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

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The UN 2030 Agenda in the EU Trade Policy

Improving Global Governance for a Sustainable New World

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

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SEED FUNDING

Una Europa Seed Funding

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

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INTRODUCTION

The European Union (EU) is proposing herself as a major actor on the international scene by systematically founding her approach to the reform processes of rules and procedures of the global economic governance on the realization of the Sustainable Development Goals (SDGs) of the United Nations (UN) 2030 Agenda. The EU trade policy thus appears the most articulated, complete and innovative commercial policy at world level, producing most advanced Preferential Trade Agreements (PTAs) with highly relevant trade and sustainable development chapters combining free trade and investment promotion with environmental, forestry and biodiversity protection, the fight against climate change, the respect of fundamental rights and the attention to gender and cultural diversity issues, while developing unilateral tools as the due diligence directive, the carbon border adjustment mechanism, the deforestation regulation, and tabling most innovative sustainability documents for the World Trade Organization (WTO) reform process. Together with the green transition, the EU is also facing the huge challenges of the economic sanctions against Russia and the energy and food crisis.

The Seed Funding Project "ImprovEUorGlobe - The UN 2030 Agenda in the EU Trade Policy: Improving Global Governance for a Sustainable New World", funded by the Una Europa Alliance, has been implemented in order to provide for a critical interdisciplinary overview and analysis of the SDGs oriented EU trade policy, constantly considering the participation of civil society in the shaping and implementation of the EU trade policy and tools, and the EU ability to play a significant and influential role in the international political debate to promote sustainability values in international relations.

ImprovEUorGlobe has involved six Una Europa Universities: *Alma Mater Studiorum* – Università di Bologna, Freie Universität Berlin, Uniwersytet Jagielloński w Krakowie (Jagellonian University in Kraków), University of Edinburgh, Helsingin Yliopisto (The University of Helsinki) and Universidad Complutense de Madrid.

The ImprovEUorGlobe Coordinator is Professor Elisa Baroncini (University of Bologna), and the ImprovEUorGlobe Chair is Dr. Filippo Fontanelli (University of Edinburgh). The Academic Leads are Dr. Ana Maria Daza Vargas (University of Edinburgh), Prof. Genia Kostka (Freie Universität Berlin), Prof. Reetta Toivanen (The University of Helsinki), Prof. Piotr Szwedo (Uniwersytet Jagielloński w Krakowie), and Prof. Raquel Regueiro Dubra (Universidad Complutense de Madrid).

Between January and July 2023, the ImprovEUorGlobe Research Team has realized an ImprovEUorGlobe Webinar Series carried out in all the participating institutions, and an ImprovEUorGlobe Course in Bologna. It launched a call for papers for young Una Europa scholars, and the selected papers were delivered in the ImprovEUorGlobe Workshop held in Bologna on 3-4 July 2023. All the ImprovEUorGlobe activities have been recorded and uploaded on the dedicated ImprovEUorGlobe website at the link https://site.unibo.it/improveuorglobe/en .

The rich debate and discussion within the ImprovEUorGlobe Research Team and with the speakers selected for the ImprovEUorGlobe Workshop produced the papers we are proud to present here through this open access publication. The ImprovEUorGlobe e-book is just a first step of a scientific

collaboration we intend to strengthen and deepen to support the EU in facing the challenges of the polycrisis currently characterizing international relations, making international trade and investments major drivers for sustainability, and thus prosperity, stability, and peace.

We are very grateful to Adv. Klarissa Martins Sckayer Abicalam, who was the ImprovEUorGlobe research assistant, for the great and precious support she provided in the realization of all the ImproveEUorGlobe activities, from the realization of the dedicated website to the editing of this publication, which has been supported also by Dr. Niccolò Lanzoni, and Ms. Alessandra Quarta and Giulia Bortino. Heartful thanks have also to be expressed to the research officers of the Una Europa Secretariat in Leuven / Brussels and the Law Department of the University of Bologna, together with the administrative staff of all the ImprovEUorGlobe Universities. Without their very generous and patient support, the ImprovEUorGlobe Project could not have seen the light, neither be accomplished. The remarkable and very communicative logos of the ImprovEUorGlobe project are the precious gift of the experts of the Graphic Design Office of the University of Bologna. We express our gratitude also to them.

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

Bologna, Edinburgh, Berlin, Helsinki, Kraków, Madrid, November 2024

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THE PARADIGM SHIFT IN THE EU'S ECONOMIC ACTION: THE EPOCH OF HOMELAND ECONOMICS

FILIPPO FONTANELLI

TABLE OF CONTENTS: *1. Introduction. – 2. 2023: The appeal of a New Global approach. – 2.a The End of Globalization? – 2.b The EU joins the pack – 3. Mapping the EU's 'homeland manouvres'. – 3.a Three stories – 3.b The entire picture, big list – 4. Conclusion: taking stock.*

ABSTRACT: *In the framework of a generalised re-thinking of economic globalisation, the European Union is also changing its policies at a remarkable rate, and appears to have abandoned its customary loyalty to open markets and economic liberalisation. In the years since 2020, the EU has adopted, or plans to adopt, numerous initiatives that can restrict the Union's openness to foreign trade and investments. While each of these measures might be insufficient to warrant the finding of a paradigm shift, their aggregate weight is revealing, especially after the publication of the EU's 'economic security' manifesto in June 2023 and in light of the ongoing attempts to establish a 'Green Steel' club with the US. This paper conducts a first comprehensive survey of these measures, and proposes to appreciate their collective implications. Whether the EU wishes to acknowledges or not, a deep revision of long-held assumptions is underway, driven chiefly by the need to adapt and survive in a climate of generalised disenchantment with the promises of globalisation. The main casualty of this process seems to be the observance of multilateral rules. For all the reassurances to the contrary, the EU appears intent on advancing its strategic interests without assuming that WTO law would constrain its action, nor protect it from external harms.*

KEYWORDS: *European Union, External Economic Action, de-globalisation, Economic Security, WTO Law, industrial planning.*

1. Introduction

At the time of writing (fall 2023) and for a while already, the law and policy of the European Union (EU)'s economic action have been changing skin at a noticeable pace for at least three years. Each speaker at the 2023 ImprovEUorGlobe workshop addressed a recent development, and still many more have occurred since 2020 that would warrant analysis and discussion. It is not obvious that a recognisable pattern runs across these novelties, allowing us to speak of a general shift in the EU's political economy, which can be recognised looking at EU's laws and policies.

This paper sets out to verify this shift and gauge its direction. It offers an overview that tracks and pulls together many different strands of the EU's recent economic policies and rules with transnational effects. This survey tests whether a widespread impression has a basis in reality, that is, the

impression that the EU is changing its ways purposefully and resolutely, in ways that exceed normal adjustments and gradual developments and rather reflect a paradigm shift, i.e., a fundamental change in approach and underlying assumptions. Customarily, the EU has been an advocate of economic openness and multilateral trade obligations, but these now seem recessive values in the EU's activity. Instead, the driving vision of EU's action in recent years incorporates various non-economic, geo-economic and geopolitical interests, and a tepid allegiance to the spirit of the World Trade Organisation (WTO) bordering on lip service.

The tide might be turning, but there is no single *tournant*[1] to isolate. No single revelatory episode, moment or measure stands out, and the EU has not explicitly acknowledged that it has in many ways reneged a paradigm that was prevailing just a few years ago. Therefore, to build the finding of a paradigm shift on more than anecdotes it is necessary to map as many symptoms as possible: EU's measures, draft measures, proposals, statements and rumours. None of them *per se* demonstrates a shift, but their accumulation since the Covid-19 pandemic needs to be accounted for. As explained below, this body of measures inclines coherently towards certain goals and policy instruments of current popularity, and away from other familiar ones. We might be witnessing the early years of a new epoch, for which it might be reasonable, in the future, to distinguish between before and after its start.

EU external policy, by definition, does not operate in a vacuum but in (an external) context, and it is designed accordingly. EU's internal regulatory measures are also better understood in the context. To the extent possible, I will try to position the EU's actions and reactions within global trends or dynamics, to point out their plausible first- and second-level rationales. A common thread across the new fabric of EU's economic action is its reactive nature – almost reluctant, at times. One might plausibly find that the EU is no longer assiduously observant of the rule-based liberalisation agenda, but its approach remains orthodox compared to that of some other global players. Sometimes, the EU experimented new policies, other times it felt the urge to respond to the new policies of its global partners and competitors. In several respects, external economic policy can be a collateral victim of domestic policies – one's own and the others'. The intended objective of robust industrial policies (think 'made-locally' schemes and support to local champions) might not be to stifle international competition, but they might just end up doing just that.

This paper is articulated as follows. **First**, I will present a few episodes and developments illustrating the current state of global trade and investment law and policy, trying to position the EU therein. **Second**, I will identify a series of EU's initiatives and measures emerged in the past few months, according to a rough taxonomy. **Third**, I make a few conclusive suggestions on how this rapidly changing scenario can be read, without indulging into exaggerations but also without overlooking the relevance of the evolutions described.

[1] M. BLANCHOT, *L'entretien infini*, Paris, Gallimard, 1969, p. 394: «ce moment où s'accomplit un changement d'époque (s'il y en a)».

2. 2023: The Appeal of a New Global Approach

The EU's action reacts to, and shapes, global developments. This section takes stock of the developments in the global outlook on economic globalisation visible in the 2020-2023 period (a) and seeks to position the EU's activity within this global picture (b).

a. The end of globalization?

In June 2023, the *New York Times* published an op-ed that reflected a widespread impression, titled «Why It Seems Everything We Knew about the Global Economy Is No Longer True»[2]. The account was criticised for being facile[3], but it reflected widely held views that seem to reverberate in many countries' recent decisions on external economic policies. The article's gist is that, in the past five years, the Western outlook on trade and investment liberalisation has reversed, a phenomenon accelerated by the climate change looming crisis, the pandemic, the war in Europe, and the US-China trade conflict (the so-called «Polycrisis»)[4]. In essence, the tacit consensus on the «superiority of open markets, liberalized trade and maximum efficiency», often collectively referred with the shorthand 'rules-based system», has largely dissolved. Reliance on these principles contributed to dangerous dependencies, the unrestrained depletion of global resources and a shift of global economic power that threatens the viability of Western dominance.

In this scenario, common and specific vulnerabilities have emerged, for which Western states had not prepared, and which they have no inclination to foster, or face again. Unhappy with market-driven outcomes, many governments thought it preferable to pry the driving seat from the hands of private capital, and adopt specific industrial policies to engineer the desirable economic, social and security results through direct intervention. This phenomenon has been described as deliberate deglobalization, that is, «the conscious thinning of cross-border commercial ties through state action»[5].

In October 2023, the UK magazine *The Economist* devoted a special issue to this global paradigm shift, and elaborated on the popular responses to the issues described above. The opening editorial, titled «Are Free Markets history?», described the fundamental change in policy labelled homeland economics, i.e., «… a protectionist, high-subsidy, intervention-heavy ideology administered by an ambitious state»[6]. The magazine considered this turn, which crept up on the world stage, an alarming one. For the present purposes, it is sufficient to note that it is not controversial that this shift has

[2] *Why It Seems Everything We Knew About the Global Economy Is No Longer True*, in *The New York Times*, 18 June 2023.
[3] D. DREZNER, *The New York Times Runs a Bad Article on Globalization*, in *Drezner's World*, 21 June 2023; S. Lester, *Is Everything We Thought about the World Economy Wrong?*, in *International Economic Law and Policy Blog*, 21 June 2023.
[4] A. TOOZE, *Welcome to the world of the polycrisis*, in *The Financial Times*, 28 October 2022.
[5] S. EVENETT, *Can the World Trade Organization Act as a Bulwark Against Deglobalization?*, in *Asian Economic Policy Review*, 2023, advance access, p. 1.
[6] *Are free markets history?*, in *The Economist*, 7 October 2023.

occurred and it is occurring in many economies[7]. There is a widespread recourse to a mix of protection, spending and regulation that makes markets less open, and countries more self-reliant, plotting to create national champions in strategic sectors and find selective allies with which preferential ties can be fostered. In many capitals, «control of the economy [has] shifted to the geo-strategists»[8]. As it was authoritatively observed, the manner in which governments reacted to the crises of recent years and to intensifying geopolitical rivalry suggest little interest among the larger trading nations in returning to rules of the game agreed at the end of the Uruguay Round 30 years ago[9].

b. The EU joins the pack

In mid-October 2023, US Trade Representative Katherine Tai was vocal about the ongoing repurposing of global trends, and the US trade policies chasing (if not shaping) them: «if you just look at the world around us, from the economy, to geopolitics, to supply chains, and sort of the clockwork of ... how we are interconnected to each other across all areas, you just see significant amount of change that's happening. And so from our perspective, in order to be responsible, and responsive, the trade policies that we pursue have to reflect the changes»[10].

Even if EU officials might be less open about admitting it, did this global shift also influence EU policies? In short, yes. It would be very hard to determine whether the EU caused it, endured it, or both. Without attempting to characterise neatly the EU's intentions, it is possible to observe how the EU navigated this global wave and learn something from this observation.

To provide another contemporary reference, in December 2022, commentators confidently observed that the EU was «ditching its free-trade gospel»[11] and was «ready to dump its free trade ideals'[12]. This diagnosis did not come out of nowhere. Days before, Commission's President VON DER LEYEN had made a speech with many 'yes, … but' points[13]. Yes, «competition is good», but it «must respect a level-playing field». Yes, the US Inflation Reduction Act (IRA) is a welcome plan to «build up a new industrial ecosystem in strategic clean energy sectors», and is «striking[ly] symmetr[ic]» to EU's own European Green Deal, but it could «lead to unfair competition, … close markets, and fragment … critical supply chains». Yes, «Europe is in a strong position, to compete on global markets», but «we must

[7] S. EVENETT, *What endgame for the deglobalisation narrative?*, in *Intereconomics*, 2023, 57, p. 343.
[8] Governments across the world are discovering 'homeland economics', in *The Economist*, 2 October 2023.
[9] EVENETT (n 5), p. 14.
[10] Ambassador K. TAI, speech at the Center for American Progress, 10 October 2023, partial transcript available at *Katherine Tai on Industrial Policy, the Global Steel and Aluminium Arrangement, and EU Digital Regulation*, in *International Economic Law and Policy Blog*, 15 October 2023.
[11] *Brussels Is Ditching Its Free-Trade Gospel*, in *Foreign Policy*, 8 December 2022.
[12] *Europe First: Brussels gets ready to dump its free trade ideals*, in *Politico*, 5 December 2022.
[13] U. VON DER LEYEN, *Speech at the College or Europe in Bruges*, 4 December 2022.

also take action to rebalance the playing field [when there are] distortions». Yes, the IRA subsidises the local industry unfairly, but fortunately the EU has deployed state aids that «will benefit 35 companies from 15 Member States». Yes, undistorted markets are great, but the EU could establish a sovereignty fund, providing «common European funding» to a «Common industrial policy». Yes, discrimination needs to be contrasted, but Europe and the US can establish a «critical raw materials club» to tackle China's chokehold thereon. VON DER LEYEN went as far as saying that a trade war with the US would be inconvenient for both, without mentioning WTO rules, which outlaw trade wars regardless of their convenience.

Net of some exaggeration, the underlying point seems valid: the EU has not been just a spectator of, but also a participant in, the collective move away from economic liberalisation. Of course, trade has never been free, and pure free trade was never anyone's agenda; even the WTO's core business is progressive liberalisation: making trade fre-*er*, not free. The recent move thus is appreciated as matter of degree (i.e., trade less free than before, or more «fragmented»)[14], and only looking at the magnitude of the restrictions and their motivations the analysis can identify a fundamental change of underlying assumptions and, in turn, a paradigm shift.

When the EU voiced clearly and loudly its anxieties, to mark its place in a post-WTO geopolitical battlefield, many novel restrictions and motivations emerged. The EU declared itself willing to advance its interest, mirroring «the assertive industrial policy of [its] competitors»[15]. The EU seemed to acknowledge that «it's not the same world as before»[16] and that the new world required new aggressive strategies. From the point of view of the multilateral rules-based order, this was not a reassuring sight: «… if the EU, one of the biggest, last big believers in open and free trade, does throw in the towel and enters a global subsidy race, it would not just undermine the global trade rulebook and further weaken the World Trade Organization. It would also send a key signal to other countries: forget about the rules, just look after yourself»[17].

The EU has had to reckon with the erosion of the WTO's authority and effectiveness, the impenitent rule-flouting of US and China, the fear of fragile value-chains breaking, the weaponisation of dependencies on energy and raw materials from non-allied countries, the urgent need to implement climate policies and promote other sustainable development goals (SDGs), and the need to revitalise the global competitiveness of EU firms in key industries.

These goals and concerns, until recently, were comparatively muted. Multilateral rules and institutions kept protectionism, industrial policies and subsidisation in check; the WTO promised to contain and police free-riding, unilateral retaliation, discrimination or beggar-thy-neighbour interventions; to a significant extent, efficiency-enhancement and wealth-creation through trade and investment were pursued more tenaciously than non-economic goals that now claim priority. The circumstances have changed: the WTO's

[14] EUROPEAN COMMISSION, N. GAÁL ET AL, *Global Trade Fragmentation. An EU Perspective*, September 2023. Economic Brief 075; *WTO warns about fragmentation of global trade into allied blocs*, in *Financial Times*, 12 September 2023.
[15] VON DER LEYEN (n 13).
[16] *Politico* (n 12), quoting a comment by Professor H. HESTERMEYER.
[17] Ibid.

grasp is at its lowest[18], as is the popularity of investor-State arbitration; instead, new global preoccupations are at their peak, and all major actors are racing to position themselves favourably for a new geopolitical and economic age, resorting if need be to home-centred industrial interventions[19]. Confronted with these changed circumstances, has the EU recalculated its core beliefs to adapt better?

This paper sets out to ascertain whether the EU subscribed to the 'homeland economics' agenda, and seeks to identify a discrete body of homeland *manoeuvres* that can certify this turn. To this end, the next section surveys a range of EU's policies and regulations, whose crucial drive seems indeed to be «to reduce risks to a country's economy – those presented by the vagaries of markets, an unpredictable shock such as a pandemic, or the actions of a geopolitical opponent»[20].

3. Mapping the EU's 'homeland manoeuvres'

How can one gauge meaningfully the EU's approach to this evolving global contingency? Of course, the EU routinely uses its external commercial power to pursue non-commercial («diplomatic») goals[21], and does it in keeping with its core values[22]. Focus on the EU's external action, however, would not exhaust the range of ways in which the EU can adjust its openness to foreign trade and investment. A better way to circumscribe this survey is to check all the policies, whether nominally external or internal, which can affect the way the EU discharges its international obligations under WTO law and investment instruments.

Using this approach, it is possible to catch also all regulatory measures and all measures of economic self-redress, that is, those measures that the EU claims to adopt in reaction to largely unpoliced unfair practices of other states. As explained in the EU's Industrial Strategy manifesto of March 2020: Global competition, protectionism, market distortions, trade tensions and challenges to the rules-based system are all on the rise. New powers and competitors are emerging. More established partners are choosing new paths[23].

This section selects three stories that arguably show more distinctly the policy shift (a), then proceeds to a comprehensive survey of recent EU's initiatives (b), with more succinct case-by-case analysis.

a. Three stories

[18] The reference here is to the clear inability of multilateral rules to constrain the behaviour of major actors, which is compounded, but not necessarily exhausted, by the crisis of the Appellate Body. For a sample of «examples of outright unpunished and non-transitory rule violations» of WTO law since 2018, see EVENETT (n 5), pp. 4-7.

[19] P. C. MAVROIDIS, B. HOEKMAN, D. NELSON, *Geopolitical Competition, Globalization and WTO Reform*, in *Robert Schuman Centre for Advanced Studies Research Paper*, 2023.

[20] *Governments across the world are discovering 'homeland economics'*, in *The Economist*, 2 October 2023.

[21] I. BORCHERT ET AL., *The Pursuit of Non-Trade Policy Objectives in EU Trade Policy*, in *World Trade Review*, 2021, 20, p. 623.

[22] Article 21(3) of the Treaty on the European Union.

[23] Communication from the COMMISSION, *A New Industrial Strategy for Europe*, COM/2020/102 final, 10 March 2020.

In the weeks immediately before and after our workshop in July 2023, the European Commission (Commission) published its «economic security strategy»[24], the Council of the EU authorised negotiations with the US on an agreement on critical minerals[25], and the Commission formalised the proposal that the EU should leave the Energy Charter Treaty (ECT)[26]. Because they mark a visible change of direction, these three developments can illustrate how the EU is adapting to the brave new world of international economic law and policy described in section 1, and warrant a more granular analysis.

i. Economic security and aluminium

As regards the EU's adoption of an economic security strategy, it bears going back a few years to appreciate the import of the EU's current rethinking of its trade and investment policies and values.

Back in 2018, «economic security» was the ultimate justification invoked by the United States to impose Section 232 tariffs on steel and aluminium[27]. This decision attracted widespread criticism by impartial commentators[28], because the idea of economic security seemed out of kilter with the permissive language of Article XXI GATT; and the products targeted did not seem to have any rational connection to the US national security. In fact, the EU itself refused to believe the security connotation of these measures, and considered them illicit safeguards in disguise, warranting legal challenge[29] and rebalancing measures. In its request for consultation of June 2018, the EU tersely opposed the idea that domestic security could consist in the effort of protecting «domestic commercial production facilities» from foreign competition, to keep them «economically viable». The dispute was thereafter settled in January 2022[30], as part of the EU and US's efforts to restore trusted relations and advance towards a comprehensive deal, the so-called 'Global Arrangement on Sustainable Steel and Aluminium' (GSA)[31].

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[24] COMMISSION, Joint communication to the European Parliament, the European Council and the Council on 'European economic security strategy' (20 June 2023) JOIN/2023/20 final.

[25] COUNCIL OF THE EU, Decision 10670/23 authorising the opening of negotiations with the United States of America for an agreement on strengthening supply chains for critical minerals, 18 July 2023.

[26] COMMISSION, Proposal for a Council decision on the Union withdrawal from the Energy Charter Treaty, 7 July 2023, COM(2023) 447 final.

[27] U.S. DEPARTMENT OF COMMERCE, *Fact Sheet: Section 232 Investigations: The Effect of Imports on the National Security*, 20 April 2017; see also ID., *Section 232 National Security Investigation of Aluminum Imports, Information on the Exclusion Process*, at https://www.bis.doc.gov/index.php/232-aluminum.

[28] For instance, D. KLEIMANN called them blatantly WTO-inconsistent tariffs», see *Section 232 Tariffs on Steel and Aluminium*, in *The Sound of Economics* podcast by Bruegel, 10 July 2023; *A cynical transatlantic deal on steal*, in *The Financial Times*, 16 October 2023: «Trump eccentrically slapped tariffs on steel and aluminium on a bunch of countries, including the EU, on bogus national security grounds».

[29] See EU's consultation request of 1 June 2018, in case DS548: *United States — Certain Measures on Steel and Aluminium Products*.

