lack of independence of the mechanism but also due to the need for more transparency in the composition and participation of group[20].

In the years following the agreement's implementation, problems with the provided structure started to emerge, reaching the point where the Peruvian civil society established its own unofficial domestic advisory group, also known as *Shadow-DAG*[21]. This unofficial mechanism got the attention of the EU Commission, which pressured Peru to implement the DAGs transparently. Although changes were made, the structure was still based on governmental institutions. On what concerns Colombia, due to the same critics and pressures, in 2017, the government decided to create an *ad-hoc* mechanism on the mould of the EU, in other words, with an independent and balanced composition[22].

---

587-610; J. Harrison, M. Barbu, A. Smith, J. Orbie, B. Richardson, A. Marx, F.C. Ebert, L. Campling, D. Martens, *From the Trenches Labour Standards Provisions in EU Free Trade Agreements: Reflections on the European Commission's Reform Agenda*, in *World Trade Review*, 2019, pp. 1-23; CEDETRABAJO, *El TLC de Colombia con la Unión Europea Centro de Estudios del Trabajo*, 2021.

[20] D. Martens, D. Potjomkina, J. Orbie, *Domestic Advisory Groups in EU Trade Agreements - Stuck at the Bottom or Moving up the Ladder?*; I. Alexovičová, D. Prévost, *Mind the compliance gap: managing trustworthy partnerships for sustainable development in the European Union's free trade agreements*, in *International Journal of Public Law and Policy*, 2019, 6, 236.

[21] D. Martens, D. Potjomkina, J. Orbie, *Domestic Advisory Groups in EU Trade Agreements - Stuck at the Bottom or Moving up the Ladder?*; D. Humanos, *Queja contra el gobierno peruano por falta de cumplimiento de sus compromisos laborales y ambientales previstos en el acuerdo comercial entre perú y la unión europea*; G.A. Tosoni, C.C. García, *TLC UE, Perú, Colombia y Ecuador: Dónde estamos y hacia dónde vamos?*, 2018, *Red Peruana por una Globalización con Equidad*.

[22] G. Alarco, A.R. Cano, C. Castillo, E. FernÁndez, *¿Qué pasó a cinco años del TLC entre Perú y la Unión Europea ?*; European Commission, *Ex post evaluation of the implementation of the Trade Agreement between the EU and its Member States and Colombia, Peru and Ecuador*; D. Humanos, *Queja contra el gobierno peruano por falta de cumplimiento de sus compromisos laborales y ambientales previstos en el acuerdo comercial entre Perú y la Unión Europea*; D. Humanos, *Queja contra el gobierno peruano por falta de cumplimiento de sus compromisos laborales y ambientales previstos en el acuerdo comercial entre Perú y la Unión Europea*.

As of the time of this publication, the composition of the DAGs remains precarious and does not cover all pillars of sustainable development. For a State such as Colombia, renowned for having the second-highest biodiversity in the world and heavily reliant on primary products, the ongoing absence of an environmental NGO in the DAG's composition after a decade of the agreement's application is a serious concern[23].

Answering open questions about the composition and work at the Colombian DAG, the DAG member commented on what he saw as why environmental NGOs did not participate. He explained that there needs to be more interest and capacity among environmental NGOs in understanding the nature of an FTA and its potential impacts. As a result of the lack of environmental representation in the DAG, such concerns are often treated as a subsidiary priority related to the other pillars of sustainable development[24].

It has been shown that Colombia's Domestic Advisory Group (DAG) needs to be balanced. Although the European model has been used as a guide, the current composition still needs the participation of environmental NGOs. The absence of environmental representatives makes the mechanism ineffective as environmental concerns will only be addressed as a secondary concern to the pillars of labour and business. If the EU's managerial approach to promoting compliance with sustainable goals is to succeed, rebalancing the composition of Colombian DAGs is a crucial point that requires at-

[23] According to the contact point of Colombia the current composition of the Colombian-DAG is formed by: Central General del Trabajo (CTG), Central Unitaria de Trabajadores de Colombia (CUT), Confederación de Trabajadores de Colombia (CTC); Asociación Nacional de Empresarios (ANDI), Asociación Colombiana de Fabricantes de Autopartes (ACOLFA), Asociación Colombiana de las Micro, Pequeñas, y Medianas Empresas (ACOPI); Centro de Estudios del Trabajo (CEDETRABAJO), Instituto Nacional de Estudios Sociales, Formación para la Vida y el Trabajo – INES, CODHES (Consultoría para los Derechos Humanos y el Desplazamiento). MINCIT and Dirección de Relaciones Comerciales, *Informaciones sobre la Realización de la sesión con la Sociedad Civil y Publico en General Y Sesiones del Subcomité de Comercio y Desarrollo Sostenible* (2023).

[24] A. Marx, B. Lein, N. Brando, *The Protection of Labour Rights in Trade Agreements: The case of the EU-Colombia Agreement*; D. Martens, D. Potjomkina, J. Orbie, *Domestic Advisory Groups In EU Trade Agreements - Stuck at the Bottom or Moving up the Ladder?*.

tention. Failure to address this issue directly affects the capability of monitoring the environmental commitments with Colombia, weakening and undermining the public's trust in the mechanism.

### 2.2. *The continued lack of logistical and financial support*

A significant issue that hampers the effectiveness of the Colombian DAG is the lack of logistical and financial support. According to the interviewee, the shortage of funds poses a significant obstacle to conducting independent research to monitor the agreement. Consequently, Colombian-DAG work is primarily carried out voluntarily during members' free time[25].

This situation underscores an apparent disparity between the two sides of the agreement. Notably, the EU's DAG exhibits a balanced representation of independent participants, a practice consistently upheld with implementing each new deal and available financial and logistical support[26]. These features enable them to operate more effectively compared to the work done in partner countries. The availability of resources is to be improved according to the new communication from the Commission that will be addressed later[27].

The Colombian government's lack of interest and commitment in financially and logistically supporting the Domestic Advisory Groups generates in the DAG members the perception that they are just a tool to legitimise the liberal goals sought by the expansion of trade[28]. As the Colombian government's availability of resources

[25] F.T. de Souza, *Interview about the 10th year of implementation of EU-Colombia FTA - With Colombian DAG Member.*

[26] EU DAGs can access funding for logistical and financial support through the EESC, and an increase in the available resources is on the table with the latest communication from the EU Commission, *The power of trade partnerships: together for green and just economic growth*. EESC, A. Mazzola, *The role of Domestic Advisory Groups in monitoring the implementation of Free Trade Agreements* (2018); D. Martens, D. Potjomkina, J. Orbie, *Domestic Advisory Groups in EU Trade Agreements - Stuck at the Bottom or Moving up the Ladder?*; European Commission, *The power of trade partnerships: together for green and just economic growth*.

[27] European Commission, *Domestic Advisory Groups*.

[28] F.T. de Souza, *Interview about the 10th year of implementation of EU-Colombia FTA - With Colombian DAG Member*; J. Orbie, D. Martens, L. Van Den Putte, *Civil Society Meetings in European Union Trade Agreements: Features,*

may be one of the reasons why support is not provided, such an issue could be addressed in future meetings with the civil society under the open forum arrangement discussing a possible alternative solution to overcome this challenge.

### 2.3. *The Civil Society Forum: a one-side dialogue*

The Civil Society Forum operates through an annual meeting under Article 282 of the agreement that involves the sub-committee on sustainable development and the DAGs and is open to civil society participation. These meetings follow the rotational character of the committee's rule of procedure, taking place in each partner's capital every three years. As of today, ten meetings have been conducted, occurring annually since the provisional application of the treaty. While the initial meetings were held in person, a forced shift due to the COVID-19 pandemic led to subsequent meetings, starting from the 6th of 2019, to be conducted through videoconferences. The following meetings have all adopted a hybrid mode, combining in-person and virtual participation[29].

A primary critique of this model pertains to the rotational character and the absence of virtual participation in the initial years. The adequacy of hosting only one annual meeting to foster meaningful dialogue within civil society is questionable, particularly in underdeveloped countries facing multiple challenges concerning labour and environmental regulation. While virtual participation can reduce logistical costs for civil society, the quality of dialogue may not match that of in-person meetings.

Moreover, an examination of published agendas reveals that only a few hours per day are allocated to the forum, potentially discouraging participation, especially for individuals not situated where the meeting is held. In other words, the sessions are open to the public, and the participation has been facilitated in recent years by including virtual participation. However, the quality, frequency and quantity

*Purposes, and Evaluation*; A. Marx, B. Lein, N. Brando, *The Protection of Labour Rights in Trade Agreements: The Case of the EU-Colombia Agreement*.

[29] *Andean Community - Civil Society Forum* (2023).

of hours allocated don't fit a broader two-way dialogue model that allows information exchange among the participants. The current arrangement can only function as a structure to legitimise the treaty or, at maximum, a top-down information-sharing platform where governments present information but do not accept feedback. Such a mechanism should aim for more, as the openness of such forums and the dialogue it can produce can bring different points of view that are not represented under the limited DAGs composition[30].

A potential improvement could involve conducting additional meetings with national coverage in each party before the central interstate Civil Society Forum. This arrangement would give civil society groups more opportunities to engage in dialogue concerning implementation issues specific to their respective contexts and challenges. In cases where the parties can't attend the main interstate forum, the insights and discussions from these national dialogues could then be transmitted by the national DAGs, enhancing the depth and relevance of talks on a broader scale.

Regarding the event organisation, criticism is directed at the need for more event promotion and the delayed release of information regarding the meeting schedule. Many times, details about the location and time were made available only in the week leading up to the event, which hindered active participation in the forum for two reasons. Initially, logistical challenges emerge, particularly concerning making travel arrangements on short notice. Secondly, the lack of adequate lead time makes preparing comprehensive studies for presentation and discussion impractical. Additionally, according to the interviewed DAG member, the meetings often serve more as a presentation of the general achievements of the Colombian government rather than directly addressing the implications of the trade agreement with the EU[31].

Despite some improvements noted by the European Economic and Social Committee (EESC), there remains ample room for enhancement, particularly concerning transparency and accountabili-

[30] L. Drieghe, D. Potjomkina, J. Orbie, J. Shahin, *Participation of Civil Society in EU Trade Policy Making: How Inclusive is Inclusion?*.

[31] D. Martens, D. Potjomkina, J. Orbie, *Domestic Advisory Groups In EU Trade Agreements - Stuck at the Bottom or Moving up the Ladder?*.

ty. Improvements in accountability are fundamental and should be prioritised, enabling a two-way dialogue where the issues raised by civil society receive proper feedback[32].

### 2.4. *The DAG-to-DAG meeting: an opportunity*

A potential constellation for the civil society mechanism involves fostering cooperation between the mechanisms established on both sides of the agreement. Although an initial proposal for organising DAG-to-DAG meetings, put forth by the Andean participants and the EESC, was initially rejected based on the agreement's provisions, persistence by the EU DAGs and their counterparts has paved the way for this possibility. Notably, the outcomes of these DAG-to-DAG meetings are later submitted to the authorities overseeing the agreement, representing a promising avenue for enhanced dialogue and cooperation between civil society stakeholders from both sides[33].

The practice of such a constellation has already proven to be fruitful. Concerns regarding labour conditions were raised in DAG-to-DAG meetings facilitated by the agreement with Korea. This resulted in the submission of two letters (in 2014 and 2016[34]) from the EU-DAG to the EU's trade commissioner, urging action on the issue. In 2017, the EU Parliament took additional steps by adopting a resolution that mandated the Commission to initiate formal consultations[35]. DAGs were the first to highlight implementation issues with the agreement with Korea, which later led to the dispute settlement. The communication among DAGs and the revised Single-Entry Point Regulation, to be addressed in the next section, presents an

[32] E.E., S. Committee, *Evaluation of the role of civil society in the participation structures under the European Union/Colombia/Peru/Ecuador Agreement*, 2020.

[33] European Committee, *Evaluation of the role of civil society in the participation structures under the European Union/Colombia/Peru/Ecuador Agreement*, p. 10.11.

[34] EPSU, *EU Domestic Advisory Group (DAG) calls on European Commission to open labour consultations on trade union rights pursuant to the EU-Korea FTA*, 2016; *Cecilia Malmstrom Letter to the DAGs*, 2017.

[35] European Parliament, *Resolution of 18 May 2017 on the implementation of the Free Trade Agreement between the European Union and the Republic of Korea*, 2017.

opportunity for EU DAGs to represent the concerns of their counterparts in third countries[36].

It has been found that the discussions held in EU-DAGs mostly revolve around environmental and labour issues, whereas third countries mainly focus on business-related matters. The interest in EU-DAGs over environmental issues presents an opportunity for the Colombian DAGs to communicate with their European counterparts and leverage this relationship to access the resources and support required to monitor the treaty's implementation of labour and environmental commitments better. By collaborating and conducting joint research, they can have a stronger voice. However, ensuring that this exchange and the research development do not create another top-down relationship is essential.

### 3. *On transparency*

Transparency among partners in regulatory treaties is crucial for compliance, as it ensures that the partner country is committed to its international law obligations, aids in decision-making processes and acts as a deterrent against possible non-compliance[37]. The same reasoning can be applied to the more informal arrangements with civil society under the EU FTA, representing a departure from traditional conceptions of international law based solely on the interaction among States[38]. Crafted to facilitate communication with civil society and assist in monitoring the agreement's implementation, Civil Society Mechanisms require a well-established and transparent process, along with the availability and accessibility of relevant data, to operate effectively.

As identified in the preceding sections, shortcomings in transparency can be highlighted. Regarding the process, it was evident

---

[36] E.-K.D.A.G.T. Jenkins, *Serious Violations of Chapter 13 of the EU-Korea FTA*.

[37] A. Chayes, A.H. Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements*, Harvard University Press, 1995; A.-M. Slaughter, *A New World Order*, Princeton University Press, 2004.

[38] A.-M. Slaughter, *A New World Order*.

that the lack of a more detailed operation in the treaty text and the absence of established guidelines for the CSMs' operation create myriad experiences in the different EU FTAs arrangements. For example, while identifying participants from EU DAGs is relatively straightforward, identifying their Colombian counterparts required a right of petition addressed to the contact point[39].

Another challenge regarding transparency is evident in the limited availability of relevant data despite the introduction of a unified website by the EU[40]. The website aims to provide access to reports produced by the treaty's institutional bodies, including specialised committees; however, the information's availability is still precarious, and many reports remain undisclosed. Accessing reports from DAGs and Civil Society Meetings is even more challenging, with very little data available. The restricted access to reports and the divergent experiences of the two sides of the Domestic Advisory Groups create barriers to their monitoring role. These obstacles hinder their ability to prepare for meetings and impede effective communication among CSMs and the broader civil society, ultimately compromising the quality of the dialogue.

If we define transparency as the provision of knowledge and information related to the policies, activities, and any matter that can influence the regime established by a trade agreement, it becomes evident that the current experience of the CSMs of the EU FTAs is not developed enough to guarantee an efficient mechanism's operation[41].

## 4. *Trying to close the gap: the power of trade partnerships communication*

In June 2022, the European Commission unveiled its new communication on trade and sustainable development, titled *The Pow-*

[39] MINCIT and Dirección de Relaciones Comerciales, *Informaciones sobre la Realización de la sesión con la Sociedad Civil y Publico en General Y Sesiones del Subcomité de Comercio y Desarrollo Sostenible*.

[40] European Commission, *Trade Relations, negotiations, and agreements - Andean Community*, 2023.

[41] A. Chayes, A.H. Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements*, Harvard University Press, 1995.

*er of Trade Partnerships: Together for Green and Just Economic Growth*[42]. This communication is a response to the comprehensive review of the strengthening of trade agreements conducted in 2021, which resulted in formulating a set of six policy priorities. Notably, one of these priorities is the role of civil society. What distinguishes this new communication is the introduction of sanctions as a policy goal for the first time. The study will now focus on the proposed policy goals outlined in the communication that intersect with the civil society mechanism operation.

The first three policy priorities outlined in the new communication address the agreement in a broader sense and have only an indirect effect on the CSMs. These priorities include (1) the need to be more proactive in the cooperation with partners, (2) stepping up the country-specific approach, and (3) mainstreaming sustainability beyond the TSD chapter of the trade agreements. All priorities are aligned with a cooperative approach that strengthens the commitment to sustainable development through various means, including incentives, capacity building, technical assistance, and financial support.

An illustrative example is the case of deforestation in Colombia, where the latest available report on the issue dates to 2021 and offers only a superficial overview of the country's environmental situation. To gain a deeper understanding, inquiries were made to the Instituto de Hidrología, Meteorología y Estudios Ambientales (IDEAM) through a right of petition[43]. The aim was to determine whether the products primarily exported were linked to the regions experiencing deforestation expansion. In response, IDEAM conveyed that they cannot currently conduct systematic, periodic, and consistent calculations of deforestation. This situation underscores the significance of bolstering the partner's capability to conduct more comprehensive and regular assessments to monitor the environmental aspects of trade agreements effectively. Thus, enhancing the partner's capacity is vital for effectively implementing trade agreements.

---

[42] European Commission, *The power of trade partnerships: together for green and just economic growth*.

[43] Ministerio de Ambiente y Desarrollo Sostenible, *Solicitud de información sobre el documento Sistema de Monitoreo de Bosques y Carbono, año 2021 - Respuesta a radicados 20239050018984 y 20239910019084*, 2023.

Furthermore, it recognises that sustainable development should be understood in a broader context and extend its influence beyond the confines of the Trade and Sustainable Development chapter, reaching other parts of the agreement and aligning with the present practice under EU FTA's litigation. Specifically, it resonates with the cases of the EU-Ukraine wood ban and EU-SADC poultry safeguards[44], where sustainable development aspects of the agreements permeated the panel's interpretation and reasoning. Furthermore, it acknowledges the role of civil society in monitoring new roadmaps to be established, underscoring the significance of their participation.

The two following policies of communication have a direct impact on civil society mechanisms. Firstly, the communication addresses the "collective monitoring of the implementation of TSD Commitments", calling, among other action points, for a more decisive role and encouraging the parties to engage with the civil society mechanisms created through structural and material contributions. It projects a more proactive role of the EU Delegations in partner countries that shall interact with government officials, other local stakeholders, and the partner's DAG.

The most notable novelty introduced by the communication is the revision of the operating guidelines for the Single-Entry Point (SEP) Regulation. This contact point formalises complaints from EU stakeholders regarding alleged violations of the Trade and Sustainable Development (TSD) Commitments. The revision explicitly acknowledges the ability of EU DAGs to submit collective complaints and represent entities in partner countries. The specific timeframes for feedback to the complaining party represent a significant improvement in accountability and offer a valuable opportunity to improve the effectiveness of DAGs, ensuring their voices are heard. Furthermore, it can potentially replicate, in a structured and effective manner, the interaction among DAGs before the adjudication that led to the Korea Labour Commitments case.

[44] European Commission, *Ukraine wood export ban*, 2020; European Commission, *Southern African Customs Union poultry safeguards*, 2022.

Under the policy "Reinforcing the role of civil society", a call for enhancements is made, urging increased dedicated events and interaction between the EU and third-party counterparts. While there is a commitment to providing financial and logistical support, it is noteworthy that this support is limited to the EU. Once again, what becomes apparent is an imbalance in the work and operation dynamics between both sides of the coin. While the EU seeks to strengthen its CSMs on the partner's side, especially in developing countries like Colombia, CSMs remain struggling to access logistical and financial support.

Several improvements can be identified from the introduction of the CSMs to the current practice. However, much work is still needed to enable these mechanisms to play a more critical and influential role. While there is considerable potential, the successful implementation and the results from the new communication remain to be seen. The evolving role and the revision of the SEP may demonstrate in the future that DAGs are not as ineffective as one might have thought initially.

## 5. *Conclusions*

The study underscores significant disparities in the experience of civil society mechanisms created under the EU-Colombia Free Trade Agreement. This distinction reflects the different challenges of a developed and underdeveloped country. The most recent communication from the EU Commission aims at improvements and adjustments for the EU Domestic Advisory Groups.

Although these enhancements shall be stimulated, followed, and, as far as possible, replicated by the partner countries, they also reinforce the development gap among the players. While one side benefits from increasing support financially and logistically, the Colombian experience shows that Civil Society's trust and engagement must be reconquered by a series of steps yet to be implemented. Aspects such as the composition of the Domestic Advisory Groups, transparency concerning its selection and, most importantly, the inclusion of specialised environmental NGOs are crucial. Budgetary

constraints in the government may justify the lack of financial and logistical support, but alternative funding should be explored in-depth and transparently with civil society.

Regarding Civil Society Forum meetings, improvements should focus on fostering a two-way dialogue. Stakeholders must receive advance notice of meeting dates for proper logistical and research planning. Implementing additional meetings held in each party's capital could be a valuable addition to enhancing the treaty dialogue with civil society.

DAG-to-DAG meetings between the EU and partner countries have proven efficient for bringing civil society concerns to the agenda. Even when formal procedures, such as the Single-Entry Point, were unavailable, informal meetings in Korea and Peru among civil society representatives overcame the barriers, demonstrating that, despite having a limited role, Civil Society Mechanisms can effectively exercise their monitoring function.

While improvements are occurring gradually, the communication shift towards sanctions appears to be a hasty attempt at a quick solution, drawing on mistaken analogies to the domestic system. The idea of penalising one individual country seems rather punitive for those who are still in search of development and struggle to reach higher regulatory standards. Cooperation must be the answer, and Civil Society Mechanisms present a promising opportunity to exert pressure over compliance.

# WOMEN PROVISIONS IN THE NEW GENERATION OF EU TRADE AGREEMENTS

*Klarissa Martins Sckayer Abicalam*

## 1. *Introduction*

As enshrined in Article 2 of the Treaty of the European Union (TEU)[1], equality between men and women is a core value and overarching principle of the EU legal order, that according to Article 8 of the Treaty on the Functioning of the European Union[2] shall be addressed to all EU activities, and so to the EU's external action[3], which comprises the Common Commercial Policy (CCP) or simply trade policy. According to Article 207, para. 1, TFEU, the CCP "shall be conducted in the context of the principles and objectives of the Union's external action" comprehending, *inter alia*, the safeguard of EU's values and fundamental interests, the protection of human rights and promotion of sustainable development.

---

[1] *Consolidated Version of the Treaty on European Union, Official Journal of the European Union*, C 326/13, 26.10.2012 [hereinafter TEU]. In fact, the EU's concern with gender equality has been present in an incipient form since the Treaty of Rome, which included "the principle that men and women should receive equal pay for equal work", as a way of equalizing production costs across the single market. See Article 199 of the Treaty Establishing the European Community (Consolidated Version 2002), Rome Treaty, 25 March 1957, *OJ C 325*, 24.12.2002, pp. 33-184 [hereinafter "Treaty of Rome"].

[2] *Consolidated version of the Treaty on the Functioning of the European Union* [2012] OJ C 326, pp. 1-390 [hereinafter TFEU].

[3] Articles 3 (5) and 21 (1), TEU.

The Treaty of Lisbon considerably expanded the scope of the CCP to expressly include trade in services, the commercial aspects of intellectual property and foreign direct investment[4]. In Opinion 2/15 related to the exclusive competence of the EU for concluding the then draft EU-Singapore Free Trade Agreement, the Court of Justice of the European Union clarified two very important points, i.e., that the commitments related to foreign indirect foreign investment[5] fall within the shared competences between the EU and the Members States[6], and that the objective of sustainable development is an integral part of the CCP[7], and so referral to international instruments related to the protection of labour and environmental rights made by the parties are part of the CCP[8] and thus are within the exclusive competence of the Union[9]. Henceforth, mainstreaming equality between women and men in the international trade agreements negotiated by the EU can be doubly justified: when it makes trade liberalisation subject to the condition that the Parties will comply with their international women's rights obligations – as it has been done with regards to the social protection of workers and environmental protection in the new generation of EU trade agreements – and as way to promote sustain-

[4] For a complete commentary on the enlargement of the CCP after the Treaty of Lisbon, see M. Hanh, G. Van der Loo (eds.), *Law and Practice of the Common Commercial Policy: The First 10 Years after the Treaty of Lisbon*, *Studies in EU External Relations*, Vol. 18, Brill, 2020.

[5] The EU competence to sign and conclude alone Free Trade Agreements of new generation was clarified by the European Court of Justice in the Opinion 2/15 of the Court of Justice issued on 16 May 2017 ECLI:EU:C:2017:376 [hereinafter *Opinion 2/15 Singapore Free Trade Agreement*]. Commenting on the Opinion, see M. Cremona, *Shaping EU Trade Policy Post-Lisbon: Opinion 2/15 of 16 May 2017* in *European Constitutional Law Review*, 2018, 14.1, pp. 231-260.

[6] *Opinion 2/15 Singapore Free Trade Agreement*, para. 136-144.

[7] *Opinion 2/15 Singapore Free Trade Agreement*, para. 147.

[8] However, the Court highlighted that those commitments should not have the intention "to harmonise the labour or environment standards of the Parties", but to "recognise their mutual right to establish their own levels of environmental and social protection, and to adopt or modify accordingly their relevant laws and policies, consistent with their international commitments in those fields". Otherwise, as a social or environmental policy, it would fall within the shared competences between the EU and its Member States. See *Opinion 2/15 Singapore Free Trade Agreement*, para. 165-166.

[9] Art. 3 (e), TFEU.

able development[10], once the objective of women empowerment is comprised in the social aspect of sustainable development, and since 2015 it is set up in the fifth of the seventeen goals of the UN's 2030 Agenda[11], strongly endorsed and promoted by the Union[12].

This chapter examines the evolution of provisions related to women in the new generation of EU trade agreements, here called "women-related" provisions, starting with a brief definition of the concept and identifying the EU and international soft law instruments that have been crucial to their development. It then makes an overview on the evolution of the women-related provisions in the new generation of EU trade agreements starting with the EU-South Korea FTA, to the so-called last generation ones, with reference to the trade agreements concluded by the EU with New Zealand, Chile (this one not yet ratified at the time of writing) and Kenya, taking into account the place of the provisions, their structure, content and the dispute settlement mechanism available to resolve possible disputes arising from them. The chapter concludes with an outlook on the women-related provisions provided for in the last generation of EU trade agreement and highlights important aspects the EU should not overlook when drafting and negotiating new provisions related to women in its trade agreements.

## 2. *Women-related provisions in the new generation of EU trade agreements*

The new generation of EU trade agreements[13], – which include a Trade and Sustainable Development chapter on standards cov-

[10] See B. Virginie, *Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm*, in *European Journal of International Law*, 23(2), pp. 377-401.

[11] United Nations General Assembly Resolution of 25 September 2015, *Transforming Our World: the 2030 Agenda for Sustainable Development*, A/RES/70/1 [hereinafter UN SDGs 2030 Agenda].

[12] European Commission, *EU approach to SDGs implementation*, https://commission.europa.eu/strategy-and-policy/sustainable-development-goals/eu-approach-sdgs-implementation_en (accessed on 10.11.2024).

[13] The term trade agreement in this chapter comprehends Free Trade Agreement (FTAs) and Economic Partnership Agreements (EPAs). On the characteristics

ering non-trade values such as environmental protection, the fight against climate change, the protection of human and labour rights, the promotion of social welfare and inclusiveness, transparency and the participation of civil society – have so far not included explicit provisions related to women. These kind of provisions, that are here named "women-related"[14] provisions, make reference to the exclusive attributes of the female sex or gender, as "women", "girl", "maternity", "mother", "pregnancy", or to the international instruments addressed to promote women's rights, as Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)[15], the Beijing Declaration and Platform for Action (BDPA)[16], the 5th SDG of the UN 2030 Agenda[17], and the International Labor Organization (ILO) Conventions that address significant commitments to ensure women's rights and non-discrimination based on sex in the labour relations, as the Conventions n. 100 (Equal Remuneration Convention)[18], n. 111 (Discrimination in Employment and Occupation Convention)[19], n. 156 (Convention concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities)[20], n. 183 (Maternity Protection Con-

---

and types of EU Trade Agreements as classified by the Council of the European Union, see *EU Trade Agreements*, Available at: https://www.consilium.europa.eu/en/policies/trade-agreements/ (accessed on 10.11.2024).

[14] The majority of the doctrine applies the term "gender-related" provisions to describe provisions related to the object of gender equality and women empowerment in trade agreements. See for example: J.A. Monteiro, *Gender Related Provisions in Regional Trade Agreements*, WTO Staff Working Paper ERSD-2021-8 24, February 2021. Taking into account the abstract and continuously evolving definition of gender in social sciences, the author of this chapter uses the term "women-related" to analyse the provisions addressed to a specific and concrete category of legal subjects: women.

[15] *Convention on the Elimination of all Forms of Discrimination Against Women*, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, *entered into force* Sept. 3, 1981.

[16] *Report of the Fourth World Conference on Women*, Beijin, Chapter I, 4-15, September 1995, A/CONF.177/20/Rev.1

[17] See footnote 11.

[18] ILO *Equal Remuneration Convention* (n. 100). Adopted on 29 June 1951 [entry into force 23 May 1953].

[19] ILO, *Discrimination (Employment and Occupation) Convention* (n. 111). Adopted on 25 June 1958 [Entry into force 15 June 1960].

[20] ILO, *Workers with Family Responsibilities Convention* (n. 156). Adopted on 23 June 1981 [Entry into force 11 August 1983].

vention)[21], and more recently the Convention n. 190 (elimination of violence and harassment in the world of work)[22], since women are the main group to suffer sexual harassment and violence in the workplace, especially young immigrant ones[23].

In fact, in the EU FTAs, the quantity and quality of explicit women-related provisions has been low and limited to non-discrimination in labour relations. Since the EU-South Korea FTA[24], considered the first new generation of an EU FTA (2011)[25], the term "women" when it appears, is only in general terms within the TSD chapter in relation to commitments to multilateral labour standards and agreements "The Parties reaffirm the commitment, under the 2006 Ministerial Declaration of the UN Economic and Social Council on Full Employment and Decent Work, to recognising full and productive employment and decent work for all as a key element of sustainable development for all countries and as a priority objective of international cooperation and to promoting the development of international trade in a way that is conducive to full and productive employment and decent work for all, including men, women and young people"[26]. In addition, article 13.4.3 of the EU-South Korea FTA, the parties commit to respecting, promoting and realising, in their laws and practices, the principles concerning the fundamental rights, including the "elimination of discrimination in respect of employment and occupation". The last paragraph of the same arti-

[21] ILO, *Maternity Protection Convention* (n. 183). Adopted on 15 June 2000 [Entry into force 07 February 2002].

[22] ILO, *Elimination of violence and harassment in the world of work* (n. 190) Adopted on 21 June 2019 [Entry into force 25 June 2021].

[23] See *Experiences of Violence and Harassment at work: A Global First Survey*, Geneva, ILO, 2022, p. 8, p. 46, https://doi.org/10.54394/IOAX8567.

[24] *Official Journal of the European Union, Free trade agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part*, 14 May 2011, L127/6 [hereinafter *EU-South Korea FTA*].

[25] Before the EU-South Korea, the EU concluded an EPA with the CARIFORUM countries, including social and environmental clauses and providing for provisions related to sustainable development in its *Trade Partnership for Sustainable Development* (Part I). However, the agreement does not technically qualify as a "new generation" EU trade agreement. On the matter, see B. Cooreman, G. van Calster, *Trade and Sustainable Development Post-Lisbon*, in *Law and Practice of the Common Commercial Policy the First 10 Years after the Treaty of Lisbon*, see footnote 4, pp. 192-196.

[26] Article 13.4.2 and Annex 13 of the *EU-South Korea FTA*.

cle states that "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 "comprising so the ILO Conventions n. 100 (Equal Remuneration Convention)[27] and n. 111 (Discrimination in Employment and Occupation Convention)[28,29]. It is noteworthy to highlight that the interpretation of Article 13.4.3 in the EU-South Korea FTA was subject to a Panel of Experts under the dispute settlement mechanism provided for by the TSD chapter, after the unsuccessful consultations requested by the EU[30]. On that occasion, the Panel concluded that the labour commitments made by the parties under the agreement were not limited to trade-related aspects of labour[31], and that the commitment made under Article 13.4.3 created to the parties a legal obligation to "make continued and sustained efforts" to ratify the ILO fundamental conventions, but with a certain leeway in selecting specific ways of making such required efforts[32].

The same approach related to women-related provisions limited to commitments to the fundamental principles of the ILO was adopted in the EU and Japan's Economic Partnership Agreement[33] signed on 17 July 2018 and in force since February 2019; in the EU-Singapore FTA with negotiations concluded on 19 October 2018 and in force from 21 November 2019[34]; in the EU-Vietnam FTA[35], signed

[27] See footnote 17.

[28] See footnote 18.

[29] The list with the up-to-date fundamental ILO Conventions is available at the ILO official website in *Fundamental Instruments* at: https://www.ilo.org/international-labour-standards/conventions-protocols-and-recommendations (accessed on 10.10.2024).

[30] Republic of Korea – compliance with obligations under Chapter 13 of the EU – Korea Free Trade Agreement, *Request for Consultations by the European Union*, Brussels, 17 December 2018.

[31] Panel of Experts Proceeding Constituted under Article 13.15 of the EU-Korea Free Trade Agreement (Korea – Labour Commitments), Report of the Panel of Experts, 20 January 2021, par. 63.

[32] *Panel Report, Korea – Labour Commitments*, para. 269, 274.

[33] *Agreement between the European Union and Japan for an Economic Partnership*, in *Official Journal of the European Union*, 27 December 2018, L 330/3 [EU-Japan FTA].

[34] Article 12.4 (e) of the EU-Singapore FTA.

[35] Article 13.4 and 13.14 of the EU-Vietnam FTA. *Free Trade Agreement between the European Union and the Socialist Republic of Viet Nam*, in *Official Journal of the European Union*, 16.06.2020, L 186/1.

on 30 June 2019 and in force from 1st August 2020; and in the part related to trade (Part Two) of the Trade and Cooperation Agreement (TCA) signed on 30 December 2020 between the European Union and the UK after the Brexit, and fully into force since 1 May 2021[36]. Nor the Comprehensive Economic and Trade Agreement (CETA)[37] with Canada – signed on 30 October 2016 and provisionally in force from 21 September 2017[38] due to its mixed nature[39] – provided for considerable explicit women-related provisions, even though Canada is considered a global leader on gender equality and have a included stand-alone "Trade and Gender" chapters in the modernised FTAs it concluded with Chile[40] and with Israel[41] in 2019. In the case of CETA, after the partial entry into force of the agreement, the CETA Joint Committee adopted the Recommendation No. 002/2018 calling for cooperation "to improve the capacity and conditions for women, including workers, businesswomen and entrepreneurs, to access and fully benefit from the opportunities created by CETA"[42], which was followed by an action plan[43].

---

[36] Art. 399 (8), "b" of the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part. *Official Journal of the European Union*, L49/10, 30.4.2021.

[37] *Comprehensive Economic and Trade Agreement between Canada and the European Union (CETA)*, in *Official Journal of the European Union*,14 January 2017, L 11/23.

[38] *Notice concerning the provisional application 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, OJ* L 238, 16.9.2017, pp. 9-9.

[39] On mixed trade agreements involving competences shared with or reserved to EU Member States, see P. Conconi, *EU Trade Agreements: To Mix or Not to Mix, That Is the Question*, in *Journal of World Trade*, 2021, 55(2), pp. 231-261.

[40] The Canada-Chile Free Trade Agreement entered into force on July 5, 1997. The modernized Canada-Chile Free Trade Agreement (CCFTA) entered into force on February 5, 2019.

[41] Protocol Amending the Free Trade Agreement Between the Government of Canada and the Government of the State of Israel [hereinafter Canada-Israel FTA], signed on 28.05.2018, in force since 01 September 2019.

[42] Recommendation 002/2018 of 26 September 2018 of the CETA Joint Committee on Trade and Gender.

[43] CETA Trade and Gender Recommendation: EU-Canada Work Plan 2020-2021, https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/CETA_work_plan-AECG_plan_travail-2020-2021.aspx?lang=eng Access 10.11.2024.

### 3. *Women-related provisions in the last generation of EU trade agreements*

The EU main step towards specific provisions addressed to women in the new generation of EU trade basically came after the EU and its Member States endorsed the "WTO Women's Economic Empowerment Declaration"[44] presented in the auspices of the WTO Ministerial Conference held in Buenos Aires in 2017. Following this event, the European Parliament (EP) adopted the Resolution "Gender Equality in EU Trade Agreements"[45], calling "for binding, enforceable and effective measures to combat the exploitation, and improve the working and living conditions, of women in export-oriented industries, in keeping with the objective of improving the living and working conditions of women in countries and sectors of concern, in particular in the garment, textile and agriculture sectors, in order to avoid that trade liberalisation contributes to precarious labour rights and increased gender wage gaps"[46]. The resolution also recommends the inclusion in the negotiation of the new EU trade agreements of international standards and legal instruments that are devoted to women's rights, such as the CEDAW, the BDPA, the fundamental ILO Conventions and the 5th SDGs of the UN 2030 Agenda, taking into consideration the more vulnerable situation of women in the informal and agricultural sectors, calling on the Commission "to continue its efforts to support MSMEs, with specific focus on, and measures for, women-led MSMEs"[47]. Moreover, the EP welcomed the Commission's commitment to ensure that the trade negotiations to modernise the EU-Chile Association Agreement would include, for the first time in an EU agreement "a specific chapter on gender and trade" and *inter alia* called on the Commission and the Council to promote and support the inclusion of a specific gender

[44] *WTO Joint Declaration on Trade and Women's Economic Empowerment* on the Occasion of the WTO Ministerial Conference in Buenos Aires in December 2017 [hereinafter WTO Buenos Aires Declaration].

[45] European Parliament Resolution *Gender Equality in EU Trade Agreements* (2017/2015(INI)), *OJ* C 162, 10.5.2019, pp. 9-23.

[46] *EP Resolution Gender Equality in EU Trade Agreements*, II, para. 15.

[47] *Ibid.*, para. 21.

chapter in the EU trade and investment agreements, building on the existing examples of Chile-Uruguay and Chile-Canada FTAs.

In the aftermath, the Commission issued the GAP III – Action Plan on Gender Equality and Women's Empowerment in External Action (2021-2025)[48], confirming that new trade agreement would include strong provisions on gender equality, compliance with the CEDAW and ILO Conventions n. 100 and 101. Moreover, the Commission reinforced that compliance with these conventions should remain a requirement under the new Generalised Scheme of Preferences plus[49], which already has the CEDAW among the human rights core conventions to be ratified and implemented in order to give trade preferences to low- and lower-middle income countries. As it has been done regarding Trade and Sustainable Development (TSD) chapters in the new generation of FTAs, the GAP III ensured that the EU would continue to include dedicated gender analyses in all ex-ante impact assessments, sustainability impact assessments, and policy reviews linked to trade[50].

As required by the EP, the Commission included for the very first time a specific section on "Trade and gender equality" (Article 19.4) with notable women-related provisions within the TSD chapter of the FTA with the New Zealand which had negotiations concluded on 30 June 2022 and is in force since 1 May 2024[51]. In the innovative article the parties expressly recognized the need to promote gender equality and women's economic empowerment and to address a gender perspective in the parties' trade and investment

---

[48] Joint Communication to the European Parliament and the Council, *EU Gender Action Plan (GAP) III – An Ambitious Agenda for Gender Equality and Women's Empowerment in EU External Action* [hereinafter GAP III]. Brussels, 25.11.2020 JOIN (2020) 17 final, https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2184 (accessed on 10.11.2024).

[49] "By removing import duties, the EU's GSP helps developing countries to alleviate poverty and create jobs based on international values and principles, including labour and human rights, environment and climate protection, and good governance". EU Generalised Scheme of Preferences at: https://policy.trade.ec.europa.eu/development-and-sustainability/generalised-scheme-preferences_en (accessed on 10.11.2024).

[50] *GAP III*, p. 5.

[51] *Free Trade Agreement between the European Union and New Zealandi*, OJ L, 2024/866, 25.3.2024 [hereinafter *EU-New Zealand FTA*].

relations, reaffirming their commitment with the 5th SDG of the UN 2030 Agenda and the objectives of the WTO Buenos Aires Declaration[52]. In addition, the Parties assumed the obligation to effectively "implement its obligations under the United Nations Conventions to which it is a party that address gender equality or women's rights" including the CEDAW and "the ILO Conventions related to gender equality and the elimination of discrimination in respect of employment and occupation", leaving room for interpretation, as it does not specify which ILO Conventions should be taken into account.

The provision also guarantees the right of the Parties to regulate, in accordance with their respective laws and policies regarding gender equality and equal opportunities for women and men, and it provides a broad and non-exhaustive list of cooperation activities to increase women's participation in international trade and to promote women's participation, leadership and education, particularly in areas where women are traditionally underrepresented, such as science, technology, engineering and mathematics (STEM), as well as innovation, e-commerce and other fields related to trade. It is also mentioned the need to promote financial inclusion, financial literacy and access to trade finance and education, as well as information with regard to measures relating to licensing requirements and procedures, qualification requirements and procedures, or technical standards relating to authorisation for the supply of a service that do not discriminate based on gender[53]. The last article of the section, acknowledging the importance of the work on trade and gender being carried out at the multilateral level, affirm that "the parties shall cooperate in international and multilateral fora, including at the WTO and OECD, to advance trade and gender issues and understanding, including, as appropriate, through voluntary reporting as part of their national reports during their WTO Trade Policy Reviews"[54]. It is noteworthy to mention that the provisions share similarities with the ones set up in the "Global Trade and Gender Ar-

[52] Article 19.4, para. 2, *EU-New Zealand FTA*.
[53] Article 19.4, para. 8.
[54] Article 19.9, *EU-New Zealand FTA*.

rangement" (GTGA)[55] launched in 2020 by New Zealand, Canada and Chile[56], but not joined by the EU.

Another considerable innovation in the EU-New Zealand FTA regards the enforceability of the TSD chapter, even though it does not apply to all women-related provisions. In the EU-New Zealand FTA, as in the others EU new generation of FTAs, the TSD chapter is not subject to the general dispute settlement mechanism (DSM) of the agreement, but to a specific one, that provides for inter-State consultations, and in case they are unsuccessful, enables the parties to submit the dispute to a Panel of Experts entitled to issue non-enforceable recommendations, as it happened in the EU-South Korea case[57]. The innovation of the EU-New Zealand FTA is that it introduced for the first time the possibility of enforcement mechanism relating to some provisions of the TSD chapter, applying the approach sustained by the Commission in the Communication "The power of trade partnerships: for green and just economic growth" issued on 22.06.2022[58] (one week before the conclusion of the negotiations). Under this new approach, there is the possibility to apply as a matter of last resort trade sanctions in case of non-compliance with a panel report that concludes for "serious violations of core TSD commitments, namely the ILO fundamental principles and rights at work, and of the Paris Agreement on Climate Change"[59]. Hence, failure to

[55] Text of the Arrangement available at: https://www.international.gc.ca/trade-commerce/inclusive_trade-commerce_inclusif/itag-gaci/arrangement.aspx?lang=eng, "Participants currently include: Canada (August 2020), Chile (August 2020), New Zealand (August 2020), Mexico (October 2021), Colombia (June 2022), Peru (June 2022), Ecuador (May 2023), Costa Rica (May 2023), Argentina (October 2023), Australia (February 2024) and Brazil (February 2024)" (accessed on 20.12.2024).

[56] About the GTGA see International Institute for Sustainable Development. *GTGA: The Global Trade and Gender Arrangement decoded*, https://www.iisd.org/articles/deep-dive/global-trade-and-gender-arrangement (accessed on 20.12.2024).

[57] Republic of Korea – compliance with obligations under Chapter 13 of the EU – Korea Free Trade Agreement, *Report of the Panel of Experts*, Brussels, 10 January 2021.

[58] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions, *The power of trade partnerships: for green and just economic growth*, Brussels, 22.6.2022 COM(2022) 409 final.

[59] Article 26.16 (2), *EU-New Zealand FTA*.

comply with women's labour rights set up in the considered fundamental ILO Conventions can be as a measure of last resort subject to trade sanctions, however non-compliance with the CEDAW is excluded from this possibility.

As in the others new generation of EU FTAs, the EU-New Zealand FTA has a specialized Committee – the TSD Committee – entitled to monitor the implementation of the TSD Chapter[60] and to contribute for discussions with the Domestic Advisory Groups (DAG), composed by "a balanced representation of independent civil society organisations including non-governmental organisations, business and employers' organisations as well as trade unions active on economic, sustainable development, social, human rights, environmental and other matters", including representatives of the Māori indigenous people in the case of New Zealand[61]. In the EU-New Zealand FTA the TSD Committee is also entitled to monitor the compliance measures that stem from the findings and recommendations delivered in the final report of the panel established to resolve a dispute arising from the TSD chapter. Moreover, since the Commission's Directorate-General for Trade (DG TRADE) appointed in 2020 its first Chief Trade Enforcement Officer (CTEO)[62] to improve compliance with EU Trade Agreements, interested stakeholders are able to lodge complaints in case of non-compliance with TSD commitments in the EU's trading partners through a new platform called Single Entry Point (SEP)[63]. In principle, the new women-related provisions provided for within the EU-New Zealand TSD chapter could be object of a complaint to the SEP, although they are not subject to the dispute settlement mechanism provided for in the agreement.

---

[60] Article 26.3 (b), *EU-New Zealand FTA*. The TSD Committee is also competent to inform the domestic advisory groups established under Article 24.6, and the contact point of the other Party, of communications and opinions received from the public.

[61] Article 24.6, *EU-New Zealand FTA*.

[62] Press release, *European Commission appoints its first Chief Trade Enforcement Officer*, 24 July 2020, https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1409 (accessed on 04.12.2024).

[63] See European Commission Directorate-General for Trade, *Operating guidelines for the Single Entry Point and complaints mechanism for the enforcement of EU trade agreements and arrangements*, Brussels, December 2023, Ref. Ares (2023) 8670907.

In the modernised trade agreement with Chile[64], with negotiations concluded just after 6 months of the EU-New Zealand one, the EU followed the model of Chile in its FTAs[65] concluded with Uruguay[66], Canada[67], Argentina[68], Brazil[69]and Ecuador[70] and included a stand-alone chapter on *Trade and Gender Equality* (Chapter 27) – separated from the TSD chapter. The structure of the chapter follows the previous FTAs concluded by Chile but can be considered more complete in terms of content and enforcement, since Chile FTAs predominantly applies a cooperative approach with its trading partners to solve possible controversies arising from the *Trade and gender* chapter. In the EU-Chile FTA, the *Trade and Gender Equality* chapter starts with an article on "Context and objectives" in which the parties expressly recall their commitments under the UN 2030 Agenda, the WTO Buenos Aires Declaration, the Beijing Declaration and Platform for Action, as well as their commitment to enhance women's capacity, conditions and access to opportunities created by trade.

In Article 27.2 "Multilateral Agreements", the Parties reaffirm in general terms their commitments to the CEDAW and to the ILO Conventions that include binding provisions on gender equality and the elimination of discrimination in respect of employment and occupation. Subsequently, there are the "General Provisions"[71] containing a vast list of positive and negative commitments of best efforts. In this section, similar to the provisions on environmental protection in EU FTAs, there is an non-derogation clause prohibiting

[64] *EU-Chile Advanced Framework Agreement*. Text Available at: https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/chile/eu-chile-agreement_en (accessed on 20.11.2024).

[65] The FTAs concluded by Chile are available at https://www.subrei.gob.cl/acuerdos-comerciales/acuerdos-comerciales-vigentes (accessed on 20.11.2024).

[66] *Chile-Uruguay Trade Agreement* (2016), into force on 13.12.2018.

[67] *Modernized Canada-Chile Free Trade Agreement* (2017), entered into force on 05.02.2019.

[68] *Chile-Argentina Free Trade Agreement* (2016), entered into force on 01.05.2019.

[69] *Chile-Brazil Free Trade Agreement* (2018), entered into force on 25.01.2022.

[70] *Trade Integration Agreement between Chile and Ecuador* (2020), entered into force on 16.05.2022.

[71] Article 27.3, *EU-Chile Advanced Framework Agreement*.

the Parties from weakening or reducing the protection afforded by their respective laws to ensure gender equality or equal opportunities between women and men, or from waiving or otherwise derogating from their respective laws on equal opportunities between women and men in order to promote trade or investment[72].

Furthermore, the agreement considerably improved the list of cooperation provisions present in the EU-New Zealand FTA, bringing more activities in sharing experiences and best practices on policies and programmes to increase women's participation in international trade, also addressing the situation of women in different roles, as labours, entrepreneurs, traders, including the needs of mothers and caregivers[73]. Although the provisions are in a separate chapter, the institutional rules of the TSD Chapter apply mutatis mutandis to the Trade and Gender Equality Chapter[74] and so the TSD Sub-Committee is also responsible for the facilitation, monitoring and implementation of the women-related provisions, underlining that "the Parties shall encourage the participation of organisations promoting equality between men and women[75]" in the DAGs and Civil Society Forums.

Regarding the dispute settlement, different from the other FTAs concluded by Chile – which have a pure cooperative approach to solve possible controversies on "trade and gender" chapter –, the EU-Chile modernised FTA stipulates that issues arising from the "trade and gender equality" chapter must be solved under the specific dispute settlement mechanism set up in the TSD chapter[76], which follows the EU's traditional approach on disputes arising from the TSD chapter[77], providing as a first step for consultations, and, in case it fails, for an adjudicative procedure whereby a Panel of experts is entitled to issue recommendations according to which the parties must take their best efforts to implement, without the possi-

[72] Article 27.3 (7) and (8), *EU-Chile Advanced Framework Agreement*.
[73] *Ibid.*, Article 27.4 (5).
[74] *Ibid.*, Article 27.5 (1).
[75] *Ibid.*, Article 27.5 (2).
[76] *Ibid.*, Article 27.6.
[77] See J.-B. Velut *et al.*, *Comparative Analysis of TSD Provisions for Identification of Best Practices to Support the TSD Review*, in *London School of Economic (LSE)*, September 2021.

bility to suspend concessions or apply sanctions in case of non-compliance.