[30] The EU withdrew the claim, and the parties agreed to launch arbitration under Article 25 DSU (with the same panel members acting as arbitrator) and immediately suspend the proceedings after appointing the arbitrator. See DS548: *US – Certain Measures on Steel and Aluminium Products*, Recourse to Article 25 of the DSU, 21 January 2022.

[31] The goals of this currently-negotiated arrangement should be, besides settling the WTO disputes, to tackle global overcapacity, accelerating decarbonisation, and creating a club open to new market-oriented economies besides the EU and US.

In December 2022, the WTO Panel issued a report in the four parallel disputes (DS544, DS552, DS556, and DS564) following the complaints of the other non-EU complainants (China, Norway, Switzerland and Türkiye) against the same US tariffs. The Panel said expressly that it was «not persuaded that the situation to which the United States refers rises to the gravity or severity of tensions on the international plane so as to constitute an 'emergency in international relations'»[32].

Fast forward to 2023, and the EU appears to have made a U-turn on the legitimacy of using economic security to justify trade restrictions, and of including aluminium among the raw materials of critical importance to its economic security. More specifically:

a. On 20 June 2023, the EU Commission published a manifesto on how to promote the EU's '«economic security strategy»[33], including through the adoption of trade-restrictive measures; it said expressly that the EU wishes to «complet[e] traditional approaches to national security with new measures to safeguard our economic security»;

b. On 30 June 2023, the Council of the EU – the EU lawmaker – published its negotiating position on the Critical Raw Materials Act, a measure seeking to diversify supply to the EU of critical minerals, through import-substitution and enhanced production and processing. Among its proposed amendments to the Commission's proposal, the Council added Aluminium as Strategic Raw and Critical Material. On 29 September 2023, after the Parliament took its position, Annex II to the Critical Raw Materials Act draft includes bauxite (an item which includes aluminium) among the Critical Raw Materials covered by the measure.

ii. Critical raw materials and other clubs

In 2023, the EU and US made some progress in trying to alleviate the import-substitution effects of the consumer subsidies granted by the IRA[34]. In March, they announced the plan to conclude a Critical Minerals Agreement (CMA) and confirmed this intention in the Joint Statement of the bilateral Trade and Technology Council (TTC) in May of that year.

In June, the Commission adopted the negotiating directives and, in July, the Council authorised the opening of the negotiations with the US. In September, the Parliament issued its views, noting both that the agreement should be pursued «to the extent that these negotiations will achieve a balanced result that is compatible with WTO rules» and, at the same time, that

[32] DS556: *United States — Certain Measures on Steel and Aluminium Products*, Report of the Panel, 9 December 2022, para. 7.166 (this finding is identical in the four parallel Reports).
[33] COMMISSION, joint communication on "European Economic Security Strategy", 20 June 2023, JOIN(2023) 20 final.
[34] Namely, subsidised vehicles must contain (in their batteries) a certain amount of its critical mineral content recycled in North America, or extracted and processed in the US (or a country with which the US has a Free Trade Agreement or a Critical Minerals Agreement (CMA)). Since the EU does not have an FTA with the US, it is necessary for the EU to conclude a CMA with the US, in order for its exports to qualify for the IRA tax rebates.

the agreement itself would be «without prejudice to possible action at WTO level»[35]. In other words,

1. the EU alludes to the possibility that the IRA might breach WTO obligations and wants to protect its export opportunities;
2. while reserving its right to raise a WTO concern, it prefers for the moment to secure from the US a preferential arrangement sparing EU products from the IRA's import-substitution effects;
3. the EU alludes to the possibility that this preference, in turn, could breach WTO obligations, and warns the negotiators against this risk.

It is hard to see how the UE and US could square this circle without breaching the principle of non-discrimination. The small club solution of a dedicated agreement targeting only minerals would ultimately favour EU over other WTO members, in breach of WTO law. Net of all the EU proclamations of loyalty to the WTO, the advancement of this plan apparently signals that the EU's anxiety to get on the good side of the IRA prevails over the concern about complying with trade obligations. For background, it is important to remember that while the WTO authorises the conclusions of preferential agreements, they must concern «substantially all the trade»[36] between the participating economies, and cannot be product-specific.
This apparent tension is also reflected in the agreement reached by the US and Japan in March 2023 regarding critical minerals, a precedent that clearly caused the EU's willingness to obtain a similar treatment in the months that followed. The US and Japan reaffirmed their GATT obligations not to restrict the import/export of critical minerals from/to «the territory of the other party»[37] and to grant national treatment to the products «of the other party»[38]. This commitment makes no sense, in isolation, since the same obligations are owed also to all other member of the WTO.
The crucial point of the US-Japan deal is rather the parties' agreement to promote «fair competition and market-oriented conditions for trade in critical minerals»[39], by coordinating their domestic trade measures against products from other markets. Moreover, US and Japan agreed to review foreign investments on their territories for adverse effects on their «national security»[40]. Ultimately, it appears that the purpose of these CMA arrangements is to lay the grounds for exclusionary practices, aimed at preserving the operation of trade obligations among a subset of friendly economies, and anticipating discriminatory measures against other economies.

Another telling comparator is the draft deal on steel, a proposed «interim» deal prepared in October 2023 by the EU Commission, which should apparently «create a joint tariff zone that will impose duties on steel

[35] EUROPEAN PARLIAMENT, resolution of 14 September 2023 on the opening of negotiations of an agreement with the United States of America on strengthening international supply chains of critical minerals (2023/2772(RSP)).
[36] See Article XXIV GATT.
[37] Article 3(1).
[38] Article 3(2).
[39] Article 3(4).
[40] Article 3(5).

and aluminium imports from non-market economies such as China»[41].If the deal effectively sets up tariffs against products originating in countries allegedly producing at overcapacity levels, it would appear that the EU is effectively ready to replicate the pattern described above with respect to the critical materials club. To avoid US unilateral restrictions (without the GSA, the US could revive its Section 232 tariffs against EU steel), the EU would accept to join the US into a members-only club, which flouts the WTO rules on preferential treatment and, more or less openly, promises to administer unilateral trade restrictions against non-members.

It is possible that the operation of these exclusionary measures could be justifiable under WTO law (whether under general exceptions, safeguards, national security or other permissible grounds), but it is doubtful. The blanket operation of the IRA (which breaches MFN and performs an arbitrary selection of preferential partners) is *prima facie* WTO-unlawful, and Japan and EU's efforts to lock-in the preference is evidently indifferent to this illegality – *pace* all the proclamations to the contrary. Likewise, the EU's readiness to join a US-led club on steel, which dishes out coordinated tariffs against global competitors, reflects the EU's disillusionment with the WTO's capacity to protect it from unilateral retaliation by the US, as well as from cheap, unfair or substandard competition from China[42].

In taking the US side, the EU appears the choose survival over multilateralism, and one partner over the others. To its relative credit, the EU is still making considerable efforts to produce policies which have at least the veneer of WTO law compliance; however, there is a palpable cynicism in this effort, and by all appearances the EU's approach to the risk of breaching WTO law seems set on the minimum standard of plausible deniability, especially if the end goal is to match the tariffs imposed by the US:

The argument for putting tariffs on China has leapt from rationale to rationale and from one supposed justification under WTO law to another. It started off with protecting national security, hopped effortlessly to defending the environment and is now alighting on eliminating excess capacity with the sure-footedness of a mountain goat[43].

iii. The ECT abandonment

On 7 July 2023, the Commission formalised its proposal that the EU and its Member States leave the ECT. This decision came after the process of «modernisation» of the ECT, which had commenced in 2017, concluded in 2022 with a draft new text of the treaty, which has never come into force.
In the wake of the modernisation round, when some countries had already announced their plans to leave the ECT, the European Parliament issued in

[41] *It's the EU and US against the rest of the world in new steel club*, in *Politico*, 11 October 2023.
[42] According to some observers, the plan would be «that the US will impose tariffs on non-club members in a way that will almost certainly violate WTO rules, and the EU will try to impose tariffs on them consistently with WTO rules by using AD/CVDs», see TAI on industrial policy (n 10).
[43] *Financial Times* (n 28).

November 2022 a resolution detailing its negative view of the resulting text[44]. In its resolution, the Parliament pointed out the modest results achieved of the modernised text, which falls short in several respects to effect the urgent adjustments needed to realign the ECT with the current climate emergency and with the ambitious goals of the European Green Plan. In particular, the Parliament would have wished to see binding commitments relating to the parties' environmental obligations, new rules on valuation, a complete carve-out of fossil fuels from the treaty's protection, and the abandonment of investor-state dispute settlement altogether. The Commission's position, still prevailing in late 2023, draws on these concerns.

Irrespective of the specific legalities of the EU's and EU Member States' withdrawals, which seem now inevitable (but must cope with the application of the treaty's sunset clause)[45], the EU's approach appears dictated by several circumstances.

On the one hand, the ECT's protection granted to the fossil fuels industry appears out of touch with the global attempts to cut fossil fuels emission, and the generalised favour towards all plans to discontinue extraction and use of fossil fuels. On the other hand, the EU's hostility towards the ECT derives also from the frustrating attempts to shut down infra-EU investor-State disputes, so far mostly unsuccessful, and the generalised view that all forms of investor-State arbitration should be discarded in favour of dispute settlement by permanent courts. At the same times, several EU Member States (in particular Spain, Italy, Germany, the Netherlands and the Czech Republic) have found themselves on the receiving end of several ECT-based investor claims, and might consider this to be a favourable juncture to leave the treaty altogether, based on a mix of opportunistic and common-good considerations.

Ultimately, the fate of the ECT, which came into effect in 1998, appears grim. It might be helpful to consider the arc of the ECT's rise-and-fall in parallel with that of the WTO (in the 1995-2019 period), and observe how the EU, ultimately, adapted itself to both regimes' decline in popularity and effectiveness.

iv. The EU's adaptation to a new paradigm

So, here is the working hypothesis that I wish to test: the EU has continued to profess loyalty to multilateral rules, but is no longer counting on the WTO regime to a) protect its trade interests or b) accommodate the pursuit of non-trade interests. For this reason, the EU does not appear overly intent on making sure that its policy-planning remains confined within the regulatory space permitted by WTO law. In an ecosystem where «governments have options that are no longer meaningfully constrained by multilateral trade rules»[46], governments can be creative. In the field of foreign investments, where international obligations are thinner and less precise, the EU appears anxious to shed some of the more inconvenient ones, and to use

[44] EUROPEAN PARLIAMENT, resolution of 24 November 2022 on the outcome of the modernisation of the Energy Charter Treaty (2022/2934(RSP)).
[45] T. MORGANDI and L. BARTELS, *Exiting the Energy Charter Treaty under the law of treaties*, in *King's Law Journal*, 2023, 34, p. 145.
[46] EVENETT (n 5), p. 15.

aggressively the regulatory space unconstrained by international obligations (for instance, with respect to inbound and outbound FDI screening). In this light, a certain inclination to go solo, adopting unilateral measures that can disrupt trade and investment flows, might be expected.

b. The entire picture, big list

The EU has not announced its plan to revisit its loyalty to the rule-based multilateral regime, and to ditch its fundamental trust in economic openness. To claim that it has done either thing deliberately, therefore, one must comb through a series of bills, drafts, negotiation documents and actual measures, to ascertain whether there is a critical mass of 'homeland' or 'clubs' initiatives reflecting a new approach.

i. Three policy poles (economic openness, domestic concerns, common goods)

Originally, this paper intended to unveil a largely subterranean trend. A few days before our July workshop, however, the EU in fact confessed its new agenda with the spectacular act of confidence mentioned above, i.e., the public announcement of an 18-page economic security manifesto. It is fair to take the economic security manifesto and the 2020 European Green Deal package as two representative sign-posts of the EU's action of these years, each of them pointing to goals other than economic openness.

In fact, to assess whether the EU is participating in the homeland shift, I propose to select the salient items of EU's action looking at whether they meaningfully distance EU's action from the pole of liberalisation, approaching it to competing interests. Bearing in mind the economic security and Green Deal markers, I suggest to adopt a simplified map with three poles: economic openness, the fostering of (other) global commons, and the advancement of national interests through proactive and reactive strategies. Economic liberalisation, previously thought to prevail over national opportunism and be compatible with other collective interests, has lost its totemic position. As a result, we must expect States and the EU to design their current policies recalculating the trade-offs between openness (now in decline), unilateral and multilateral interests. For each measure listed below, I will try to explain how the EU appears willing to sacrifice the former, moving the centre of gravity of its action closer to the latter two.

National interests and global commons are not mutually exclusively. The negotiation between the EU and the UK regarding the level playing-field clauses of their Trade and Cooperation Agreement is a plain illustration of their mixture[47]. Measures designed to ensure that foreign producers observe standards comparable to those prevailing at home merge two concerns. First, the 'leakage' issue, that is, the realisation that imposing costly standards on domestic producers might cause production to shift elsewhere, with no real contribution to the social goal pursued. Second, the realisation that compliance with stringent standards increases domestic producers' costs, making them vulnerable to the competition from foreign products that are

[47] F. FONTANELLI, *The Law of UK Trade with the EU and the World After Brexit*, in *King's Law Journal*, 2023, 34, pp. 17-19.

cheaper to produce. For instance, the carbon border adjustment mechanism (see below) exemplifies well this double rationale: it fights carbon-leakage and rebalances the competitiveness of domestic producers that have to pay for the emission trading scheme. Is it a measure dictated by environmental concerns or protectionism? More likely, a combination.

To the extent possible, I will survey the EU's action across different formats of policy-making and law-making: multilateral (for instance, at the WTO); bi- and pluri-lateral (for instance, through FTAs); unilateral (for instance, internal EU-wide regulations); soft law initiatives (like the establishment of the Trade and Technology Council (TTC), or the clubs-based initiatives). Inevitably, the interaction between 'poles' and formats sometimes is revealing: a flurry of bilateral or unilateral measures affecting trade, inherently, demonstrates a tendency to move away from the multilateral pole, and accept that global market integration could be reduced by the externalities of domestic or preferential regulation.

ii.A full palette of initiatives

Below is a skeletal list of EU initiatives adopted, planned or announced in the past few years, in rough chronological order. Besides a short description, I cannot afford here to provide for each a detailed analysis and explanation. Instead, I want to offer a synoptic outline, a chart demonstrating the density and thickness of the EU's policies driving away from the pole of 'economic openness', towards the other two poles of 'national interests' Ϫ and 'global values' Θ.

a) The FDI screening Regulation[48]. This regulation empowers Member States to filter foreign direct investments in their territory on the grounds of security or public order. Among the grounds that can be invoked to trigger the screening are the investment's potential effects on critical infrastructure and technology and the supply of critical inputs; the Commission itself can issue opinions to the Member States relating to investments that could affect the EU interests in these fields, recommending their screening. Ϫ

b) *The European Green Deal*[49]. This policy package seeks to transform the EU's economy, towards a more sustainable model that can address the climate challenge. This document is the blueprint in which many of the items listed below were announced. In this plan, the EU confirmed that it would establish a carbon border adjustment mechanism (CBAM) and launch a coordinated industrial strategy. It also foreshadowed the need to review its value chains to diversify the supply of raw materials critical for green, technological and defence industries, and the possibility to grant aid for battery producers. It described its willingness to set standards across its global value chains, leveraging its economic power. This initiative contains ample evidence of the EU's concern for its domestic interests, possibly at the expense of multilateral efforts. Ϫ Θ

[48] Regulation (EU) 2019/452 of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union, PE/72/2018/REV/1, OJ L 79I , 21.3.2019. See also consolidated text of 23 December 2021.

[49] Communication from the COMMISSION on *The European Green Deal*, COM/2019/640 final, 11 December 2019.

c) *The 'New Industrial Strategy'*[50]. In this document, the EU acknowledged the «new and ever-changing geopolitical realities» that Europe's industry must confront. It confirmed its commitment to «uphold, update and upgrade the world trading system», an ambiguous formula that tries to blend loyalty to the WTO and concern about its current record. The document expressly called for the creation of EU champions in strategic industries relating to clean and digital technologies. It also contained a section on a global level playing fields, declaring that «the EU should not be naïve to threats to fair competition and trade». In this section, the EU announced its plans to pass measures against foreign subsidies, and to include binding climate conditionality in all future trade agreements. 𝕏

d) The '*Farm to Fork Strategy*'. Within this action plan – launched in 2020 to make food systems «fair, healthy and environmentally-friendly»[51] – the EU announced that it would use its trade policy to obtain «to obtain ambitious commitments from third countries»[52] in the areas of animal welfare, use of pesticides and fight against antimicrobial resistance. It also foreshadowed its plans to reduce its contribution to global deforestation and strengthen ocean governance, including by applying zero tolerance for illegal, unreported and unregulated fishing (IUU). 𝕏 Θ

e) The '*EU Biodiversity Strategy for 2030*'[53]. The EU introduced several environmental goals (on land use, marine ecosystems, freshwater, pollution reduction etc), and pledged to promote them also at the global level, including by «using external action to promote the EU's ambition», for instance advancing WTO negotiations on the fisheries subsidies, ensuring implementation of biodiversity provisions in FTAs, and promoting sustainable value chains. 𝕏 Θ

f) The revised Trade Enforcement Regulation[54]. With this revision, the EU equipped itself with the right to strike with retaliatory trade measures those WTO countries which, after having lost a dispute with the EU before a WTO Panel, appeal the decision into the void (owing to the current collapse of the Appellate Body that should hear such appeals), instead of allowing the Panel report to become final, or instead of bringing the appeal before an arbitration tribunal pursuant to art 25 of the WTO Dispute Settlement Understanding.[55]

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[50] Communication from the COMMISSION on *A New Industrial Strategy for Europe*, COM/2020/102 final, 10 March 2020.

[51] COMMISSION, *Farm to Fork Strategy*, available at https://food.ec.europa.eu/system/files/2020-05/f2f_action-plan_2020_strategy-info_en.pdf.

[52] Ibid., p. 18.

[53] Communication from the COMMISSION on *EU Biodiversity Strategy for 2030 Bringing nature back into our lives*, COM/2020/380 final, 20 May 2020.

[54] Regulation (EU) 2021/167 of 10 February 2021 amending Regulation (EU) No 654/2014 concerning the exercise of the Union's rights for the application and enforcement of international trade rules, OJ L 49, 12.2.2021.

[55] For instance, the EU considered using these powers against Indonesia, which appealed the adverse Panel report on nickel export restrictions, see report of 30 November 2022 in case *Indonesia – Measures Relating to Raw Materials*, WT/DS592/7.

g) Export controls Regulation[56]. This Regulation provides for a system of prohibition and licensing for the exportation of dual-use items, the list of which is constantly updated. 𝔛
h) The 'Trade Policy Review'[57] and 'Power of Trade Partnerships'[58] action plans. Between 2021 and 2022, the Commission announced its project to repurpose and revisit the EU's external trade policies to tackle global uncertainties and the new ecosystem created by five trends: technological evolutions, the rise and posture of China, the climate threat, the digital transformation, and the risk that the EU's relative position in the international economy be eclipsed by other actors. The plans include strengthening and diversifying value chains to reduce dependencies and secure access to critical goods and materials; reforming or adopting WTO rules on digital trade and industrial subsidies; empowering the EU to pursue its interests also unilaterally. With specific regard to FTAs, the EU announced its intention to introduce enforceable provisions on social and global goals in the EU's FTAs (the so-called «trade and sustainable development», or TSD clauses on labour, human rights, environmental protection, emissions commitments, etc); provide for the power to issue trade sanctions for breaches of these provisions; and establish a dedicated institution, the Chief Trade Enforcement Officer (CTEO), tasked with the review of FTA-based complaints by EU-based stakeholders, including those relating to TSD obligations.
i) The '*Blue Economy*' action plan[59]. In the framework of this policy, the EU indicated the plans to favour «blue economy supply chains» and to promote regional and multilateral efforts on ocean governance.
j) The '*Anti-Coercion Instrument*'[60]. This instrument was designed precisely to empower the EU to take defensive steps in situations for which WTO-authorised measures are not available. It envisages the possibility that the EU adopt trade countermeasures against attempts by non-EU country to «pressure the EU or a member state into making a specific choice» using or threatening trade and investment measures.
k) The '*Nature Restoration Law*'[61]. In conjunction with this new proposed measure aimed at reducing the use of chemicals in agriculture in the EU, the Commission has announced that it would consult with third countries to

[56] Regulation (EU) 2021/821 of 20 May 2021 setting up a Union regime for the control of exports, brokering, technical assistance, transit and transfer of dual-use items (recast), PE/54/2020/REV/2, OJ L 206, 11.6.2021.
[57] Communication from the COMMISSION on *Trade Policy Review - An Open, Sustainable and Assertive Trade Policy*, COM(2021) 66 final, 18 February 2021.
[58] Communication from the COMMISSION on *The power of trade partnerships: together for green and just economic growth*, COM(2022) 409 final/2, 16 August 2022.
[59] Communication from the COMMISSION on *A new approach for a sustainable blue economy in the EU -*
Transforming the EU's Blue Economy for a Sustainable Future, COM(2021) 240 final, 17 May 2021.
[60] COMMISSION, Proposal for a Regulation on the protection of the Union and its Member States from economic coercion by third countries, COM/2021/775 final, 8 December 2021; see also COUNCIL OF THE EU, Press Release: *Trade: political agreement on the anti-coercion instrument*, 28 March 2023; EUROPEAN PARLIAMENT, *MEPs adopt new trade tool to defend EU from economic blackmail*, 3 October 2023.
[61] COMMISSION, Proposal for a Regulation on nature restoration, COM/2022/304 final, 22 June 2022.

prohibit imports into the EU of foods that do not comply with comparable standards.

l) The proposed Regulation on Forced Labour[62]. This bill seeks to empower the EU to stop products made using forced labour at the EU borders.

m) The proposed '*Cyber-Resilience Act*'[63]. In a coordinated attempt to improve the cybersecurity of hardware and software products in the EU, the EU sets «essential cybersecurity» product requirements, which apply also to imported products placed on the single market. The EU also establishes a conformity protocol (conformity certification and related assessment procedures) and calls for the conclusion of dedicated Mutual Recognition Agreements (MRAs) with specific partners.

n) The proposed '*Single Market Emergency Instrument*' (SMEI)[64]. In this proposal, the EU wants to equip itself with the power to take emergency measures within the Single Market in circumstances of crisis. The proposal includes the possibility for the Commission to identify goods of strategic importance for which reserves need to be built, and to issue «priority-rated orders» to economic operators in the relevant value chains, which might entail the disregard of contractual commitments to non-EU parties. While these measures point to the possibility of export restrictions, the proposal recites the characteristic reassurance that «any measures deemed necessary taken under this Regulation, including those necessary to prevent or relieve critical shortages, are implemented in a manner that is … consistent with WTO obligations»[65].

o) The Regulation on Foreign Subsidies[66]. This measure empowers the Commission to investigate – and potentially sanction – «distortive foreign subsidies», i.e., financial contributions from non-EU states to activities or investments that can distort the functioning of the single market. The common understanding is that, with this measure, the EU wished to take steps to curb subsidies that are not covered by the WTO law (the agreements on Subsidies and Countervailing Measures agreement), and might in fact have established a system of trade defences that might exceed those permitted under WTO rules.[67]

p) The '*Green Deal Industrial Plan*'[68]. This policy merges the industrial plan, the green deal one and the net-zero initiatives into one overarching