After the conclusion of the negotiations with Chile, the EU concluded on 19 June 2023 an EPA with Kenya[78] and is in force since 1 July 2024. Differently from the agreement with Chile, the one with Kenya does not contain a "Trade and Gender" chapter, but a section (Article 4), inside the TSD chapter, as the EU-New Zealand FTA. In this section, the parties also refer to the WTO Buenos Aires Declaration and the 5th SDG and reaffirm their commitments with the CEDAW and ILO Conventions related to gender equality and the elimination of discrimination in respect of employment and occupation. However, the article does not include an explicit non-regression clause on women's rights, and neither provide for a detailed list of cooperation activities addressed to increase women's participation in international trade, as the EU-Chile and EU-New Zealand provide, but addresses the matter in general terms.

Regarding dispute settlement, the women-related provisions are also subject to mechanism provided for the TSD chapter[79], which comprise an arbitration Panel in case consultations fail[80]. However, as in the traditional model of EU-FTAs, non-compliance with a Panel's report relating to a subject under the TSD chapter does not trigger the possibility to apply temporary remedies[81]. Even though, under the terms of the agreement, no later than twenty-one days after the date of the arbitration panel ruling, the Party complained against shall inform its DAG[82] of the compliance measures it has taken or intends to take in response to the arbitration panel ruling, and the TSD Committee is also responsible for monitoring the implementa-

[78] 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 ST/13573/2023/INIT, *OJ* L, 2024/1648, 1.7.2024, ELI http://data.europa.eu/eli/agree_internation/2024/1648/oj [hereinafter *EU-Kenya FTA*].

[79] Article 16.2, *EU-Kenya FTA*.

[80] Article 18 of the TSD Chapter of the *EU-Kenya FTA*.

[81] Article 117 of the *EU-Kenya FTA* does not apply to the dispute settlement under the TSD chapter.

[82] About the role and composition of the DAG, see https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/transparency-eu-trade-negotiations/domestic-advisory-groups_en (accessed on 20.12.2024).

tion of the compliance measures, taking into account the observations of the DAGs[83].

## 4. *Concluding remarks*

Equality between men and women is a fundamental value and an overarching principle of the EU's legal order, which is embedded in all its policies, including its trade policy. However, in the new generation of FTAs, which have included a chapter on trade and sustainable development (TSD) since the EU-South Korea FTA, explicit provisions addressing gender equality and women's economic empowerment – as enshrined in the UN's 5th SDG – have not been a priority. This scenario would start to change after the EU endorsed the WTO Women's Economic Empowerment Declaration[84] presented in the auspices of the WTO Ministerial Conference held in Buenos Aires in 2017, followed by the European Parliament Resolution "Gender Equality in EU Trade Agreements"[85].

The present chapter considered the EU trade agreements of new generation, focusing on the last ones with negotiations concluded before December 2024. It is undeniable the quantitative and qualitative improvement of explicit women-related provisions, especially in the modernised EU-Chile FTA, which, following the Chile's approach, included a stand-alone chapter on "Trade and gender equality", comprising positive and negative obligations, commitments with important international agreements as the CEDAW and the ILO Conventions related to non-discrimination between men and women, and a vast list of cooperation activities to promote women's economic empowerment. Despite the remarkable progress made on women-related provisions, much remains to be evaluated, in particular the language used in the provisions, their level of responsiveness and the models for dispute settlement applicable in case of non-compliance with them. Although the EP has called for enforce-

[83] Article 18.6 and 18.7 of the *EU-Kenya FTA*.
[84] *Cit.,* note 39.
[85] *Cit.,* note 35.

ment mechanisms in the TSD chapters, the last agreements – except for the one with New Zealand and only in the case of serious violations of multilateral labour standards and agreements, and a failure to effectively implement the Paris Agreement on Climate Change – maintained the traditional EU model for dispute settlement under the TSD chapter, without the possibility to apply trade sanctions as a last resort.

Overall, it is crucial that the women-related provisions included in the last generation of EU trade agreements and the criteria for adopting different models of DSM to enforce these provisions objectively assess the legal commitments and practices of the trading partners regarding women's rights. In addition, strengthening existing participatory and transparency mechanisms, such as the DAGs, to increase the involvement of women from civil society, business, consumer and labour organizations in the drafting and implementation of the agreement is crucial not only to ensure respect for women's fundamental rights, but also to ensure that women's best interests in terms of self-realization and work-life balance are respected[86] – and so that women are not treated as a mere means to increase the economic gains of the parties[87] or to justify undue protectionist measures.

[86] See A. Slaughter, *Unfinished Business: Women, Men, Work, Family*, Random House, 2016.

[87] See H. Erin *et al.*, *Gender in Global Trade: Transforming or Reproducing Trade Orthodoxy?*, in *Review of International Political Economy: RIPE*, 2022, 29(4), pp. 1368-93, doi:10.1080/09692290.2021.1915846.

# CULTURAL COOPERATION PROTOCOLS IN THE PREFERENTIAL AGREEMENTS OF THE EUROPEAN UNION

*Alessandra Quarta*

## 1. *Introduction*

Cultural cooperation protocols are instruments recently introduced by the European Union in its latest generation of preferential agreements, the so-called PTAs (Preferential Trade Agreements)[1].

The adoption of these protocols in the relevant EU trade agreements is due to the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions[2]. Indeed, as stated in the text of the Commission Communication "A European Agenda for Culture in a Globalising World"[3], "[a]s parties to the

---

[1] See P. Stoll, J. Xu, *Conflict of Jurisdiction: WTO and PTAs*, in A. Trunk, M. Fedorova, A. Aliyev (eds.), *Law of International Trade in the Region of the Caucasus, Central Asia and Russia - Public International Law, Private Law, Dispute Settlement*, Leiden-Boston, Brill-Nijhoff, 2022, pp. 312-322. See also G. Adinolfi, *The New Generation Preferential Agreements of the European Union*, Torino, Giappichelli, 2021.

[2] UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, Paris, October 20, 2005. See related Council Decision No. 2006/515/EC of May 18, 2006 on the conclusion of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, in *OJEU* No. L 201, July 25, 2006, p. 15.

[3] *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of*

UNESCO Convention on the Protection and the Promotion of the Diversity of Cultural Expressions, the Community and the Member States have reaffirmed their commitment to developing a new and more pro-active cultural role for Europe in the context of Europe's international relations and to integrating the cultural dimension as a vital element in Europe's dealings with partner countries and regions".

This commitment reflects the EU's awareness of the need to find further dialogue mechanisms to address the new challenges globalisation brings.

This chapter presents the only examples we have of such instruments to date: the cultural cooperation protocol included in the Agreement between the EU and the CARIFORUM Countries[4], the one found in the Agreement with the Republic of Korea[5], and the one contained in the Agreement with Central America[6].

---

*the Regions, on a European agenda for culture in a globalizing world*, Brussels, 10.5.2007 COM(2007).

[4] Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part, in *OJEU* No. L 289/I of October 30, 2008, p. 3, signed on October 15, 2008 and entered into force on November 1, 2008. Protocol III on cultural cooperation, in *OJEU* No. L 289/II, Oct. 30, 2008, p. 1938 and the related Council Decision of 15 July 2008 on the signature and provisional application of the Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part OJ L 289, 30.10.2008, pp. 1-2.

[5] Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, signed October 6, 2010, (provisional application since January 1, 2011, entered into force May 1, 2015), in *OJEU* No. L 127, May 14, 2011, p. 6. Protocol on Cultural Cooperation, in *OJEU* No. L 127, May 14, 2011, p. 1418. This Agreement was signed and provisionally applied in the territory of the EU as a result of Council Decision No. 2011/265/EU of September 16, 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, in *OJEU* No. L 127/1, May 14, 2011, p. 1.

[6] Agreement Establishing an Association between the European Union and its Member States, on the One Part, and Central America, on the Other Part, in *OJEU* No. L 346, Dec. 15, 2012, p. 3 (signed June 29, 2012, provisionally applied since Aug. 1, 2013). Protocol on Cultural Cooperation, in *OJEU* No. L 346, Dec. 15, 2012, p. 2622; see also the related Council Decision of 25 June 2012 on the signing,

## 2. *The first example of cultural protocol: the protocol with the CARIFORUM Countries*

The first Protocol on Cultural Cooperation[7] was introduced in 2008, but to fully understand its significance, the longstanding relationship between the European Union and the CARIFORUM Countries must be reviewed[8]. This relationship dates back to the late 1950s and is rooted in the 1957 Treaty of Rome, which set out measures for these Nations' economic and social development. Negotiations between the EEC and these States have always extended beyond CARIFORUM to include a broader group known as the ACP (African, Caribbean and Pacific) States[9]. This broad partnership found

---

on behalf of the European Union, of the Agreement establishing an Association between the European Union and its Member States, on the one hand, and Central America on the other, and the provisional application of Part IV thereof concerning trade matters, OJ L 346, 15.12.2012, p. 1–2.

[7] See M. Chochorelou, *The European Identity in the EU Free Trade Agreements: Economic rather than Cultural Objectives?*, in *Cuadernos Europeos de Deusto*, 2019, pp. 236-239; F. Fiorentini, *Cultural Heritage in the EU Trade Agreements: Current Trends in a Controversial Relationship*, in A. Jakubowski, K. Hausler, F. Fiorentini (eds.), *Cultural Heritage in the European Union. A Critical Inquiry into Law and Policy*, Leiden-Boston, Brill-Nijhoff, 2019; B. Garner, *Towards a European Strategy on Culture and Development. Learning from the CARIFORUM-EU Economic Partnership Agreement*, in *Politique Européenne*, 2017, 2(56), pp. 146-168; J. Loisen, *Relations through Protocols on Cultural Cooperation: Fostering or Faltering Cultural Diversity?*, in K. Donders, C. Pauwels, J. Loisen (eds.), *The Palgrave Handbook of European Media Policy*, 2014, pp. 509-525; E. Psychogiopoulou, *The External Dimension of EU Cultural Action and Free Trade: Exploring an Interface*, in *Legal Issues of Economic Integration*, 2014, 41(1), pp. 65-84; S.P. Silva, *Monitoring the Implementation & Results of the CARIFORUM - EU EPA AGREEMENT*, Final Report, 2014; C. Souyri-Desrosier, *EU protocols on cultural cooperation. An attempt to promote and implement the CDCE within the framework of bilateral trade negotiations*, in L. Richieri Hanania (ed.), *Cultural Diversity in International Law. The effectiveness of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, London-New York, Routledge, 2014, pp. 209-224.

[8] CARIFORUM consists of Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, Dominican Republic, Grenada, Guyana, Haiti, Jamaica, Saint Lucia, Saint Vincent and the Grenadines, Saint Kitts and Nevis, Suriname, and Trinidad and Tobago. Haiti signed the Agreement under analysis in 2009 while Cuba, although part of CARIFORUM, is not a party to the Treaty.

[9] This acronym refers to the associated African, Caribbean and Pacific countries that are signatories to the first Lomé Convention of 1975. See N. Keijzer, M.

its initial legal basis in the two Yaoundé Conventions[10]. However, the landscape evolved with the adoption of the 1975 Lomé Convention[11], which established a preferential trade regime. Crucially, this arrangement eschewed reciprocity and granted unilateral benefits to ACP countries – a principle later deemed incompatible with WTO rules. In response, the Cotonou Agreement[12] was introduced in 2000 and will serve as the cornerstone of EU-ACP relations until June 2023. At the heart of the Cotonou Agreement, which guided negotiations during the creation of the 2008 Cultural Protocol, were

---

Negre, *Outsourcing a partnership? Assessing ACP-EU cooperation under the Cotonou Partnership Agreement*, in *South African Journal of International Affairs*, 2014, 21(2), pp. 279-296; G. Vassalli, J.A. Taborda, T. Guarnizo Useche, *Cooperation between the European Union and Latin America 2007-2013*, in *Il Politico* (Univ. Pavia, Italy), 2014, 2, pp. 148-167; P. Sutton, *The European Union and the Caribbean Region: Situating the Caribbean Overseas Countries and Territories*, in *European Review of Latin American and Caribbean Studies*, 2012, 93, pp. 79-94; M. Carbone, *Common and intersecting interests: EU-Caribbean relations and the post-Cotonou EU-ACP partnership*, in *The Round Table. The Commonwealth Journal of International Affairs*, 2020, 109(5), pp. 526-541.

[10] Convention of Association between the European Economic Community and the African and Malagasy States Associated with that Community, signed at Yaoundé July 20, 1963, in *OJ* No. 93, June 11, 1964, pp. 1431-1457. See also Convention of Association between the European Economic Community and the African and Malagasy States associated with that Community, signed at Yaoundé July 29, 1969, in *OJ* No. L 282, Dec. 28, 1970, pp. 2-30.

[11] ACP-CEE Convention of Lomé, in *Guce* No. L 25, January 30, 1976 pp. 2-40.

[12] Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States, of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on June 23, 2000, in *OJ* No. L 317, December 15, 2000, pp. 3-353. For subsequent amendments, refer to Council Decision No. 2005/599/EC of June 21, 2005, on the signing, on behalf of the European Community, of the Agreement amending the Partnership Agreement between the members of the African, Caribbean and Pacific Group of States, of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on June 23, 2000, in *OJ* No. L 209, August 11, 2005, pp. 26-64 and Council Decision No. 2010/614/EU of June 14, 2010 on the position to be taken by the European Union within the ACP-EU Council of Ministers concerning the transitional measures applicable from the date of signing to the date of entry into force of the Agreement amending for the second time the Partnership Agreement between the members of the African, Caribbean and Pacific Group of States, of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on June 23, 2000, as first amended in Luxembourg on June 25, 2005, in *OJ* No. L 269, October 13, 2010, pp. 1-4.

principles of equality between partners and robust cooperation at multiple levels. These included governments, local authorities, civil society, and the private sector on both sides. Future revisions of this agreement are expected to pave the way for enhanced regional cooperation between ACP Countries[13].

Immediately after the entry into force of the 2005 UNESCO Convention, the European Commission, through the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Communication on a European Agenda for Culture in a Globalising World*, once again emphasised the centrality of its role in bringing this instrument onto the international stage. Moreover, as a careful reading of this Communication shows, culture is "an essential element in achieving the EU's strategic objectives of prosperity, solidarity and security, while ensuring a stronger presence on the international scene". In line with this position, it has been decided to include cultural protocols in some of the recent trade agreements.

### 2.1. *Analysis of the structure of the protocol*

In terms of structure, the protocol consists of nine articles. Article 1 sets out the scope, objectives and definitions; it then moves on to Section 1, entitled *Horizontal Provisions*, which runs from Article 2 to Article 4 and closes with Section 2, which contains the "Sectoral Provisions", from Article 5 to Article 9.

The preamble begins by referencing the 2005 UNESCO Convention and the fact that its principles and definitions are recognised. A reference to Articles 14, 15 and 16 of that instrument is then included. The first cited provision, Article 14, provides in detail sustainable development cooperation that aims to decrease poverty, considering the needs of developing countries; Article 15 specifies the modalities of collaboration; and Article 16 provides for the possibility of preferential treatment for developing countries.

[13] See M. Carbone, *Common and intersecting interests*, *supra*, note 9.

An important innovation lies in the fact that cooperation is also established in the audiovisual sector between the two regions. The result of the cooperation is considered a European product that can enjoy all the benefits provided by the protocol.

The text of the Protocol begins by stating, in Article 1, that the provisions of the Protocol may not prejudice the framework established by the text of the Agreement, also referring to the exclusion of the audiovisual services sector from the liberalisation commitments undertaken in the services chapter.

The effort to ensure the preferential treatment provided by the UNESCO Convention results from several provisions of the Protocol. Article 3, for example, provides an obligation for the parties to facilitate the entry and stay, albeit temporary, of artists and cultural workers originating from the other contracting party. This provision is central because it introduces the necessary conditions for the entry and temporary stay of professionals for a period with a maximum duration of ninety days within twelve months. This measure will be analysed by referring to Title II, "Investment, Trade in Services and Electronic Commerce", contained in the Agreement's text, referred to in Paragraph 1 of Article 3. Since several categories of cultural professionals can't enter and circulate in the other party's territory based on what is provided in Title II of the Treaty, an *ad hoc* article in the protocol was provided.

The importance of narrowing the gap in progress between CARIFORUM countries and the EU is also the focus of Article 4, in which technical assistance is to be provided.

The second part of the protocol provides sectoral provisions, among which the discipline for audiovisuals in Article 5 stands out. This article encourages the negotiation of new co-production agreements and the implementation of existing ones.

From the European point of view, thanks to Directive No. 13/2010/EU[14] on audiovisual media services, it is envisaged that

[14] Directive No. 2010/13/EU of the European Parliament and Council of March 10, 2010 in *OJEU* No. L 95, April 15, 2010, p. 1, on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive). Then, in 2018, Directive No. 2018/1808/EU of the European

co-productions can benefit from quotas guaranteeing entirely European products. The text of the Directive mentioned above is partly different from its two predecessors in 1989 and 1997: the difference lies in the definition given in Article 1 of "European works"[15], which has been adapted to keep up with the times.

It is necessary to consider what the requirements are for a co-production to be a co-production and to be able to enter the European territory with the facilities provided. As can be seen from reading the text of Article 5 (2) of the Protocol, these are stringent conditions that are difficult for countries that are not fully developed to meet.

This pattern of treatment, however, is not reciprocal. Within the CARIFORUM countries, there is no mechanism similar to the European one to access co-productions.

The remaining protocol rules called for generic cooperation to facilitate exchanges and contacts in the cultural fields involved.

Despite the direct reference to the 2005 UNESCO Convention, when it comes to implementing the protocol, it has been stipulated that institutions and mechanisms established in the Economic Partnership Agreement should be considered.

The protocol has no mechanism to involve cultural experts in reviewing exchanges, even though regular monitoring is expected.

Further criticism is related to the fact that there is no actual budget forecast for implementing the sector's development. It should be noted, however, that this does not mean that the EU does not intend to intervene economically as well, as demonstrated by the fact that, according to the official website of the European Commission, between 2014 and 2020 the EU has allocated 346 million eu-

---

Parliament and Council of November 14, 2018 amending Directive No. 2010/13/EU, in *OJ* No. L 303, Nov. 28, 2018, p. 69, on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), was introduced in view of changing market realities, which, however, did not affect the previous definition given in item *n.*, of Article 1.

[15] Council Directive No. 89/552/EC of October 3, 1989, on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, *OJ* No. L 298, Oct. 17, 1989, p. 23.

ros within the framework of the Regional Cooperation Programme, which has allowed for the general development of numerous themes in these countries. As far as the cultural sector is concerned, the Commission has already launched the Creative Europe programme since 2014, through which it supports cultural and audiovisual projects from third Countries.

During the fourth meeting of the CARIFORUM-EU Joint Council, held in Brussels on 17 November 2017, the two parties took further steps towards the rapid and full activation of the Protocol on Cultural Cooperation[16]. The fact that almost ten years after the negotiation of this agreement, further instruments are needed for the cultural protocol to be effectively implemented highlights a complex situation.

In conclusion, therefore, it can be said that the protocol with the CARIFORUM countries has laid the foundation for this type of cooperation; the fact that it originated as a development of trade policy[17], as already pointed out, has resulted in its limited scope in terms of protection and cultural cooperation.

### 3. *The Protocol with the Republic of Korea*

The second cultural protocol was annexed to the free trade agreement with the Republic of Korea in 2010.

Again, to grasp the peculiarities of this instrument, it is good to reconstruct the relations between the parties briefly. The relation-

[16] See Minutes of the Fourth Meeting of the Joint CARIFORUM-EU Council, held on 17 November 2017 in Brussels, Belgium, available online at https://data.consilium.europa.eu/doc/document/ST-3651-2018-INIT/en/pdf.

[17] See M. Chochorelou, *The European Identity in the EU Free Trade Agreements*, *supra*, note 7; S. Formentini, L. Iapadre, *Cultural Diversity and Regional Trade Agreements: the Case of Audiovisual Services*, UNU-CRIS Working Papers, W-2007/4; J. Loisen, *Relations through Protocols on Cultural Cooperation: Fostering or Faltering Cultural Diversity?*, *supra*, note 7; L. Richieri Hanania, *Cultural Diversity and Regional Trade Agreements - The European Union Experience with Cultural Cooperation Frameworks*, *supra*, note 7; A. Vlassis, *L'Union européenne, acteur international de la diversité Culturelle? Le protocole de cooperation culturelle*, in *InaGlobal*, 2010.

ship between these two international actors dates back to the early 1960s. It has evolved from a beginning stage of diplomatic ties to an increase in economic and trade exchanges, partly due to reforms implemented by Korea to open its market to foreign investment.

The Agreement under consideration here is part of a broader landscape; evidence of this is that other treaties were in place before its adoption. Examples are the Framework Agreement on Trade and Cooperation signed in 1996[18], the Agreement on Cooperation and Mutual Administrative Assistance in Customs Matters of 1997[19] and the Agreement on Cooperation in Competitive Activities of 2009[20].

Since the early stages of the negotiations, the Commission has decided to use the text of the Protocol initialled with the CARIFORUM Countries as the basic text of the Protocol. On the part of European experts, the news was met with perplexity stemming mainly from the fact that the South Korean cultural sector is not comparable to that of Caribbean countries; Korea is highly developed in audiovisual[21]. This aspect was precisely emphasised by European coalitions for cultural diversity from several member states, led by *Beat Santschi*, Vice President for Europe of the International Federation of Coalitions for Cultural Diversity, in a letter sent to then Eu-

[18] This is the Framework Agreement on Trade and Cooperation concluded on October 28, 1996, between the European Community and its Member States, on the one hand, and the Government of the Republic of Korea, on the other hand, which entered into force on April 1, 2001, as of today no longer in force because it was replaced by the Framework Agreement between the European Union and its Member States, on the one hand, and the Republic of Korea, on the other hand, concluded on May 10, 2010, and entered into force on June 1, 2014.

[19] Agreement between the European Community and the Republic of Korea on Cooperation and Mutual Administrative Assistance in Customs Matters, in *OJ* No. L 121, May 13, 1997, p. 14, entered into force May 1, 1997.

[20] Agreement between the European Community and the Government of the Republic of Korea concerning cooperation on anti-competitive activities, in *OJEU* No. L 202, Aug. 4, 2009, p. 36.

[21] See F. Fiorentini, *Cultural Heritage in the EU Trade Agreements, cit. supra,* note 6; B. De Witte, *The Value of Cultural Diversity in European Union Law*, in H. Schneider, P. Van den Bossche (eds.), *Protection of Cultural Diversity from a European and International Perspective*, Antwerp, Intersentia, 2008, pp. 219-247; J. Loisen, F. De Ville , *The EU-Korea Protocol on Cultural Cooperation: Toward Cultural Diversity or Cultural Deficit?*, in *International Journal of Communication*, 2011, 5, pp. 254-271.

ropean Commission President Barroso[22]. The opinions of these experts are very critical: they immediately express concern about the marginal role given to the cultural sector, first during the negotiations and later in the final text of the agreement. Suggestions arising from the letter are that the Commission should include a specific request for Korea to ratify the UNESCO Convention on Cultural Diversity; again, the Commission should conduct in-depth studies on the Korean landscape of the cultural sector in general and audiovisuals specifically; and in addition, the experts request that any measure of preferential treatment be eliminated because it is not required by the Convention just mentioned for already developed countries among which Korea is included.

### 3.1. *The structure of the protocol: the important focus on the audiovisual sector*

The general structure of the protocol consists of ten articles divided into several sections.

First, the scope, objectives and definitions underlying the entire framework of the Protocol are indicated in Article 1. Regarding the scope, it is made clear from the outset that, subject to the general provisions of the Agreement, the Protocol identifies the framework for cooperation to facilitate exchanges of cultural goods and services, including in the audiovisual sector.

Then we have Section A on horizontal provisions, which includes Articles 2 to 4; Section B, on the other hand, provides for sectoral provisions and is, in turn, divided into Subsection A on provisions on audiovisual works formed by Articles 5, 6 and 7, and Subsection B on the promotion of cultural sectors other than the audiovisual sector which includes Articles 8, 9 and 10.

Among the various norms, it is worth mentioning at the outset of the Article 3. This provision foresees the establishment, six months after the entry into force of the Agreement, of a Cultural Cooperation Committee composed of officials from both sides with

[22] See European Coalitions for Cultural Diversity, *Comments on the Concept Paper on the draft Cultural Cooperation Protocol with Korea*, March 18, 2009.

experience in cultural matters, whose role will be to ensure the implementation of the Protocol and to deal with any disputes.

In addition, the implementation of this instrument is overseen by the so-called "advisory groups" outlined in Article 3. The text stipulates that each party may appoint one or more of these groups. The Committee on Cultural Cooperation may request their involvement when seeking a mutually beneficial resolution to a given issue.