[62] COMMISSION, Proposal for a Regulation (EU) on prohibiting products made with forced labour on the Union market of 14 September 2022, COM(2022) 453 final 2022/0269 (COD).
[63] COMMISSION, Proposal for a Regulation (EU) on horizontal cybersecurity requirements for products with digital elements and amending Regulation (EU) 2019/1020 of 15 September 2022, COM(2022) 454 final, 2022/0272(COD).
[64] COMMISSION, Proposal for a Regulation (EU) establishing a Single Market emergency instrument of 19 September 2022, COM(2022) 459 final 2022/0278 (COD).
[65] Recital 37.
[66] Regulation (EU) 2022/2560 of 14 December 2022 on foreign subsidies distorting the internal market, PE/46/2022/REV/1, OJ L 330, 23.12.2022; see also Commission Implementing Regulation (EU) 2023/1441 of 10 July 2023 on detailed arrangements for the conduct of proceedings by the Commission pursuant to Regulation (EU) 2022/2560, C/2023/4622, OJ L 177, 12.7.2023.
[67] M. FRANK, *The EU's new Foreign Subsidy Regulation on collision course with the WTO*, in *Common Market Law Review*, 2023, 60, 4, p. 925.
[68] Communication from the COMMISSION on *A Green Deal Industrial Plan for the Net-Zero Age*, 1 February 2023, COM(2023) 62 final.

framework policy. The plan expressly laments China's current domination of the market of net-zero technologies, due to state subsidies, and pledges to use all available trade defences. The EU announced its plan to adopt a Critical Raw Materials Act, and provide access to finance, including through newly authorised state aid, to the industries suffering from foreign-subsidised competition. The Plan reiterated the EU's commitment to trade openness and its support to the WTO, but noted with respect to the former that «openness only thrives where fairness survives», and about the latter that the WTO must adopt new rules on green investment and industrial subsidies. Interestingly, the EU announced also the establishment of a bilateral task force with the US to discuss the implementation of the IRA, and the willingness to create a Critical Raw Materials Club.

q) The proposed Corporate Sustainability Due Diligence Directive[69]. It is expected that the Trialogue conversations between Commission, Council and Parliament will conclude, and the Directive will be adopted, in 2024 (the first Commission draft was published in early 2022). The Directive would establish a new range of due diligence obligations for economic operators in the single market, which must make sure to map, prevent, and mitigate any risk that their activities might breach human rights, labour and environmental standards. For the first time, this due diligence duties extend also to the conduct of contractors along the value chains, including those based outside the EU. The proposals raised concerns that the Directive «might act as a trade barrier to developing countries that have different standards than the EU»[70].

r) The '*Critical Raw Materials Act*'[71]. This initiative seeks to increase EU's access to critical raw materials with a set of import-substitution strategies, including the promotion of local production, processing and recycling, and the sourcing of a more diverse range of suppliers. It sets a combination of minimum local content thresholds for the EU's consumption, which would be reached also thanks to specific support and facilitated administrative processes, and a maximum threshold for supplies from one single country[72]. In addition, the EU confirmed its plan to establish a «Critical Raw Materials Club» for like-minded partners intent on similar strategies.

s) The 'De-forestation' Regulation[73]. This measure covers a series of commodities, the production of which is considered disproportionately responsible for the widespread cutting of forests, with a knock-on effects on global carbon capture. The Regulation requires importers to ensure that these

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[69] COMMISSION, Proposal for a Directive on Corporate Sustainability Due Diligence of 23 February 2022, COM/2022/71 final.

[70] WTO, TRADE POLICY REVIEW BODY - *Trade policy review - European Union - Minutes of the meeting* - 5 and 7 June 2023, WT/TPR/M/442/Add.1, p. 467 (question from South Korea).

[71] Communication from the COMMISSION on *A secure and sustainable supply of critical raw materials in support of the twin transition*, COM(2023) 165 final, 16 March 2023; COMMISSION, Proposal for a Regulation establishing a framework for ensuring a secure and sustainable supply of critical raw materials, COM/2023/160 final, 16 March 2023.

[72] Namely, at least 10% of the EU's annual consumption for extraction, 40% of the EU's annual consumption for processing, 15% of the EU's annual consumption for recycling, and no more than 65% of the Union's annual consumption of each strategic raw material at any relevant stage of processing from a single third country.

[73] Regulation (EU) 2023/1115 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,
PE/82/2022/REV/1, OJ L 150.

goods, in the countries of origin, were produced in compliance with domestic laws and de-forestation standards. Countries are included in different groups according to different levels of de-forestation risks, and different obligations and frequency of inspection apply to each group, with a prospect of country-based discrimination that could easily lead to complaints under WTO law.

t) The '*Carbon Border Adjustment Mechanism*' regulation[74]. This regulation, which will enter into force gradually (the transitional phase started on 1 October 2023 only imposes reporting duties), seeks to extend the carbon-pricing measures adopted internally (through the Emission Trading Scheme) to imported goods, providing for the possibility to levy upon them a carbon-tariff based on their embedded emissions. In spite of the widespread uncertainty about its WTO-legality, the EU systematically confirms that «CBAM is a WTO-compatible measure». Χ Θ

u) The '*Chips Act*' Regulation[75]. This Regulation, adopted in the framework of the Digital Europe Programme, provides funding for the EU operators in the semiconductor value chain, and provide fast-track procedures for the opening of production facilities and foundries in the EU. To achieve security of supply, the Chips Acts replicates the SMEI model and establishes that the Commission can request to integrated facilities and «EU foundries» to accept, in times of shortage, «priority-rated orders» to supply the EU[76], including if necessary by disregarding contractual commitments with (non-EU) third parties. This emergency device, which ultimately could result in an export restriction, could raise issues of compliance with WTO law obligations.

v) New TSD provisions in FTA law-making. In its negotiation with New Zealand[77] and Kenya[78], the EU has introduced in the treaty language novel TSD provisions in line with the 2022 'Power of Trade Relationships' plan: enforceable provisions on non-economic commitments, including emission-reduction obligations, and the possibility to take trade countermeasures to retaliate against breaches of TSD provisions.

w) The FTA negotiations with Mercosur and India. The EU have been embroiled in lengthy negotiations with India and Mercosur. Both partners have expressed resentment at the EU's attempt to charge the FTAs with an ever-increasing set of TSD obligations and/or at the contemporaneous entry into force of EU unilateral measures that tend to erode much of the access to

[74] Regulation (EU) 2023/956 of 10 May 2023 establishing a carbon border adjustment mechanism, PE/7/2023/REV/1, OJ L 130, 16.5.2023; Commission implementing regulation (EU) 2023/1773 of 17 August 2023.

[75] Regulation (EU) 2023/1781 of 13 September 2023 establishing a framework of measures for strengthening Europe's semiconductor ecosystem and amending Regulation (EU) 2021/694 (Chips Act), PE/28/2023/INIT,
OJ L 229, 18.9.2023.

[76] Ibid, Article 26.

[77] See EU-New Zealand FTA of 9 July 2023.

[78] COMMISSION, *Key elements of the EU-Kenya Economic Partnership Agreement*, 19 June 2023, at https://policy.trade.ec.europa.eu/news/key-elements-eu-kenya-economic-partnership-agreement-2023-06-19_en.

the EU market that the treaty would theoretically open for their goods and commodities (CBAM, de-forestation, due diligence)[79].

x) Outward FDI screening proposals. In 2023, in the context of the TTC discussions with the US, the EU has started considering whether to adopt a system similar to the US one, whereby it could control (and limit) EU investments abroad in certain strategic sectors[80]. This prospect, clearly conceived in the framework of the EU's wider de-risking/de-coupling strategy relating to China, has also been mentioned in the June 2023 manifesto on economic security.

y) The *Critical Minerals* and *Green Steel Clubs* initiatives[81].

z) The coordinated withdrawal from the ECT[82].

4. Conclusions: Taking stock

To some extent, everything the EU has done recently is a form of future-proofing[83], i.e. planning against future contingencies and risks. Bearing in mind the 'poles' of the EU action helps answering the overarching question whether the EU has made a radical change away from rules-based openness. The alphabet-long list in the previous section appears a solid basis to answer in the positive, and the surrounding commentaries, including by the EU officials, give credit to the idea that the EU is adapting to new challenges.

Interestingly, many initiatives that can restrict foreign trade and investments are, at the same time, protective of local interests and/or premised on global values. In other words, it is not always possible to discern the prevailing deglobalisation driver, i.e. whether the EU's future-proofing efforts lean decisively towards safeguarding its own future, or rather the future of the planet. For the present purposes, this further classification is not decisive: what matters is the coordinated set of actions that reflect the EU's disillusionment with economic openness. There is no moral hue to this finding. In fact, some of the initiatives described above are not protectionist, and rather risk to inflict economic harm to EU activities and consumers. Export controls on chips and other materials, and due-diligence restrictions on foreign commodities that are not produced also in the EU, ultimately, preclude business opportunities to, or impose new costs on, domestic producers and citizens.

Conversely, it is worth asking whether each of these initiatives is genuinely aligned with the global goals it evokes (often relating to the corresponding Sustainable Development Goals, or 'SDGs'). Some apparent glitches appear obvious: local content requirements in green industry industrial plans are not obviously environment-friendly (and the 'infant industry' motivations are debatable), de-forestation requirements linked to

[79] For instance, see *India plans to challenge EU carbon tax at WTO*, in *Reuters*, 16 May 2023; *Brazil fears environmental sanctions from EU-Mercosur trade deal*, in *Euractiv*, 13 June 2023.

[80] *Brussels seeks new controls to limit China acquiring new tech*, in *Financial Times*, 14 March 2023.

[81] See above, section 2.a.

[82] See above, section 2.a.

[83] M. PAULSEN, *The Past, Present, and Potential of Economic Security*, working paper available on SSRN (17 October 2023), p. 60.

anti-corruption and domestic legalities seem incongruous, and understandably countries whose exports stand to incur CBAM costs might challenge the new scheme's operation as being primarily protectionist. This new regulatory landscape, in other words, requires constant scrutiny, as it cannot any longer be assumed that rules develop under the benevolent auspices of two principles that are now close to exhausted: the inherent good of market openness and the operation of the WTO as ultimate guarantor of global compliance with a rule-based system.

Understandably, the EU's labelling might be too convenient to be truthful, as are the repeated assertions of WTO-compliance. For instance, the SMEI names no less than five SDGs among its goals: the eradication of poverty, the promotion of decent work conditions, the fostering of industrial innovation, the reduction of inequalities and peace. Looking at all the tools of the SMEI (and the comparable tools of the Chips Act), however, it is clear that governmental intervention on the production and supply of crisis-relevant goods, and public authorities dictating the priority of domestic new orders over existing foreign ones, deserve scrutiny for their clear trade-distortive potential.

The resulting picture is one in which the EU has repositioned itself vis-à-vis trade openness. This is not to say that the EU has become adverse to economic openness across the board: that is not the case. However, the EU is displaying a more discerning approach: whether trade and investment must be promoted cannot be presumed, and depends chiefly on the sector. There is no longer a fixed menu, which can accommodate tailored adjustments; economic openness is now an *à la carte* menu.

That customary templates and recipes have no longer a strong anchoring value is visible in the context of FTA negotiations, a field in which traditionally copy-pasting between treaties would account for most of the resulting text. The negotiations with Mercosur are particularly meaningful, since the EU's partners have expressed fatigue at the EU's efforts to tailor many sections, introducing unprecedented clauses, and providing for *ad nationem* commitments (for instance, requesting strict deforestation and climate goals from Brasil). At the same time, the unilateral turn of EU's action (on forced labour, social due diligence, deforestation) seems to frustrate considerably the concessions granted through FTAs, and FTA partners are alert to this, and can become unimpressed by FTAs that impose increasing obligations and but offer shrinking convenience.

A last comment, albeit very generic, might be in order with respect to the range of unilateral regulatory measures with which the EU, presumably, wishes to alter behaviour abroad, by virtue of the so-called Brussels effect[84]. Leveraging the appeal of its considerably-sized market, EU's rules on due diligence, product requirements and carbon-pricing listed above can, and are designed to, promote the raise of foreign standards in fields like environmental protection, labour conditions, human rights safeguards, waste management, ocean and forestry conservation, etc. In these fields, it might be easier for the EU to go solo and nudge partners into adaptation to maintain economic relations, than introducing specific commitments in bilateral or

[84] A. BRADFORD, *The Brussels Effect:* How *the European Union Rules the World*, Oxford, OUP, 2020.

multilateral instruments. However, it would be fair to wonder how this dynamics (leveraging market power to change foreign behaviour) differs from the definition of economic coercion that the EU itself wishes to contrast. Where does all the above leave us? Arguably, this paper found sufficient evidence to conclude that the EU's approach to economic openness is now *à la carte*, and that homeland initiatives are now relatively common, albeit never advertised as such. This finding calls for a careful monitoring of future plans: it cannot be assumed that they will be in line with the paradigm of economic openness. A few suggestions might help adjusting our expectations and help our readings of current and future actions:

The expression «rule-based» has changed meaning. It tended to indicate multilateral rules; now it can also refer to other rules, for instance EU or global principles or values. This change might not be advertised, but the shift is important. While rules used to be invoked as a reminder of the EU's commitments and the other parties' interests (which rules guaranteed), now the rules in question tend more often to be the rules that justify derogating from the duties *vis-à-vis* third parties;

- The EU's readiness to respond to breaches is now part of a proactive (not just reactive) strategy, bordering on breach-anticipation. The EU, with understandable pragmatism, is no longer inclined to entrust its protection to the global rulebook and the WTO's enforcing powers. Preparing a diverse tool-kit empowering the EU to take self-redress measures is a significant portion of its contemporary initiatives[85].
- The word «efficiency» has also changed meaning. To justify this semantic slip without express signalling it, the EU simply assumes that efficiency is now measured against a wider context (not just cost-reduction to maximise returns, respecting social safeguards). New variables are now featured in the efficiency calculation, which relate to different plans of future-proofing (the increase of value chains resilience, the mitigation of crises, the prevention of dependencies). What used to be efficient 20 years ago is considered a problem now, for which efficient solutions must in turn be designed.

What is the role of law, in this paradigm shift? Judging from the list of EU's initiatives in the previous section, the impression is that the EU is resorting heavily to a range of legal measures to implement its policies and, at the same time, it is moderately concerned with the interests of trade partners, which are safeguarded by existing trade and investment rules. In other words, law is now an instrument to advance, rather than constrain, new policies.

In this scenario, it would be preferable if the EU would acknowledge more transparently the various rationales behind each initiative, and observers should be on high alert over homeland moves, disguised or overt. If the last three years have taught us anything, it is that the EU will not shy away from reducing its economic openness to pursue domestic and global geopolitical goals.

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[85] Transatlantic Trade in Turbulent Times - Speech by C. MALMSTRÖM, European Commissioner for Trade, 19 July 2018, available at https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_18_4604: «A large part of protecting ourselves is enforcing trading rules, because the global rulebook is useless if it is not followed. And to be clear, we enforce the rules wherever they are broken».

IN SEARCH OF THE SUSTAINABLE DEVELOPMENT GOALS: AN INTERDISCIPLINARY LITERATURE REVIEW THROUGH THE LENS OF EU TRADE POLICY

PALOMA ALMODÓVAR

TABLE OF CONTENTS: 1. Introduction. – 2. Methodology applied in this literature review – 2.1 Bibliometric analysis of literature. – 2.2. Scientific mapping analysis. – 2.2.1 Specifications for building the science map. – 2.2.2 An examination of EU trade policy and SDGs using science mapping. – 3. Enhancing Science Mapping Results with Content Analysis. – 3.1. Motor themes in the literature. – 3.1.1 The topic of "carbon" in literature. – 3.1.2 The topic of "intensification" in literature. – 3.2. Highly developed and isolated themes in the literature. – 3.2.1 The topic of "strategy" in literature. – 3.2.2 The topic of "impact assessment" in literature – 3.3 Emerging themes in the literature. – 3.3.1 The topic of "governance" in literature. – 3.4 Transversal and basic themes in the literature. – 3.4.1 The topic of "US" in literature. –3.4.3 The topic of "politics" in literature. – 3.4.2 The topic of "growth" in literature. – 4. Conclusions and insights for further research.

ABSTRACT: *This study conducted an in-depth literature review to investigate the implications of EU trade policies for sustainability. The research utilised bibliometric techniques to assess the scholarly output in this field and developed a scientific map to identify key areas of research focus and thematic relationships among documents. A content analysis further enriched the findings. Our scientific map identified eight primary themes and presented the thematic networks for each theme. The analysis highlighted the scarcity of literature on this field, emphasising the need for future research to fill gaps in the literature, particularly in the area of understanding how EU trade policies affect firms and their sustainability practices. This research highlights the importance of multidisciplinary approaches in exploring diverse dimensions of the research question and provides insights for future investigations in this area.*

KEYWORDS: *EU trade policy, sustainable development, literature review, bibliometric analysis, scientific mapping analysis.*

1. Introduction

The pursuit of the United Nations' 2030 Agenda for Sustainable Development has emerged as a central concern for policymakers, scholars, and stakeholders across the globe. The 17 Sustainable Development Goals (SDGs) are the central focus of this agenda, which collectively endeavour to safeguard the environment, eradicate poverty, and ensure peace and

prosperity for all by 2030[1]. As a key actor in the global economy, the European Union (EU) assumes a crucial role in the attainment of these goals, particularly through its trade policy.

The trade policies of the EU have the potential to exert both positive and negative effects on the attainment of these SDGs. The EU can leverage trade agreements to foster inclusive and sustainable economic growth, thereby making a contribution to different SDGs, including but not limited to decreasing poverty, promoting gender equality, and enhancing employment and economic growth. In addition, the EU can advocate for ecologically sustainable practices within trade agreements to support the SDGs associated with environmental protection and climate action. Conversely, ineptly formulated trade policies can exacerbate disparities, cause environmental deterioration, and undermine human rights. Therefore, it is crucial for the EU to meticulously design its trade policies to align with the SDGs and ensure that trade agreements foster sustainable and inclusive economic growth while safeguarding human rights and the environment.

Examining the EU trade policy and its relationship with the SDGs is crucial in academic and policy-making domains. For this purpose, we undertake a review of the literature in order to furnish valuable insights into the current understanding of the relationship between the EU's trade policy and the SDGs. Furthermore, researchers and policymakers can pinpoint gaps in knowledge, limitations, and significant findings by evaluating existing studies. Therefore, an extensive and thorough literature review can promote a better understanding of the EU's role in advancing sustainable development through its trade policies and inform critical policy decisions in this crucial area.

Our research objectives are twofold. The first objective is to evaluate the level of development in this research domain from a multidisciplinary perspective. Specifically, we employ bibliometric analysis to quantitatively assess the impact and significance of research output. Using this approach, we examine the research literature on EU trade policies and their relationship with the SDGs to identify the most influential publications and the areas where most research has been carried out. In doing so, we seek to understand the extent of academic attention devoted to this topic. The second objective of our study is to identify the main areas that have received the most attention from researchers. To achieve this, we constructed a scientific map and carried out content analysis within each of these areas to refine the specific aspects that have been explored. We achieve these goals by conducting a systematic review of the literature available in the Web of Science (WoS) database using the SciMat software. On the one hand, the WoS database is a highly respected source of academic literature, covering a range of disciplines such as economics, political science, and environmental studies, which provides an extensive overview of the academic discourse. On the other hand, the SciMat software allows us to visualise the knowledge domains related to EU trade policies and SDGs, thereby identifying the most prominent themes and

[1] W. COLGLAZIER, *Sustainable Development Agenda: 2030*, in *Science*, 2015, 349, pp. 1048-1050.

interconnections within the literature. Thus, our research delves deeper into the specific research topics and questions being explored by researchers.

The structure of this paper is as follows. Firstly, we outline the methodology employed and provide bibliometric indicators. Secondly, we present a scientific map of the research conducted. Thirdly, we augment the results of the science mapping with content analysis. Finally, we summarise the key conclusions drawn from this study as well as its limitations.

2. Methodology applied in this literature review

The aim of this study is to conduct an in-depth literature review to understand how researchers have addressed the SDGs in relation to EU trade policies. To this end, there is no single approach to a systematic and rigorous literature review. On the one hand, we may review the theoretical contents addressed by academics, in order to obtain an overview of the topics that have aroused the most interest within a specific area of research; while, on the other hand, we may review the empirical analyses achieved by different works, in an attempt to unify the results reached in the literature[2]. This paper will focus on the first type of study.

In an attempt to provide our study with greater objectivity and scientific rigour, we will develop the following steps: (a) bibliometric techniques; and (b) scientific mapping techniques enriched with content analysis.

2.1 Bibliometric analysis of literature

For gathering high-quality literature/data focused on the intersection of EU trade policies and SDG-related issues, we used the WoS Core Collection. We conducted a broad search, in which we identified the keywords "sustainability," "trade policy," and "European Union" (including various derivations and cognates of these terms). We selected the "topic" field, ensuring that the search would cover the main parts of the documents, such as titles, abstracts, and keywords.

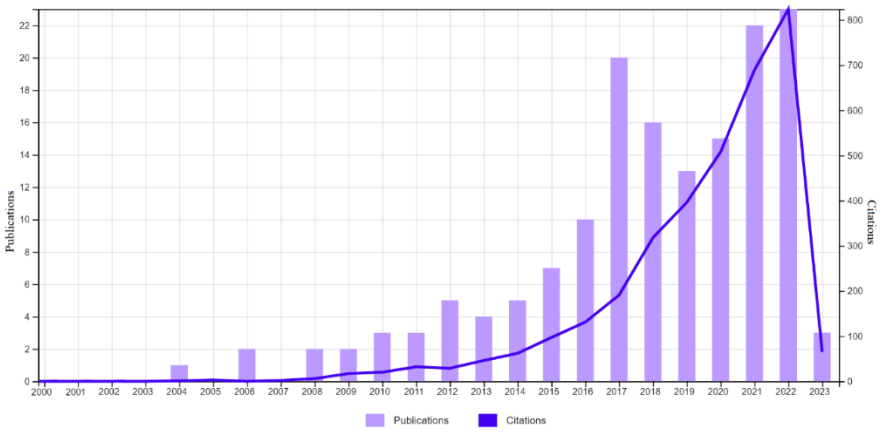
For the purpose of this literature review, we had to decide when the SDGs actually came into being. The idea of creating a set of global goals to promote sustainable development had been discussed for many years at United Nations Conferences. However, it was the Rio+20 United Nations Conference on Sustainable Development in 2012 that provided a major impetus for the development of the SDGs[3]. At Rio+20, member states called for the development of the SDGs to succeed the Millennium Development Goals (MDGs), which were established in 2000 as a follow-up to the United

[2] E. DE DIEGO, P. ALMODÓVAR, *Mapping Research Trends on Strategic Agility over the Past 25 Years: Insights from a Bibliometric Approach*, in *European Journal of Management and Business Economics*, 2022, 31, pp. 219-238.
[3] M. SCHMIDT, D. GIOVANNUCCI, D. PALEKHOV, B. HANSMANN, *Sustainable Global Value Chains*, in Springer, 2019.