It is then stipulated in Article 3*bis* that should issues arise in cultural matters, the first instrument to refer to is consultation with the Committee on Cultural Cooperation.

If a satisfactory solution cannot be reached, the provisions of Chapter 14 of the General Agreement (Dispute Resolution) should be applied, with the amendments incorporated in Article 3*bis* of the Protocol.

The text emphasises the autonomy of cultural and commercial fields. According to Article 3*bis* (d) of the Protocol, if a plaintiff has a dispute concerning matters related to the cultural protocol, they may suspend only the obligations arising from that protocol. On the other hand, Article 3*bis* (e) states that for disputes not related to the protocol issues, the obligations arising from it cannot be suspended.

The following article builds on what is provided in the first protocol concluded with the Caribbean Countries. An effort is planned to facilitate the entry and stay of cultural workers who cannot benefit from what is stated in the Agreement's Chapter on Trade in Services, Establishment and Electronic Commerce.

Then, the discipline for audiovisual co-productions was introduced in Section B, "Sectoral Provisions", Subsection A, entitled "Provisions on Audiovisual Works".

The opening provision, Article 5, is also well-detailed because of the enormous strength of the Korean audiovisual industry. For this reason, preferential market access is mutually established between the parties.

Paragraph 7 of Article 5 indicates that co-productions are eligible for the respective schemes for promoting local and regional cultural content for three years, renewable. According to Sec. 4 of Art. 5, such co-productions are eligible for the EU's schemes for promoting local and regional cultural content if they meet detailed require-

ments. At the same time, they are eligible for the Korean schemes to promote local and regional cultural content if they fall under the cases indicated in Sec. 5.

The co-production regulations have long been criticised. The first issue concerns that Article 16 of the UNESCO Convention provides preferential treatment only for developing countries, among which Korea cannot be included. Moreover, a good market analysis would have been sufficient to see how the audiovisual sector is one in which Korea's power is evident[23].

The last articles of this subsection provide for additional forms of cooperation, such as organising festivals, seminars and various initiatives that can give greater dissemination to audiovisual products (Art. 6). These are regulations with no critical issues or innovations compared to the previous protocol.

It is then stipulated that the parties can use each other's equipment to realise the works (Art. 7), and this testifies, again, how the Asian country is considered to be able to provide valuable technical tools for European productions.

The last subsection deals generically with promoting cultural sectors other than audiovisual, particularly the performing arts in Article 8, publications in Article 9, and the protection of sites and monuments as part of cultural heritage in Article 10.

This important Agreement has been applied, albeit provisionally, since July 2011.

The EU National Advisory Group, whose members are representatives of the cultural sector, met in September 2013 for an initial assessment of the implementation of the right to promote cultural diversity and cooperation in co-productions. It was noted that there were no co-produced works at the time of the analysis, but the importance of this instrument was emphasised.

More recently, in the Commission's Proposal for a Council decision on the extension of the entitlement for co-productions as provided for in Article 5 of the Protocol on Cultural Cooperation to the

[23] See S. Zhao, *Promoting and Protecting Cultural and Creative Industries through Free Trade Agreements: The Experience from Korea and Japan*, in *Chinese (Taiwan) Yearbook of International Law and Affairs*, Vol. 39, Leiden, Brill, 2021, pp. 360-389.

Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part[24], the debate emphasised the successful contribution of the Cultural Protocol as a whole to the development of cultural relations in line with the 2005 UNESCO Convention.

## 4. *The protocol with Central America*

The cultural protocol between the EU and Central America was concluded in 2012. Relations between the EU and Latin American countries[25] date back to the 1960s and were strained during the Cold War. These relations were revived in the 1980s when Spain and Portugal joined the European Economic Community[26].

It must be emphasised that the main reason for the decision to increase relations with areas of Latin America, in general, lay in the desire to counteract the U.S. many Countries in those areas were suffering from dependence on the United States.

Within this landscape, the Association Agreement with Central America fits; negotiations were initiated following the 2006 European Union-Latin America and Caribbean Summit, during which the EU and several Central American Republics[27] agreed to begin negotiations for an Association Agreement.

### 4.1. *Structure and content of the protocol with Central America*

The protocol structure provides in Article 1 the purposes and definitions, and again, the 2005 UNESCO Convention is referred to.

---

[24] See European Commission's Proposal for a Council Decision on the extension of the entitlement for co-productions as provided for in Article 5 of the Protocol on Cultural Cooperation to 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, Brussels, 13.1.2023 COM(2023) 23 final.

[25] Latin America includes South America, Central America and Cuba (included with special status).

[26] See G. Vassalli, J.A. Taborda, T. Guarnizo Useche, *Cooperation between the European Union and Latin America 2007-2013*, *supra*, note 9.

[27] The Central American States that are parties to this Agreement are Panama, Guatemala, Costa Rica, El Salvador, Honduras and Nicaragua.

It then continues with Section A, which contains the horizontal provisions, specifically in Articles 2 to 4, and Section B on sectoral provisions provided in Articles 5 to 8. It then concludes with Section C, in which Article 9 identifies the final clauses.

A first clarification is included in the footnote, which states that the provisions of the Protocol are excluded from Title X of the Agreement, which deals with dispute settlement. Therefore, in this case, there is a gap within the framework provided by the protocol since it does not state how to resolve any disputes.

Within the preamble, there is a provision for a subcommittee on cooperation, consisting of experts, to deal with the implementation of the protocol. The fact that only the task related to implementation is explicitly mentioned confirms the unwillingness to give this body the ability to resolve disputes.

Horizontal provisions are aimed, in general, at improving the development of cultural policies; Article 2, devoted to cultural exchanges and dialogue, also provides for the possibility of using preferential treatment.

This section likewise includes provisions regarding the entry and temporary stay of experts in the field for whom the parties are expected to facilitate mobility. Again, the professionals to whom the provision is addressed are identified, but unlike previous protocols, the duration of mobility is not indicated.

Lastly, Article 4 reintroduces the technical assistance scheme under which the EU is committed to supporting states whose cultural policy development lags.

The following section provides for sectoral provisions, and here, too, the role of audiovisual is highlighted with the provision of Article 5. The article opens with a commitment in para. 1 for all parties to encourage negotiating new co-production agreements and implementing existing ones. The following paragraph refers to facilitating the access of co-productions to each other's markets. The article closes with par. 3 stating that the parties are to encourage each other's territories as locations in which to set films and TV series, and by par. 4, which repeats the pattern already seen, of the possible temporary importation of useful technical material for the creation of films and TV series by professionals.

Subsequent Articles 6, 7, and 8 were taken from the previous protocols. The first deals with cooperation for the performing arts and defines the general will to cooperate.

In Art. 7, legislation on publication was included. Again, the text of the article is very brief; it is a single paragraph where the intention to cooperate is highlighted.

Lastly, Art. 8 identifies a willingness to work together to protect historic sites and monuments based on UNESCO efforts; this text also has no notable innovative elements.

The final section, Section C, which contains the closing provisions, includes Article 9, with the rules for the Protocol's entry into force.

The Council of the European Union, by Decision (EU) No. 2024/1156[28], approved the Agreement. Before this act, this instrument was provisionally applied due to what was envisaged, and only the trade-related provisions were in force.

To date, we have no impact assessment, among those carried out during the period of provisional application, that considers the Protocol on Cultural Cooperation, as the latter has not been part of the provisions provisionally applied since 2013. It will be interesting to see whether the Protocol will finally receive more attention now that it has entered into force on 1 May 2024.

## 5. *Conclusions*

Several similarities and distinctions can be inferred from the cultural protocols concluded to date.

Common features lie in generic language and the fact that these protocols are covenant instruments of an essentially programmatic nature. Of course, this does not mean that they are without enforcement.

[28] Council Decision (EU) No. 2024/1156 of April 12, 2024 on the conclusion of the Agreement establishing an Association between the European Union and its Member States, of the one part, and Central America, of the other part, in *OJEU* No. L, April 17, 2024. The European Parliament had approved this Agreement on December 11, 2012.

Again, all three instruments share a constant reference to the 2005 UNESCO Convention; in each of the protocols, there is an express reference to this instrument in both the preamble and the article devoted to definitions and purposes.

It cannot be overlooked that none of the protocols have a fundamental mechanism to ensure their full effectiveness. Indeed, in the protocol with Korea, there is an attempt to go in this direction, but it is a mere effort. In this case, there is provision for the creation of a committee to deal with disputes over culture and the implementation of the protocol itself; on the other hand, in the case of Central America, there is a return to a system whereby even cultural aspects are handled from a primarily economic point of view. It has been decided that the implementation of the protocol will take place according to what has been established within the Trade Agreement, and, in addition, there is no indication regarding dispute resolution. To conclude the analysis of the implementation mechanisms, which in the case of the protocols analysed here are underpinned by the existence of committees or subcommittees made up of experts in cultural matters, the data specific to the first model of cultural protocol, that with the Caribbean countries, is undoubtedly the least reassuring: in fact, it does not address this issue.

Despite the points of contact, the differences that characterise the three instruments remain equally evident, examples of which are the different levels of depth for the audiovisual sector issue as well as the decision of whether or not to identify unique groups of experts to whom to entrust the implementation and, only in the case of the Republic of South Korea, also the resolution of any disputes.

However, it is questionable whether the EU could have done more to establish at least a minimum standard of requirements to be included in each cultural protocol. As has long been suggested by experts in the cultural field, a single strategy should be developed to identify the objectives to be pursued in negotiations with third Countries. In addition, it may be beneficial to consider assessing the situation in the State with which one is about to enter into negotiations, with a view to avoiding a repetition of the controversy that accompanied the Korean Agreement concerning audiovisual issues.

SESSION VII

# INTERNATIONAL SUSTAINABLE FINANCE AND THE EU APPROACH

# SUSTAINABLE FINANCE FOR SUSTAINABLE DEVELOPMENT: REFORMING THE INTERNATIONAL FINANCIAL SYSTEM

*Tiziano Bussani*

## 1. *Introduction*

In the last decade, the evolution of the global debate on sustainable development and climate change has led to a general rethinking of the relationship between finance and sustainability, highlighting the need to reorient the global flows of capital – both public and private – toward financial activities capable of bringing concrete and long-lasting benefits to the climate, the environment, and society at large. While the still-dominant "traditional finance" paradigm has been contested for not considering the climate, environmental, and social costs of investments, the alternative model of "sustainable finance", which is based on the integration of sustainability considerations into financial decision-making[1], has rapidly gained momentum worldwide and become central to global economic policy agen-

[1] On the difference between the two paradigms, see in particular A.M. Fatemi, I.J. Fooladi, *Sustainable finance: A new paradigm*, in *Global Finance Journal*, 2013, 24(2); S.T. Fullwiler, *Sustainable Finance. Building a More General Theory of Finance*, in *Global Institute for Sustainable Prosperity Working Paper*, 2015, 106; D. Schoenmaker, *Investing for the common good: a sustainable finance framework*, Bruegel, 2017; D. Schoenmaker, W. Schramade, *Principles of sustainable finance*, Oxford University Press, 2019; A.S. Gutterman, *Sustainable finance*, in *SSRN Electronic Journal*, 2020; P. Delimatsis, *Sustainable Finance*, in P. Delimatsis, L. Reins (eds.), *Trade and Environmental Law*, Cheltenham, 2021.

das, especially since 2015, following the Paris Agreement and the UN 2030 Agenda[2].

To date, there is a global consensus on the need for a structural change and a paradigm shift within the international financial system, from traditional to sustainable finance, to support the internationally agreed-upon objectives of climate transition and sustainable development. However, as this entails reforming the global financial sector, many regulatory challenges arise.

The paper aims to explore the role of sustainable finance in the international financial system by focusing on the main international economic, political, and normative drivers. First, it highlights the evolution of the market from earlier examples of ethical finance to the emergence of the sustainable finance paradigm. Second, it retraces the most significant initiatives undertaken in the last decade by global economic governance institutions, which have expressly supported sustainable finance as a major component of the overall reform process needed to align the international financial system with the international objectives of climate transition and sustainable development. Third, it examines the main components of the sustainable finance sector, including sustainable-labelled financial instruments and services as well as sustainability-related assurance, disclosure, and reporting practices, and focuses on emerging global standards.

## 2. *Sustainable finance beyond the domain of ethics*

Only in recent times has the relationship between private finance and ethics intensified significantly and eventually extended beyond the confines of religious communities, philanthropic organizations, and charities[3]. As a matter of fact, the still-dominant "tra-

[2] According to UNEP, *Accelerating Financial Centre Action on Sustainable Development*, 2017, p. 9, the year 2017 is considered "the year that sustainable finance entered the mainstream".

[3] In modern economic thinking, finance and ethics have always been considered as separated and opposed worlds having few points of contact: in fact, economic action rationally requires pursuing the selfish objective of profit while min-

ditional finance" paradigm envisions investment decision-making as a function of the risk/profit analysis only, in which, however, the climate, environmental, and social costs of investments are not taken into account. These costs are indeed considered as mere "externalities", i.e. non-legally and non-financially relevant, but just ethical, issues.

This approach, which still governs the functioning of global financial markets, is dramatically changing. Traditional finance, indeed, has proved incompatible with international climate and sustainability goals, as it remains neutral to such international objectives, thereby perpetuating the existing systemic misallocation of capital in favor of unsustainable economic activities and the consequent exacerbation of environmental and social imbalances within the global economy. In this context, the alternative model of "sustainable finance" is rapidly gaining attention worldwide at all levels of financial governance, as it promises to progressively align global financial markets with sustainable development goals[4].

This paradigm (including more specific approaches such as climate finance, green finance, socially responsible investing, impact finance, and more[5]) seeks to incorporate climate, environmental, and social sustainability considerations – i.e. the Economic Social and

---

imizing ethical considerations, whereas ethical action morally requires pursuing altruistic objectives while minimizing the expectation of economic return. On the relation between finance and ethics see *inter alia* P. Garonna, F. Spaolonzi, *Ethics in finance, finance in ethics New approaches to financing and solidarity*, Louis University Press, 2016; J.L. Retolaza, L. van Liedekerke, L. San-Jose (eds.), *Handbook on Ethics in Finance*, Springer, 2021.

[4] The externalization of the climate, environmental, and social costs of business activities within international economy lays at the very core of existing concerns about the unsustainability of the current global development model, which incepted the debate on sustainable development since late '70s, advocating for a structural change in international economic relations (see G.H. Brundtland, *Report of the World Commission on Environment and Development. Our Common Future*, UN Doc. A/42/427, and UN General Assembly, Resolution n. 42/187 of 11 December 1987 *Report of the World Commission on Environment and Development*, UN Doc. A/RES/42/187). The focus on the integration of those externalities in global finance, to leverage the transition to sustainability within the whole international economic system, is a result of the evolution of the debate on sustainable development that occurred in the last decade.

[5] See ICMA, *Sustainable Finance. High-Level Definitions*, 2020, for the relevant definitions.

Governance "ESG" factors[6] – into financial decision-making, so that finance and investments can generate, along with profits, long-lasting benefits for the environment and society at large, thus effectively financing climate action and sustainable development[7]. The distinguishing feature of "sustainable finance", as opposed to "traditional finance", is precisely the integration of ESG factors into financial products, services, practices, and regulations[8]. This integration concerns not just single financial instruments (as in the case of green bonds and other sustainable debt instruments) but also issuer-to-market informational flows (like sustainability-related disclosure and reporting). Indeed, the sustainable finance sector is essentially focused on two distinct, but intertwined goals[9]: (i) mobilizing capital for climate action and sustainable development through appropriate financial instruments and investment strategies, to be labelled as "green", "sustainable" or in other terms related to sustainable development; (ii) improving the quality of information flows regarding the environmental and social impact of companies and financial institutions, so that private and public investors can take sustainability factors into account when making investment decisions.

With reference to both goals, the sector has initially grown thanks to industry best practices, which gained the growing attention of market actors interested in applying and experimenting with ethics-based finance. Earlier examples can be found in the aftermath of social uprisings in the late 60s in the United States and the con-

[6] The concept of ESG has developed over time in international financial practice as a result of the activity of market operators, in particular in the areas of performance evaluation, rating, indices, and investing. The term ESG began to spread worldwide, especially in the beginning of the new century, and became mainstream in the last five years. Nowadays, ESG factors are the backbone of sustainable finance, as they constitute the conceptual and analytical framework to identify and assess sustainability issues regarding business and financial activities. However, there are no universally accredited and standardized definitions of ESG factors and their components.

[7] For a critical appraisal of sustainable finance definitions see M. Migliorelli, *What Do We Mean by Sustainable Finance? Assessing Existing Frameworks and Policy Risks*, in *Sustainability*, 2021, 13.

[8] See note 1.

[9] S.K. Park, *Global Finance in the Context of Climate Change*, in *Elgar Encyclopedia of International Economic Law*, 2024.

sequent opposition to the weapons industry, which led to the establishment in 1971 of the "Pax World Balanced Fund", the first socially responsible mutual fund in the United States designed to avoid investments in any firm involved in the production of weapons[10].

Afterward, the use of ethics-based investment screening criteria became more and more popular, especially in the '80 and '90, as the demand for socially responsible investments[11] began to rise, especially in most industrialized countries, thereby leading to the proliferation across the markets of *ad hoc* funds, indices, and investment practices making use of ESG criteria. This has happened thanks to increasing shareholder activism and societal pressure for corporate social responsibility[12], but also to specific international institutional initiatives, such as the *UN Principles for Responsible Investments* (UN PRI)[13], advocating for a growing consideration of the ESG in private business and finance, including by providing appropriate principles and guidelines[14]. With the ever-growing threat of climate change, this phenomenon has also focused on climate-responsible investments more specifically.

---

[10] R. Gittell, M. Magnusson, M. Merenda, *The Sustainable Business Case Book*, 2012, pp. 395 ff.

[11] Socially Responsible Investment (SRI) refers to "investing with the aim of achieving financial returns while respecting specific ethical, environmental and/or social criteria". ICMA, *Sustainable Finance. High-Level Definitions*, 2020.

[12] Corporate Social Responsibility refers to forms of private self-regulation of companies, often requested by shareholders to guide managerial choices, which aim to contribute to ethical, social, and environmental objectives. The phenomenon mainly affected multinational companies operating in the real economy, but also financial institutions.

[13] The UN PRI is a voluntary framework for integrating the ESG in investment analysis and decision-making. The framework was released in 2006 by the Principles for Responsible Investments (PRI), an UN-related association incorporated under English law establishing a public-private partnership for advancing the ESG across financial markets as well as the banking and insurance sector. Other normative frameworks from the PRI include *UN Principles for Sustainable Insurance* and the *UN Principles for Responsible Banking* released in 2012 and 2019 respectively.

[14] Earlier international initiatives in '90s and early 2000 include the *UNEP Statement of Commitment by Financial Institutions on Sustainable Development*, the document published by the UNEP at the 1992 Rio Conference that recognized, for the first time, the importance of sustainable development for the entire financial sector, and the *UN Global Compact*, launched in 2000 by the UN Secretary-General to promote and strengthen businesses' commitments to sustainable development.

In this background, the emergence of green bonds in 2007/2008 represented a crucial turning point. As, in said years, the European Investment Bank and the World Bank issued the first "use-of-proceeds" bonds to exclusively fund environmentally friendly projects, the idea of structuring and labelling financial securities with specific sustainability credentials rapidly spread throughout the market, involving both public and private actors as issuers and traders[15]. To ensure product and market integrity, international industry standards have been rapidly developed, thereby providing voluntary rules for issuers. In this respect, the first private standard, the *Climate Bonds Standard and Certification Scheme*[16], was released in 2011 by the Climate Bonds Initiative (CBI), a not-for-profit based in London[17], followed in 2014 by the *Green Bond Principles*[18] compiled by the International Capital Market Organization (ICMA), an industry association including more than six hundred private and public financial actors worldwide[19]; afterward, some other sector-specific regional standards have been issued by public regulators, namely the ASEAN Green Bond Standards for ASEAN markets in 2018[20] and the EU Green Bond Standard for the EU market in 2023[21].

---

[15] The market, which started to dramatically grow since 2013, when municipalities and corporates entered the market, has expanded worldwide while embracing new sub-types of bonds, new kinds of issuers and underwriters, and new jurisdictions. S.K. Park, *Investors as Regulators: Green Bonds and the Governance Challenges of the Sustainable Finance Revolution*, in *Stanford Journal of International Law*, 2018, 54(1).

[16] CBI, *Climate Bonds Standard and Certification Scheme*, from *Version 1.0* released in 2011 to the latest *Version 4.0* of 2023 and following updates. It combines sector-specific taxonomy-based process standards with a certification process managed by the same CBI.

[17] See https://www.climatebonds.net/.

[18] ICMA, *Green Bond Principles*. The ICMA also issues voluntary standards and guidance concerning other sustainable debt instruments (such as the *Social Bond Principles* and the *Sustainability-Linked Bond Principles*) and related review practices.

[19] See https://www.icmagroup.org/.

[20] ASEAN Capital Markets Forum (ACMF), *ASEAN Green Bond Standards,* and other sustainable finance standards and frameworks. These standards have been developed by the ACMF, the grouping of capital market regulators from all 10 ASEAN jurisdictions, in collaboration with the ICMA.

[21] Regulation (EU) 2023/2631 on European Green Bonds and optional disclosures for bonds marketed as environmentally sustainable and for sustainability-linked bonds.

In little more than a decade, the green bond market has exponentially grown worldwide, evolving from a niche market dominated by development banks to one of the fastest-growing segments of financial markets, thus effectively becoming a new asset class[22]. During the same period, new sustainable debt instruments have emerged, such as social bonds, sustainability bonds, sustainability-linked bonds, and more; in parallel, specific industry standards for those types of instruments have been issued and progressively consolidated in the global market.

The innovation of green bonds was paramount, as it introduced to the market the strategy of labelling financial instruments in terms related to sustainable development, to signal the destination of funds to economic activities contributing to climate, environmental, and social sustainability goals. Overcoming previous experimentation with ethical and socially responsible finance, which resulted in the application of individual exclusion criteria to general investment operations, green bonds have created a direct and positive link between financing and sustainable development by creating inclusion lists for green projects only; thereby, green bonds positioned themselves as instruments effectively contributing to the internationally agreed objectives of climate and environmental sustainability[23].

In this context, the mainstreaming of sustainable finance in the following years was also due to the growing relevance of the principle of sustainable development within the international legal system and the prioritization of climate change issues in international policy, highlighting the need to integrate climate and sustainability considerations into financial services. Nowadays, climate, environmental, and social justice considerations are permeating and innovating the whole financial sector and its regulation, thereby acquiring more and more legal and financial value. Beyond the domains of ethics, this signals an ongoing paradigm shift from traditional to sustainable finance to address global sustainability concerns.

---

[22] M. Doran, J. Tanner, *Critical challenges facing the green bond market*, in *International Financial Law Review*, 2019. For an updated report on global sustainable debt market, see CBI, *Sustainable debt global state of the market 2023*, 2024.

[23] D. Schoenmaker, W. Schramade, *Principles of sustainable finance*, Oxford University Press, 2019.

## 3. *Sustainable finance as a reform process of the international financial system*

The upsurge of sustainable finance in recent years is the result of the combination of several intertwined normative, political, and economic factors that intensified after the 2008 financial crisis and especially following the adoption, in 2015, of two paramount international acts, the 2030 Agenda for Sustainable Development and the Paris Agreement.

On the one hand, the General Assembly's 2030 Agenda[24], which is the UN's long-term strategic framework supporting the ecological and sustainability transition, detailed the 17 SDGs (Sustainable Development Goals) integrating the overall international objective of sustainable development, while setting a universal agenda for "transforming our world" and calling for its global adoption and implementation by all subjects and actors (including states, international organizations, NGOs, regulators, businesses, and the private sector in general); to this end, it advocated for the enhanced collaboration and cooperation between all actors and stakeholders involved, in the so-called spirit of "global partnership" referred to in SDG 17[25], in all sectors of the economy and society, including finance[26].

On the other hand, the Paris Agreement, signed in the context of the UNFCCC Conference of the Parties, established specific obligations for States on climate change mitigation, adaptation, and finance, including that "to strengthen the global response to the

[24] UN General Assembly, Resolution No. 70/1 of 25 September 2015, *Transforming our world: the 2030 Agenda for Sustainable Development*, UN Doc. A/RES/70/1.

[25] See in particular targets 16 and 17 of SDG 17, *Strengthen the means of implementation and revitalize the global partnership for sustainable development*.

[26] This does not constitute an SDG in itself, but it is expressly considered, as a means of implementation of the 17 SDGs, by the Addis Ababa Action Agenda, the outcome document of the third International Conference on Financing for Development, held in Addis Ababa between the 13 and 16 July 2015, which forms an integral part of the 2030 Agenda. Namely, the relationship between finance and sustainability is considered under Action Area B of the Addis Ababa Action Agenda regarding *Domestic and International private business and finance* in support of the SDGs.

threat of climate change, in the context of sustainable development and efforts to eradicate poverty, including by […]. Making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development" (art. 2.1.c). Thereby, the 196 signing States explicitly committed, *inter alia*, to reform finance in order to support the climate transition.