Nations Millennium Declaration[4]. The MDGs were a set of eight time-bound objectives aimed at reducing poverty, hunger, disease, and inequality by 2015. As a component of the 2030 Agenda for Sustainable Development, the United Nations General Assembly ratified the SDGs in September 2015. They build on the legacy of the MDGs and aim to continue the work of building a more sustainable and equitable world for all[5]. We conducted our search from the year 2000 onwards because this marks the establishment of the MDGs, which preceded and set the stage for the development of the SDGs in 2015. By searching from 2000 onwards, we aimed to capture literature that references the essence of the SDGs and ensure the rigour of our search. Therefore, we search publications from 2000 to 2023 (note: as discussed below, we also replicated the analyses for the period 2015-2023. The results remained robust).

Using the above criteria, we obtained 157 results (search date: 08 February 2023). We then conducted an in-depth reading of each document to verify that they focused on our object of study. We found one article that did not fit, and it was eliminated. This paper was published in 2002, which makes sense, as it was very early in the emergence of the MDGs/SDGs and, therefore, only alluded to a sustainability case study of one EU member state, but made no mention of any kind of trade agreements nor the EU involvement. Thus, although the search was conducted between 2000 and 2023, the 156 documents we used for our analysis were published between 2004 and 2023.

Figure 1. Publications and citations for the period 2000-2023.



Source: WoS (2023b)[6]

[4] G. SCHMIEG, E. MEYER, I. SCHRICKEL, J. HERBERG, G. CANIGLIA, U. VILSMAIER, M. LAUBICHLER, E. HÖRL, D. LANG, *Modeling Normativity in Sustainability: A Comparison of the Sustainable Development Goals, the Paris Agreement, and the Papal Encyclical*, in *Sustainability Science*, 2018, 13, pp. 785-796.

[5] J.D. SACHS, *From Millennium Development Goals to Sustainable Development Goals*, in *The lancet*, 2012, 379, pp. 2206-2211.

[6] *WOS, Citation Report, available at: https://www.webofscience.com/wos/woscc/citation-report/0e7bbc41-3170-459f-b638-cbdac370cc91-72e47f8d, 2023b.*

Figure 1 shows publications and citations on the subject of EU trade policy and aspects related to SDGs over the years. The data indicates a consistent upward trend for both publications, which have been cited 3,323 times, suggesting that the topic is still growing and has not yet reached its mature stage[7]. In the figure, we also observe that the highest growth occurs from 2012 onwards, which is related to the year in which the SDGs were formally agreed upon at the Rio-20 conference[8].

Table 1. Web of Science categories with the largest number of publications related to EU trade policy and Sustainable Development Goals.

	Web of Science Categories	Record Count	% of 156
1	Economics	41	26.3%
2	Environmental Sciences	36	23.1%
3	Environmental Studies	27	17.3%
4	International Relations	25	16.0%
5	Law	23	14.7%

Source: WoS (2023a)[9]

Table 1 represents a **!Fine imprevista della formula**[10] and the SciMAT tool. The reason we employed SciMAT for our investigation is due to its broader array of functionalities in comparison to other tools, as noted by Cobo et al. (2012)[11]. Furthermore, the utilisation of impact measures (e.g., sum of citations, h-index) in the tool enriches the findings and aids in their interpretation. Furthermore, SciMAT provides distinct characteristics that are not present in other mapping software. These include a pre-processing module, use of bibliometric indicators, and a guide for setting up the analysis[12].

[7] E. DE DIEGO, P. ALMODÓVAR, *Mapping Research Trends on Strategic Agility over the Past 25 Years: Insights from a Bibliometric Approach*, in *European Journal of Management and Business Economics*, 2022, 31, pp. 219-238.

[8] E. HALISÇELIK, M.A. SOYTAS, *Sustainable Development from Millennium 2015 to Sustainable Development Goals 2030*, in *Sustainable Development*, 2019, 27, pp. 545-572.

[9] *WOS, Analize Results: 156 publications selected from Web of Science Core Collection, available at: https://www.webofscience.com/wos/woscc/analyze-results/0e7bbc41-3170-459f-b638-cbdac370cc91-72e47f8d, 2023a.*

[10] M.J. COBO, A.G. LÓPEZ-HERRERA, E. HERRERA-VIEDMA, F. HERRERA, *SciMAT: A New Science Mapping Analysis Software Tool*, in *Journal of the American Society for Information Science and Technology*, 2012, 63, pp. 1609-1630.

[11] M.J. COBO, A.G. LÓPEZ-HERRERA, E. HERRERA-VIEDMA, F. HERRERA, *SciMAT: A New Science Mapping Analysis Software Tool*, in *Journal of the American Society for Information Science and Technology*, 2012, 63, pp. 1609-1630.

[12] M.J. COBO, A.G. LÓPEZ-HERRERA, E. HERRERA-VIEDMA, F. HERRERA, *An Approach for Detecting, Quantifying, and Visualizing the Evolution of a Research Field: A Practical Application to the Fuzzy Sets Theory Field*, in *Journal of Informetrics*, 2011, 5, pp. 146-166; M.J. COBO, F. CHICLANA, A. COLLOP, J. DE ONA, E. HERRERA-VIEDMA, *A Bibliometric Analysis of the Intelligent Transportation Systems Research Based on Science Mapping*, in *IEEE transactions on intelligent transportation systems*, 2013, 15, pp. 901-908.

2.2.1 Specifications for building the science map

We chose "keywords" for our co-word analysis as it is a widely used metric. The SciMAT software provides two types of keywords: those identified by the author and those identified by WoS through artificial intelligence. We use both in the interest of a more complete analysis. We grouped words that referred to the same concept (for example, singulars and plurals or perfect synonyms -"EE.UU"; "US"; "USA"; and "the United States of America"-) and we eliminated any keywords that were too generic or broad (for example, "study" or "research"). Thus, we started with a total of 880 keywords, and ended with 781 keywords. Finally, the SciMAT software offers the capability of examining the literature across different time periods, providing insights into how topics have progressed over time. Given the limited volume of literature available, we conducted an analysis of the entire period from 2000 to 2023. To test the reliability of our findings, we replicated the study for the years 2015-2023 and observed that the results were consistent. This approach strengthens the validity of our analysis and offers further confidence in the reliability of our conclusions.

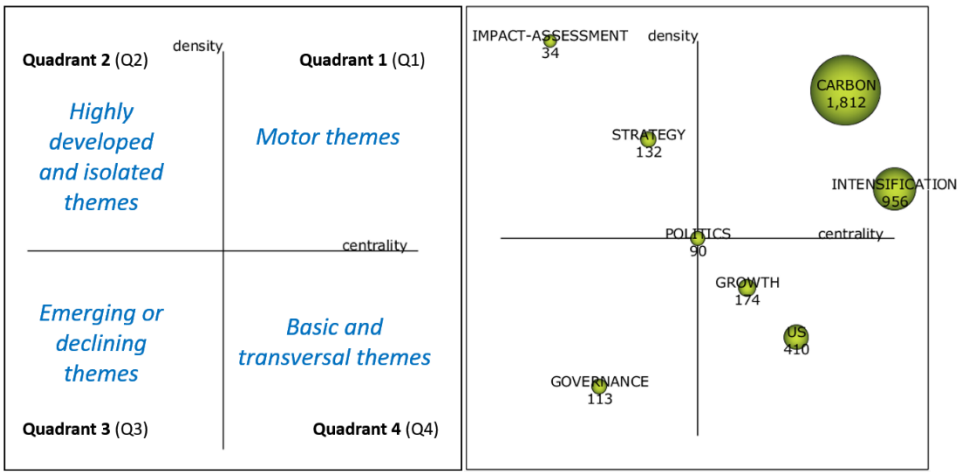
In order to conduct a co-word analysis, we had to make various decisions. For the normalisation and similarity measurement of the co-occurrence of keywords, we opted for the equivalence index. To cluster the normalised co-word network, we selected the single-center algorithm, which had a minimum network size of three and a maximum of twelve. This allowed us to identify groups of strongly related keywords that formed the research themes.

2.2.2 ***An examination of EU trade policy and SDGs using science mapping***

After performing the aforementioned analyses, we evaluated the primary research topics that have been addressed in the literature using two essential values[13]: (a) centrality values, which quantify the importance of a research topic within a given field by measuring its level of interaction with other networks or topics (i.e., the strength of external connections), and how it relates to the current state of research; and (b) density values, which measure the level of internal cohesion in a network (i.e., the strength of the connections within the network) and are indicative of the level of advancement or development of the topic. A two-dimensional graph can be created using these values, with centrality represented on the horizontal axis and density on the vertical axis.

[13] M. CALLON, J.P. COURTIAL, F. LAVILLE, *Co-Word Analysis as a Tool for Describing the Network of Interactions Between Basic and Technological Research: The Case of Polymer Chemsitry*, in *Scientometrics*, 1991, 22, pp. 155-205; M.J. COBO, A.G. LÓPEZ-HERRERA, E. HERRERA-VIEDMA, F. HERRERA, *An Approach for Detecting, Quantifying, and Visualizing the Evolution of a Research Field: A Practical Application to the Fuzzy Sets Theory Field*, in *Journal of Informetrics*, 2011, 5, pp. 146-166; M.J. COBO, A.G. LÓPEZ-HERRERA, E. HERRERA-VIEDMA, F. HERRERA, *SciMAT: A New Science Mapping Analysis Software Tool*, in *Journal of the American Society for Information Science and Technology*, 2012, 63, pp. 1609-1630.

Figure 2. Strategic diagram for the EU trade policy and SDGs (on the number of citations).



Source: Based on Cobo et al. (2012) and output from SciMat

Figure 2 presents two strategic diagrams. On the left, the figure shows the illustration of what is implied by the location of the themes in the different quadrants due to their density and centrality values; according to Cobo et al. (2012)[14], the first quadrant (Q1) collects the motor themes; the second quadrant (Q2) contains those topics that are highly developed and/or isolated; the third quadrant (Q3) shows the topics that are emerging or declining; and, finally, the fourth quadrant (Q4) contains the topics that are basic or transversal in the literature. On the right, the figure was generated with SciMAT software and shows the eight main themes on which the Academy has focused, and they are located along the four quadrants. A comprehensive discussion of each of the topics will be presented in the next section.

3. Enhancing Science Mapping Results with Content Analysis

In an attempt to illustrate the various themes explored in the academic world, we provide a more in-depth analysis of the results depicted in Figure 2. The following subsections will focus on the four quadrants of this figure. First, we will identify the topic (in order of relevance based on the number of publications and citations) and show its cluster network. These network graphs, which are generated with SciMAT software, display the main topic connected to a network of subtopics. The size of the bubbles reflects the h-index of documents related to each keyword, and the thickness of the lines between bubbles indicates the number of documents related to the equivalence index. As a result, this visualisation enables the identification of the significance of certain keywords within a given network by assessing their frequency in documents and the level of association between related keywords. Secondly, we will enrich the discussion with content analysis.

[14] M.J. COBO, A.G. LÓPEZ-HERRERA, E. HERRERA-VIEDMA, F. HERRERA, *SciMAT: A New Science Mapping Analysis Software Tool*, in *Journal of the American Society for Information Science and Technology*, 2012, 63, pp. 1609-1630.

3.1. Motor themes in the literature

Motor themes, situated in the top right quadrant of the strategic diagram, represent well-developed and critical subject matters that play a crucial role in shaping and structuring a research field. Characterised by their strong centrality and high density, these themes serve as driving forces within the discipline, underpinning its growth and evolution. By virtue of their prominent position and substantial development, motor themes contribute significantly to the field's intellectual framework, establishing themselves as essential components in the advancement of the discipline as a whole[15].

Figure 3. Strategic diagram of quadrant 1 showing the motorthemes in the literature.

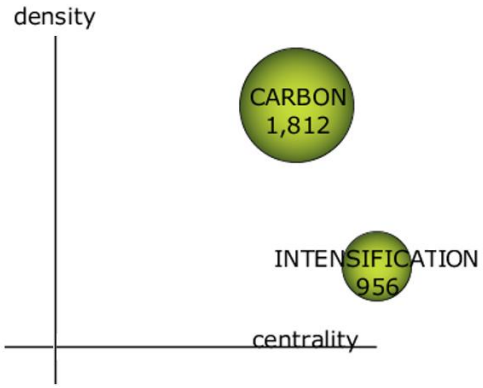


Figure 3 presents the motor themes identified within the literature on EU trade policies in pursuit of the United Nations SDGs. These motor themes, which play a pivotal role in shaping the discourse and development of this research area, include "carbon" and "intensification." As key subject matters, they hold significant implications for understanding and addressing the interplay between EU trade policies and their contributions to achieving the SDGs. In the following sections, we shall delve into an in-depth analysis of each of these topics.

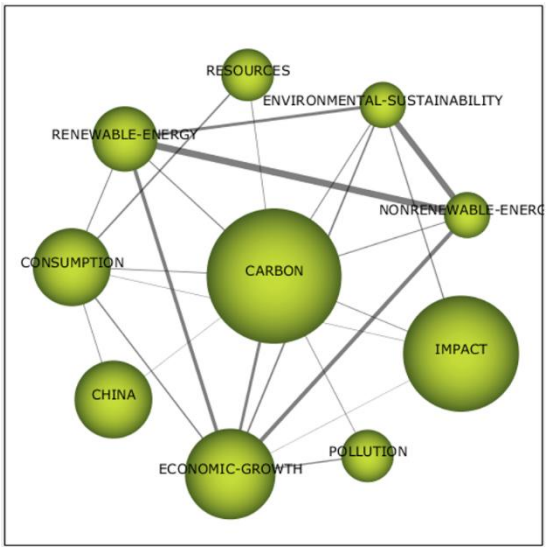
3.1.1 The topic of "carbon" in literature

Regarding the topic of "carbon", the literature refers to the fundamental element in fossil energy. Thus, the EU faces the task of ensuring that its trade policy aligns with its objectives of meeting the SDGs and reducing carbon emissions. Achieving this requires promoting sustainable goods and services

[15] A. VELEZ-ESTEVEZ, P. DUCANGE, I.J. PEREZ, M.J. COBO, *Conceptual Structure of Federated Learning Research Field*, in *Procedia Computer Science*, 2022, 214, pp. 1374-1381; J.R. LÓPEZ-ROBLES, M.J. COBO, M. GUTIÉRREZ-SALCEDO, M.A. MARTÍNEZ-SÁNCHEZ, N.K. GAMBOA-ROSALES, E. HERRERA-VIEDMA, *30th Anniversary of Applied Intelligence: A Combination of Bibliometrics and Thematic Analysis using SciMAT*, in *Applied Intelligence*, 2021, 51, pp. 6547-6568.

through trade, including environmental and social protections in trade agreements, and encouraging other countries to adopt sustainable practices by using trade as a tool[16]. Its key relevance comes from the concern derived from the increased occurrence of extreme weather events has drawn considerable attention towards the greenhouse effect and global warming[17]. Thus, most research is focused on highlighting the importance of implementing sustainable development emission reduction projects to decrease greenhouse gas emissions[18].

Figure 4. Thematic network of the topic "carbon."



	Documents
CARBON	17
IMPACT	14
ECONOMIC-GROWTH	10
CONSUMPTION	8
CHINA	8
RENEWABLE ENERGY	6
RESOURCES	4
POLLUTION	4
NON-RENEWABLE ENERGY	3
ENVIRONMENTAL-SUSTAINABILITY	3

In a more rigorous manner, according to Figure 4, the topic of "carbon" has been dealt with in the literature together with issues related to the "impact" it causes, its relationship with "economic growth", its "consumption", the relevance of "renewable energy" for its reduction, "resources", "pollution", the problems involved in "non-renewable energy" and its relationship with "environmental sustainability". In addition, it is remarkable the large number of works focused on the study of carbon emissions in the case of "China". One of the most relevant works on this subject is the one by Liu et al. (2016)[19], they explained that the swift growth of global carbon emissions is related to international trade, because it involves substantial emissions in exports from emerging economies. This situation creates a dilemma for climate and trade

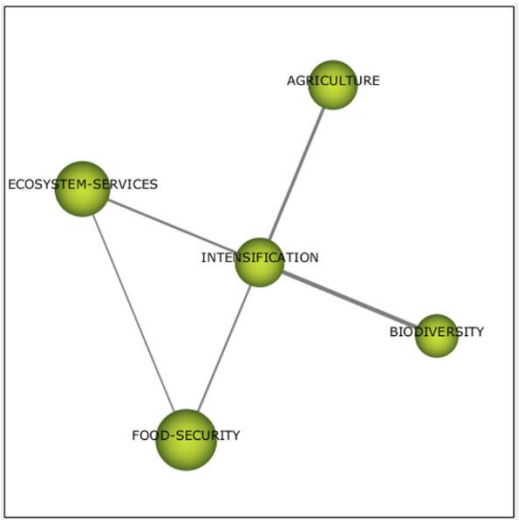
[16] F. CLORA, W. YU, *GHG Emissions, Trade Balance, and Carbon Leakage: Insights from Modeling Thirty-One European Decarbonization Pathways towards 2050*, in *Energy Economics*, 2022, 113, p. 106240.
[17] C.Y. DYE, C.T. YANG, *Sustainable Trade Credit and Replenishment Decisions with Credit-Linked Demand under Carbon Emission Constraints*, in *European Journal of Operational Research*, 2015, 244, pp. 187-200.
[18] W. HUANG, Q. WANG, H. LI, H. FAN, Y. QIAN, J.J. KLEMEŠ, *Review of Recent Progress of Emission Trading Policy in China*, in *Journal of cleaner production*, 2022, 349, p. 131480.
[19] Z. LIU, S.J. DAVIS, K. FENG, K. HUBACEK, S. LIANG, L. DÍAZ ANADON, B. CHEN, J. LIU, J. YAN, D. GUAN, *Targeted Opportunities to Address the Climate–Trade Dilemma in China*, in *Nature Climate Change*, 2016, 6, pp. 201-206.

policies because although trading with emerging economies offers economic benefits due to their manufacturing proficiency, it also escalates global CO2 emissions. These authors also claimed that the reason for the emissions related to Chinese exports, which are greater than the yearly emissions of Japan and Germany, can be attributed to China's heavy dependence on coal-based energy and the high emissions intensity in specific provinces and industries. As a result, this kind of export might be used as a targeted opportunity to address the challenge of balancing trade interests with climate concerns. They proposed improving production methods and reducing carbon emissions in energy systems or limiting trade volumes.

3.1.2 The topic of "intensification" in literature

Regarding the topic of "intensification," literature discusses the sustainable intensification/utilisation of land as well as the production methods used for agricultural and food purposes[20]. The appearance of this topic as a motor theme emphasises the importance of trade policies that prioritise sustainable land use practices and protect terrestrial ecosystems.

Figure 5. Thematic network of the topic “Intensification.”



	Documents
FOOD-SECURITY	6
ECOSYSTEM SERVICES	5
INTENSIFICATION	4
AGRICULTURE	4
BIODIVERSITY	3

Taking a more rigorous approach, based on the information presented in Figure 5, the topic of “intensification” has been discussed in conjunction with “agriculture”, “biodiversity”; “food security” and “ecosystem services”. In this line, one of the most significant studies is the publication by Fischer et

[20] M.E. BROWN, E.R. CARR, K.L. GRACE, K. WIEBE, C.C. FUNK, W. ATTAVANICH, P. BACKLUND, L. BUJA, *Do Markets and Trade Help or Hurt the Global Food System Adapt to Climate Change?*, in *Food policy*, 2017, 68, pp. 154-159; H. WITTMAN, M.J. CHAPPELL, D.J. ABSON, R. KERR, J. BLESH, J. HANSPACH, I. PERFECTO, J. FISCHER, *A Social–Ecological Perspective on Harmonizing Food Security and Biodiversity Conservation*, in *Regional Environmental Change*, 2017, 17, pp. 1291-1301.

al. (2014)[21], they proposed a framework to address the challenges related to biodiversity conservation and agricultural commodity production, which distinguishes between "land sharing" and "land sparing". They explain that a land-sparing strategy involves dedicating certain portions of land exclusively to conservation, while using other parts for intensive agricultural production. On the other hand, a land-sharing strategy aims to balance conservation and production by using less intensive agricultural techniques throughout the entire area, allowing for some biodiversity to be maintained. Nonetheless, there has been disagreement surrounding this framework. One reason is that many scholars have narrowed their focus to food production, instead of broader concepts like land scarcity or food security. There are also discussions on the practicality of how to quantify biodiversity, and various scale effects that are challenging to account for. They argue that it is crucial to tackle these problems and create alternative and comprehensive approaches to conceptualise the difficulties related to biodiversity, food, and the scarcity of land in agriculture.

3.2. Highly developed and isolated themes in the literature

Highly developed and isolated themes refer to those subject matters within a field that exhibits a high degree of specialisation and coherence, yet remain peripheral and less crucial to the overall discipline. Despite their advanced development, these themes lack the requisite background and significance to substantially impact the field's current state, and as such, do not serve as primary drivers of research interest. Positioned in the top left quadrant of the strategic diagram, these isolated themes persist as tangential aspects of the field, rather than primary focal points[22].

Figure 6. Strategic diagram of quadrant 2 showing the highly developed and isolated themes in the literature.

[21] J. FISCHER, D.J. ABSON, V. BUTSIC, M.J. CHAPPELL, J. EKROOS, J. HANSPACH, T. KUEMMERLE, H.G. SMITH, H. VON WEHRDEN, *Land Sparing versus Land Sharing: Moving Forward*, in *Conservation Letters*, 2014, 7, pp. 149-157.

[22] A. VELEZ-ESTEVEZ, P. DUCANGE, I.J. PEREZ, M.J. COBO, *Conceptual Structure of Federated Learning Research Field*, in *Procedia Computer Science*, 2022, 214, pp. 1374-1381; J.R. LÓPEZ-ROBLES, M.J. COBO, M. GUTIÉRREZ-SALCEDO, M.A. MARTÍNEZ-SÁNCHEZ, N.K. GAMBOA-ROSALES, E. HERRERA-VIEDMA, *30th Anniversary of Applied Intelligence: A Combination of Bibliometrics and Thematic Analysis using SciMAT*, in *Applied Intelligence*, 2021, 51, pp. 6547-6568.