Moreover, two other initiatives that occurred in 2015 deserve attention, as they contributed to kickstarting the policy debate on sustainable finance. The first was the speech from the former Governor of the Bank of England and Chairman of the Financial Stability Board, Mark Carney, entitled *Breaking the Tragedy of the Horizon – climate change and financial stability*[27], which demonstrated how financial policymakers should start taking into account climate change, as it poses physical, liabilities, and transitions risks that can dramatically affect domestic and global financial stability. The speech, which was given in the dual role of central banker and chairman of the FSB, had a great impact worldwide, sensitizing both financial policymakers and actors to the need to internalize and address climate-related risks within the global financial system. In this respect, a first, fundamental international policy signal came from the same FSB, which in the same year established the Task Force on Climate-Related Financial Disclosure (TCFD), to develop recommendations for the financial industry concerning climate-related disclosure[28].

The second initiative was the United Nations Environmental Programme (UNEP) initiative *Inquiry: Design of a Sustainable Financial System*, established to advance policy options to improve the financial system's effectiveness in mobilizing capital for sustainable development[29]. One of the first published reports, entitled *The Financial System We Need. Aligning the Financial System with Sus-*

[27] M. Carney, *Breaking the Tragedy of the Horizon – climate change and financial stability*, speech given at Lloyd's of London on 29 September 2015.

[28] TCFD, *Final Report. Recommendations of the Task Force on Climate-related Financial Disclosures*, 2017.

[29] UNEP, *The Financial System We Need. Aligning the Financial System with Sustainable Development*, 2015 and UNEP, *Towards a Theory of Sustainable Finance*, 2015.

*tainable Development*, outlined the "fundamental need to ensure that the financial system serves the transition to sustainable development" and offered a structured set of policy options for policymakers and regulators – which would necessarily entail the "involvement of new actors, new coalitions and new instruments" – to foster sustainability within the entire financial sector, including banks, institutional investors, equity and debt markets, insurance, credit rating agencies, and public finance[30]. In the following years, other reports were published by the UNEP monitoring ongoing initiatives and deepening the relevant policy options[31].

Against this background, the 2016 G20 summit held in Hangzhou (China) boosted momentum for sustainable finance. In the final *communiqué*, G20 Leaders recognized that "in order to promote environmentally sustainable growth globally, it is necessary to scale funding towards environmentally sustainable activities" expressing the belief "that efforts could be made to provide clear strategic policy signals and regulatory frameworks, promote voluntary principles for green finance, expand learning networks for skills development, support the development of local green bond markets, foster international collaboration to facilitate cross-border investments in green bonds, encourage and facilitate knowledge sharing on environmental and financial risks, and improve the measurement of green finance activities and their impacts"[32]. This programmatic declaration, which also included more specific recommendations and reports, offered a clear vision of international economic policy, stimulating the interest of investors, issuers, institutions, and regulators worldwide.

Another important initiative by global governance institutions was the publication, in 2017, of the UNEP-World Bank's *Roadmap for a Sustainable Financial System*[33], whose objective was "to propose an integrated approach that can be used by all financial sec-

[30] UNEP, *The Financial System We Need. Aligning the Financial System with Sustainable Development*, 2015.

[31] UNEP, *Financing the Transition. How financial system reform can serve Sustainable Development*, 2016; UNEP, *The Financial System We Need. From momentum to transformation*, 2016; UNEP, *Making Waves: Aligning the Financial System with Sustainable Development*, 2018.

[32] G20, *2016 Hangzhou Summit Communiqué*, 2016, point 21.

[33] UNEP, World Bank, *Roadmap for a Sustainable Financial System*, 2017.

tor stakeholders – both public and private – to accelerate the transformation toward a sustainable financial system", unlocking "the full potential of the financial system […] to serve as an engine in the global economy's transition toward sustainable development". The Roadmap stressed the need to reform the entire financial sector through the convergence of "three drivers of change"[34], that is to say international initiatives (including policy signals, recommendations, guidance, assistance, and research from international institutions and coalitions), domestic initiatives (including national and regional policy frameworks, soft-law, and regulations) and market-based initiatives (including best practices, voluntary industry standards, and self-regulations of stock exchanges), thereby bringing "policy cohesiveness across ministries, central banks, financial regulators, and private financial sector participants to focus efforts"[35].

In this context, through the 2018 *Action Plan on Sustainable Finance*, the EU intended to lead this reform process of the global financial sector by announcing a package of proposals for reforming the EU financial market[36]. This led to the adoption, in following years, of paramount EU regulations and directives on sustainable finance, such as the Regulation on sustainability-related disclosure (2019), the Taxonomy Regulation (2020), the Directive on corporate sustainability reporting (2022), and the Regulation on green and sustainability-linked bond (2023)[37].

Overall, these initiatives fostered sustainable finance as a crucial reforming factor for the whole international financial system, creating consensus for action. Accordingly, they identified the barriers to the sound growth of those markets and consequent policy actions and reforms to be possibly implemented at the internation-

[34] *Ibid.*, p. 9.

[35] *Ibidem.*

[36] European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. "Action Plan: Financing Sustainable Growth"*, 8.3.2018, EU Doc. COM/2018/097 final.

[37] Regulation (EU) 2019/2088 on sustainability-related disclosures in the financial services sector; Regulation (EU) 2020/852 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088; Directive (EU) 2022/2464; for green and sustainability-linked bond, see note 21.

al, regional, and domestic levels. As a result, states and public regulators started issuing *ad hoc* guidelines, standards, and regulations covering different aspects of sustainable finance[38].

In the next years, the whole sector was steadily caught by the ongoing rampant innovation, which has rapidly scaled up green and sustainable finance products and practices worldwide, from both a quantitative and a qualitative point of view. Indeed, while new types of sustainable-labelled instruments and practices multiplied across the market, appropriate industry standards and guidelines have been developed to increase product transparency and integrity. At the same time, green and sustainable assurances and assessment schemes started to spread in the market as reviewing services to verify compliance with voluntary standards and labels.

Furthermore, the growth of sustainable finance is also to be attributed to the strong commitment of the world's main stock exchanges. Starting in 2015, financial centers such as London, Paris, Luxembourg, Copenhagen, and Amsterdam in Europe, Shanghai and Beijing in China, San Francisco and Los Angeles in the United States, and Vancouver and Montreal in Canada have taken the lead and are steadily increasing the quality and depth of their sustainable finance offerings, especially by creating dedicated market segments for the listing of green and other securities having specific sustainability requirements[39]. Their role in shaping the regulation of sustainable finance has become central both at the domestic and global levels. International initiatives such as the UN Principles for Responsible Investments (PRI)[40], Sustainable Stock Exchange Initiative (SSE)[41], Sustainable Banking and Financial Network (SBFN)[42] have facilitated

[38] See the PRI regulatory database available on the following web page: https://www.unpri.org/policy/global-policy/regulation-database.

[39] See the SSE stock exchange database available on the following web page: https://sseinitiative.org/exchanges-filter-search.

[40] See note 14.

[41] The SSE is a UN partnership program created in 2009 to serve as a global platform to analyze how regulated markets, in collaboration with investors, issuers, regulators, and policy-makers, can align with the SDGs.

[42] The SBFN, established in 2012, is a voluntary community of financial sector regulators, central banks, ministries of finance, ministries of environment, and industry associations from emerging markets committed to advancing sustainable finance for national development priorities, financial market deepening, and stability.

this issue along with the activity of organizations such as the IOSCO, the OECD, the ICMA, the CBI, and others, which contributed with policy recommendations, standards, research, and capacity building.

### 4. *Sustainable finance instruments, practices, and related global standards*

Sustainable finance, as the process of incorporation of sustainability considerations into financial decision-making, concerns all sectors and aspects of finance. To understand the phenomenon, three main macro-areas can be identified, as the integration can involve single financial instruments and services, general investment operations, or issuer-to-market information flows.

At the product level, the structuring and labelling of financial instruments in terms related to sustainable finance concern debt instruments especially, namely bonds. Within the global debt market, indeed, a proper sustainable bond market segment can be identified. This includes green, social, and sustainability bonds, which are thematic bonds whose proceeds are earmarked to exclusively finance or refinance eco-friendly (green) and social-oriented (social) projects or a combination of both (sustainability). Eligible projects[43] are identified in the bond "framework", which is the legal document – whose enforceability, however, varies from case to case – governing the use of proceeds, post-issuance reporting, and verification[44]. To date, both private and public actors, including governments, multilateral development banks, and supranational institutions like the EU, issue those categories of bonds[45].

This ever-growing market segment is governed by a complex interplay of voluntary standards and domestic regulations. At the

[43] Projects include financial assets and business activities.

[44] S.K. Park, *Investors as Regulators: Green Bonds and the Governance Challenges of the Sustainable Finance Revolution*, in *Stanford Journal of International Law*, 2018, 54(1), and T. Bussani, *Compliance monitoring and enforcement with voluntary standard: the case for external review on green bonds*, in *Cahiers Jean Monnet*, 2021, 14.

[45] See note 22.

global level, the leading standards are the ICMA Principles[46], which provide for a general taxonomy for eligible projects, appropriate process standards covering pre-issuance and post-issuance activity, including reporting, and guidelines for external reviews, the latter including all verifications provided by independent third parties to verify compliance[47]. At the regional level, namely in ASEAN and the EU[48], the market is also governed by public standards, which are aligned with ICMA Principles, and complementary regulations, like the Taxonomy Regulation for the EU[49]. At the local level, those instruments may also be regulated by the single stock exchange's listing requirements, which often refer to global or regional standards as the main substantive regulation, thereby providing enforcement mechanisms to existing voluntary standards.

Other important sustainable debt instruments are sustainability-linked (or ESG-linked) bonds. These are not earmarked, use-of-proceeds instruments, but general-purpose bonds, whose financial performance is however linked to the issuer's ESG performance, as defined by the specific key performance indicators and sustainability performance targets outlined in the relevant framework, as above defined. Also in this case, the ICMA Sustainability-Linked Bond Principles provide a common normative framework for the whole market[50].

However, the bond market does not exhaust the spectrum of possible sustainable debt instruments. Indeed, also green, social, sustainability, and ESG-linked loans are diffused and governed by

[46] See note 18. The Principles provide guidance to issuers based on four core components (namely: the use of proceeds; the procedure for project evaluation and selection; the management of proceeds; and reporting) and external reviews. According to the same ICMA, in 2023, 97% of sustainable bonds issued were aligned with the ICMA Principles. ICMA, *Sustainable bonds aligned with GBP, SBP, SBG and SLBP in 2023*, 2024.

[47] See note 44. In this regard, the CBS (see note 16) is at the same a standard for climate-aligned bonds, with its own taxonomy, and a certification scheme, that is an external review mechanism consisting in a certificate issued by the same standard-setter.

[48] See notes 20 and 21.

[49] According to the EU Green Bonds Regulation (see note 21) eligible projects for bond labeled as "EU green bonds", must be compliant with the Taxonomy Regulation (see note 37).

[50] ICMA, *Sustainability-Linked Bond Principles*.

sector-specific industry standards, which are modelled based on the corresponding ICMA's Principles[51]. Moreover, green deposits, that is to say, "use-of-proceeds" bank deposits that can be used only to fund eco-friendly business and financial activities, have been recently introduced; despite no global reference standard having been developed yet, standards on use-of-proceeds bonds and loans can apply, with necessary adjustments[52].

Beyond debt, sustainable financial strategies also concern investment funds and indices. To date, many green or sustainability-related mutual funds have populated the markets. These thematic funds apply precise investment strategies based on negative or positive ESG-based screening criteria, to invest in specific sectors or instruments. The development of sustainability indices in all major financial centers has facilitated these operations, as they evidence to investors the ESG performance of instruments and issuers across markets[53]. Furthermore, more innovative sustainable financial instruments are emerging, including green equities[54], ESG-linked derivatives[55], and ESG insurance products[56], all being innovations still lacking standardization or regulatory processes.

---

[51] See the *Green*, *Social*, *Sustainability*, and *Sustainability-Linked Loan Principles* compiled jointly by the Loan Market Association (LMA), the Asian Pacific Loan Market Association (APLMA), and the Loan Syndications and Trading Association (LSTA).

[52] Indeed, the regulatory components of said instruments are the same: taxonomies for eligible projects, use-of-proceeds constraints, post-issuance reporting, and external verification.

[53] Sustainability-related indices are indeed designed to track the ESG performance of listed companies. Metrics, methodologies, and measures vary significantly from index to index.

[54] These are equities that are listed in specific green or sustainable segments of stock exchanges in consideration of the activity exercised and overall ESG performance. In 2023, the World Federation of Exchanges issued the *The WFE Green Equity Principles* for stock exchanges aiming at establishing green equity segments.

[55] These are derivatives supporting ESG objectives by adding an ESG-pricing component to conventional hedging instruments, to facilitate the achievement of ESG performance targets or lowering the cost of ESG-related investments. Other kinds of ESG-oriented derivates exist in the market. C. Baker, *Derivatives and ESG*, in *American Business Law Journal*, 2022, 59(4).

[56] The integration of ESG into insurance products still lacks sector-specific reference standards.

Within the entire sustainable financial sector, ESG assurance services, including all services provided by an independent third party that verifies sustainability credentials of sustainable finance instruments and practices, play a fundamental role in ensuring market integrity and transparency[57]. This is true, either in the case of more standardized assets, where assurances consist of verifications for compliance with standards and labels, like the above-mentioned external review services for green and sustainable bonds, or in the case of substantially unregulated innovations, where assurances serve to ascertain data, assumptions, or credentials, on a case-by-case basis. Assurance services include certification, second-party opinions, as well as scoring and rating provided by specialized agencies.

Since the provision of sustainability assurance services, unlike financial auditing, is almost completely unregulated in most jurisdictions, in 2023 the International Auditing and Assurance Standards Board (IASSB) proposed the *International Standard on Sustainability Assurance*, introducing a global standard for all kinds of assurance services concerning sustainability in business and finance[58]. At the EU level, in the same year, the Commission proposed a Regulation on ESG ratings, the latter being defined as opinions "on a company or financial instrument's sustainability profile or characteristics, exposure to sustainability risks or impact on society and/or the environment"[59]. These proposals can bring more transparency, compliance, and effectiveness to this crucial sector, with positive effects on the entire sustainable finance landscape.

Finally, as far as the integration of sustainability into the general operations of financial actors is concerned, reference is made especially to ESG disclosure and reporting practices. These are building

[57] See on these specific aspects and T. Bussani, *Compliance monitoring and enforcement with voluntary standard: the case for external review on green bonds*, in *Cahiers Jean Monnet*, 2021, 14.

[58] IAASB, *International Standard on Sustainability Assurance (ISSA) 5000, General Requirements for Sustainability Assurance Engagements*, 2023.

[59] European Commission, *Proposal for a Regulation of the European Parliament and of the Council on the transparency and integrity of Environmental, Social and Governance (ESG) rating activities*, COM(2023) 314 final, 13.6.2023.

blocks of the informational regulatory approach to finance and sustainability. More specifically, ESG disclosure concerns the release of information to investors, regulators, and the public concerning certain aspects of the ESG footprint of a financial (or non-financial) institution, as required by regulators, investors, or applicable industry standards. In contrast, ESG reporting is the process of communicating ESG strategies and performance in a structured, comprehensive, and as standardized as possible manner, so that issuers' overall commitments to sustainability can be compared along with results achieved over time. Disclosure and reporting are hence strictly related. At the normative level, some global standards and guidelines apply, such as the TCFD Recommendations on climate-related financial disclosure (2017)[60], the *Global Standards for Sustainability Reporting* from the Global Reporting Initiative (GRI, 2020)[61], or the more recent International Financial Reporting Standards (IFRS) on sustainability-related financial information and climate-related disclosure (2023)[62].

## 5. *Conclusions*

Sustainable finance is envisioned by global economic governance institutions (namely UNEP, WB, G20, EU) as the crucial area to concentrate efforts, in order to reform the international financial system and finance the transition to a climate-resilient and more sustainable global economy. Market-based innovation and initiatives

[60] See note 28.

[61] Global Reporting Initiative, *Global Standards for Sustainability Reporting*, 2020. The GRI is a not-for-profit established in 1997 to create global standards on sustainability reporting.

[62] IFRS, *IFRS S1 "General Requirements for Disclosure of Sustainability-related Financial Information"* and *IFRS S2 "Climate-related Disclosures"*. IFRS is a foundation established in 2001 with the mission of developing high-quality standards that bring transparency, accountability, and efficiency to capital markets. In the same year, it established the International Accounting Standards Board (IASB) to compile the *IFRS Accounting Standards*. In 2021, it established the International Sustainability Standards Board (ISSB) to compile said standards on sustainability disclosure.

have pushed the way forward by enriching the market with sustainable financial products, practices, and strategies. Regulatory efforts have come both from the private and the public sector. Private actors like ICMA, CBI, IAASB, GRI, IFRS, and others have emerged as global standard-setters in the international financial regulatory arena by providing substantive norms for nascent, but still unregulated, sustainable finance market segments. UN-led coalitions and programs, such as the PRI, SSE, and SBFN, created positive environments for financial regulators and stock exchanges, which, by engaging with each other as well as with international institutions, standard-setters, and private actors, have been able to innovate financial markets by introducing soft-law and regulations in the relevant jurisdictions.

As a result, to date, sustainable finance is governed by a complex interplay of binding and non-binding norms resulting from the overlap of global industry standards and domestic regulations. This is consistent and coherent: on the one hand, with the normative structure of international financial law, which is characterized by an informal, hybrid, and multi-layered mode of governance and law-making, where global industry standards form a common regulatory basis for international financial markets; on the other, with the global call for action in support of the SDG, as advocated by the 2030 Agenda and confirmed by the above-mentioned global economic governance institutions in the cited documents, which supported the private sector in contributing to reforming international finance. In this context, global standards represent a fundamental building block of the international regulation of sustainable finance.

However, regulatory concerns arise, as at the international level it is indispensable not only to prevent greenwashing (or SDG-washing) practices[63], which can affect the contribution of the entire sector to climate and sustainability transition, but also to avoid market fragmentation and ensure compliance globally. Therefore, there is a need for internationally agreed or however

[63] These are deceptive practices on the real sustainability credentials of a sustainable finance product or service.

interoperable taxonomies and definitions for sustainable activities as well as international mechanisms to enforce compliance with standards and regulations. In this regard, more recent initiatives such as the International Platform on Sustainable Finance (IPFS, 2019)[64] and the 2021 G20 Sustainable Finance Roadmap[65] promise to strengthen international policy coordination and governance in the right direction. Further innovations and reforms in this area are expected and indeed needed.

[64] IPSF is an international informal forum for policy-makers established within the G20 with the aim of promoting international cooperation and policy coordination among regulators in the field of sustainable finance.

[65] The Roadamp is a multi-year document focusing the attention of the G20 members, relevant international organizations, networks, initiatives, and other stakeholders to key priorities of the sustainable finance agenda. G20, *G20 Rome Leaders' Declaration*, 2021, point 31.

# "GOLD STANDARDS" FOR "GREENING" FINANCIAL FLOWS? THE "BRUSSELS EFFECT" OF THE EU SUSTAINABLE FINANCE AGENDA

*Federica Agostini*

## 1. *Introduction*

Within the realm of market-led and regulatory initiatives steering capital markets towards sustainability goals[1], the European Union (EU) has taken a pioneering role. The EU's regulatory activism began with the 2017 Action Plan on sustainable finance[2], followed by a 2021 Renewed Sustainable Finance Strategy[3] and by a 2023 legislative package[4], which have culminated in a wide array of regulatory measures. The broad scope and granularity of EU sustainable finance measures are unparalleled in other jurisdictions, arguably positioning the EU as a leader in this field on the global policy stage[5].

---

[1] As also illustrated by T. Bussani, *Sustainable Finance for Sustainable Development: Reforming the International Financial System*, in this volume.

[2] Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, *Action Plan: Financing Sustainable Growth*, 290, 2018.

[3] Communication from the Commission, *Strategy for Financing the Transition to a Sustainable Economy*, 390, 2021.

[4] Communication from the Commission, *A sustainable finance framework that works on the ground*, 209, 2023.

[5] As also acknowledged by the EU Commission, Communication from the Commission, *Long-term competitiveness of the EU: looking beyond 2030*, 2023, 168, para 2.

The objective of these EU initiatives also appears to be the creation of global "gold standards" that can serve as benchmarks for non-EU market actors and regulators alike.

One compelling lens for analysing how EU rules have shaped the regulatory globalisation of sustainable finance measures could be the so-called "Brussels effect"[6] theory, coined by *Anu Bradford* and recurrently cited in academic scholarship[7]. This theory attributes the cross-border circulation of EU policies to a number of factors, including market size, regulatory capacity, political will to generate stringent rules, the difficulty of evading EU regulations by moving to a laxer regulatory regime (due to the "inelasticity" of regulatory targets), and the challenges of simultaneously applying multiple regulatory frameworks (stemming from the "non-divisibility" of companies' activities)[8]. In an op-ed, the author of the concept also highlighted the potential of EU sustainable finance policies to exert such effects[9].

While the scope of EU measures to advance sustainability goals in the banking and financial sector has been wide-ranging, EU's leadership is particularly evident in its definitional initiatives, which attempt to crystallise a legally binding definition of "sustainability" in the financial context. In particular, the EU Taxonomy[10], the EU

---

[6] A. Bradford, *The Brussels Effect*, in *Northwestern University Law Review*, 2012, 107(1); A. Bradford, *The Brussels Effect*, Oxford University Press, 2020.

[7] See, among others, A.L. Newman, E. Posner, *Putting the EU in its place: policy strategies and the global regulatory context*, in *Journal of European Public Policy*, 2015, 22(9), pp. 1316-1335, p. 1326. On the potential effects of crypto-asset regulation, see P. Raschner, O. Kosenkov, *Exporting Environmental-Friendly Digitalisation? Implications of EU's MiCA Regulation on the Global Governance of Crypto Systems,* 2023, https://ssrn.com/abstract=4718770.

[8] A. Bradford, *The Brussels Effect*, 2012, pp. 11-18.

[9] K. Anev Janse, A. Bradford, *The Brussels Effect on Sustainable Finance*, in *Project Syndicate*, 26 April 2021, https://www.project-syndicate.org/commentary/eu-sustainable-finance-taxonomy-brussels-effect-by-kalin-anev-janse-and-anu-bradford-2021-04.

[10] Particularly the Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088, 2020, L 198/13 and the Delegated Acts, see *infra*, 2.1.

Green Bond Standard[11] and the Proposal for an ESG Ratings Regulation[12] significantly went beyond previous standards and initiatives in order to anchor financial services, activities and instruments labelled as "sustainable" to uniform and transparent criteria[13]. The EU Taxonomy and the EU Green Bond Standard also strive to introduce a science-based benchmark for what counts as "sustainable". Establishing a level playing field for "sustainable" financial practices are seen as the first and crucial step to fight "greenwashing"[14]. Clear and uniform criteria are also expected to foster investor confidence and encourage investments in "sustainable" products and companies[15]. Such ambitious endeavours lay the foundation for other regulators to follow suit.

Against this background, this essay will outline the core novelties of the EU Taxonomy, the EU Green Bond Standard and the Proposal aiming at regulating ESG ratings. It will later investigate the factors that have contributed or could contribute to the circulation of the EU model, giving rise to a "Brussels effect".

---

[11] Regulation (EU) 2023/2631 of the European Parliament and of the Council of 22 November 2023 on European Green Bonds and optional disclosures for bonds marketed as environmentally sustainable and for sustainability-linked bonds, *OJ* L 2631.

[12] EU Commission, *Proposal for a Regulation of the European Parliament and of the Council on the transparency and integrity of Environmental, Social and Governance (ESG) rating activities* 2023/0177.

[13] Another relevant definitional initiative, out of the scope of the present essay, led to the introduction of two financial benchmarks to measure progress against Paris Agreement goals ("Climate Transition" and "EU Paris-aligned" Benchmarks), Regulation (EU) 2019/2089 of the European Parliament and of the Council of 27 November 2019 amending Regulation (EU) 2016/1011 as regards EU Climate Transition Benchmarks, EU Paris-aligned Benchmarks and sustainability-related disclosures for benchmarks, 2019, *OJ* 317/17.

[14] I.e. the mismatch between communications and actions in the environmental sphere, M.A. Delmas, V.C. Burbano, *The Drivers of Greenwashing*, in *California Management Review*, 2011, 54, 64; TerraChoice Group, Inc., *The Seven Sins of Greenwashing*, 2009, https://www.map-testing.com/assets/files/2009-04-xx-The_Seven_Sins_of_Greenwashing_low_res.pdf.

[15] On "nudging" as a policy objective, see D.A. Zetzsche, L. Anker-Sørensen, *Regulating Sustainable Finance in the Dark*, in *Eu. Bus. Org. L. Rev.*, 2022, 23, pp. 12-13.

## 2. *A global benchmark to classify "sustainable finance": the EU Taxonomy*

### 2.1. *Analysis*

At the heart of the EU's sustainable finance framework lies the EU Taxonomy, a classification system for economic activities and financial products furthering sustainability goals. It is grounded on general principles, enshrined in a Regulation[16], as well as on a set of technical criteria, laid out in various Delegated regulations[17].

The Regulation identifies six specific high-level objectives toward environmental sustainability, i.e., climate change mitigation, climate change adaptation, the sustainable use and protection of water and marine resources, the transition to a circular economy, pollution prevention and control, the protection and restoration of biodiversity and ecosystems. "Aligned" economic activities and finan-

[16] Regulation 2020/852/EU.

[17] Commission Delegated Regulation (EU) 2021/2139 of 4 June 2021 supplementing Regulation (EU) 2020/852 of the European Parliament and of the Council by establishing the technical screening criteria for determining the conditions under which an economic activity qualifies as contributing substantially to climate change mitigation or climate change adaptation and for determining whether that economic activity causes no significant harm to any of the other environmental objectives; Commission Delegated Regulation (EU) 2022/1214 of 9 March 2022 amending Delegated Regulation (EU) 2021/2139 as regards economic activities in certain energy sectors and Delegated Regulation (EU) 2021/2178 as regards specific public disclosures for those economic activities, 2022, *OJ* 188/1; Commission Delegated Regulation (EU) 2023/2485 of 27 June 2023 amending Delegated Regulation (EU) 2021/2139 establishing additional technical screening criteria for determining the conditions under which certain economic activities qualify as contributing substantially to climate change mitigation or climate change adaptation and for determining whether those activities cause no significant harm to any of the other environmental objectives; Commission Delegated Regulation (EU) 2023/2486 of 27 June 2023 supplementing Regulation (EU) 2020/852 of the European Parliament and of the Council by establishing the technical screening criteria for determining the conditions under which an economic activity qualifies as contributing substantially to the sustainable use and protection of water and marine resources, to the transition to a circular economy, to pollution prevention and control, or to the protection and restoration of biodiversity and ecosystems and for determining whether that economic activity causes no significant harm to any of the other environmental objectives and amending Commission Delegated Regulation (EU) 2021/2178 as regards specific public disclosures for those economic activities.

cial products are those that substantially contribute to at least one of these objectives whilst "not significantly harming" any of the other ones. They will also have to observe minimum safeguards laid out in international soft law instruments, like OECD Guidelines for Multinational Enterprises and the UN Guiding Principles on Business and Human Rights[18]. More importantly, they must comply with a series of technical screening criteria, established by the Commission on the basis of the science-driven recommendations of a multi-stakeholder group (the "Platform on sustainable finance"), laid out in Level 2 Acts[19]. As a result, the EU Taxonomy in its current outlook does not aim to cover the entire spectrum of assets and activities in the EU real economy, but only those in those sectors that are expected to advance environmental goals.

The Taxonomy also serves as the bedrock for further measures advancing the EU sustainable finance agenda. First, financial and non-financial institutions are required to disclose the extent to which their activities align with the Taxonomy[20]: for instance, companies have to report the proportion of their turnover, capital expenditures, operational expenditures and total assets in line with the Taxonomy ("green asset ratio")[21]. Second, the Sustainable finance Disclosure Regulation (SFDR) requires financial products, like investment funds, claiming to promote social or environmental objectives "among other characteristics", or having "sustainable investment" as their primary objective, to disclose the percentage of their investments in line with the Taxonomy[22].

---

[18] Art. 3 (c), *ibidem*.

[19] Commission Delegated Regulation 2021/2139.

[20] Following the KPIs in the Annexes to the Commission Delegated Regulation (EU) 2021/2178 of 6 July 2021 supplementing Regulation (EU) 2020/852 of the European Parliament and of the Council by specifying the content and presentation of information to be disclosed by undertakings subject to Articles 19a or 29a of Directive 2013/34/EU concerning environmentally sustainable economic activities, and specifying the methodology to comply with that disclosure obligation.

[21] See Annex I-II, *ibidem*.

[22] Art. 8(2a), Art. 9 (4a) Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector.

Third, the EU and member states willing to introduce new public measures, standards or labels must apply the same criteria to determine whether economic activities qualify as "sustainable"[23]. For example, as the following paragraph will illustrate, the EU Green Bond Regulation designates bonds as "EU green" when all the proceeds are used in accordance with the Taxonomy criteria[24].

Alongside the fully aligned activities, the Delegated Regulation also contemplates "transitional" ones. While these do not comply with the technical screening criteria, they still contribute to climate change mitigation objectives if their GHG emission levels correspond to the best performance in the sector and there are no low-carbon alternatives[25]. The Delegated Regulation also considers "enabling activities", which do not directly contribute, but rather facilitate other activities in advancing environmental objectives, like manufacturing and research for the creation of renewable energy[26]. The latter must, however, have themselves substantial positive environmental impact and not lead to a lock-in in assets that undermine long-term environmental goals[27], considering the economic lifetime of those assets.

### 2.2. *Strong "Brussels Effects", with some caveats*

While the one designed at EU level did not constitute the first or the only example of Taxonomy globally, its introduction certainly marked a change in pace and scope in the global policy landscape. The Sustainable Banking & Finance Network identified 47 taxonomies (either in the form of fully-fledged classification systems or of lists of activities deemed as "sustainable") published between 2012

[23] Art. 4 Regulation 2020/852.

[24] See *infra* s. 3.1.

[25] Art. 10 (1) Regulation 2020/852.

[26] Art. 10 (2), *ibidem*.

[27] I.e., allowing high-emitting activities to persist, preventing less emitting alternatives from entering the market; Platform on Sustainable finance, *The Extended Environmental Taxonomy: Final Report on Taxonomy extension options supporting a sustainable transition*, p. 108, https://finance.ec.europa.eu/system/files/2022-03/220329-sustainable-finance-platform-finance-report-environmental-transition-taxonomy_en.pdf.

and February 2024[28]. Entities that had already introduced criteria for "sustainable" activities before the EU include market actors, like the non-governmental organisation Climate Bonds Initiative, and national standard-setters, including regulators like the Mongolian Financial Stability Commission[29] or central banks like Bangladesh Bank[30], the People's Bank of China[31] and Banco do Brasil, within the network of the Brazilian Federation of Banks (Febraban)[32]. It is worth noting, however, that most of these initiatives are narrower in scope than the EU classification system, only including high-level lists of eligible projects[33] or methods to calculate the alignment of assets with sustainability goals[34]. The 2020 Taxonomy Regulation, in contrast, inaugurated a more comprehensive architecture, merging high-level principles with (the legal basis for) the subsequently introduced granular criteria. Three main factors could arguably account for the progressive globalisation of the EU model.

First, the Taxonomy has an extraterritorial application, with disclosure requirements for banks, companies and institutional investors concerning the alignment of their economic activities, regardless of where these activities take place. An inevitable "Brussels effect" may thus derive from the practical difficulties of evading the

---

[28] SBFN Toolkit, *Sustainable finance taxonomies*, 2024, p. 18, https://www.sbfnetwork.org/wp-content/uploads/2024/05/SBFN-Toolkit_Sustainable-Finance-Taxonomies.pdf.

[29] Together with the Mongolia Sustainable Finance Association, *Mongolian Green Taxonomy*, 2019, https://www.sbfnetwork.org/wp-content/assets/policy-library/1270_Mongolia_Green_Taxonomy_2019_MSFA.pdf.

[30] Bangladesh Bank, *Sustainable Finance Policy for Banks and Financial Institutions - Sustainable Taxonomy*, 2020, https://www.bb.org.bd/mediaroom/circulars/gbcrd/dec312020sfd05.pdf.

[31] See People's Bank of China (PBOC), *Green Bond Endorsed Projects Catalogue*, 2015, http://www.greenfinance.org.cn/displaynews.php?cid=79&id=468, and the *Mongolian Green Taxonomy*, 2019.

[32] Febraban, *The Brazilian Financial System and the Green Economy - Measuring financial resource allocation towards a green economy by the Brazilian financial system*, 2015, https://cmsarquivos.febraban.org.br/Arquivos/documentos/PDF/Measuring%20financial%20resource%20allocation%20towards%20A%20green%20economy%20by%20the%20brazilian%20financial%20system.pdf; and *ibidem*, 2016, https://cmsarquivos.febraban.org.br/Arquivos/documentos/PDF/2016_Measuring%20Green%20Economy_EN.pdf.

[33] Like the one by the PBOC, see footnote 31.

[34] Like Febraban's methods, see footnote 32.

application of the EU framework. In other words, the "nondivisibility" of companies' production from the EU territory pushes market actors to consider the Taxonomy criteria, even for activities that take place beyond the EU borders[35].

Second, the size and attractiveness of the EU market for "sustainable" funds[36] may also drive "Brussels effects" at market level. For instance, non-EU companies may seek to demonstrate high alignment with the EU Taxonomy criteria for capital-raising purposes.

Third, there is already evidence of the regulatory export of the EU model across several other jurisdictions. Several subsequent Taxonomies also revolve around similar principles, like the notions of "substantial contribution" and minimum "safeguards", technical screening criteria, as well as presenting a link between the classification systems and reporting requirements[37]. While transnational bodies like the UNGP as well as multilateral development banks like the World Bank have also been influential for the design of non-EU taxonomies, especially across emerging economies[38], the wide circulation of the EU model appears is undeniable.

Even though the core building blocks of the EU Taxonomy have widely circulated, other countries have implemented divergent approaches regarding other more controversial aspects of this frame-

---

[35] One of the factors considered by A. Bradford, *The Brussels Effect*, Oxford University Press, 2020, pp. 18-19.

[36] E.g. combined assets in "sustainable" funds under SFDR amounted to EUR 5.5 trillion in the first quarter of 2024, Morningstar, *SFDR Article 8 and Article 9 Funds: Q1 2024 in Review*, 2024, p. 7, https://www.morningstar.com/en-uk/lp/sfdr-article8-article9.

[37] For a comparative analysis see SBFN Toolkit, *Sustainable finance taxonomies*, 2024, pp. 37, 39, 44.

[38] See the World Bank's work toward the elaboration of high-level principles for national taxonomies, World Bank, *Developing a National Green Taxonomy - A World Bank Guide*, 2020, https://documents1.worldbank.org/curated/en/953011593410423487/pdf/Developing-a-National-Green-Taxonomy-A-World-Bank-Guide.pdf; See e.g. the actors involved in the Working Group on Sustainable Finance Taxonomies in Latin America and the Caribbean, also involving the European Commission as external technical advisor. UNGP, *Common Framework of Sustainable Finance Taxonomies for Latin America and the Caribbean*, 2023, https://www.undp.org/latin-america/publications/common-framework-sustainable-finance-taxonomies-latin-america-and-caribbean.

work. In particular, notable idiosyncrasies exist across jurisdictions concerning the scope of these classification systems, reflecting countries' varied transition pathways and climate policies.

For instance, additional technical screening criteria for climate adaptation introduced in 2022 also cover nationally sensitive sectors for EU Member States, like gas and nuclear activities. As a result, as long as market actors comply with additional transparency requirements, they can count such activities as part of their Taxonomy-aligned revenues or as part of their "Green Asset Ratio"[39]. Such decision faced criticism from stakeholders and some Member States, resulting in pending litigation in front of the ECJ[40]. This extension illustrates the blurred line between science and politics in the design of taxonomies, leaving for other countries to make different choices. In contrast, the Chinese taxonomy also incorporates "green services" and other strategic sectors aligned with its own industrial policy[41].

Moreover, the EU Taxonomy currently operates as a binary system, "signalling" Taxonomy-aligned (i.e. "green") activities and assets[42], as well as differentiating them from those that do not comply with the technical screening criteria or breach the "do no significant harm" criteria[43]. This approach has three consequences that also af-

---

[39] Annexes I-II-III Commission Delegated Regulation (EU) 2022/1214.

[40] For the annulment of a Decision by the European Commission denying the internal review of the Taxonomy Delegated Act on gas and nuclear under the Aarhus convention, Case T-579/22, *ClientEarth v Commission*, *OJ* C 45.

[41] See the more recent version, PBOC, National Development and Reform Commission (NDRC), China Securities Regulatory Commission (CSRC), *Green Bond Endorsed Projects Catalogue*, 2021, http://www.pbc.gov.cn/goutongjiaoliu/113456/113469/4342400/2021091617180089879.pdf. For an in-depth comparison of the EU and Chinese approaches, see also Climate Bonds Initiative, *Global green taxonomy development, alignment, and implementation*, 2022, p. 10, https://www.climatebonds.net/files/reports/cbi_taxonomy_ukpact_2022_01f.pdf.

[42] On signalling effects, E. Torsten , D. Gao, F. Packer, *A taxonomy of sustainable finance taxonomies*, BIS Papers, n. 118, 2021, pp. iii, 2, 3, https://c2e2.unepccc.org/wp-content/uploads/sites/3/2021/10/bis-bis-papers-no-118-a-taxonomy-ofsustainable-finance-activities-12-october-2021.pdf.

[43] As graphically illustrated by Platform on Sustainable finance, *The Extended Environmental Taxonomy: Final Report on Taxonomy extension options supporting a sustainable transition*, p. 27. The Platform has highlighted that the reporting requirements based on Taxonomy and revolving around capital expenditures and operating expenditures would speak against it operating as a binary sys-

fect the circulation of the EU model. First, criteria for the identification of "brown" activities are missing. Second, the focus on fully-aligned, enabling and transitional activities fails to capture the full spectrum of "shades of green", such as the technologies and assets that do not fully align but may become "green" in the future. Recognising their importance for meeting the transition goals[44], the Platform on Sustainable finance proposed a broader classification system potentially covering the entire economy. This "traffic lights" system would categorise economic activities based on their different environmental impacts, classifying them as "green" (if they substantially contribute to environmental objectives), "red" (if they do significant harm), "amber" (if they have an intermediate impact) or "grey" (if they neither substantially contribute nor do significant harm)[45]. Third, the EU Taxonomy as currently designed also fails to capture activities that contribute to social goals. The latter are only relevant in the form of "minimum social safeguards", acting as external boundaries for what can qualify as "environmentally sustainable"[46]. Previous efforts to expand the scope of the Taxonomy to social goals were discontinued[47].

On the contrary, the coverage of subsequent Taxonomies has varied widely. The 2023 Mexican Taxonomy also provides technical criteria for social and governance goals like gender equality[48]. The Indonesian taxonomy addresses some of the coverage limitations of

---

tem, *ibidem*, p. 17. While the Taxonomy does not create a net differentiation of "green" and "brown" market actors, the differentiation between Taxonomy-aligned and non-Taxonomy-aligned assets arguably still makes it a binary system, not acknowledging nuances.

[44] As also acknowledged by Commission Recommendation (EU) 2023/1425 of 27 June 2023 on facilitating finance for the transition to a sustainable economy.

[45] Platform on Sustainable finance, *The Extended Environmental Taxonomy: Final Report on Taxonomy extension options supporting a sustainable transition*, pp. 23, 27.

[46] See *supra*, para 2.1.

[47] Platform, *The social Taxonomy- final report*, 2022, https://finance.ec.europa.eu/system/files/2022-08/220228-sustainable-finance-platform-finance-report-social-taxonomy_en.pdf.

[48] Gobierno de México, *Taxonomía Sostenible de México*, 2023, pp. 193-207, https://www.gob.mx/cms/uploads/attachment/file/809773/Taxonom_a_Sostenible_de_M_xico_.pdf.

the EU Taxonomy, by incorporating transitional and brown activities, as well as the social sphere[49].

Overall, despite the evident "Brussels effects" of the EU Taxonomy, several country-specific peculiarities remain. National divergencies are also expected to persist with regards to the link between taxonomies and the issuance of "sustainable" bonds, as the following section will illustrate.

## 3. *A uniform standard for EU green bonds*

### 3.1. *Analysis*

"Sustainable" bonds (including green bonds, social bonds, transition bonds and sustainability-linked bonds, among others) have become an increasingly popular financing technique to channel funds towards sustainability projects and to facilitate issuers' transition toward more sustainable practices. In essence, the "sustainability" label either results from the allocation of the funds raised from investors toward sustainability projects ("use-of-proceeds" bonds), or from the link between sustainability-related targets (like the reduction of GHG emissions) and bonds' financial conditions ("sustainability-linked" bonds)[50]. Following the first example of green bonds issued by the European Investment Bank (EIB) in 2007[51], the EU has remained a global leader in the issuance of "sustainable" debt instruments over the years[52]. The pre-

[49] Sustainable Finance Indonesia, *Indonesia Green Taxonomy*, https://www.ojk.go.id/keuanganberkelanjutan/Uploads/Content/Regulasi/Regulasi_22012011321251.pdf.

[50] ICMA, *Green Bond Principles - Voluntary Process Guidelines for Issuing Green Bonds*, 2022, https://www.icmagroup.org/assets/documents/Sustainable-finance/2022-updates/Green-Bond-Principles-June-2022-060623.pdf. On sustainability-linked bonds, F. Agostini, *Navigating sustainability-linked bonds: friends or foes (of the transition)?*, in *FBF blog*, 2024, https://fbf.eui.eu/navigating-sustainability-linked-bonds-friends-or-foes-of-the-transition/.

[51] EIB, *Climate Awareness Bonds*, https://www.eib.org/en/investor-relations/cab/index.htm.

[52] E.g. the most populary currency for the issuance of sustainable bonds in 2022 was EUR, see Environmental finance, *Sustainable Bonds Insight 2023*, 2024, p. 43, https://www.environmental-finance.com/assets/files/research/sustainable-

dominant benchmark guiding the issuance of "sustainable bonds" globally has hitherto been a series of voluntary market standards, such as the Green Bond principles, designed by the International Capital Markets Association (ICMA)[53].

However, building on the 2018 Action Plan[54], the EU has introduced a Green Bond Regulation (EUGBR)[55], approved in November 2023 and set to take effect from November 2024[56]. The aim is to establish a common Standard for "EU Green Bonds". While the Regulation has the direct force of law among all Member States, its application will be voluntary, meaning that market actors can still issue green bonds in the EU without complying with the Regulation. However, all actors who choose to use the "EU Green Bond" Standard – whether financial or non-financial entities, or sovereign issuers (with some adjustments[57]) – will need to comply with disclosure and external review requirements. The core distinctive feature of EUGB-labelled bonds, compared to existing market practices, is the requirement to allocate at least 85% of the proceeds to EU Taxonomy-aligned projects[58].

Without delving into all the technicalities of the EUGBR[59], it is worth examining some of the distinctive features that could influence the circulation of the EU model. A pre-requisite for issuing

---

bonds-insight-2023.pdf; ICMA, *Sustainable Bond Market Data- Sustainable Bond Issuance per Region*, https://www.icmagroup.org/sustainable-finance/sustainable-bonds-database/.

[53] On the governance of the green bond market ahead of the introduction of the standard, S. Gilotta, *Green Bonds: A Legal and Economic Analysis*, in T. Kuntz (ed.), *Research Handbook on Environmental, Social, and Corporate Governance*, Edward Elgar, 2023; F. Agostini, *From Green Bond Principles to Green bond clauses: mitigating greenwashing through contract law*, in M. Heidemann, M. Andenas (eds.), *Quo vadis Commercial Contract? Reflections on Sustainability, Ethics and Technology in the Emerging Law and Practice*, Springer, 2023.

[54] See *Introduction*.

[55] Regulation 2023/2631/EU.

[56] Art. 72 (2) EUGBR.

[57] Art. 13, Annex I, II EUGBR.

[58] Art. 4 (1), 5 (1) EUGBR.

[59] For an in-depth analysis see N. Maragapolous, *Towards a European Green Bond: A Commission's Proposal to Promote Sustainable Finance*, in D. Ramos Munoz, A. Smolenska, *Greening the Bond market*: *A European perspective*, Palgrave MacMillan, 2023.

EU Green Bonds is the publication of a Factsheet, outlining how the proceeds of the bonds will be allocated, reviewed by a third-party provider[60]. After the issuance, market actors must publish annual allocation reports, also subject to external review[61], and an impact report after the full allocation of proceeds or once during the bond's life time[62]. The Standard will also introduce external supervision over bond issuers by national competent authorities, who will predominantly oversee the formal compliance with disclosure requirements rather than the "green" credentials[63]. The European Securities and Markets Authority (ESMA) will also authorize and exercise supervisory powers over reviewers[64].

### 3.2. *Yet to be seen, but controversial, "Brussels Effects"*

While few initiatives within the global sustainable finance policy landscape are comparable with the EUGBR in scope and magnitude[65], several questions remain open as to its adequacy to circulate across other jurisdictions with the same intensity as the EU Taxonomy.

On the one hand, the Regulation created a passporting mechanism, allowing market actors both within and outside the Union to adopt the Standard when issuing bonds in the EU market[66]. Third-country reviewers will also be allowed to assess EUGB issuances upon a positive decision by the Commission concerning the

---

[60] Art. 8, Annex II EUGBR.

[61] Art. 9, Annex III EUGBR.

[62] Art. 10, Annex IV EUGBR.

[63] Art. 37 EUGBR.

[64] Art. 47-53 EUGBR. On the shortcomings of these oversight mechanisms, strongly focussing on formal publication requirements instead of the substance of such documentation or environmental credentials, see E. Cerrato Garcia, F. Agostini, *The green bonds market in the light of European Commission's proposal: implications for greenwashing liability*, in D. Ramos Munoz, A. Smolenska, *Greening the Bond market*: *A European perspective*, Palgrave MacMillan, 2023.

[65] For instance, China has introduced a link between green bond issuance and the high-level Taxonomy of eligible projects, see PBOC, NDRC, CSRD, *supra*; SBFN, *supra*, p. 73.

[66] Explanatory Memorandum EUGBR.

equivalence of their legal regimes for accreditation[67]. The possibility for non-EU issuers and reviewers to engage with EUGB issuances introduces an element of "regulatory export" to the regime[68]. Such elements are also likely to foster regulatory competition, as non-EU jurisdictions may have incentives to introduce their own domestic provisions to avoid the migration of green bond issuers and reviewers to the EU market.

On the other hand, the voluntary and stringent nature of the EUGBS may also limit the potential "Brussels effect" of the Regulation. The mandatory alignment with the Taxonomy, coupled with the option to deviate from the (voluntary) Standard, grants prospective green bond issuers considerable leeway to align with more flexible market-designed standards, like ICMA Principles[69]. The relative ease of circumventing the EUGBR makes the regulatory target particularly "elastic"[70]. These circumstances may result in a low take-up of the EUGBS among market participants[71] and may discourage other regulators from emulating the EU model.

## 4. *A harmonised framework for ESG ratings*

### 4.1. *Analysis*

The other side of the coin to the definition of "sustainable" economic activities and financial instruments relates to the means for assessing to what extent companies and investments effectively ad-

[67] Art. 32 EUGBR.

[68] One of the EU strategies in the global regulatory context, see A.L. Newman, E. Posner, *Putting the EU in its place: policy strategies and the global regulatory context*, 2015, p. 1326.

[69] As also highlighted by E. Cerrato Garcia, F. Agostini, *The green bonds market in the light of European Commission's proposal: implications for greenwashing liability*, 2023.

[70] Term borrowed from A. Bradford, *The Brussels Effect*, Oxford University Press, 2020, pp. 48-51; A. Bradford, *The Brussels Effect*, in *Northwestern University Law Review*, 2012, 107(1), p. 16.

[71] One of the possible scenarios also envisaged by A. Lehmann, *The EU green bond standard: sensible implementation could define a new asset class*, Bruegel, 2023, https://www.bruegel.org/blog-post/eu-green-bond-standard-sensible-implementation-could-define-new-asset-class.

vance sustainability goals[72]. Similar to how credit ratings have traditionally supported capital market investors in the assessment of the reliability of entities and securities, ESG ratings have gained popularity for evaluating sustainability performance and credentials. Unlike the static and "binary" nature of the Taxonomy[73], ESG ratings would allow not only to signal to investors companies and products with an optimal sustainability profile, but also to rate the progressive transition of entities.

While the EU regulator has long recognised the need for "tools" to facilitate investments toward sustainability goals[74], it was only with the 2023 Sustainable Finance Package that the relevance of ESG ratings was formally acknowledged. This led to a Proposal for a Regulation on ESG ratings as well as the respective service providers[75], over which the EU law-making bodies have reached a provisional agreement in 2024[76]. It portrays ESG ratings as "opinion[s], score[s], or both" regarding "a rated item's profile or characteristics with regard to environmental, social and human rights, or governance factors or exposure to risks or the impact on environmental, social and human rights, or governance factors". It places at the core of ESG ratings an "established methodology and ranking system of rating categories"[77].

---

[72] On the interlinkages between the Taxonomy and the Proposal on ESG ratings, C. Gortsos, D. Kyriazis, *The Taxonomy Regulation and its Implementation*, EBI Working Paper Series, 2024, p. 19, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4381950; on the ESG rating regime as a "definitional" initiative, especially due to the transparency requirements. D. Ramos Muñoz, A. Smoleńska, *The governance of ESG ratings and benchmarks (infomediaries) as gatekeepers: exit, voice and coercion*, 2023, EBI Working Paper Series 149, p. 15, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4531520.