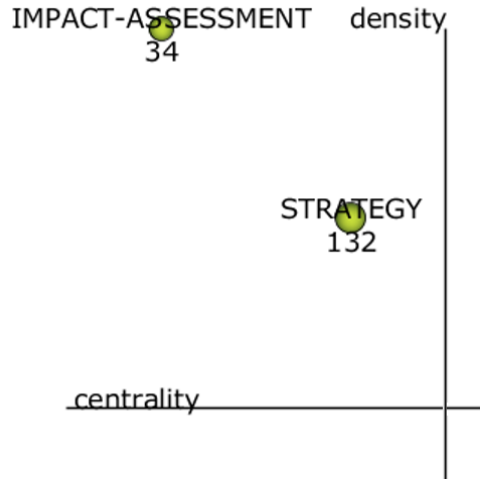


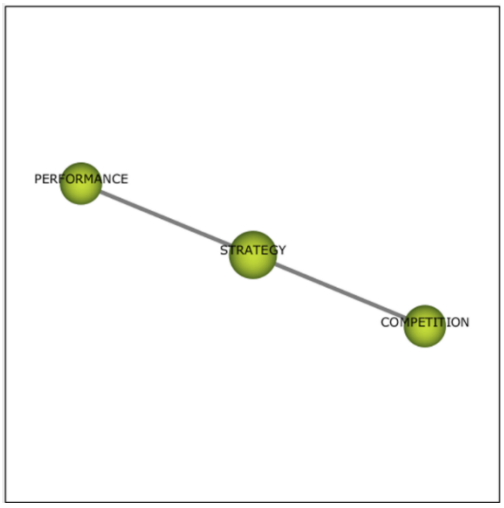
Figure 6 presents the highly developed and isolated themes discernible within the literature on EU trade policies in the context of the SDGs. These themes, which exhibit advanced development but remain peripheral to the core research concerns, encompass "strategy" and "impact assessment." In the ensuing sections, we shall undertake a comprehensive examination of each of these themes, elaborating on their key concepts, relevance, and the implications they bear for the broader scholarly discourse on EU trade policies and their alignment with the SDGs.

3.2.1 The topic of "strategy" in literature

With respect to the theme of "strategy," the existing literature primarily addresses action plans formulated by various institutions in response to EU trade policies and the growing emphasis on sustainability[23]. These strategic approaches often focus on how institutions navigate and adapt to the evolving trade policy landscape, with particular attention to the integration of sustainability objectives. Notably, certain studies within this theme also explore the realm of corporate strategy, examining how individual firms adapt their strategic decision-making processes in light of EU trade policies and the pursuit of sustainable development[24]. Thus, the theme of "strategy" encompasses a diverse array of perspectives and approaches to understanding the complex interplay between trade policy, institutional action, and sustainable development.

Figure 7. Thematic network of the topic “strategy.”

[23] A. TOSINI, *Integrated Planning for Landscape Protection and Biodiversity Conservation*, in *Nature Policies and Landscape Policies: Towards an Alliance*, 2015, pp. 307-314.
[24] W. TONG, D. MU, F. ZHAO, G.P. MENDIS, J.W. SUTHERLAND, *The Impact of Cap-and-Trade Mechanism and Consumers' Environmental Preferences on a Retailer-Led Supply Chain*, in *Resources, Conservation and Recycling*, 2019, 142, pp. 88-100.



	Documents
STRATEGY	4
PERFORMANCE	3
COMPETITION	3

More specifically, Figure 7 depicts how "strategy" is usually analysed in terms of "competition" and "performance". In this context, Tong et al. (2019)[25] illustrated that consumers demonstrate a readiness to pay higher prices for products with low-carbon footprints. As a result, the decision-making of manufacturers and retailers is fundamental. According to their explanation, within a supply chain where the retailers have the leading role, there are two strategies available: promoting low-carbon products or not promoting them. According to their results, the actions of manufacturers and retailers are greatly impacted by elements such as the carbon credit market price, emissions limit, and consumer interest in environmentally-friendly products. Thus, they emphasised the importance of sustainable decision-making in strategic matters for manufacturers and retailers, as well as the need for collaboration to attain sustainable profitability over time.

3.2.2 The topic of "impact assessment" in literature

Concerning the theme of "impact assessment," it entails the methodical examination of EU trade policies to determine their congruence with the SDGs. This essential process functions as a foundation for pinpointing potential risks, unforeseen repercussions, and prospects linked to these policies. Through carrying out in-depth impact assessments, policymakers and stakeholders can gain a more profound comprehension of the intricate consequences of trade policies, thereby facilitating the promotion of responsible and sustainable trade practices. Within this framework, the theme of "impact assessment" emphasises the significance of meticulous analysis and data-driven decision-making in striving to align trade policies with SDGs.

Figure 8. Thematic network of the topic "impact assessment."

[25] W. TONG, D. MU, F. ZHAO, G.P. MENDIS, J.W. SUTHERLAND, *The Impact of Cap-and-Trade Mechanism and Consumers' Environmental Preferences on a Retailer-Led Supply Chain*, in *Resources, Conservation and Recycling*, 2019, 142, pp. 88-100.

	Documents
SUSTAINABILITY IMPACT-ASSESSMENT	4
TRADE NEGOTIATIONS	3
IMPACT-ASSESSMENT	3

To better understand how the literature has dealt with this topic, Figure 8 displays the connection of "impact assessment" with "sustainability impact assessment" and "trade negotiations". In this line, Dias Simões (2018)[26] explained that, in the EU, two streams of studies analyse the effects of trade policies: impact assessments and sustainability impact assessments. While the former is a generic concept that encompasses a wide range of valuations, the latter has two notable features. Firstly, this kind of assessment represents a change in the methods used for trade and investment policymaking. It focuses on the potential social, human rights, environmental, and economic effects of current trade negotiations. Secondly, it serves as a means of collaboration among a larger number of stakeholders with a vested interest in the negotiation process. Furthermore, in our literature review, we find documents that allude to the impact that trade negotiations have on the sustainability of different aspects, such as health[27] or environment[28]. A notable research is the one by Khan et al. (2021)[29], they proposed a methodology that connects global factors influencing land use to local impacts through a series of models. The study employed both a global economic model and an integrated assessment model to evaluate alterations in the demand for agricultural lands on a national scale. The authors noted that the expected changes in land use are driven by a variety of factors, including demographic shifts, technological advancements, global trade, and the expansion of the EU. They explained that these changes have significant effects on the quality of landscapes and the

[26] F. DIAS SIMÕES, *External Consultants as Actors in European Trade and Investment Policymaking*, in *Netherlands Yearbook of International Law 2017: Shifting Forms and Levels of Cooperation in International Economic Law: Structural Developments in Trade, Investment and Financial Regulation*, 2018, pp. 109-138.
[27] M.G. CHUNG, Y. LI, J. LIU, *Global Red and Processed Meat Trade and Non-Communicable Diseases*, in *BMJ Global Health*, 2021, 6, p. e006394.
[28] F.F. ADEDOYIN, A.A. ALOLA, F.V. BEKUN, *The Alternative Energy Utilization and Common Regional Trade Outlook in EO-27: Evidence From Common Correlated Effects*, in *Renewable and Sustainable Energy Reviews*, 2021, 145, p. 111092.
[29] I. KHAN, F. HOU, H.P. LE, S.A. ALI, *Do Natural Resources, Urbanization, and Value-Adding Manufacturing Affect Environmental Quality? Evidence From the Top Ten Manufacturing Countries*, in *Resources Policy*, 2021, 72, p. 102109.

value of natural areas as the demand for agricultural products and agrarian production structures change.

3.3 Emerging themes in the literature

Emerging or declining themes are characterised by their relative weakness (low density and low centrality) within a research field. These themes are typically situated in the bottom left quadrant of the strategic diagram, indicating their marginal status with respect to the field's core concerns. As both weakly developed and peripheral, they often represent nascent or waning subject matters that are either gaining traction or receding from the research focus. Consequently, these themes tend to be the object of either an impulse toward growth or a gradual decline, reflecting their dynamic nature within the broader disciplinary landscape[30].

Figure 9. Strategic diagram of quadrant 3 showing the emerging or declining themes in the literature.

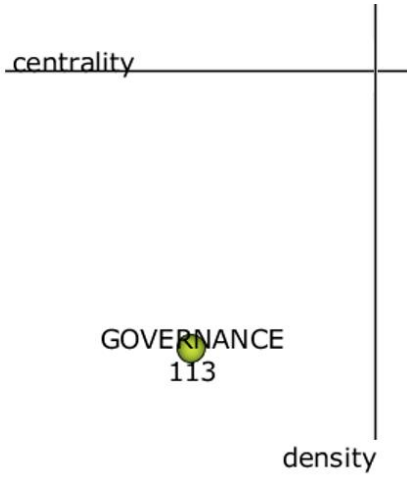


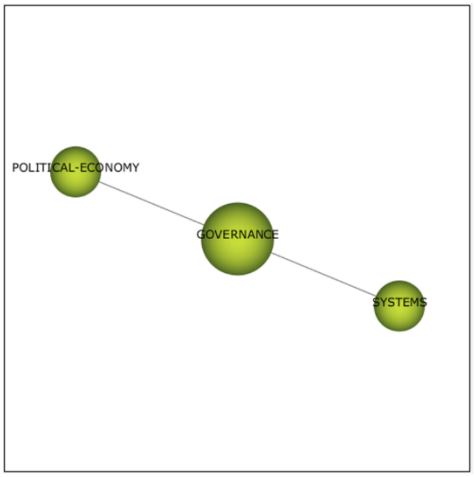
Figure 9 displays the theme identified as an emerging or declining theme within the literature on EU trade policies and their alignment with the SDGs. This theme is "governance." It is worth noting that, given the nascent stage of the research area under investigation, we believe that the "governance" theme is more appropriately classified as "emerging" rather than "declining." In the subsequent section, we shall delve into a detailed discussion of this theme.

3.3.1 The topic of "governance" in literature

[30] A. VELEZ-ESTEVEZ, P. DUCANGE, I.J. PEREZ, M.J. COBO, *Conceptual Structure of Federated Learning Research Field*, in *Procedia Computer Science*, 2022, 214, pp. 1374-1381; J.R. LÓPEZ-ROBLES, M.J. COBO, M. GUTIÉRREZ-SALCEDO, M.A. MARTÍNEZ-SÁNCHEZ, N.K. GAMBOA-ROSALES, E. HERRERA-VIEDMA, *30th Anniversary of Applied Intelligence: A Combination of Bibliometrics and Thematic Analysis using SciMAT*, in *Applied Intelligence*, 2021, 51, pp. 6547-6568.

In the context of EU trade policy and sustainability, the topic "governance" pertains to the guidelines and regulations that direct the conduct of actors within the trading system, such as governments, corporations, and civil society. This includes standards and rules concerning environmental conservation[31], and labour practices[32], among others.

Figure 10. Thematic network of the topic "Governance."



	Documents
GOVERNANCE	9
SYSTEMS	5
POLITICAL-ECONOMY	5

According to the cluster network depicted in Figure 10, the aim of "governance", in this context, is frequently researched jointly with "political economy" and "systems". In this sense, De Ville and Siles-Brügge (2015)[33] pointed out that, since July 2013, the EU and the US have been in continuous negotiations for a Transatlantic Trade and Investment Partnership. The main contention of their research is that the positive forecasts regarding the removal of trade barriers between the EU and the US are improbable due to discrepancies in regulatory frameworks, resulting in increased expenses and hindered market entry. Moreover, they argued that the potential deregulatory influence of the agreement is being underestimated and that there is a need for critical evaluation of the economic and quantitative aspects of international political economy.

We also find that some scholars, to ensure that trade policies and activities uphold sustainable development principles, focus their research on specific cases. For example, Leipold et al. (2016)[34] stated that global

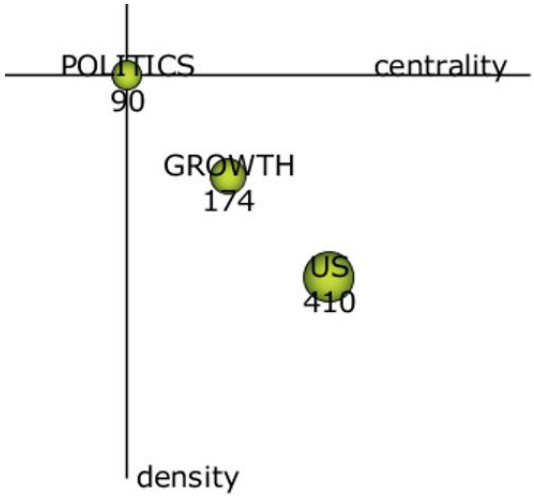
[31] S. LEIPOLD, M. SOTIROV, T. FREI, G. WINKEL, *Protecting "First World" Markets and "Third World" Nature: The Politics of Illegal Logging in Australia, the European Union and the United States*, in *Global Environmental Change*, 2016, 39, pp. 294-304.
[32] J. HARRISON, M. BARBU, L. CAMPLING, B. RICHARDSON, A. SMITH, *Governing Labour Standards through Free Trade Agreements: Limits of the European Union's Trade and Sustainable Development Chapters*, in *Journal of Common Market Studies*, 2019, 57, pp. 260-277.
[33] F. DE VILLE, G. SILES-BRÜGGE, *The Transatlantic Trade and Investment Partnership and the Role of Computable General Equilibrium Modelling: An Exercise in 'Managing Fictional Expectations'*, in *New Political Economy*, 2015, 20, pp. 653-678.
[34] S. LEIPOLD, M. SOTIROV, T. FREI, G. WINKEL, *Protecting "First World" Markets and "Third World" Nature: The Politics of Illegal Logging in Australia, the European Union and the United States*, in *Global Environmental Change*, 2016, 39, pp. 294-304.

forest governance witnessed the establishment of a timber legality regime to control the timber trade system. The US, EU, and Australia passed laws that prohibit the entry of illegally harvested timber into their markets. Thus, they examined the discourse and decision-making procedures of the stakeholders involved in drafting each law and how these affect the governance's design and implementation. In the same spirit, Holden (2019)[35] explored the interaction between the EU's framing of trade policy in the SDGs and the views of European civil society organisations, and examined how different forms of ideational power affected the process and analysed the implications of governance.

3.4 *Transversal and basic themes in the literature*

Basic and transversal themes, located in the bottom right quadrant of the strategic diagram, represent subject matters that hold considerable relevance and potential influence within a research field, yet remain underdeveloped. These themes, which encompass general foundational concepts and cross-disciplinary concerns, are critical to the advancement and growth of the discipline. Despite their significance, however, these themes have not been adequately explored or developed, indicating an area of research that warrants further attention and investigation to fully realise its potential impact on the field[36].

Figure 11. Strategic diagram of quadrant 4 showing basic or transversal themes the in the literature.



[35] P. HOLDEN, *Finding Common Ground? European Union and European Civil Society Framing of the Role of Trade in the Sustainable Development Goals*, in *Journal of Common Market Studies*, 2019, 57, pp. 956-976.

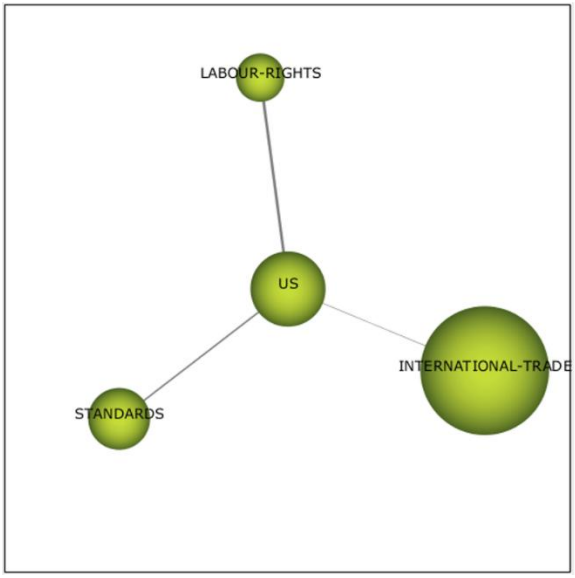
[36] A. VELEZ-ESTEVEZ, P. DUCANGE, I.J. PEREZ, M.J. COBO, *Conceptual Structure of Federated Learning Research Field*, in *Procedia Computer Science*, 2022, 214, pp. 1374-1381; J.R. LÓPEZ-ROBLES, M.J. COBO, M. GUTIÉRREZ-SALCEDO, M.A. MARTÍNEZ-SÁNCHEZ, N.K. GAMBOA-ROSALES, E. HERRERA-VIEDMA, *30th Anniversary of Applied Intelligence: A Combination of Bibliometrics and Thematic Analysis using SciMAT*, in *Applied Intelligence*, 2021, 51, pp. 6547-6568.

Figure 11 illustrates the themes classified as basic and transversal themes within the literature under examination. These themes include "growth" and "US." Furthermore, at the intersection of the abscissa and the ordinate, we observe the theme of "politics." This particular topic is not clearly situated within any of the plot's quadrants. However, following an in-depth analysis of the documents that comprise this literature review, we have decided to position "politics" within the explanations pertaining to quadrant Q4. In the ensuing sections, we shall provide a comprehensive examination of each of these themes.

3.4.1 The topic of "US" in literature

The theme "US" emerges as a transversal or basic topic within the literature, potentially owing to its considerable impact on the achievement of SDGs, given its role as a key player in global trade. Moreover, the EU and the US maintain the most substantial trade relationship with one another, and their respective trade strategies can exert reciprocal influence on each other's economic growth, development[37], and labour rights[38]. Thus, the notoriety of the "US" theme within the literature emphasises the importance of understanding the interdependencies between the EU and the US in the context of trade policies and the SDGs.

Figure 12. Thematic network of the topic "US."



	Documents
INTERNATIONAL TRADE	15
US	7
STANDARDS	5
LABOUR-RIGHTS	3

As illustrated in the thematic network (or cluster) presented in Figure 12, the theme "US" is frequently examined in conjunction with associated

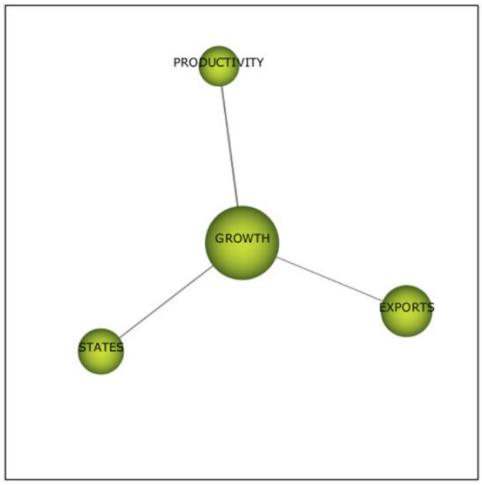
[37] A. SBRAGIA, *The EU, the US, and Trade Policy: Competitive Interdependence in the Management of Globalization*, in *Journal of European Public Policy*, 2010, 17, pp. 368-382.
[38] A. TYC, *Workers' Rights and Transatlantic Trade Relations: The TTIP and beyond*, in *The Economic and Labour Relations Review*, 2017, 28, pp. 113-128.

concepts such as "international trade," "standards," and "labour rights." This interconnected exploration of themes suggests that research about the "US" is deeply entwined with broader considerations, emphasising the significance of understanding the multifaceted implications of the US's role within the global trade landscape, as well as its interplay with the establishment and enforcement of standards and labour rights. In this context, Harrison (2019)[39] explored the implications of the increasing number of labour provisions in free trade agreements. He specifically looked at the effectiveness of labour provisions in agreements established by the US and EU and noted a significant disparity between policymakers' claims about the importance of these provisions and their actual impact. This research also examined attempts at reform made by the US and EU, highlighting several deficiencies.

3.4.2 The topic of "growth" in literature

The relationship between EU trade policy and the SDGs in relation to the theme of "growth" is complex. Although trade is widely recognised as a vital component of economic growth, the EU has predominantly focused on improving market access and promoting exports through its trade policy[40]. As a result, the literature underscores the necessity for this approach to be harmonised with SDGs in order to ensure its long-term sustainability.

Figure 13. Thematic network of the topic "growth."



	Documents
GROWTH	9
EXPORTS	5
STATES	4
PRODUCTIVITY	3

As depicted in Figure 13, the theme "growth" is frequently investigated in tandem with related concepts such as "exports," "states," and "productivity." This interconnected examination of themes highlights the importance of comprehending the intricate interplay between growth and its contributory factors, such as exports and productivity, as well as the role of

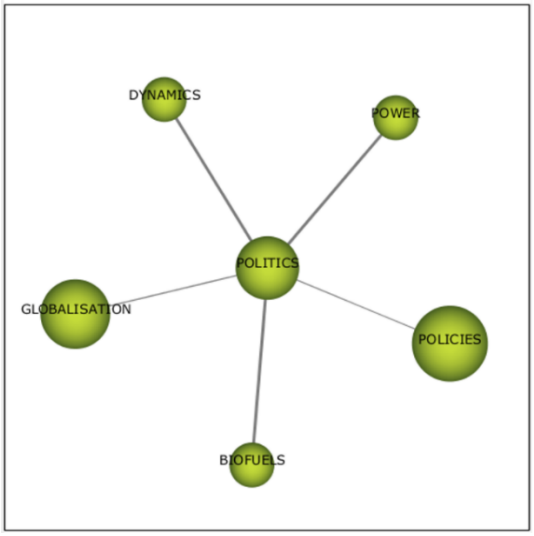
[39] J. HARRISON, *The Labour Rights Agenda in Free Trade Agreements*, in *The Journal of World Investment & Trade*, 2019, 20, pp. 705-725.
[40] K.R. FINGERMAN, G.J. NABUURS, L. IRIARTE, U.R. FRITSCHE, I. STARITSKY, L. VISSER, T. MAI-MOULIN, M. JUNGINGER, *Opportunities and Risks for Sustainable Biomass Export from the South-Eastern United States to Europe*, in *Biofuels, Bioproducts and Biorefining*, 2019, 13, pp. 281-292.

states in shaping and influencing these dynamics. In this line, Davidaviciene and Maciulyte-Sniukiene (2019)[41] discussed the European Commission's priority of a balanced and progressive trade policy that can enhance the EU's economic growth. This study examined the varying outcomes of previous research on how international trade affects a country's economic performance (while some studies have reported a positive relationship between export/import and economic growth, others have found that the impact is either not significant or has a negative effect). As a result, the authors posed the question of whether international trade inevitably leads to economic growth and hypothesised that the impact of international trade may depend on a country's productivity level and could take effect after a certain period. The investigation found that both import and export have a positive impact on the performance of EU member states. The study found that the effect of export on a country's performance was not significantly different based on the country's productivity level. However, the impact of imports was stronger in more developed countries with higher productivity levels.

3.4.3 The topic of "politics" in literature

The theme of "politics" plays a substantial role in shaping the EU's trade policy concerning the SDGs, as manoeuvring through a multifaceted political landscape. Such alignment necessitates reaching a consensus among diverse stakeholders and engaging in negotiations on interrelated issues, a process that has become increasingly intricate in the context of globalisation. Consequently, the "politics" theme highlights the need for astute political strategising and diplomatic acumen in order to effectively address the challenges posed by the intersection of trade policy and sustainable development within the evolving global arena.

Figure 14. Thematic network of the topic “politics.”



	Documents
POLICIES	8
GLOBALISATION	7
POLITICS	6
POWER	3
DYNAMICS	3
BIOFUELS	3

[41] V. DAVIDAVICIENE, A. MACIULYTE-SNIUKIENE, *The Impact of International Trade on EU Member States Performance*. *Conference Proceedings “New Challenges of Economic and Business Development"*, 2019, pp. 204-216.

As demonstrated in Figure 14, the theme "politics" is frequently examined in conjunction with associated concepts such as "policies," "globalisation," "power," "dynamics," and "biofuels." This interconnected exploration of themes highlights the intricate nature of research focusing on "politics" and its multifarious connections to various aspects of the trade, policy-making, and sustainable development. Consequently, the analysis alludes to the importance of understanding the complex interplay between politics and its diverse influences on policies, globalisation, power dynamics, and emerging sectors such as biofuels, within the broader context of international trade and SDGs. Thus, Daugbjerg and Swinbank (2015)[42] argued that international organisations can either constrain or facilitate certain domestic policy alternatives. They demonstrated that while the legal structure of the World Trade Organisation had become more receptive to environmental sustainability concerns, incorporating social sustainability issues linked to biofuel policies was more complex. The authors pointed out that the raw materials and end products related to biofuels are tradable and must adhere to the same regulations as other commodities under the World Trade Organisation. This presented a dilemma for the EU's biofuels policy, which aimed to bolster domestic production while also fulfilling the objective of having 20% of the EU's energy consumption sourced from renewable sources by 2020.

4. *Conclusions and insights for further research*

In this research, we conducted an in-depth literature review that examined several aspects of the EU trade policies and their sustainability implications. To accomplish this, we employed bibliometric techniques, which enabled us to analyse and evaluate the scholarly output in this field. Additionally, we created a scientific map to visualise the thematic relationships among the documents and identify the main areas of research focus. The implementation of bibliometric techniques furnished us with a quantitative means to evaluate the calibre and significance of the scholarly output. The creation of a scientific map aided us in visualising the research focus areas, which allowed us to recognise the main topics and areas that necessitate further exploration. Additionally, we conducted a content analysis of the various sources, including academic papers, books, and conference proceedings, to achieve a comprehensive understanding of the research landscape within this domain.

Our analysis adopted a multidisciplinary perspective, allowing us to explore various dimensions of the research question. It is worth noting the scarcity of literature on this topic. The specific categories in the WoS included economics, environmental sciences, environmental studies, international relations, and law. Our analysis revealed that several categories, such as management and business, have not received adequate attention from researchers. This finding highlights the need for further research in these

[42] C. DAUGBJERG, A. SWINBANK, *Globalization and New Policy Concerns: The WTO and the EU's Sustainability Criteria for Biofuels*, in *Journal of European Public Policy*, 2015, 22, pp. 429-446.

areas, particularly in understanding how EU trade policies impact firms and their sustainability practices.

Using the scientific map, we identified eight main themes in our literature review objectively. The map representation showed four quadrants, each with its own implications. In the first quadrant, we found the motor themes in the literature, such as "carbon" and "intensification." In the second quadrant, we found highly developed and isolated themes, such as "strategy" and "impact assessment." In the third quadrant, we identified emerging or declining themes, and our analysis identified "governance" as an emerging theme, not a declining one. Finally, in the fourth quadrant, we found the basic and transversal themes, such as "growth" and "US." At the intersection of the abscissa and the ordinate, we found the "politics" theme. For each of these themes, our research presented the thematic networks, i.e., all the sub-topics on which each of these themes was developed.

As discussed previously, the scientific map generated in our study allowed us to identify the various research themes explored by scholars and their relative significance in advancing the field. Additionally, the map facilitated the identification of significant gaps in the literature, particularly the lack of research on the impact of EU trade policies on firms and their ability to achieve sustainability objectives. Our study underscores the importance of addressing this research gap by deepening our understanding of how EU trade policies affect firms at the microeconomic level. This focus is crucial since businesses play a vital role in implementing trade policies, and their engagement is essential in achieving SDGs. By addressing this research gap, scholars can gain valuable insights into the effectiveness of different policies and their implications for business practices. These insights may inform policy design, enabling policymakers to create more effective and targeted trade policies that promote sustainable development. Additionally, this research may also guide businesses on adopting sustainable practices, enhancing their capacity to contribute to the sustainable development agenda while maintaining long-term economic viability.

It is important to acknowledge the limitations of our research, which stem from both the techniques employed and the database selected to identify the study documents. While the WoS is a prominent and widely used database in academic research, it is not the sole option available, and therefore, we recommend that future studies replicate our approach using alternative databases, such as Scopus. Furthermore, our study relied on the number of citations received by different documents to identify relevant publications. However, it is crucial to note that the number of citations, while an important indicator, may be subject to biases. For instance, recent publications may require more time to accumulate sufficient citations to have a significant impact on the analysis. Additionally, the analysis does not differentiate between citations that support the quality of the articles and those that result from criticisms of the same. Nevertheless, we attempted to mitigate these limitations through a thorough examination of each article that comprised our literature review.

Finally, researchers may consider supplementing our bibliometric analysis with other methods, such as expert interviews and surveys, to gain a more comprehensive understanding of the research landscape. Such an

approach may help to triangulate the findings and reduce the potential for biases resulting from any single method. Overall, while our study has limitations, we believe that it provides valuable insights into the state of the literature on EU trade policies and their relationship with sustainability, and we hope that our recommendations will guide future research in this field.

GENDER EQUALITY IN INTERNATIONAL TRADE

LIDIA MORENO BLESA

TABLE OF CONTENTS: 1. Gender perspective. – 2. Gender in International Trade Law – 3. International relocation of companies. – 3.1 Gender border adjustment mechanism. – 3.1.1 GATT's exception in article XX(a). – 3.1.2. GATT's exception in article XX(b). – 3.2. Civil liability of companies about violations of human rights and jurisdiction over individual contracts of employment. – 4. Gender Equality in the European Union and in the Council of Europe. – 5. Final Remarks.

***ABSTRACT**: The abstract of your contribution: The gender perspective is related to discrimination, inequality and exclusion of women in any human activity, while creating the conditions for change to advance the construction of equality. There is another approach to this matter based on equality between men and women, which implies that the interests, needs and priorities of both women and men are taken into consideration, recognizing the diversity of different groups of people. Equality between women and men is seen both as a human rights issue and as a precondition for, and indicator of, sustainable people-centered development. This last topic is the most important now because international law provides ways to protect it in public and private jurisdiction. The public measure will be carried out through an economic mechanism at the border, while the private ones will be exercised through a civil liability action. International trade law and private international law will be linked, since both regulations pursue the same objective, which is gender equality.*
***KEYWORDS:** gender equality, International Trade Law, Private International Law.*

1. Gender perspective

The gender perspective could be understood as a conceptual tool that allows to analyze discrimination, inequality and exclusion of women in any human activity, at the same time, it creates the change conditions to advance in the construction of equality. Its application in labour markets is producing important benefits to help in the equalization of people when imbalances between them are evident. Thus, for example, reference could be made to work-life balance plans, leave due to the birth or adoption of children, or positive discrimination to favor socially disadvantaged or historically excluded groups. Differences could be found between two related concepts, that is, gender and equality between women and men (gender equality)[1]. The former refers to the social attributes and opportunities associated with being

[1] Available online: https://www.un.org/womenwatch/osagi/conceptsandefinitions.htm (Accessed on 21 June 2023).

male and female and the relationships between women and men and girls and boys, as well as the relations between women and those between men. These attributes, opportunities and relationships are socially constructed and are learned through socialization processes. Gender determines what is expected, allowed and valued in a woman or a man in a given context. In most societies there are differences and inequalities between women and men in responsibilities assigned, activities undertaken, access to and control over resources, as well as decision-making opportunities. Gender is part of the broader socio-cultural context. Other important criteria for socio-cultural analysis include class, race, poverty level, ethnic group and age.

On the other hand, gender equality refers to the equal rights, responsibilities and opportunities of women and men and girls and boys. Equality does not mean that women and men will become the same but that women's and men's rights, responsibilities and opportunities will not depend on whether they are born male or female. Gender equality implies that the interests, needs and priorities of both women and men are taken into consideration, recognizing the diversity of different groups of women and men. Gender equality is not a women's issue but should concern and fully engage men as well as women. Equality between women and men is seen both as a human rights issue and as a precondition for, and indicator of, sustainable people-centered development. Gender equality is therefore an issue which must be promoted in all areas, including international economic law. Indeed, international economic law must be cognizant that liberalization may not necessarily improve welfare. Instead, it can produce and re-produce inequality and social disparities while simultaneously expanding the wealth of others. Because women occupy different roles in society and because they often have differential access to power and resources than men, their experiences with the effects of international economic law can be vastly different than that of men[2]. This last concept is the most interesting for us, because it is recognized as a human right and can be claimed before the competent bodies, both public and private.

In any case, there are others approaches to the gender perspective. For example, the ecofeminism that it represents the union of the radical ecology movement and feminism. It appears as a form of contextual thinking, pluralistic and holistic. Ecofeminism consists in rejecting a hierarchical view of the world, focusing on the relationship between the entities of the systems rather than emphasizing the importance and diversity of individuals and their supposed position in the scale of being. Every living being deserves the same ethical respect since it occupies the same position within the system: humans and non-humans are equally important. There are no dichotomous alternations such as male or female because the importance of the whole and the interdependence of its parts are emphasized. In fact, there are not differences, as there is variety and richness[3]. Ecofeminism also focuses attention on approaches to work with the potential to re-constellate labour in

[2] B. CHOUDHURY, "Rights of women", *Elgar Encyclopedia of International Economic Law,* Edited by Thomas Cottier and Krista Nadakavukaren Schefer, 30 Nov 2017.

[3] L. VALERA, "Françoise d'Eaubonne and ecofeminism: rediscovering the link between women and nature", in D. Vakoch and S. Mickey, *Women and nature?: Beyond dualism in gender, body, and environment,* Routledge, London, 2018, p. 15.

fairer and more sustainable ways. Ecofeminist organizing can be based on the satisfaction of human needs through the creation of use-values, rather than the purchase of commodities. This will, it is hoped, encourage new relationships with nature based on respect, cooperation and reciprocity, reliable community based on mutual respect between men and women, grassroots democracy, and synergistic approaches to problem solving rooted in the understanding that everything is interconnected[4].

The last idea suggests that normal contemporary organizational forms and practices are embedded within patriarchal structures that are responsible for chronic undervaluation of women. But gender approach as a human right is the most important point[5], because international law provides ways to protect it both public and private. The public measure will be carried out through an economic mechanism at the border, while the private ones will be exercised through a civil liability action. International trade law and private international law will be linked, since both regulations pursue the same objective, which is gender equality. Companies will be the receiver of both measures and must be responsible for the results of their application. Women will be the beneficiaries of the new rule of law, which eliminates discriminatory treatment from a gender perspective. The goal is to establish legal boundaries on production methods that rely on women's labor to achieve higher profits. In all the measures that are carried out there must be a single purpose that must attend to considerations of justice. Regulation must eliminate existing legal inequalities and transform reality to avoid economic dysfunctions between men and women, to ensure that everyone has the same opportunities regardless of their gender.

2. Gender in International Trade Law

International trade law has a gender dimension, which depends on women's role in the economy. Gender issues are increasingly being taken into consideration in trade policymaking. There is an increase in the number of trade agreements with gender-equality-related provisions or chapters, and more countries and regions are introducing gender mainstreaming tools in their trade policy processes. There are also developments within the multilateral trading system toward greater recognition of gender issues in trade policymaking[6]. Because of the work carried out by the international lawmakers, the existence of gender chapters and provisions in free trade

[4] A. YOUNG AND S. TAYLOR, "Organizing and managing ecofeminism. Material manifestations of spiritual principles in business", in M. Phillips y N. Rumens, *Contemporary Perspectives on Ecofeminism*, Routledge, London and New York, 2016, p. 215.

[5] All human rights impose a combination of negative and positive duties on states and include an obligation of conduct and an obligation of result. The former requires action reasonably calculated to realize the enjoyment of a particular right. The latter requires states to achieve specific targets to satisfy a substantive standard. C. DOMMEN, "On How the Human Rights Framework Can Contribute to Inclusive Trade Agreements", *Journal of World Trade*, 57, no. 1, 2023, p. 159.

[6] UNCTAD, *Linking Trade and Gender towards Sustainable Development. An Analytical and Policy Framework*, UNCTAD/DITC/2022/1, 20 February 2023, p. 67.

agreements and regional trade agreements is confirmed. For example, gender equality is integrated into trade agreements through non-discrimination provisions in employment and through International Labour Organization (ILO) Conventions 100 and 111. By adopting a gender approach to international economic law, states can ensure that the transaction costs of liberalization do not fall below the minimum standards that human rights law prescribes for a life in dignity. Linkage of these issues is, thus, one way both to minimize the negative externalities that liberalization can incur and prevent these externalities from hampering the overall success of liberalization efforts[7].

Gender provisions have been integrated into trade agreements vigorously, but there is no a trade and gender agreement or the mandate to negotiate it within the WTO. However, the Joint Declaration on Trade and Women's Economic Empowerment on the Occasion of the WTO Ministerial Conference in Buenos Aires in December 2017[8] has represented a major push by WTO members. It has been endorsed by 127 WTO members and observers. Those who have endorsed the declaration agree to collaborate on making trade and development policies more gender-responsive by taking the following steps: (i) sharing experiences relating to policies and programmes to encourage women's participation in the economy, (ii) sharing best practices for conducting gender-based analysis and monitoring of trade policies, (iii) sharing methods and procedures to collect gender-disaggregated data, using indicators, and analysing gender-focused statistics related to trade, (iv) working together with the WTO to remove barriers for women's economic empowerment and increase their participation in trade, and (v) ensuring that Aid for Trade supports tools and know-how for analysing, designing and implementing more gender-responsive trade policies. The Buenos Aires Joint Declaration is the first document fully devoted to gender issues in the WTO framework, and it marked a decisive step forward in putting trade and gender on the international trade agenda. It is significant in that it reflects that the trade community has moved from its long-standing approach that trade is "gender-neutral" to formally recognizing that trade has a different impact on men and women and gender inequalities.

Another important step in the feminization of international trade came from the WTO, with the emergence of an Informal Working Group on Trade and Gender (The IWGTG). The IWGTG brings together WTO members and observers seeking to intensify efforts to increase women's participation in global trade. It was established on 23 September 2020 as a follow-up to an initiative launched at the Ministerial Conference in Buenos Aires in 2017, known as the Joint Declaration on Trade and Women's Economic Empowerment. The Group aims to share best practice on removing barriers to women's participation in world trade, to exchange views on how to apply a "gender lens" to the work of the WTO, to review gender-related reports produced by the WTO Secretariat, and to discuss how women may benefit

[7] B. CHOUDHURY, *Public Services and International Trade Liberalization: Human Rights and Gender Implications,* Cambridge University Press, 2012, p. 25.

[8] Available online: https://www.wto.org/english/thewto_e/minist_e/mc11_e/genderdeclarationmc11_e.pdf (Accessed on 20 June 2023).

from the Aid for Trade initiative. Participation in this Informal Working Group is open to all WTO members. The initiative is chaired by Botswana, Iceland and El Salvador[9]. The Working Group's Work Plan is based on four pillars: (i) sharing best practices and exchanging views on removing trade-related barriers to women's participation in trade, (ii) considering the scope for a "gender lens" to be applied to the work of the WTO, (iii) reviewing analytical work undertaken by the WTO Secretariat, (iv) contributing to the Aid for Trade work programme as a means of increasing women's participation in trade.

The IWGTG formulated a Joint Ministerial Declaration on the Advancement of Gender Equality and Women's Economic Empowerment within Trade[10]. The declaration was not tabled at the 12th Ministerial Conference of the WTO, however, the three co-chairs of the Informal Working Group (Iceland, Botswana, and El Salvador) issued a statement stressing that gender-responsive trade policies can contribute to women's economic empowerment which in turn is essential to support sustainable peace and development. The co-chairs reported that members in the Informal Working Group have begun implementing the first work plan on trade and gender at the WTO, based on four pillars: working on gender-responsive trade policy and sharing experiences; applying a gender lens to the work of the WTO; reviewing and discussing gender-related research and analytical work; and exploring how best to support the delivery of the WTO Aid for Trade work programme. In addition to these four pillars, the co-chairs also intend to focus on issues related to the collection of data in trade broken down by gender, an area which needs further understanding and knowledge.

The WTO provides the rule of law for the international trading system. It is crucial for the functioning of the global trading economy[11]. Multilateral rule of law is vital for the global economy and can also contribute to gender equality, opening the way to job opportunities and better salaries, training and, ultimately, the independence of women since their situation is especially vulnerable to changing economic circumstances[12]. One of the most obvious results of trade liberalization and the restructuring of production relations worldwide has been the "feminization of the workforce", that is, increased participation of women in paid employment in jobs formerly occupied by men. Globalization has made corporations recognize that they can decrease wages and increase labour force control in an increasingly competitive international environment by taking advantage of traditional patriarchal

[9]Available online: https://www.wto.org/english/tratop_e/womenandtrade_e/iwg_trade_gender_e.htm (Accessed on 28 June 2023).

[10]Available online: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN22/7.pdf&Open=True (Accessed on 20 June 2023).

[11] ANNE O. KRUEGER, *International trade. What everyone needs to know,* Oxford University Press, 2020, p. 294.

[12] C. OTERO GARCÍA CASTRILLÓN, "Asimetrías y dependencias en la regulación del comercio internacional actual", in J.P. Pampillo Baliño and S. Botero Gómez (Coord.), *Justicia social global. Perspectivas, reflexiones y propuestas desde Iberoamérica,* Tirant lo Blanch, México, 2022, p. 347.

controls over women across the globe[13]. Regarding the need to include the addition of an explicit social clause of the WTO agreements that would allow member states to refuse trade benefits to states that violate fundamental labor standards[14], the inclusion of a gender clause could also be considered. Globalization is not only an economic and technological but also a legal phenomenon. The universal recognition of human rights as part of general international law requires universal rules which, like the WTO guarantees, protect also economic and legal freedom and non-discrimination across frontiers and access to judicial settlement of disputes at the national and international levels[15]. In this sense, the Preamble to the WTO agreement requires that relations in the field of trade and economic endeavor should be conducted with a view to 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.

The entire WTO ecosystem requires that members of the international organization comply, in good faith, with their human rights obligations and with their obligations of trade liberalization at the same time without letting a conflict arise between the two sets of legislation. For this reason, the WTO provisions would be interpret taking into account all the relevant international obligations of the disputing states. The flexibility of many of the WTO obligations, including article XX of GATT, allows that WTO members can simultaneously respect both their human rights and their WTO rights and obligations[16]. Therefore, there is enough rule of law in the WTO system to prevents States from engaging in a "race to the bottom" to implement policies that attract investment at a cost to individuals. Indeed, the WTO framework encourages trade while recognizing the impact on people. The overlap in objectives requires the development and implementation of trade regulation with regard to international human rights, although only to the extent necessary within the discrete scope of the trade framework, that suggesting a limited role by trade law in terms of a form of protection for human rights[17]. In such a way that gender equality, as a fundamental right that informs the rest of the legal system, including the rules of the WTO, stands as the ultimate limit for the correct application of free trade legislation.

Another important achievement in the international trade law to protect the equality of men and women is the adoption of a Global Agreement on Trade and Gender, signed by Canada, Chile and New Zealand on August 4,

[13] L. MCDONAL, "Trade with a female face. Women and the new international trade agenda", in *Global Trade and Global Social Issues,* edited by Annie Taylor, and Caroline Thomas, Taylor & Francis Group, 1999, p. 56.

[14] V.A. LEARY, "The WTO and the Social Clause: Post-Singapore", *European Journal of International Law,* vol. 8, no. 1, 1997, p. 119.

[15] E. PETERSMANN, "The WTO Constitution and Human Rights." *Journal of International Economic Law,* vol. 3, no. 1, March 2000, pp. 24 and 25.

[16] G. MARCEAU, "WTO Dispute Settlement and Human Rights", *European Journal of International Law,* Vol. 13, Nª 4, 2002, p. 813.

[17] L. YARWOOD, "Trade law as a form of human rights protection?", *Nujs Law Review,* Vol. 3, Issue 1, 2010, pp. 30 and 31.

2020[18]. The three States Partners established the Inclusive Trade Action Group (ITAG) to work together to help make international trade policies more inclusive in order to ensure that the benefits of trade and investment are more broadly shared. This can have a positive impact on economic growth and help to reduce inequality and poverty. It can also help to maintain support for trade which is very important for countries that are dependent on trade for their prosperity. The Agreement is not linked or connected to a specific trade agreement and is therefore open to signing by any interested economy. On October 6, 2021, within the framework of the OECD ministerial meeting, Mexico signed on to the Global Trade and Gender Agreement. In June 2022, Colombia and Peru joined the Global Trade and Gender Agreement. On May 15, 2023, Costa Rica and Ecuador joined the Global Trade and Gender Arrangement and the Inclusive Trade Action Group. The Global Agreement is designed to remove barriers that women have when they participate in international trade, in addition to proposing various cooperation activities.

In order to remove barriers that women face in international trade, the general dispositions in article 2 of the agreement stablishes four goals, which are the following (a) The Participants will promote mutually supportive trade and gender policies in order to improve women's participation in trade and investment and in the furtherance of women's economic empowerment and sustainable development. (b) Each Participant will work towards increasing women's participation in trade and investment. (c) Each Participant will enforce its laws and regulations promoting gender equality and improving women's access to economic opportunities. (d) The Participants recognise that it is inappropriate to encourage trade and investment by weakening or reducing the protection afforded in their respective gender equality laws and regulations. Also, there is a strong commitment about discrimination in the workplace in article 6, because the Participants support the goal of promoting gender equality in that site. In relation to cooperation activities, article 9 stablish seventeen areas of joint activity that reveal an ambitious work program[19]. However, despite representing a strong political commitment and

[18] Available online: http://www.sice.oas.org/TPD/GTGA/GTGA_e.asp (Accessed on 29 June 2023).

[19] The Participants may cooperate in the following areas: (i) developing programmes to promote women's full and equal participation, empowerment and advancement in society by encouraging, valuing and recognising women's unpaid care work, capacity-building and skills enhancement of women including at work, in business, and at senior levels in all sectors of society (such as on public and private boards); (ii) improving women's access to participation, leadership and education, in particular in fields in which they are traditionally underrepresented such as science, technology, engineering, mathematics (STEM), as well as innovation, e-commerce and any other field related to trade; (iii) promoting financial inclusion and education as well as access to financing and financial assistance, including trade financing; (iv) promoting business development services for women and programmes to improve women's digital skills and access to online business tools; (v) enhancing women entrepreneurs' participation in government procurement markets; (vi) advancing women's leadership and developing women's networks; (vii) developing initiatives to promote gender equality within enterprises; (viii) fostering women's participation in decision-making positions in the public and private sectors; (ix) fostering women's entrepreneurship, including activities to

goodwill on behalf of the participants, it is not a binding instrument nor is subject to dispute resolution mechanism. Without a strong system for resolving gender equality conflicts, the rules in this matter could be seen as a weak paper. In this context, there must be a process to litigate breaches of the agreement, that can be triggered easily and quickly. But there are still no adjudicating bodies in the Global Agreement on Trade and Gender, so there is still a long way to go in this issue, but the expectations seem to be hopeful.