[73] See *supra*, 2.1.

[74] Among others, EU Commission, *A sustainable finance framework that works on the ground*, 2023, para 1, 1.3.

[75] EU Commission, *Proposal (…) on the transparency and integrity of Environmental, Social and Governance (ESG) rating activities 2023/0177*.

[76] For the approved texts, see EU Parliament, *Legislative resolution of 24 April 2024 on the proposal for a regulation of the European Parliament and of the Council on the transparency and integrity of Environmental, Social and Governance (ESG) rating activities*, COM(2023)0314 – C9-0203/2023 – 2023/0177(COD), https://www.europarl.europa.eu/doceo/document/TA-9-2024-0347_EN.pdf.

[77] Art. 3 (1) Proposal.

These can be qualitative or quantitative in nature, and potentially serve different purposes, from the assessment of sustainability risks to evaluating external impacts[78]. Given the competition among market providers in the design of methodologies, there are significant divergences across ESG ratings, particularly in the factors considered, the indicators, and the approaches to balance them[79]. The broad variety of environmental, social and governance matters are not always considered separately; on the contrary, some providers provide aggregate scores, which may confuse and mislead investors about sustainability profiles[80]. Such discrepancies, along with the need to protect investors, have driven the decision to regulate this phenomenon at the EU level. According to the EU Commission, the existing fragmentation could also prevent companies from obtaining an accurate assessment of the sustainability risks and opportunities of their activities, or of those of their competitors[81].

The Proposal, largely drawing on regulatory techniques for credit rating agencies and financial benchmarks, focuses on transparency, authorisation and governance requirements. Providers are expected to provide information around their rating methodology in a dedicated section in their website[82]. They will have to obtain ESMA's authorisation[83], which will also exercise investigation and supervisory powers[84].

The Proposal also requires them to prevent conflicts of interest[85], also by introducing a "sliding door" system, preventing ESG

---

[78] As noted by D. Ramos Muñoz, A. Smoleńska, op. cit., pp. 5-6. This distinction is also recurrent in the industry, see ESMA, *ESG ratings: Status and key issues ahead*, ESMA Report on Trends, Risks and Vulnerabilities 1, 2021, p. 700, https://www.esma.europa.eu/sites/default/files/trv_2021_1-esg_ratings_status_and_key_issues_ahead.pdf.

[79] F. Berg, J.F. Kölbel, R. Rigobon, *Aggregate Confusion: The Divergence of ESG Ratings*, in *Review of Finance*, 2022, 26(6), pp. 1315-44.

[80] ESMA, *ESG ratings: Status and key issues ahead*, ESMA Report on Trends, Risks and Vulnerabilities 1, 2021, p. 701.

[81] Explanatory memorandum, Proposal.

[82] Art. 23 (1) Proposal.

[83] Arts. 6-9 Proposal.

[84] Arts. 30, 33, 35-42 Proposal.

[85] Art. 25 Proposal.

rating providers from engaging in concurrent activities like auditing or consulting[86].

The regulatory approach underlying the Proposal is indirect. It largely posits a reactive approach on investors' side, orienting their decisions based on the additional flow of information resulting from ESG ratings. Supervision over providers also ensures a certain level of accountability[87]. On the contrary, the attention for substantive requirements has been limited: for instance, the Proposal prohibits the aggregation of E, S and G elements in one unique rating[88]. However, it does not go as far to harmonise the rating methodology, which will remain subject to market competition to ensure the variety and independence of approaches[89].

The assimilation of ESG ratings to credit rating agencies and financial benchmarks could be reasonably grounded on their similar role as intermediaries that should address investors' information asymmetry ("Infomediaries")[90]. Yet, some have also criticised this approach, which neglects their role as "gatekeepers" that should also attest to the reliability of such information[91].

### 4.2. *The premises for "Brussels Effects"?*

While the international standard-setter IOSCO had already provided policy recommendations concerning ESG rating providers in 2021[92], the EU Proposal emerged in a largely unregulated space. To the author's best knowledge, only the UK Financial Conduct Au-

[86] Art. 16 (1), with some exceptions under Art. 16 (2) Proposal.

[87] D. Ramos Munoz, A. Smolenska, *Greening the Bond market*: *A European perspective*, Palgrave MacMillan, 2023, pp. 14, 18.

[88] Art. 23 (2) Proposal.

[89] Recital (36) Proposal.

[90] M. Siri, M. Gargantini, *Information Intermediaries and Sustainability: ESG ratings and benchmarks in the European Union*, ECMI Working Paper, 2022, https://www.ecmi.eu/publications/working-papers/information-intermediaries-and-sustainability-esg-ratings-and-benchmarks.

[91] D. Ramos Munoz, A. Smolenska, *Greening the Bond market*: *A European perspective*, Palgrave MacMillan, 2023.

[92] IOSCO, *Environmental, Social and Governance (ESG) Ratings and Data Products Providers - Final Report*, 2021, pp. 49-50, https://www.iosco.org/library/pubdocs/pdf/IOSCOPD690.pdf.

thority (FCA) had explored the merits of a potential code of conduct for ESG ratings, commissioning it to ICMA[93] for release toward the end of 2024[94]. The code will, however, be a soft law instrument[95].

Several aspects of the currently negotiated Regulation suggest potential for ""Brussels effects" in the coming years. First, the EU Proposal explicitly regulates ESG rating providers not based in the EU, allowing them to operate in the EU only subject to an "equivalence decision"[96]. Given the size of the EU market for "sustainable" products, the activity of ESG rating providers is hardly "divisible"[97], and the incentives to circumvent the application of the EU regime are low. These factors encourage, in turn, the industry to align. Second, the indirect regulatory approach, enabling market actors to retain their existing methodologies, may be perceived as less burdensome. Other regulators may be more prone to replicate similar transparency and organisational requirements with a view to protecting investors and boosting confidence in ESG ratings. In this context, the observed circulation of EU initiatives based on similar regulatory techniques, such as the Credit Rating Agencies Regulation[98], highlights the potential impact of the EU Proposal. The IOSCO Policy Recommendations for providers, also emphasizing the role of transparency, organisational requirements and the mitigation of conflicts of interests, make such an outcome even more likely[99].

---

[93] FCA, *Code of Conduct for ESG data and ratings providers*, 22 November 2022, https://www.fca.org.uk/news/news-stories/code-conduct-esg-data-and-ratings-providers.

[94] Through the spring budget 2024, HM Treasury, *Policy paper - Spring Budget 2024*, para 6.10, https://www.gov.uk/government/publications/spring-budget-2024/spring-budget-2024-html.

[95] FCA, *supra*, footnote 93.

[96] Arts. 9-11 Proposal.

[97] Terminology borrowed from A. Bradford, *The Brussels Effect*, Oxford University Press, 2020, p. 17.

[98] E. Cervone, *Credit Rating Agencies: Financial Multipolarity, EU Regulatory Export and The Development of Global Standards Through Multilevel Governance*, in C.L. Lim, B. Mercurio, *International Economic Law after the Global Crisis*, Cambridge University Press, 2015, pp. 12-13.

[99] IOSCO, *Environmental, Social and Governance (ESG) Ratings and Data Products Providers - Final Report*, 2021, pp. 50-52.

## 5. *Conclusions*

EU definitional initiatives to foster sustainable finance represent an ambitious attempt to conceptualise and standardise the assessment of "sustainability" in the financial sector. They also provide valuable case studies for understanding the cross-border circulation of the EU sustainable finance agenda. While the EU Taxonomy has undoubtedly inspired a wave of policy measures, complex issues like the Taxonomy's coverage and the treatment of transitional activities have led to divergent policy choices in other countries. The essay has also concluded that the circulation of the EU Green Bond Standard among non-EU issuers, as well as the adoption of similar initiatives by other policy-makers, is likely to be low. The significant compliance costs and the existence of more flexible, market-designed standards are likely to act as barriers to the globalisation of the EU model. Lastly, while the impact of the proposed ESG Ratings Regulation remains uncertain, the indirect regulatory approach and rating providers' need to operate in the EU market lay the foundation for potentially wide circulation of this initiative.

# LIST OF AUTHORS AND EDITORS


Patrick Abel, Max Weber Fellow, European University Institute, Florence, Italy; Assistant Professor, University of Passau, Germany.

Federica Agostini, Assistant Professor, International and European Law Department, Utrecht University.

Elisa Baroncini, Full Professor of International Law, *Alma Mater Studiorum* - Università di Bologna, Re-Globe Coordinator.

Yanis M. Bourgeois, Economic Affairs Officer, World Trade Organization.

Tiziano Bussani, PhD International Law, Post-Doc Research Fellow of Fondazione Fratelli Confalonieri, FUTMOFIN Jean Monnet Chair 2023-2026, Università di Milano.

Federico Casolari, Full Professor of European Union Law, *Alma Mater Studiorum* - Università di Bologna, Director of the Department of Legal Studies.

Giulia Ciliberto, Associate Professor in EU Law, Universitas Mercatorum.

Ilaria Colombo, PhD Candidate in International and EU Law, Università Bocconi Milano.

Ylli Dautaj, Lecturer with Brunel Law School, UK; Adjunct Professor with Penn State Law, US; and Partner at DER Legal, Stockholm, Sweden.

Goran Dominioni, Assistant Professor in Law, Dublin City University.

Victor do Prado, former Director of Council and Trade Negotiations Committee at the WTO and Professor of Fundamentals of Economic Diplomacy, Paris School of International Affairs.

Monika Feigerlová, Senior Researcher at the Institute of State and Law of the Czech Academy of Sciences.

Davide Grespan, Legal Advisor in charge of Dispute Settlement, EU Permanent Mission to the WTO.

Marina-Elissavet Konstantinidi, LL.M., Attorney at Law, Piraeus Bar Association, Greece.

Niccolò Lanzoni, Post-doc Research Fellow and Adjunct Professor in International Law, *Alma Mater Studiorum* - Università di Bologna.

Pietro Manzini, Full Professor of European Union Law, *Alma Mater Studiorum* - Università di Bologna.

Maria Laura Marceddu, Visiting Lecturer in International Investment Law, at King's College London.

Klarissa Martins Sckayer Abicalam, PhD Candidate in European Union Law – External Relations, *Alma Mater Studiorum* - Università di Bologna.

Maria Rosaria Mauro, Full Professor of International Law, Universitas Mercatorum.

Marcin J. Menkes, Professor at Warsaw School of Economics.

Alessandro Monti, Assistant Professor, Faculty of Law, University of Copenhagen.

Aishwarya Narayanan, UN Affairs intern at ITC's representative office to the United Nations in New York.

Josephine Norris, Member of the Legal Service, European Commission and Adjunct Professor of International Trade Law at the Vrije Universiteit Brussel.

Elena Orrù, Associate Professor of Maritime and Transport Law, *Alma Mater Studiorum* - Università di Bologna.

Aditi Pandey, PhD Teaching Assistant International Economic Law, Università della Svizzera italiana.

Alessandra Quarta, PhD Candidate in European Union Law, *Alma Mater Studiorum* - Università di Bologna.

Emanuela Rassu, PhD Candidate in Law and management of Sustainability, Università degli Studi di Siena.

Emily Reid, Professor of International Economic Law and Sustainable Development, University of Southampton.

María Moreno Sancho, PhD Candidate in International Law, Complutense University of Madrid.

Federico Siscaro, International Relations Officer, The Customs and Monopolies Agency, Italy.

Attila Massimiliano Tanzi, Full Professor of International Law, *Alma Mater Studiorum* - Università di Bologna.

Greta Tellarini, Full Professor in Maritime and Transportation Law, *Alma Mater Studiorum* - Università di Bologna.

Felipe Tomazini de Souza, PhD Candidate in International Law, Università di Cagliari.

# PUBBLICAZIONI DEL SEMINARIO GIURIDICO DELLA UNIVERSITÀ DI BOLOGNA

1. Coli U., *Collegia et sodalitates*, 1913.
2. Donatelli I., *La "consortia" di Avesa*, 1914.
3. Valenza P., *Il diritto di usufrutto nelle leggi sulle tasse del registro*, 1915.
4. Zingali G., *La statistica della criminalità*, 1916.
5. Tumedei C., *La separazione dei beni ereditari*, 1917.
6. Albertoni A., *L'"Apokeryxis"*, 1923.
7. Salvi F., *La cessione dei beni ai creditori*, 1947.
8. Milani F., *Distinzioni delle servitù prediali*, 1948.
9. Fassò G., *I "quattro autori" del Vico*, 1949.
10. Ferri L., *La trascrizione degli acquisti "mortis causa" e problemi connessi*, 1951.
11. Rossi G., *La "Summa arboris actionum" di Ponzio da Ylerda*, 1951.
12. Poggeschi R., *Le associazioni e gli altri gruppi con autonomia patrimoniale nel processo*, 1951.
13. Matteucci N., *Antonio Gramsci e la filosofia della prassi*, 1951.
14. Forchielli P., *I contratti reali*, 1952.
15. Salvi F., *Il possesso di stato familiare*, 1952.
16. Fassò G., *La storia come esperienza giuridica*, 1953.
17. Palazzini Finetti L., *Storia della ricerca delle interpolazioni nel Corpus iuris giustinianeo*, 1953.
18. Rossi G., *Consilium sapientis iudiciale*, 1958.
19. Mancini G.F., *La responsabilità contrattuale del prestatore di lavoro*, 1957.
20. Ferri L., *L'autonomia privata*, 1959.
21. Torelli P., *Scritti di storia del diritto italiano*, 1959.
22. Santini G., *I Comuni di Valle del medioevo. La Costituzione federale del "Frignano"*, 1960.
23. Gianniti F., *I reati della stessa indole*, 1959.
24. Ghezzi G., *La prestazione di lavoro nella comunità familiare*, 1960.
25. Nardi E., *Case "infestate da spiriti" e diritto romano e moderno*, 1960.
26. Ferri L., *Rinunzia e rifiuto nel diritto privato*, 1960.
27. Ghezzi G., *La responsabilità contrattuale delle associazioni sindacali*, 1963.
28. Bonsignori A., *Espropriazione della quota di società a responsabilità limitata*, 1961.
29. Redenti E., *Scritti e discorsi giuridici di un mezzo secolo*, vol. I, *Intorno al diritto processuale*, 1962.
30. Redenti E., *Scritti e discorsi giuridici di un mezzo secolo*, vol. II, *Intorno al diritto sostanziale*, 1962.
31. Gualandi A., *Spese e danni nel processo civile*, 1962.
32. Bonsignori A., *Assegnazione forzata e distribuzione del ricavato*, 1960.
33. Mancini G.F., *Il recesso unilaterale e i rapporti di lavoro*, vol. I, *Individuazione della fattispecie. Il recesso ordinario*, 1962.
34. Nardi E., *Rabelais e il diritto romano*, 1962.
35. Romagnoli U., *Il contratto collettivo di impresa*, 1963.
36. Santini G., *I "comuni di pieve" nel medioevo italiano*, 1964.
37. Rudan M., *Il contratto di tirocinio*, 1966.
38. Bonini R., *I "libri de cognitionibus" di Callistrato. Ricerche sull'elaborazione giurisprudenziale della "cognitio extra ordinem"*, 1964.
39. Colliva P., *Ricerche sul principio di legalità nell'amministrazione del Regno di Sicilia al tempo di Federico II*, 1964.
40. Mengozzi P., *L'agenzia di approvvigionamento dell'Euratom*, 1964.
41. *Scritti minori di Antonio Cicu*, tomi I e II, *Scritti di teoria generale del diritto - Diritto di famiglia*, 1965.
42. *Scritti minori di Antonio Cicu*, *Successioni e donazioni. Studi vari*, 1965.
43. Sacchi Morsiani G., *Il potere amministrativo delle Comunità europee e le posizioni giuridiche dei privati*, I, 1965.
44. Ghezzi G., *La mora del creditore nel rapporto di lavoro*, 1965.
45. Roversi Monaco F.A., *Enti di gestione. Struttura, funzioni, limiti*, 1967.
46. Gianniti F., *L'oggetto materiale del reato*, 1966.

47. Mengozzi P., *L'efficacia in Italia di atti stranieri di potestà pubblica su beni privati*, 1967.
48. Romagnoli U., *La prestazione di lavoro nel contratto di società*, 1967.
49. Montuschi L., *I limiti legali nella conclusione del contratto di lavoro*, 1967.
50. Ranieri S., *Scritti e discorsi vari*, vol. I, *Scritti di diritto penale*, 1968.
51. Ranieri S., *Scritti e discorsi vari*, vol. II, *Scritti di procedura penale*, 1968.
52. Bonini R., *Ricerche di diritto giustinianeo*, 1968.
53. Santini G., *Ricerche sulle "Exceptiones legum romanorum"*, 1969.
54. Lo Castro G., *La qualificazione giuridica delle deliberazioni conciliari delle fonti del diritto canonico*, 1970.
55. Sacchi Morsiani G., *Il potere amministrativo delle Comunità europee e le posizioni giuridiche dei privati*, II, 1970.
56. Roversi Monaco F.A., *La delegazione amministrativa nel quadro dell'ordinamento regionale*, 1970.
57. Gianniti F., *Studi sulla corruzione del pubblico ufficiale*, 1970.
58. De Vergottini G., *Indirizzo politico della difesa e sistema costituzionale*, 1971.
59. Mengozzi P., *Il regime giuridico internazionale del fondo marino*, 1971.
60. Carinci F., *Il conflitto collettivo nella giurisprudenza costituzionale*, 1971.
61. Osti G., *Scritti giuridici*, voll. I e II, 1973.
62. Zuelli F., *Servizi pubblici e attività imprenditoriale*, 1973.
63. Pergolesi F., *Sistema delle fonti normative*, 1973.
64. Montuschi L., *Potere disciplinare e rapporto di lavoro*, 1973.
65. Pattaro E., *Il pensiero giuridico di L.A. Muratori tra metodologia e politica*, 1974.
66. Pini G., *Arbitrato e lavori pubblici*, 1974.
67. Carpi F., *L'efficacia "ultra partes" della sentenza civile*, 1974.
68. De Vergottini G., *Lo "Shadow cabinet"*, 1973.
69. Paolucci L.F., *La mutualità nelle cooperative*, 1974.
70. De Gennaro A., *Crocianesimo e cultura giuridica italiana*, 1974.
71. Stortoni L., *L'abuso di potere nel diritto penale*, 1978.
72. Gianniti F., *Prospettive criminologiche e processo penale*, 1977.
73. Bonvicini D., *Le "joint ventures": tecnica giuridica e prassi societaria*, 1977.
74. De Vergottini G., *Scritti di storia del diritto italiano*, voll. I, II, III, 1977.
75. Lambertini R., *I caratteri della Novella 118 di Giustiniano*, 1977.
76. Dalla D., *L'incapacità sessuale in diritto romano*, 1978.
77. Di Pietro A., *Lineamenti di una teoria giuridica dell'imposta sull'incremento di valore degli immobili*, 1978.
78. Mazzacuva N., *La tutela penale del segreto industriale*, 1979.
79. Romanelli G., *Profilo del noleggio*, 1979.
80. Borghesi D., *Il contenzioso in materia di eleggibilità*, 1979.
81. Dalla Torre G., *L'attività assistenziale della Chiesa nell'ordinamento italiano*, 1979.
82. Carpi F., *La provvisoria esecutorietà della sentenza*, 1979.
83. Alleva P., *Il campo di applicazione dello statuto dei lavoratori*, 1980.
84. Puliatti S., *Ricerche sulla legislazione "regionale" di Giustiniano*, 1980.
85. Fassò G., *Scritti di filosofia del diritto*, voll. I, II, III, 1982.
86. Sgubbi F., *Uno studio sulla tutela penale del patrimonio*, 1980.
87. Lambertini R., *Plagium*, 1980.
88. Dalla D., *Senatus consultum Silanianum*, 1980.
89. Vandelli L., *L'ordinamento regionale spagnolo*, 1980.
90. Nardi E., *L'otre dei parricidi e le bestie incluse*, 1980.
91. Pellicanò A., *Causa del contratto e circolazione dei beni*, 1981.
92. Giardini D., *Politica e amministrazione nello Stato fondato sul decentramento*, 1981.
93. Bortolotti D., *Potere pubblico e ambiente*, 1981.
94. Roffi R., *Contributo per una teoria delle presunzioni nel diritto amministrativo*, 1982.
95. Alessi R., *Scritti minori*, 1981.
96. Bassanelli Sommariva G., *L'imperatore unico creatore ed interprete delle leggi e l'autonomia del giudice nel diritto giustinianeo*, 1983.
97. Zanotti A., *Cultura giuridica del Seicento e* jus publicum ecclesiasticum *nell'opera del cardinal Giovanni Battista De Luca*, 1983.
98. Illuminati G., *La disciplina processuale delle intercettazioni*, 1983.
99. Toniatti R., *Costituzione e direzione della politica estera negli Stati Uniti d'America*, 1983.
100. Nardi E., *Squilibrio e deficienza mentale in diritto romano*, 1983.
101. Dalla D., *Praemium emancipationis*, 1983.

102. Mazzacuva N., *Il disvalore di evento nell'illecito penale - L'illecito commissivo doloso e colposo*, 1983.
103. *Studi in onore di Tito Carnacini*. I. *Studi di diritto costituzionale, civile, del lavoro, commerciale*, 1983.
104. Caia G., *Stato e autonomie locali nella gestione dell'energia*, 1984.
105. Baratti G., *Contributo allo studio della sanzione amministrativa*, 1984.
106. Bortolotti D., *Attività preparatoria e funzione amministrativa*, 1984.
107. Puliatti S., *Ricerche sulle novelle di Giustino II. La legislazione imperiale da Giustiniano I a Giustino II*, 1984.
108. Lambertini R., *La problematica della commorienza nell'elaborazione giuridica romana*, 1984.
109. Zuelli F., *Le collegialità amministrative*, 1985.
110. Pedrazzoli M., *Democrazia industriale e subordinazione*, 1985.
111. Zanotti M., *Profili dogmatici dell'illecito plurisoggettivo*, 1985.
112. Ruffolo U., *Interessi collettivi o diffusi e tutela del consumatore*, I, 1985.
113. Biagi M., *Sindacato democrazia e diritto*, 1986.
114. Insolera G., *Problemi di struttura del concorso di persone nel reato*, 1986.
115. Malagù L., *Esecuzione forzata e diritto di famiglia*, 1986.
116. Ricci G.F., *La connessione nel processo esecutivo*, 1986.
117. Zanotti A., *Il concordato austriaco del 1855*, 1986.
118. Selmini R., *Profili di uno studio storico sull'infanticidio*, 1987.
119. Dalla D., *"Ubi venus mutatur"*, 1987.
120. Zunarelli S., *La nozione di vettore*, 1987.
121. Zoli C., *La tutela delle posizioni "strumentali" del lavoratore*, 1988.
122. Cavina M., *Dottrine giuridiche e strutture sociali padane nella prima età moderna*, 1988.
123. Califano L., *Innovazione e conformità nel sistema regionale spagnolo*, 1988.
124. Sarti N., *Gli statuti della società dei notai di Bologna dell'anno 1336 (contributo allo studio di una corporazione cittadina)*, 1988.
125. Scarponi S., *Riduzione e gestione flessibile del tempo di lavoro*, 1988.
126. Bernardini M., *Contenuto della proprietà edilizia*, 1988.
127. La Torre M., *La "lotta contro il diritto soggettivo". Karl Larenz - la dottrina giuridica nazionalsocialista*, 1988.
128. Garcia De Enterria J., *Le obbligazioni convertibili in azioni*, 1989.
129. Biagi Guerini R., *Famiglia e Costituzione*, 1989.
130. Caia G., *Arbitrati e modelli arbitrali nel diritto amministrativo*, 1989.
131. Magagni M., *La prestazione caratteristica nella Convenzione di Roma del 19 giugno 1980*, 1989.
132. Petroni L., *La disciplina pubblicistica dell'innovazione tecnologica in Francia*, 1990.
133. Zanotti A., *Le manipolazioni genetiche e il diritto della Chiesa*, 1990.
134. Sartor G., *Le applicazioni giuridiche dell'intelligenza artificiale*, 1990.
135. Rossi L.S., *Il "buon funzionamento del mercato comune". Delimitazione dei poteri fra CEE e Stati membri*, 1990.
136. Luchetti G., *La legittimazione dei figli naturali nelle fonti tardo imperiali e giustinianee*, 1990.
137. Sarti N., *Un giurista tra Azzone e Accursio*, 1990.
138. Gustapane A., *La tutela globale dell'ambiente*, 1991.
139. Bottari C., *Principi costituzionali e assistenza sanitaria*, 1991.
140. Donini M., *Illecito e colpevolezza nell'imputazione del reato*, 1991.
141. Perulli A., *Il potere direttivo dell'imprenditore*, 1992.
142. Vandelli L. (a cura di), *Le forme associative tra enti territoriali*, 1992.
143. Gasparri P., *Institutiones iuris publici*, 1992.
144. Capuzzo E., *Dal nesso asburgico alla sovranità italiana*, 1992.
145. Biavati P., *Accertamento dei fatti e tecniche probatorie nel processo comunitario*, 1992.
146. Ferrari F., *Atipicità dell'illecito civile. Una comparazione*, 1992.
147. Gustapane A., Sartor G., Verardi C.M., *Valutazione di impatto ambientale. Profili normativi e metodologie informatiche*, 1992.
148. Orlandi R., *Atti e informazioni della autorità amministrativa nel processo penale. Contributo allo studio delle prove extracostituite*, 1992.
149. Carpani G., *Le aziende degli enti locali. Vigilanza e controlli*, 1992.
150. Musso A., *Concorrenza ed integrazione nei contratti di subfornitura industriale*, 1993.
151. Donini M., *Il delitto contravvenzionale. "Culpa iuris" e oggetto del dolo nei reati a condotta neutra*, 1993.