3. International Relocation of Companies

Currently, there is a trend to evade the application of the law by the international relocation of companies, what is a consequence of the globalization issues. These phenomena, which economically can bring high benefits to the companies that practice them, from the perspective of the values necessary to protect the equality of people, can receive a less positive approach. We are referring, for example, to merchandise trade coming from countries where equality between women and men in labour markets is devoid of adequate legal guarantees. What territorially in a certain country may be legal and in accordance with the law, in others it raises discrepancies that may need the corresponding legal corrections. Therefore, globalization takes away national sovereignty, giving more power to multinational companies. In this scenario, there are those who see positive benefits point to the huge expansion in wage employment of women in export industries in developing countries. On the other hand, several women's groups and researchers say that the search for greater flexibility and lower costs as firms compete in the global economy has led to the exploitation of cheap female labor in developing countries, with no increase in their welfare[20].

For the case that concerns us now, there could be situations in which the product in question has been manufactured by women with much lower wages than their male counterparts or with the impossibility of enjoying maternity leave. In modern value chains, men are concentrated in higher status, more remunerative contract farming since they generally control household land and labour, while women predominate as wage labourers in agro-industries. Women workers are generally segregated in certain nodes of the chain (e.g., processing and packaging) that require relatively unskilled

promote the internationalisation of small and medium sized enterprises (SMEs) led by women and the integration of women in the formal sector of the economy; (x) developing trade missions for businesswomen and women entrepreneurs; (xi) advancing care policies and programmes with a gender and shared social responsibility perspective including parenting and other family co-responsibilities; (xii) supporting economic opportunities for rural and Indigenous women in trade and investment; (xiii) enhancing the competitiveness of women-owned enterprises to allow them to participate and compete in local, regional, and global value chains; (xiv) promoting the use of diverse suppliers, including women-owned businesses; (xv) conducting gender-based analysis and monitoring the gender-based effects of trade; (xvi) sharing methods and procedures for the collection of gender statistics and sex-disaggregated data, the use of indicators, monitoring and evaluation methodologies and the analysis of gender-focused statistics related to trade; and (xvii) other areas upon which they may jointly decide.

[20] G. SWAMY, "International trade and women", *Economic and Political Weekly*, Vol. 39, Nº 45, 2004, pp. 4885-4889.

labour, reflecting cultural stereotypes on gender roles and abilities[21]. But gender outcomes in labor markets do not reflect natural or objective differences between men and women, but rather reflect the outcome of discrimination and disadvantage, and the behavioral reactions by workers and employers[22]. All of this would place the companies located in those countries where these practices are protected by law in a more competitive situation. In addition to allowing them to produce goods at costs below their normal value, which could be classified as social dumping, a greater and better capacity to meet market demands could also be verified. It is evident that in economies where the gender perspective has recognized more rights for vulnerable groups, the possibility of their leadership in the market could be reduced.

The current trend towards globalization that make an economy open to trade and investment with the rest of the world are needed for sustained economic growth. The evidence on this is clear. No country in recent decades has achieved economic success, in terms of substantial increases in living standards for its people, without being open to the rest of the world[23]. But social dumping threatens the welfare state in developing countries with lower levels of worker protection. In any case, to properly understand the meaning of social dumping, it is necessary to consider that it can be defined as the strategy geared towards the lowering of wage or social standards for the sake of enhanced competitiveness, prompted by companies and indirectly involving their employees and/or home or host country governments[24]. However, the dumping concept has been used inappropriately to refer to imports at low prices, whatever the reason for the reduction in said price. But dumping about prices regulated by Article VI of the GATT, which sanctions as unfair competition is the export of products at a price lower than their normal value, that is, the price of the product in the domestic market of the country of production[25]. Therefore, a term which is frequently used as a synonym for social dumping is "unfair competition". We define unfair competition as an unfair, unethical and often illegal attempt to achieve a competitive advantage by means of false, unethical or fraudulent trade practices. Social dumping is a form of unfair competition.

From the WTO rules, there is a social clause that allows Members to take measures against goods produced by prison labour in article XX(e) related to general exceptions of the GATT. The latter could be understood as

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[21] FAO, *agricultural value chain development: threat or opportunity for women's employment?*, 2010, Available online: https://www.fao.org/3/i2008e/i2008e04.pdf (Accessed on 21 June 2023).

[22] G. STANDING, "Global feminization Through Flexible Labor: A Theme Revisited", *World Development*, Vol. 27, No. 3, p. 583.

[23] IMF, *Global Trade Liberalization and the Developing Countries*, November 2001. Available online: https://www.imf.org/external/np/exr/ib/2001/110801.htm (Accessed on 29 June 2003).

[24] M. BERNACIAK, "Social dumping: political catchphrase or threat to labour standards?", *European Trade Union Institute*, Brussels, Working Paper, 2012, p. 6.

[25] L.M. HINOJOSA MARTÍNEZ AND T. FAJARDO DEL CASTILLO, "Los nuevos problemas del comercio internacional", in Derecho Internacional Económico, L. M. Hinojosa Martínez and J. Roldán Barbero (Coord.), Tirant lo Blanch, Valencia, 2022, p. 224.

products made under conditions of forced or compulsory labour[26]. But this measure has a complicated utility, because of the difficulties that customs authorities have in determining the conditions under which goods are produced in export countries. In any case, something needs to be done about minimum labor standards for human rights reasons and specially for gender equality. In addition, specific areas of the world, for example the European Union, can benefit from the inclusion of a social clause as they can improve their comparative competitiveness. There could be any doubt about the application of human rights inside the core rules of WTO. Under article 23 of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU)[27], panels and the Appellate Body have exclusive jurisdiction over claims arising under the WTO agreements. The interpretation given by GATT jurisprudence has been to understand that there is no basis in the DSU for panels and the Appellate Body to adjudicate non-WTO disputes, so the WTO dispute settlement system could not be used to determine rights and obligations outside the covered agreements[28].

But apart from the WTO agreements, the only laws that a panel or the Appellate Body may apply are the customary principles of treaty interpretation, as is stipulated in DSU article 3.2, which states that the DSS serves to clarify the provisions of WTO agreements in accordance with customary rules of interpretation of public international law. About the meaning of expression related to clarify the provisions of WTO agreements in accordance with rules of interpretation of public international law, the GATT jurisprudence states that this rule has received its most authoritative and succinct expression in the Vienna Convention on the Law of Treaties, within the rubric of article 31, with states the following: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. That general rule of interpretation has attained the status of a rule of customary or general international law. As such, it forms part of the "customary rules of interpretation of public international law" which must been applicable in seeking to clarify the provisions of the General Agreement and the other "covered agreements" of the Marrakesh Agreement Establishing the WTO. That direction reflects a measure of recognition that the General Agreement is not to be read in clinical isolation from public international law[29]. Therefore, the WTO law is effectively immune from, and supreme to, the great body of international law in which it is notionally embedded. There would never be an instance where an adjudicator might determine whether or not WTO law conflicted with, or was subordinate to, any other international

[26] P. WAER, “Social Clauses in International Trade. The Debate in the European Union”, *Journal of World Trade*, Vol. 30, 4, 1996, p. 26.

[27] Article 23 of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes states the following: When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding.

[28] WTO Appellate Body Report, *Mexico — Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, AB-2005-10, adopted 6 March 2006, para 56.

[29] WTO Appellate Body Report, *United States — Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, AB-1996-1, adopted 29 April 1996, p. 17.

rule, including rules of jus cogens status[30], so the human rights law could not be applicable in relation with WTO law.

However, there is another approach about the application of the law in the WTO context. The covered agreements are obviously part of the applicable law in WTO dispute settlement. But the WTO covered agreements are incomplete, and sometimes it becomes necessary to apply other international law[31]. The GATT jurisprudence reaches the same conclusion when states that customary international law applies generally to the economic relations between the WTO Members. Such international law applies to the extent that the WTO treaty agreements do not "contract out" from it[32]. The International Law Commission also support the leading role of international law in relation to the WTO law and makes a distinction between jurisdiction and applicable law. While the WTO Dispute Settlement Understanding limits the jurisdiction to claims which arise under the WTO covered agreements only, there is no explicit provision identifying the scope of applicable law. There seems, thus, little reason of principle to depart from the view that general international law supplements WTO law unless it has been specifically excluded and that so do other treaties which should, preferably, be read in harmony with the WTO covered treaties[33]. In conclusion, there are enough arguments to support the used of international law as a supplement of the WTO law and particularly in the human rights issues. This means that gender equality, as a fundamental right, can allow a measure contrary to the rules of international trade based on general exceptions, but it could be necessary to include an express reference to this in the WTO law system. Within article XX, it could be proposed to include a new general exception regarding the measures that are necessary to protect Fundamental Rights. This solution is highly essential due to the globalization and its effects, among others, on global value chains.

Globalization entails, among other consequences, the relocation of production to countries where costs are lower, which has repercussions in the reduction of wages in the least qualified sectors and the loss of importance of some sectors, such as agriculture[34]. Production in many sectors has become fragmented across multiple countries that link firms, workers and consumers around the world because of the global value chains. No longer are products simply made in one country and shipped to another for sale. Indeed, products often go through many stages, traversing several borders and adding components and value before they reach their final markets. The prominent role female workers play in many export-oriented industries integrated in global value chains shows that participation in this production system has

[30] R. HARRIS AND G. MOON, "GATT article XX and human rights: what do we know from the first 20 years?", *Melbourne Journal of International Law,* Vol. 16, 2015, pp. 9 and 10.
[31] I. VAN DAMME, "Treaty interpretation by the WTO Appellate Body", *The European Journal of International Law*, Vol. 21 no. 3, 2010, p. 647.
[32] WTO Panel Report, *Korea — Measures Affecting Government Procurement*, WT/DS163/R, adopted 1 May 2000, para 7.96.
[33] INTERNATIONAL LAW COMMISSION, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN GAOR, 58th sess. UN Doc A/CN.4/L.682, 13 April 2006, para 45 and 169.
[34] J.C. FERNÁNDEZ ROZAS, *Sistema del comercio internacional,* Civitas, 2001, p. 309.

important impacts on women and gender relations[35]. Global production network is generating increasing opportunities for employment in developing countries. This can contribute to enhancing the wellbeing of those with few or no assets other than their labour. However, the type of employment generated is sometimes worse, a large number of workers are often migrant and in many sectors include a significant proportion of women with insecure and unprotected employment[36]. All of this makes it essential to insert the social clause in the WTO law system, with a particular lens on the protection of fundamental rights. However, when it has been proposed to revive a labor rights clause in the GATT, developing countries consider this a protectionist measure and have resisted, thus blocking full consideration[37]. Therefore, it will be urgent to face the reluctance of opponents to create the best working conditions anywhere in the world and without discrimination based on gender. Only in the absence of changes that improve the human rights of women, the solution must be to implement trade restrictive measures to compensate for the lack of gender equality.

3.1. Gender border adjustment mechanism

The world is facing a profound gender approach and the discrimination perspective require a global response. The European Union's international leadership must go hand in hand with bold domestic action. To meet the objective of a gender perspective in international trade, the Union needs to increase its ambition for the coming decade and update its equality policy framework. Just the same that has happened in environmental matters, action could be taken in gender issues. About to the environment, the Commission set out a new growth strategy, in its communication of 11 December 2019[38] entitled "The European Green Deal". That strategy aims to transform the Union into a fair and prosperous society, with a modern, resource-efficient and competitive economy, where there are no net emissions (emissions after deduction of removals) of greenhouse gases (greenhouse gas emissions) at the latest by 2050 and where economic growth is decoupled from the use of resources. The European Green Deal aims to protect, conserve and enhance the Union's natural capital, and to protect the health and well-being of citizens from environment-related risks and impacts. The above is a consequence of the Paris Agreement[39], adopted on 12 December 2015 under the United Nations Framework Convention on Climate Change (the Paris Agreement), entered into force on 4 November 2016. The Parties to the Paris Agreement have agreed to hold the increase in the global average temperature well below

[35] P. BAMBER AND C. STARITZ, "The Gender Dimensions of Global Value Chains", *International Centre for Trade and Sustainable Development,* September 2016, pp. 1 and 2.
[36] S. BARRIENTOS, G. GEREFFI and A. ROSSI, "Economic and social upgrading in global production networks: A new paradigm for a changing world", *International Labour Review,* Vol. 150, Nº 3-4, 2011, p. 320.
[37] L. COMPA, "Labor rights and labor standards in international trade", *Law and Policy in International Business,* vol. 25, 1993, p. 181.
[38] 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. COM (2019) 640 final. Brussels, 11.12.2019.
[39] OJ L 282, 19.10.2016.

2 °C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1,5 °C above pre-industrial levels.

Tackling climate and other environment-related challenges and reaching the objectives of the Paris Agreement are at the core of the European Green Deal. The Union committed to reducing the Union's economy-wide net greenhouse gas emissions by at least 55 % compared to 1990 levels by 2030. The supranational International Organization has been pursuing an ambitious policy on climate action and has put in place a regulatory framework to achieve its 2030 target for greenhouse gas emissions reduction. One of the legislations implementing that target is the Regulation establishing a carbon border adjustment mechanism (the CBAM)[40]. The CBAM regulation officially entered into force the day following its publication in the Official Journal of the EU on 16 May 2023. The CBAM itself will enter into application in its transitional phase on 1 October 2023, with the first reporting period for importers ending 31 January 2024. The subject matter of the regulation is provided in article 1 and establishes a carbon border adjustment mechanism to address greenhouse gas emissions embedded in certain goods on their importation into the customs territory of the Union to prevent the risk of carbon leakage.

Regarding the operation of the CBAM, article 5 establishes an application for authorization, that's mean any importer established in a Member State shall, prior to importing goods into the customs territory of the Union, apply for the status of authorised CBAM declarant (application for an authorisation). After that, in order to import goods into the EU territory, authorized CBAM declarant will need to buy carbon certificates corresponding to the carbon price that would have been paid, had the goods been produced under the EU's carbon pricing rules. Conversely, once a non-EU producer can show that they have already paid a price for the carbon used in the production of the imported goods in a third country, the corresponding cost can be fully deducted for the EU importer. The CBAM will therefore help reduce the risk of carbon leakage by encouraging producers in non-EU countries to green their production processes[41]. At that point, and under strict conditions linked to their implementation of certain obligations and commitments by the third countries, some goods with origin in that territories could be exempted from the mechanism, as established in article 2. If that is the case, those partners should have put in place the decarbonisation measures and an emissions system equivalent to the EU's. Therefore, the goal is that the levels of climate ambition of the EU prevail against the absence of climate action in third countries.

Serious doubts are raised about the compatibility of the CBAM with the WTO. In particular, the requirement to apply for an authorization to then purchase and deliver CBAM certificates could be inconsistent with the EU's obligations under Article I (the principle of most-favored nation treatment)

[40] OJ L 130, 16.5.2023.

[41] EUROPEAN COMMISSION, Questions and Answers: Carbon Border Adjustment Mechanism (CBAM), Brussels, 10 May 2023. Available online: https://taxation-customs.ec.europa.eu/system/files/2023-06/20230602%20Q%26A%20CBAM.pdf (accessed on 10 July 2023).

and Article III (the national treatment principle) of the GATT 1994[42]. Although, at the same time, any inconsistency with WTO rules is justified based on the general exceptions provided for in Article XX of the GATT 1994, because of the environmental approach of the CBAM. However, several conditions need to be met in order for Article XX's sections (b) and (g) to be successfully invoked, including two that have a bearing on the legal implications: the need for a sufficient connection between the CBAM and its environmental objective, which is inferred from the wording "necessary to" and "relating to"; and a requirement that the measure not be applied in a manner that would constitute "a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail," which is derived from the introductory paragraph of Article XX.

In any case, the CBAM affects imports from third countries of goods, such as cement, electricity, fertilisers, iron and steel, aluminium and chemicals. At the same time, the idea that we defend is that gender equality could be included as an aspect to be considered in a new gender border adjustment mechanism (The GBAM), in which imports from third countries of certain goods[43] must pay a border compensation to prevent the risk of discrimination against women. The incompatibility with the GATT 1994 rules could be justified on the basis of the general exception provided for in Article XX of the GATT 1994, especially paragraph (a) and (b). In both paragraphs is necessary that measures adopted by the contracting parties against WTO rule of law are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade. The purpose of the GBAM would be to put a fair price on the discriminatory work carried out during the production by women of goods that are entering in the EU, and to encourage equitable industrial production in non-EU countries. There must be a clear rule of law in international trade, which avoids divergent interpretations and achieves a fair play in the liberalization of goods interchange.

3.1.1. GATT's exception in article XX(a)

In this case, the GATT agreement allows a measure against trade liberalization taken by a contracting party that is necessary to protect public morals. This concept, which is based on the idea of *ordre publique* in private international law, relates to the fundamental public policies of a society, and

[42] EUROPEAN PARLIAMENT resolution of 10 March 2021 towards a WTO-compatible EU carbon border adjustment mechanism, 2020/2043(INI), Available online: https://www.europarl.europa.eu/doceo/document/TA-9-2021-0071_EN.html (accessed on 19 June 2023). More GATT 1994 articles could be incompatible with the CBAM mechanism, such as Article XI: General Elimination of Quantitative Restrictions or Article XVI: Subsidies, among others. See, eg, B. LIM, K. HONG, J. YOON, J.-I. CHANG, I. CHEONG, "Pitfalls of the EU's Carbon Border Adjustment Mechanism". *Energies* 2021, 14, 7303, https://doi.org/10.3390/en14217303.

[43] Maybe just the products usually manufactured by women.

not merely order in the sense of civil peace and public security[44]. The exception may be invoked only where a genuine sufficiently serious threat is posed to one of the fundamental interests of society, that's mean it should be interpreted to include the emerging international public policy of human rights[45]. It may be argued that the protection of women's rights as a broader part of human rights norms and principles codified in international legal instruments recognized by WTO Members, squarely falls within the general exception[46]. Since gender equality is a fundamental right, there is no doubt that article XX(a) of GATT 1994 is applicable to eliminate the differences between men and women in international trade.

To better understand the meaning of the term public morals, it is recommended to use the GATT jurisprudence. The expression has been interpreted by the Appellate Body to denote standards of right and wrong conduct maintained by or on behalf of a community or nation[47]. Moreover, the concept of public moral has been understood in the sense that can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values[48]. This broad sense could thus encompass the possibility of measures that go even beyond the minimum rights guaranteed to women in the international human rights conventions as possibly being justifiable under the public moral exception[49]. More likely, article XX was designed to prevent countries from obtaining a comparative advantage through extreme forms of cost minimization[50]. The spend of time tends to support that economic measures are a viable alternative to the use of military force in the pursuit of human rights goals[51]. In conclusion, article XX(a) should permit a WTO Member to ban the importation of products produced in a manner violating human rights norms in order to protect the public morals of the importing Member[52]. Therefore, there are enough

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[44] R. HOWSE & M. MUTUA, *Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization,* Montreal: International Center for Human Rights and Democratic Development, Policy Paper, 2000. Available online: https://www.iatp.org/sites/default/files/Protecting_Human_Rights_in_a_Global_Economy_Ch.htm (accessed on 26 June 2023).

[45] C. MCCRUDDEN, "International Economic Law and the Pursuit of Human Rights: A Framework for Discussion of 'Selective Purchasing' Laws under the WTO Government Procurement Agreement", *Journal of International Economic Law*, Vol. 2, 1999, p. 41.

[46] R. ACHARYA ET AL., "Trade and Women - Opportunities for Women in the Framework of the World Trade Organization", *Journal of International Economic Law*, vol. 22, no. 3, September 2019, p. 330.

[47] WTO Appellate Body Report, *United States Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005, para 296.

[48] WTO Panel Report, *China Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R and Corr.1 adopted 19 January 2010, para 5.11.

[49] R. ACHARYA ET AL, *op. cit*. p. 330.

[50] E. ALBEN, "GATT and the Fair Wage: A Historical Perspective on the Labor-Trade Link", *Columbia Law Review, v*ol. 101, no. 6, October 2001, p. 1441.

[51] SUSAN S. GIBON, "International Economic Sanctions: The Importance of Government Structures", *Emory International Law Review*, vol. 13, no. 1, Spring 1999, p. 162.

[52] L. BARTELS, "Article XX of GATT and the Problem of Extraterritorial Jurisdiction. The Case of Trade Measures for the Protection of Human Rights", *Journal of World Trade*, 36 (2), p. 356.

arguments to prove the viability of a measure against trade liberalization when gender equality is threatened, because nondiscrimination between women and men is a primary human right and the indeterminate legal figure of public morality allows include women when they must be protected in international trade.

3.1.2. GATT's exception in article XX(b)

Now, the GATT agreement allows a measure against trade liberalization taken by a contracting party that is necessary to protect human, animal or plant life or health. Article XX lays out exemptions from GATT rules on environmental protection, one being when the measure constitutes unjustifiable discrimination between countries where the same conditions prevail. Of course, article XX must be considered contextually, and the notion of trade liberalization should not be applied without question[53]. The latter requires using GATT jurisprudence in order to better understand the meaning of the exception. When a State is seeking to justify a trade-restrictive measure on the grounds that it advances human rights and because is covert by article XX(b) of the GATT must prove compliance with the following two requirements: (i) That the policy in respect of the measures for which Article XX is invoked falls within the range of policies designed to protect human life or health; and (ii) the inconsistent measures for which the exception is invoked are necessary to fulfil the policy objective[54]. As regards subparagraph (i), the GATT jurisprudence consider that, inasmuch that the notion of "protection" is included, the words "policies designed to protect human life or health" imply the existence of a health risk[55]. Therefore, there must be determined, on the basis of the relevant rules of evidence, whether the product at issue poses a risk to human life or health. Once such a risk is found to exist, the objective of the measure should be assessed to determine whether the policy underlying the measure is to reduce such a risk and thus falls within the range of policies covered by general exception[56].

In the case of human rights, it is not the product that poses the risk. Instead, it may be the production process, as is the case with most labor rights, or activities entirely disconnected from the product or production process, as is the case with other human rights[57]. Therefore, the link between the product and the measure would be too weak to justify a unilateral trade restrictive measure. For example, imagine a Member justifying an import ban on textile and clothing products from Turkey by asserting that the measure protects

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[53] S. ZAKARIA, "Fair Trade for Women, at Last: Using a Sanctions Framework to Enforce Gender Equality Rights in Multilateral Trade Agreements." *Georgetown Journal of Gender and the Law*, vol. 20, no. 1, Fall 2018, p. 248.

[54] WTO Panel Report, *United States-Standards for Reformulated and Conventional Gasoline*, WT/DS2/9, adopted 20 May 1996, para 6.20.

[55] WTO Panel Report, *European Communities-Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/R, adopted 18 September 2000, para 8.170.

[56] WTO Panal Report, *Brazil-Measures affecting imports of retreaded tyres*, WT/DS332/R, adopted 12 June 2007, para 7.42.