152. Califano Placci L., *Le commissioni parlamentari bicamerali nella crisi del bicameralismo italiano*, 1993.
153. Fornasari G., *Il concetto di economia pubblica nel diritto penale. Spunti esegetici e prospettive di riforma*, 1994.
154. Manzini P., *L'esclusione della concorrenza nel diritto antitrust italiano*, 1994.
155. Timoteo M., *Le successioni nel diritto cinese. Evoluzione storica ed assetto attuale*, 1994.
156. Sesta M. (a cura di), *Per i cinquant'anni del codice civile*, 1994.
157. Tullini P., *Contributo alla teoria del licenziamento per giusta causa*, 1994.
158. Rescigno F., *Disfunzioni e prospettive di riforma del bicameralismo italiano: la camera delle regioni*, 1995.
159. Lugaresi N., *Le acque pubbliche. Profili dominicali, di tutela, di gestione*, 1995.
160. Sarti N., *Maximum dirimendarum causarum remedium. Il giuramento di calunnia nella dottrina civilistica dei secoli XI-XIII*, 1995.
161. Colliva P., *Scritti minori*, 1996.
162. Dugato M., *Atipicità e funzionalizzazione nell'attività amministrativa per contratti*, 1996.
163. Gardini G., *La comunicazione degli atti amministrativi. Uno studio alla luce della legge 7 agosto 1990, n. 241*, 1996.
164. Manzini P., *I costi ambientali nel diritto internazionale*, 1996.
165. Mittica M.P., *Il divenire dell'ordine. L'interazione normativa nella società omerica*, 1996.
166. Luchetti G., *La legislazione imperiale nelle Istituzioni di Giustiniano*, 1996.
167. La Torre M., *Disavventure del diritto soggettivo. Una vicenda teorica*, 1996.
168. Camon A., *Le intercettazioni nel processo penale*, 1996.
169. Mancini S., *Minoranze autoctone e Stato. Tra composizione dei conflitti e secessione*, 1996.
170. Zanobetti Pagnetti A., *La non comparizione davanti alla Corte internazionale di giustizia*, 1996.
171. Bricola F., *Scritti di diritto penale*. Vol. I, *Dottrine generali, Teoria del reato e sistema sanzionatorio*. Vol. II, *Parte speciale e legislazione complementare, Diritto penale dell'economia*, 1997.
172. Graziosi A., *La sentenza di divorzio*, 1997.
173. Mantovani M., *Il principio di affidamento nella teoria del reato colposo*, 1997.
174. Biavati P., *Giurisdizione civile, territorio e ordinamento aperto*, 1997.
175. Rossi G. (1916-1986), *Studi e testi di storia giuridica medievale*, a cura di Giovanni Gualandi e Nicoletta Sarti, 1997.
176. Pellegrini S., *La litigiosità in Italia. Un'analisi sociologico-giuridica*, 1997.
177. Boni G., *La rilevanza del diritto dello Stato nell'ordinamento canonico. In particolare la canonizatio legum civilium*, 1998.
178. *Scritti in onore di Giuseppe Federico Mancini*. Vol. I, *Diritto del lavoro*, 1998.
179. *Scritti in onore di Giuseppe Federico Mancini*. Vol. II, *Diritto dell'Unione europea*, 1998
180. Rossi A., *Il GEIE nell'ordinamento italiano. Criteri di integrazione della disciplina*, 1998.
181. Bongiovanni G., *Reine Rechtslehre e dottrina giuridica dello Stato. H. Kelsen e la Costituzione austriaca del 1920*, 1998.
182. Caputo G., *Scritti minori*, 1998.
183. Garrido J.M., *Preferenza e proporzionalità nella tutela del credito*, 1998.
184. Bellodi Ansaloni A., *Ricerche sulla contumacia nelle* cognitiones extra ordinem, I, 1998.
185. Franciosi E., *Riforme istituzionali e funzioni giurisdizionali nelle Novelle di Giustiniano. Studi su nov. 13 e nov. 80*, 1998.
186. Cattabriga C., *La Corte di giustizia e il processo decisionale politico comunitario*, 1998.
187. Mancini L., *Immigrazione musulmana e cultura giuridica. Osservazioni empiriche su due comunità di egiziani*, 1998.
188. Gustapane A., *L'autonomia e l'indipendenza della magistratura ordinaria nel sistema costituzionale italiano. dagli albori dello Statuto Albertino al crepuscolo della bicamerale*, premessa di Giuseppe De Vergottini, 1999.
189. Ricci G.F., *Le prove atipiche*, 1999.
190. Canestrari S., *Dolo eventuale e colpa cosciente. Ai confini tra dolo e colpa nella struttura delle tipologie delittuose*, 1999.
191. Fassò G., *La legge della ragione*. Ristampa, a cura di Carla Faralli, Enrico Pattaro, Giampaolo Zucchini, 1999.
192. Fassò G., *La democrazia in Grecia*. Ristampa, a cura di Carla Faralli, Enrico Pattaro, Giampaolo Zucchini, 1999.
193. Scarciglia R., *La motivazione dell'atto amministrativo. Profili ricostruttivi e analisi comparatistica*, 1999.

194. Briguglio F., *"Fideiussoribus succurri solet"*, 1999.
195. Maltoni A., *Tutela dei consumatori e libera circolazione delle merci nella giurisprudenza della Corte di giustizia, profili costituzionali*, prefazione di Augusto Barbera, 1999.
196. Fondaroli D., *Illecito penale e riparazione del danno*, 1999.
197. Rossi L.S., *Le convenzioni fra gli Stati membri dell'Unione europea*, 2000.
198. Gragnoli E., *Profili dell'interpretazione dei contratti collettivi*, 2000.
199. Boni G., *La rilevanza del diritto secolare nella disciplina del matrimonio canonico*, 2000.
200. Lugaresi N., *Internet, privacy e pubblici poteri negli Stati Uniti*, 2000.
201. Lalatta Costerbosa M., *Ragione e tradizione. Il pensiero giuridico ed etico-politico di Wilehlmvon Humboldt*, 2000.
202. Semeraro P., *I delitti di millantato credito e traffico di influenza*, 2000.
203. Verza A., *La neutralità impossibile. Uno studio sulle teorie liberali contemporanee*, 2000.
204. Lolli A., *L'atto amministrativo nell'ordinamento democratico. Studio sulla qualificazione giuridica*, 2000.
205. Busetto M.L., *Giudice penale e sentenza dichiarativa di fallimento*, 2000.
206. Campanella P., *Rappresentatività sindacale: fattispecie ed effetti*, 2000.
207. Bricola F., *Scritti di diritto penale. Opere monografiche*, 2000.
208. Lassandari A., *Il contratto collettivo aziendale e decentrato*, 2001.
209. Bianco A., *Il finanziamento della politica in Italia*, 2001.
210. Raffi A., *Sciopero nei servizi pubblici essenziali. Orientamenti della Commissione di garanzia*, 2001.
211. Piergigli V., *Lingue minoritarie e identità culturali*, 2001.
212. Cafaro S., *Unione monetaria e coordinamento delle politiche economiche. Il difficile equilibrio tra modelli antagonisti di integrazione europea*, 2001.
213. Morrone A., *Il custode della ragionevolezza*, 2001.
214. Masutti A., *La liberalizzazione dei trasporti in Europa. Il caso del trasporto postale*, 2002.
215. Zanotti A., Orlando F., *L'itinerario canonistico di Giuseppe Caputo*, 2002.
216. Lupoi M.A., *Conflitti transnazionali di giurisdizioni*. Vol. I, *Policies, metodi, criteri di collegamento*. Vol. II, *Parallel proceedings*, 2002.
217. Lolli A., *I limiti soggettivi del giudicato amministrativo. Stabilità del giudicato e difesa del terzo nel processo amministrativo*, 2002.
218. Curi F., *Tertium datur. Dal Common Law al Civil Law per una scomposizione tripartita dell'elemento soggettivo del reato*, 2003.
219. Cottignola G., *Studi sul pilotaggio marittimo*, 2003.
220. Gardini G., *L'imparzialità amministrativa tra indirizzo e gestione. Organizzazione e ruolo della dirigenza pubblica nell'amministrazione contemporanea*, 2003.
221. Cevenini C., *Virtual enterprises. Legal issues of the on-line collaboration between undertakings*, 2003.
222. Monducci J., *Diritto della persona e trattamento dei dati particolari*, 2003.
223. Villecco Bettelli A., *L'efficacia delle prove informatiche*, 2004.
224. Zucconi Galli Fonseca E., *La convenzione arbitrale rituale rispetto ai terzi*, 2004.
225. Brighi R., *Norme e conoscenza: dal testo giuridico al metadato*, 2004.
226. Luchetti G., *Nuove ricerche sulle istituzioni di Giustiniano*, 2004.
227. *Studi in memoria di Angelo Bonsignori*, voll. I, II, 2004.
228. Piperata G., *Tipicità e autonomia nei servizi pubblici locali*, 2005.
229. Canestrari S., Foffani L. (a cura di), *Il diritto penale nella prospettiva europea. Quali politiche criminali per l'Europa?* Atti del Convegno organizzato dall'Associazione Franco Bricola (Bologna, 28 febbraio-2 marzo 2002), 2005.
230. Memmo D., Miconi S. (a cura di), *Broadcasting regulation: market entry and licensing. Regolamentazione dell'attività radiotelevisiva: accesso al mercato e sistema di licenze. Global Classroom Seminar*, 2006.

230.bis Briguglio F., *Studi sul procurator*, 2007.

231. Querzola L., *La tutela anticipatoria fra procedimento cautelare e giudizio di merito*, 2006.
232. Tarozzi S., *Ricerche in tema di registrazione e certificazione del documento nel periodo postclassico*, 2006.
233. Botti F., *L'eutanasia in Svizzera*, 2007.
234. Fondaroli D., *Le ipotesi speciali di confisca nel sistema penale*, 2007.
235. Alagna R., *Tipicità e riformulazione del reato*, 2007.
236. Giovannini M., *Amministrazioni pubbliche e risoluzione alternativa delle controversie*, 2007.
237. Montalti M., *Orientamento sessuale e costituzione decostruita. Storia comparata di un diritto fondamentale*, 2007.

238. Tordini Cagli S., *Principio di autodeterminazione e consenso dell'avente diritto*, 2008.
239. Legnani Annichini A., *La mercanzia di Bologna. Gli statuti del 1436 e le riformagioni quattrocentesche*, 2008.
240. Lolli A., *L'amministrazione attraverso strumenti economici*, 2008.
241. Vaccarella M., *Titolarità e funzione nel regime dei beni civici*, 2008.
242. Tubertini C., *Pubblica amministrazione e garanzia dei livelli essenziali delle prestazioni*, 2008.
243. Fioriglio G., *Il diritto alla privacy. Nuove frontiere nell'era di Internet*, 2008.
244. Botti F., *Manipolazioni del corpo e mutilazioni genitali femminili*, 2009.
245. Nisco A., *Controlli sul mercato finanziario e responsabilità penale. Posizioni di garanzia e tutela del risparmio*, 2009.
246. Zanobetti Pagnetti A., *Il rapporto internazionale di lavoro marittimo*, 2008.
247. Mattioli F., *Ricerche sulla formazione della categoria dei cosiddetti quasi delitti*, 2010.
248. Bertaccini D., *La politica di polizia*, 2009.
249. Astrologo A., *Le cause di non punibilità. Un percorso tra nuovi orientamenti interpretativi e perenni incertezze dogmatiche*, 2009.
250. Di Maria S., *La cancelleria imperiale e i giuristi classici: "Reverentia antiquitatis" e nuove prospettive nella legislazione giustinianea del codice*, 2010.
251. Valentini E., *La domanda cautelare nel sistema delle cautele personali*, 2010.
252. Querzola L., *Il processo minorile in dimensione europea*, 2010.
253. Bologna C., *Stato federale e "national interest". Le istanze unitarie nell'esperienza statunitense*, 2010.
254. Rasia C., *Tutela giudiziale europea e arbitrato*, 2010.
255. Zucconi Galli Fonseca E., *Pregiudizialità e rinvio (Contributo allo studio dei limiti soggettivi dell'accertamento)*, 2011.
256. Bellodi Ansaloni A., Ad eruendam veritatem. *Profili metodologici e processuali della* quaestio per tormenta, 2011.
257. Pontoriero I., *Il prestito marittimo in diritto romano*, 2011.
258. *Giustizia senza confini. Studi offerti a Federico Carpi*, 2012.
259. Gustapane A., *Il ruolo del pubblico ministero nella Costituzione italiana*, 2012.
260. Caianiello M., *Premesse per una teoria del pregiudizio effettivo nelle invalidità processuali penali*, 2012.
261. Briguglio F., *Il Codice Veronese in trasparenza. Genesi e formazione del testo delle Istituzioni di Gaio*, 2012.
262. Valentini E., *La domanda cautelare nel sistema delle cautele personali*, Nuova edizione, 2012.
263. Tassinari D., *Nemo tenetur se detegere. La libertà dalle autoincriminazioni nella struttura del reato*, 2012.
264. Martelloni F., *Lavoro coordinato e subordinazione. L'interferenza delle collaborazioni a progetto*, 2012.
265. Roversi-Monaco F. (a cura di), *Università e riforme. L'organizzazione delle Università degli Studi ed il personale accademico nella legge 30 dicembre 2010, n. 240*, 2013.
266. Torre V., *La privatizzazione delle fonti di diritto penale*, 2013.
267. Raffiotta E.C., *Il governo multilivello dell'economia. Studio sulle trasformazioni dello Stato costituzionale in Europa*, 2013.
268. Caruso C., *La libertà di espressione in azione. Contributo a una teoria costituzionale del discorso pubblico*, 2013.
269. Pedrini F., *Le "clausole generali". Profili teorici e aspetti costituzionali*, 2013.
270. Curi F., *Profili penali dello* stress *lavoro-correlato. L'*homo faber *nelle organizzazioni complesse*, 2013.
271. Casale D., *L'idoneità psicofisica del lavoratore pubblico*, 2013.
272. Nicodemo S., *Le istituzioni della conoscenza nel sistema scolastico*, 2013.
273. Legnani Annichini A., *«Proxeneta est in tractando». La professione ingrata del mediatore di commercio (secc. XII-XVI)*, 2013.
274. Monducci J., *Il dato genetico tra autodeterminazione informativa e discriminazione genotipica*, 2013.
275. Mantovani M., *Contributo ad uno studio sul disvalore di azione nel sistema penale vigente*, 2014.
276. De Donno M., *Consensualità e interesse pubblico nel governo del territorio*, 2015.
277. Pacilli M., *L'abuso dell'appello*, 2015.
278. Pištan Č., *Tra democrazia e autoritarismo. Esperienze di giustizia costituzionale nell'Europa centro-orientale e nell'area post-sovietica*, 2015.

279. Bellodi Ansaloni A., *L'arte dell'avvocato,* actor veritatis. *Studi di retorica e deontologia forense*, 2016.
280. Hoxha D., *La giustizia criminale napoleonica. A Bologna fra prassi e insegnamento universitario*, 2016.
281. Querzola L., *L'efficacia dell'attività processuale in un diverso giudizio*, 2016.
282. Pieri B., *Usurai, ebrei e poteri della Chiesa nei* consilia *di Paolo da Castro*, 2016.
283. Rasia C., *La crisi della motivazione nel processo civile*, 2016.
284. Drigo C., *Le Corti costituzionali tra politica e giurisdizione*, 2016.
285. Polacchini F., *Doveri costituzionali e principio di solidarietà*, 2016.
286. Calcagnile M., *Inconferibilità amministrativa e conflitti di interesse nella disciplina dell'accesso alle cariche pubbliche*, 2017.
287. Villa E., *La responsabilità solidale come tecnica di tutela del lavoratore*, 2017.
288. Vincieri M., *L'integrazione dell'obbligo di sicurezza*, 2017.
289. Casale D., *L'automaticità delle prestazioni previdenziali. Tutele, responsabilità e limiti*, 2017.
290. Ganarin M., *L'interpretazione autentica nelle attuali dinamiche evolutive del diritto canonico*, 2018.
291. Laus F., *Il rapporto collaborativo tra pubblico e privato nella contrattazione pubblica. Unione Europea e ordinamenti nazionali: analisi comparata di modelli e riforme*, 2018.
292. Bonacini P., *Multa scripsit, nihil tamen reperitur. Niccolò Mattarelli giurista a Modena e Padova (1204 ca.-1314 ca.)*, 2018.
293. Gabellini E., *L'azione arbitrale. Contributo allo studio dell'arbitrabilità dei diritti*, 2018.
294. Lupoi M.A., *Tra flessibilità e semplificazione. Un embrione di case management all'italiana?*, 2018.
295. Dallari F., *Vincoli espropriativi e perequazione urbanistica. La questione della discrezionalità*, 2018.
296. Donini A., *Il lavoro attraverso le piattaforme digitali*, 2019.
297. Novaro P., *Profili giuridici dei residui delle attività antropiche urbane. Gli incerti confini della gestione dei rifiuti urbani*, 2019.
298. Mattioli F., *Giustiniano, gli* argentarii *e le loro attività negoziali. La specialità di un diritto e le vicende della sua formazione*, 2019.
299. Raffiotta E.C., *Norme d'ordinanza. Contributo a una teoria delle ordinanze emergenziali come fonti normative*, 2019.
300. Medina M.H., *Servio Sulpicio Rufo: un retrato final desde la perspectiva de Cicerón*, 2020.
301. Centamore G., *Contrattazione collettiva e pluralità di categorie*, 2020.
302. Caruso C., *La garanzia dell'unità della Repubblica. Studio sul giudizio di legittimità in via principale*, 2020.
303. Mattheudakis M.L., *L'imputazione colpevole differenziata. Interferenze tra dolo e colpa alla luce dei principi fondamentali in materia penale*, 2020.
304. Tega D., *La Corte nel contesto. Percorsi di* ri-accentramento *della giustizia costituzionale in Italia*, 2020.
305. Bologna C., *La libertà di espressione dei «funzionari»*, 2020.
306. Abis S., *Capace di intendere, incapace di volere. Malinconia, monomania e diritto penale in Italia nel XIX secolo*, 2020.
307. Legnani Annichini A., *Avvocati indisciplinati. I procedimenti del Sindacato Fascista degli Avvocati e dei Procuratori di Bologna (1934-1942)*, 2020.
308. Caruso C., Medico F., Morrone A. (a cura di), Granital Revisited? *L'integrazione europea attraverso il diritto giurisprudenziale*, 2020.
308.bis Canestrari S., *Ferite dell'anima e corpi prigionieri. Suicidio e aiuto al suicidio nella prospettiva di un diritto liberale e solidale*, 2021.
309. Morrone A., *Il sistema finanziario e tributario della Repubblica. I principi costituzionali*, 2021.
310. Pezzato E., Si sanctitas inter eos sit digna foedere coniugali. *Gli apporti patrimoniali alla moglie superstite in età tardoantica e giustinianea*, 2021.
311. Molinari M., *La Parafrasi greca delle Istituzioni di Giustiniano tra* methodus docendi *e mito. Ἔχε ταῦτα ὡς ἐν προθεωρία*, 2021.
312. Guerrieri G., Luchetti G., Lupoi M.A., Manes P., Martino M., Tassani T. (a cura di), *Fiducia e destinazione patrimoniale. Percorsi giuridici a confronto*, 2022.
313. Morrone A., Mocchegiani M. (a cura di), *La regolazione della sicurezza alimentare tra diritto, tecnica e mercato: problemi e prospettive*, 2022.
314. Giupponi T.F. , Arcuri A. (a cura di), *Sicurezza integrata e* welfare *di comunità*, 2022.
315. Bonetti T., *La partecipazione strumentale*, 2022.

316. Guarnieri E., *Funzionalizzazione e unitarietà della vicenda contrattuale negli appalti pubblici*, 2022.
317. Cavina M., *Un inedito di Giulio Claro (1525-1575): Il «trattato di duello». Edizione dal manoscritto [Madrid] Biblioteca de San Lorenzo de El Escorial, g. II. 10*, 2022.
318. Pacilli M., *La tutela camerale tra forme e garanzie*, 2022.
319. Calcagnile M., *L'oggetto del provvedimento amministrativo e la garanzia di effettività nell'amministrazione pubblica*, 2022.
320. Mengozzi P., *L'idea di solidarietà nel diritto dell'Unione europea*, 2022.
321. Tomer A., *'Aedes sacrae' e 'edifici destinati all'esercizio pubblico del culto cattolico'. La condizione giuridica delle chiese tra ordinamento canonico e ordinamento italiano*, 2022.
322. Caletti G.M., *Dalla violenza al consenso nei delitti sessuali. Profili storici, comparati e di diritto vivente*, 2023.
323. Mulazzani G., *La Cassa depositi e prestiti e la riforma amministrativa dell'economia*, 2023.
324. Visconti A.M., *Banca centrale europea e sovranità economico-finanziaria*, 2023.
325. Pedullà L., *Contributo per una teoria sulla costituzionalizzazione del giusto procedimento*, 2023.
326. D'Angelo G. (edited by), *Aspects of customs control practices in selected EU member states*, 2023.
327. De Petris A.L., *Il principio* servitus in faciendo consistere nequit *e la categoria dell'onere reale nella tradizione romanistica*, 2023.
328. Medico F., *Il Doppio Custode. Un modello per la giustizia costituzionale europea*, 2023.
329. Santangelo A., *Uno studio sui delitti di turbativa*, 2023.
330. Albanese A., Quod nullum est nullum producit effectum? *I vizi del contratto e la forza del fatto*, 2023.
331. Pontoriero I., Veglia M. (a cura di), *«E sarai meco sanza fine cive». Temi, personaggi e fortuna della cultura politica e giuridica di Dante*, 2023.
332. Gustapane A., *La responsabilità penale dei pubblici ufficiali tra insindacabilità legislativa, imparzialità giudiziaria e discrezionalità amministrativa*, 2023.
333. Graziadei M., Timoteo M., Carpi A. (a cura di), *Chi resiste alla globalizzazione? Globalismi, regionalismi, nazionalismi nel diritto del XXI secolo*, 2023.
334. Sereni Lucarelli C., *L'accesso al fatto nel processo amministrativo*, 2024.
335. Marolda G., *Dietro le quinte del Quirinale. Una prospettiva di indagine della posizione costituzionale del Presidente della Repubblica*, 2024.
336. Arcuri A., *La forma delle fonti. La problematica del potere normativo nello Stato membro dell'Unione europea*, 2024.
337. Rasia C., *Contributo allo studio dell'espropriazione forzata contro l'amministrazione pubblica*, 2024.
338. Hoxha D., Masculus facta sum. *Indagini storico-giuridiche sulla maschilizzazione fra tardo Medioevo ed Età Moderna*, 2024.
339. Medico F., Morrone A. (a cura di), *Salario minimo legale e Costituzione*, 2024.
340. Mezzetti L. (edited by), *Science, Technology and Law. Mutual Impact and Current Challenges*, 2024.
341. Perchinunno F., *La reviviscenza delle norme giuridiche*, 2025.
342. Boni G., Ganarin M., Tomer A., *La lesione dei principi di legalità penale e del giusto processo nell'ordinamento canonico. Quali ripercussioni giuridiche nel diritto italiano?*, 2025.
343. Baroncini E., Casolari F., Manzini P., Tanzi A.M., Tellarini G., Quarta A. (edited by), *Sustainable Development as Fundamental Pillar of Economic Governance and Public Affairs. The EU Approach and International and Domestic Perspectives*, 2025.

Finito di stampare nel mese di febbraio 2025
per i tipi di Bologna University Press

The Department of Legal Studies of the University of Bologna hosted and supported the Jean Monnet Module Project “Re-Globe – Reforming the Global Economic Governance: The EU for SDGs in International Economic Law”. This open-access book gathers the interdisciplinary research contributions developed in the activities of the Re-Globe Project, starting from the Re-Globe Ravenna International Conference. It provides the analysis of the Re-Globe research team and several Re-Globe guests belonging to academia and national, EU and international institutions. The publication thus offers a wide, in-depth and critical overview of the relevance the EU approach has for sustainability matters in International Economic Law, with insights into Energy, Finance and Transport Law.