[57] T. ERES, "The limits of GATT article XX: a back door for human rights?", *Georgetown Journal of International Law*, vol. 35, no. 3, 2004, p. 618.

human life or health because the majority of textile and clothing products manufacturers use women labor without equal treatment in relation of men. In analyzing the import ban under Article XX(b), a panel would first examine whether there is a risk. It is undisputed that women in some parts of the world live in deplorable poverty that forces them to work in appalling conditions to survive and under discriminatory measures compared with men. Endorsing women labor through the consumption of textile and clothes produced with women labor arguably threatens human life or health, by somehow "tainting" the consumer. The legal issue, however, is whether a nexus exists between the targeted product and the risk. In other words, whether Turkish textiles in and of themselves pose a risk to human life or health. A legal analysis could reveal that no causal connection exists between the targeted product, textiles from Turkey, and the risk, less protection of human life or health. But in a dynamic interpretation of the general exception, derived from the greater presence of women in specific labour activities under discriminatory measures with respect to men, it could show that the risk exists.

Therefore, it could still unclear whether the intensity of the causal link may ultimately result in the invalidation of a measure allegedly justified under Article XX GATT[58]. The existence of international conventions for the protection of the policy considered supports the existence of a risk to the extent that it shows the concern shared by several States aware of a current or potential danger. International cooperation in this sense deserves recognition, at least, of a presumption of compliance with this first requirement of Article XX(b)[59]. There is no doubt that ILO Conventions 100 and 111 show the existence of a risk in relation to women and gender equality, which must be considered in compliance with the general exception. But there is another difficult to use the general exception in this matter, because of the extraterritorial effects of the measure against international trade liberalization. The question would be whether Article XX(b) allows a WTO Member to prohibit the importation of products produced in a way that violates human rights to protect the human life or health of persons in the territory of another WTO Member? Some authors are very clear about it and establish that, unless independently harmful, any product manufactured in the context of racketeering or organized crime would have to be given the full protection of GAT'T[60]. Therefore, when human rights violations occur in the territory of another WTO Member, such as gender discrimination, article XX(b) should allow an extraterritorial protection. Supporting this approach could mean that it deals with “common, vital or important interests or values”, which would justify the invocation of Article XX[61].

There is another requirement to justify a trade-restrictive measure to covert by article XX(b) of the GATT and it refers to the criterion of the

[58] A. DESMEDT, “Proportionality in WTO Law", *Journal of International Economic Law* , vol. 4, no. 3, September 2001, p. 467.
[59] R. Mª. FERNÁNDEZ EGEA, *Comercio de mercancías y protección del medio ambiente en la OMC*, Marcial Pons, 2008, p. 173.
[60] R. HOWSE, “The World Trade Organization and the Protection of Workers' Rights”, *Journal of Small and Emerging Business Law*, vol. 3, no. 1, Summer 1999, p. 144.
[61] WTO Appellate Body Report, *European Communities - Measures Affecting Asbestos and Products Containing Asbestos, (Canada)*, WT/DS/135, adopted 12 March 2001, para 172.

necessity of the measure. The assessment of the necessity of a measure could be focused on the existence of other measures consistent or less inconsistent with the GATT 1994[62]. However, the latest jurisprudential approach of WTO agreements considerer that the word "necessary" is not limited to that which is "indispensable" or "of absolute necessity" or "inevitable", but other measures, too, may fall within the ambit of this exception[63]. As used in Article XX(d), the term "necessary" refers to a range of degrees of necessity, so not only "necessary" can be understood as "indispensable", but it can also be understood as "making a contribution to". In appraising the "necessity" of a measure in these terms, it is useful to bear in mind different aspects in the assessment. It seems that a treaty interpreter assessing a measure claimed to be necessary to secure compliance of a WTO- consistent law or regulation may, in appropriate cases, take into account the relative importance of the common interests or values that the law or regulation to be enforced is intended to protect. But there are other aspects of the enforcement measure to be considered in evaluating that measure as "necessary". One is the extent to which the measure contributes to the realization of the end pursued and another aspect is the extent to which the compliance measure produces restrictive effects on international commerce. In sum, determination of whether a measure, which is not "indispensable", may nevertheless be "necessary" within the contemplation of Article XX(d), involves in every case a process of weighing and balancing a series of factors which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports. Consequently, there are enough criteria to consider that the protection of gender equality and non-discrimination between sexes is necessary because it makes a contribution to the respect of fundamental rights as an important value that the law or regulation to be enforced is intended to preserve.

3.2. Civil liability of companies about violations of human rights and jurisdiction over individual contracts of employment

Another approach to the gender equality in international trade law could be made from the perspective of the privatization of private and international law[64]. One phenomenon is the use of private actors and private law to enforce public policies in the fundamental rights arena. For example, a state government may consider that it is more efficient to enforce the protections of gender equality not through setting government standards and establishing a gender border adjustment mechanism, but through tort action lawsuits brought by women. This is a kind of privatized law enforcement, in which

[62] WTO Panel Report, *European Communities-Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/R, adopted 18 September 2000, para 8.174.
[63] WTO Appellate Body Report, *Korea-Measures affecting import of fresh, chilled and frozen beef*, WT/DS169/AB/R, adopted 11 December 2000, para 161-164.
[64] A. MILLS, "The privatization of private (and) international law", *Current Legal Problems*, Vol. XX, 2023.

private actors are given private rights and sometimes even direct incentives (such as the award of exemplary damages) to pursue public regulatory goals. The result is an important public role of private international law, both actual and potential, in ordering the regulation of private international transactions and disputes. But there is a legal barrier related with economic self-determination, it is believed that it includes the sovereign prerogative of states to make decisions on what economic development path to pursue, including the right to take active advantage of an ability to attract investment capital through minimalist labour rights protection. It is also the case that economic policy can vary significantly from one jurisdiction to another, such that extraterritorial regulation of corporate conduct abroad is much more likely to interfere with, or pre-empt, policy choices the host state has made or has chosen not to make[65].

We can considerer a private legal relationship with a cross-border element when a company has an establishment in one state and change to another, looking for more benefits conditions. The latter can be achieved when the gender perspective allows in some countries to produce cheaper goods that are then sold at higher prices elsewhere. Many times, the manufacture of products is achieved through the violation of fundamental rights, such as the principle of non-discrimination between men and women. Therefore, gender equality should address to legally amend these unfair behaviors. From the point of view of the private international law, the place of commission of a tort is the way through courts make a determination of jurisdiction. But the effect is that disputes may be resolved far away from the economies to which they are connected and even without possibilities of being resolved because in those countries fundamental rights are not violated. To understand the latter, it should be noted that activity which takes place in a state's territory where the company is relocated may be regulated by a set of rules with values or social conditions different from those of the state of origin. Another jurisdiction to protect gender equality, but in the labour markets, is usually that of the courts for the place where the employee habitually carries out his work. This forum grant jurisdiction to courts "close to the worker's interest"[66]. But once again, the dispute remains unresolved because fundamental rights are not violated in those countries.

One approach to these issues could be to allow civil claims to be brought by foreign nationals based on internationally unlawful activities outside European Union territory, implicitly relying on a conception of universal civil jurisdiction. Leaving behind the traditional approach that links jurisdiction and territory, a broad jurisdiction is proposed with the objective, shared by the international community, to prevent or punish certain behaviors that violet human rights[67]. To give an example, it could be to include the *forum necessitatis* in the Brussels I bis Regulation, because it can provide protection

[65] C.M. SCOTT, *Torture as tort : comparative perspectives on the development of transnational human rights litigation*, Bloomsbury Publishing Plc, 2001, p. 54.
[66] A.L. CALVO CARAVACA AND J. CARRASCOSA GONZÁLEZ, *European Private International Law,* Comares, 2002, p. 342.
[67] M. REQUEJO ISIDRO, "La responsabilidad de las empresas por violación de Derechos Humanos deficiencias del marco legal", *Scientia Juris*, 2011, p. 32.

for plaintiffs in an increasingly globalized legal system[68]. This proposal guarantees the right to a fair trial of EU claimants, which is of particular relevance for EU companies investing in countries with immature legal systems[69]. Therefore, access to the courts is enabled despite not being provided for in the corresponding rules, because the contrary would give rise to an unjustified and unreasonable limitation that, assessing the circumstances of the specific case, constitutes a denial of justice[70]. The conclusion could be that a judgment denouncing a human rights violation, identifying a responsible individual, and providing reparations can go a long way toward restoring a victim's sense of justice[71]. In any case, the application of the *forum necessitatis* should be governed by the principle of reasonableness, that invites thinking about whether a multinational enterprise can insulate itself from liability by operating through a web of subsidiaries. The principle of reasonableness does not mean reciprocity, but rather of a shared approach. The shared approach is not linked to specific expressions of substantive values, but rather of a shared approach to international law, in which there is a miscellaneous approach to private international law based in reasonable expectations, genuine links, the duty to evaluate and balance, the distinction between overlap in regulation and direct conflict and between potential conflict and actual clash[72].

The conflicts of laws solutions related to civil liability of companies for behaviors against gender equality has also had a weak answer from the private international law instruments. The most obvious impact of international private rights on domestic rules of private international law is their direct application to the rules themselves. International rights place limits on the private international law rules of national systems. A conflict with international private rights could clearly arise openly, for example, when an indirect rule gives rise to the application of a law that discriminates on grounds of gender[73]. This could be happened with the *lex loci delicti commisi* when almost inevitably led to the law of the country where the human rights abuses have materialized, that is, to host State of women. In addition, an individual employment contract is governed by the law of the country in which of from which the employee habitually carries out his work in performance of the contract, so the law applicable to the relationship will be that of the countries in which the rights of women worked are not safeguard.

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[68] S. REDFIELD, "Searching for Justice: The Use of Forum Necessitatis", *Georgetown Journal of International Law*, vol. 45, no. 3, 2014, p. 908.

[69] EUROPEAN COMMISSION, Proposal for a regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast), COM (2010) 748 final, Brussels, 14.12.2010.

[70] P.A. DE MIGUEL ASENSIO, "Derechos humanos, diversidad cultural y Derecho internacional privado", *Revista de Derecho Privado,* julio-agosto 1998, p. 24.

[71] B. VAN SCHAACK, "In Defense of Civil Redress: The Domestic Enforcement of Human Rights Norms in the Context of the Proposed Hague Judgments Convention", *Harvard International Law Journal*, Volume 42, Number 1, Winter 2001, p. 200.

[72] A.F. LOWENFELD, *International litigation and the quest for reasonableness*, Clarendon Press-Oxford, 1996, pp. 229 and 230.

[73] A. MILLS, *The confluence of Public and Private international law. Justice, pluralism and subsidiarity in the international constitutional ordering of private law,* Cambridge University Press, 2009, p. 272.

A suitable tool to avoid this lack of illegality in the non-contractual obligations and in the employment contract could be the overriding mandatory provisions, that is, those related with the application of the provisions of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the non-contractual obligation or the employment contract[74]. The definition of overriding mandatory provisions could be found in the article 9 of Roma I Regulation, which says that are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation. There is no doubt that gender equality, as a fundamental right, can be understood as an overriding mandatory provision to protect women when there are insufficient safeguarding measures in the host country.

4. Gender Equality in the European Union and in the Council of Europe

Despite the United Nations (UN) has carried out important work in the protection of human rights related with women[75], attention is focused on regional instruments, both from the European Union and the Council of Europe. As regards to the first, the European Union law is an example of an adequate protection of equality between men and women. The integration law of the supranational entity protects civil, political, economic and social human rights in a more balanced way than in others international organizations. The noneconomic benefits of integration law (such as the protection of human rights and democratic peace in Europe, compulsory jurisdiction for peaceful settlement of disputes in the European Union) offer additional evidence for mutual synergies between economic integration law, human rights and social welfare[76]. In the European Union the protection of fundamental rights is guaranteed at a national level by the constitutional systems of the Member

[74] Forum mandatory rules can operate as a counter-weight, when the locus damni criterion offers pseudo-impunity for European companies acting in countries whose legal rules on civil liability are deficient. C. OTERO GARCÍA-CASTRILLÓN, "International Litigation Trends in Environmental Liability: A European Union–united States Comparative Perspective". Journal of Private International Law, Vol. 7, Nº 3, 2011, p. 569.

[75] The most important universal instrument within the UN is the Convention on the Elimination of All Forms of Discrimination Against Women New York, adopted on December 18, 1979. The Convention was the culmination of more than thirty years of work by the United Nations Commission on the Status of Women, a body established in 1946 to monitor the situation of women and to promote women's rights. The Commission's work has been instrumental in bringing to light all the areas in which women are denied equality with men. These efforts for the advancement of women have resulted in several declarations and conventions, of which the Convention on the Elimination of All Forms of Discrimination against Women is the central and most comprehensive document. To know more about this treaty, it is recommended to see this link: https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-elimination-all-forms-discrimination-against-women. (Accessed on 17 July 2023).

[76] E. PETERSMANN, "Taking Human Dignity, Poverty and Empowerment of Individuals More Seriously: Rejoinder to Alston.", *European Journal of International Law* , vol. 13, no. 4, September 2002, P. 849.

States and at EU level by the Charter of Fundamental Rights of the European Union (the Charter). Ever since the Treaty of Lisbon the Charter has the same legal value as a treaty. The principles of the free movement of workers, the freedom of establishment and the free movement of services must be tested against these fundamental rights[77]. Tittle III of the Charter is devoted to equality with two important articles in relation to gender perspective. Firstly, article 21, which includes the principle of non-discrimination and, secondly, article 23, which is related to equality between women and men. Therefore, in the EU there are enough protection, rights and justice for EU citizens. About the latter, The Court of Justice of the European Union ensures EU law is applied in the same way in all EU countries and settles legal disputes between national governments and EU institutions. In certain circumstances, it can also be used by citizens, companies or organisations to take action against an EU institution which may have infringed their rights[78].

In recently negotiate trade agreements, the European Union has included gender equality clauses. For example, in the EU-Chile Advanced Framework Agreement there will be a dedicated Trade and Gender chapter, with commitments to eliminate discrimination against women[79]. In 2017, the EU and Chile agreed to modernise the 2002 Association Agreement and replace it with a new-generation Advanced Framework Agreement (AFA) that reinforces and deepens their bilateral relationship. The negotiations between the EU and Chile reached their political conclusion in Brussels on 9 December 2022. The modernisation of the existing EU-Chile Association Agreement foresees two parallel legal instruments: on the one hand, the Advanced Framework Agreement, that will include, a) the Political and Cooperation pillar, and b) the Trade and Investment pillar (inclusive of investment protection provisions), and, on the other side, an Interim Trade Agreement (iTA) covering trade and investment liberalisation. These instruments are expected to be signed and concluded in parallel. The iTA will remain in force only until the AFA is fully ratified and enters into force[80]. The iTA, as published upon its political conclusion in December 2022, has a chapter 27 devoted to trade and gender equality with seven articles in this matter. These rules will contribute to gender equality through different ways, such as the commitment to effectively implement the Convention on the Elimination of all Forms of Discrimination Against Women. As well as the commitment not to weaken or reduce the levels of protection nor to waive or

[77] J. BUELENS AND L. MICHIELSEN, "Social dumping: a symptom of the european construction. An explanatory study of social dumping in road transport", in *From social competition to social dumping*, J. J. Buelens (Ed.) M. Rigaux (Ed.), Intersentia, 2016, p. 44.
[78] EUROPEAN UNION, Justice and Fundamental Rights. Available online: https://european-union.europa.eu/priorities-and-actions/actions-topic/justice-and-fundamental-rights_en. (Accessed on 16 July 2023).
[79] EUROPEAN COMMISSION, EU and Chile strengthen a comprehensive political and trade partnership. Available online: https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7569. (Accessed on 16 July 2023).
[80] EUROPEAN COMMISSION, EU-Chile Advanced Framework Agreement. Available online: https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/chile/eu-chile-agreement/text-agreement_en. (Accessed on 16 July 2023).

otherwise derogate from its laws aimed at ensuring gender equality or equal opportunities for women and men, in order to encourage trade or investment. Also, with priority areas for sharing of information and joint initiatives, such as policies on maximising positive impacts of women's participation in trade[81].

The Council of Europe is the continent's leading human rights organization with 46 members states, 27 of which are members of the European Union. All Council of Europe members states have signed up to the European Convention on Human Rights, a treaty designed to protect human rights, democracy and the rule of law. Within the institutional structure we highlight the European Court of Human Rights (ECHR), because oversees the implementation of the Convention in the member states[82]. Article 14 of the Convention establishes the prohibition of discrimination, that's mean, the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. Also, the Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms is an important tool in this matter, because provides for a general prohibition of discrimination. The current non-discrimination provision of the European Convention on Human Rights is of a limited kind because it only prohibits discrimination in the enjoyment of one or the other rights guaranteed by the Convention, so The Protocol removes this limitation and guarantees that no-one shall be discriminated against on any ground by any public authority. The most recent achievement of the Council of Europe on the protection of women is the gender equality strategy for the years 2018-2023, that is focusing on the following six strategic areas: 1. Prevent and combat gender stereotypes and sexism; 2. Prevent and combat violence against women and domestic violence; 3. Ensure the equal access of women to justice; 4. Achieve a balanced participation of women and men in political and public decision-making; 5. Protect the rights of migrant, refugee and asylum-seeking women and girls; 6. Achieve gender mainstreaming in all policies and measures.

To better understand the results achieved from the Council of Europe in relation to gender equality, the jurisprudence of the ECHR is the best tool on this matter. The analysis of Article 14 and sex discrimination jurisprudence showed how the Court's approach to gender equality is a comparative approach concerned primarily with the prohibition of direct discrimination[83]. But there are other types of discrimination, such as indirect and positive discrimination. The Court first expounded its approach to direct

[81] EUROPEAN COMMISSION, The EU-Chile agreement explained. Available online: https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/chile/eu-chile-agreement/agreement-explained_en. (Accessed on 16 July 2023).
[82] COUNCIL OF EUROPE, The Council of Europe in brief. Available online: https://www.coe.int/en/web/about-us/who-we-are. (Accessed on 16 July 2023).
[83] I. RADACIC, "Gender Equality Jurisprudence of the European Court of Human Rights", *The European Journal of International Law,* Vol. 19, no. 4, 2008, p. 856.

discrimination in *Abdulaziz, Cabales and Balkandali v. UK*[84], in which it was said that the advancement of the equality of the sexes is today a major goal in the member States of the Council of Europe. This means that very weighty reasons would have to be advanced before a difference of treatment on the ground of sex could be regarded as compatible with the Convention. As regards indirect discrimination, the Court gave a definition in *Hoogendijk v. Netherlands*[85] and considered that where an applicant is able to show, on the basis of undisputed official statistics, the existence of a *prima facie* indication that a specific rule – although formulated in a neutral manner – in fact affects a clearly higher percentage of women than men, it is for the respondent Government to show that this is the result of objective factors unrelated to any discrimination on grounds of sex. If the onus of demonstrating that a difference in impact for men and women is not in practice discriminatory does not shift to the respondent Government, it will be in practice extremely difficult for applicants to prove indirect discrimination. In relation to positive discrimination, the Court referred to it in *Andrle v. The Czech Republic*[86] and said that, however, it is difficult to pinpoint any particular moment when the unfairness to men begins to outweigh the need to correct the disadvantaged position of women by means of affirmative action. In conclusion, in the sphere of the Council of Europe there is broad recognition of the gender equality in its different approaches, so the law of this regional organization can be used in the protection of women.

5. Final Remarks

At present, there is no doubt that gender perspective has been considered in free trade agreements and regional trade agreements, because these legal instruments include express protection for these situations. In addition, it would be essential to regulate effective dispute resolution mechanisms to guarantee compliance with these measures, when there are breaches of the rules. Dispute resolution mechanisms would allow to achieve the Sustainable Development Goals, in particular number five, which seeks to achieve gender equality and empower all women and girls. From the perspective of WTO, the proposal could be a modification of article XX(e) of GATT and the negotiation of a separate code that deals with its practical implementation. The general exception in this case allows Members to take measures against goods produced by prison labour, but it would be possible to eliminate the mention to prisons and make a reference to the importation of goods made under discriminatory working conditions to protect women with unequal conditions to men in labour issues. Perhaps it is time to act more decisively and incorporate a gender clause in the WTO agreements. There is

[84] Available online: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57416%22]}. (Accessed on 17 July 2023).
[85] Available online: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-68064%22]}. (Accessed on 17 July 2023).
[86] Available online: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-103548%22]}. (Accessed on 17 July 2023).

no doubt that without appropriate investigative powers, the policing and enforcement of such provision would be highly problematic. But the difficulty in establishing effective mechanisms to fight against products manufactured in violation of basic labor standards cannot be an excuse to adopt measures that protect women. Quite the contrary, the existence of gender discrimination is a scourge that must be eliminated with all legal resources available.

Other resources than could be used to fight against gender discrimination in the WTO system would be the establish of a single court to interpret, apply and balance trade and human rights norms. Another measure could be that WTO adjudicators allow other international bodies to participate in dispute settlement proceedings or to include private parties whose fundamental rights have been violated. Trade and human rights must be restructured in ways that foster the more coherent creation and implementation of international law obligations into the WTO system. For this reason, article XX could be amended to include a new sub-article expressly excepting legitimate domestic human rights measures. Now the article XX(a) and (b) of GATT can be used to allow measures against free trade, when it is necessary to apply a gender perspective that avoid discrimination between men and women. Through these rules, fundamental rights can be protected, but gender equality, additionally, can be used to compensate for goods made by women because of discriminatory measures in relation with men. The promotion and protection of human rights must be the first responsibility of Governments and WTO should adopt a gender approach related to international trade.

Another important angle from which an evaluation may be made of gender equality is in relation to the private international law and fundamental rights. Conflict of jurisdictions and laws should be examined not only in terms of how it resolves disputes between the parties, but also in terms of how it allocates authority between different legal orders, and indeed beyond them. Private international law can impede access to European courts for human rights abuses committed by subsidiaries or contractors of European corporations outside the European Union. A reform of private international law instruments should allow foreign citizens to bring civil claims based on internationally illegal activities outside the EU territory, which would implicitly be warranted in a conception of universal civil jurisdiction. Also, the resolution of conflict of laws regarding non-contractual obligations and international contract of employment is governed by the legislation of the countries in which the rights of women are not safeguarded. To avoid the lack of remedies when European companies acting in countries whose legal rules on gender equality are deficient, forum mandatory rules can operate to safeguard the public interest of a country. Therefore, the nondiscrimination of women must be regulated by global rules rather than state policies, by an interest of universal justice and not by national regulation.

INTERNATIONAL LABOUR ORGANIZATION MANDATE ON GENDER EQUALITY AS A BASIC LABOR STANDARD IN EUROPEAN UNION TRADE POLICY

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ABSTRACT: *Due respect for core labour standards in international trade is a fundamental issue that has been gaining increasing political and economic relevance as the process of globalisation advances. As the WTO itself indicates, the competent organisation to determine these labour standards is the ILO, whose objective is the protection and promotion of labour rights. Therefore, in the context of international trade in general, and the trade policy of the European Union - a member of the WTO - in particular, these core labour standards must be respected. There are five such standards. In this paper we focus on one of the most important ones, which is the elimination of discrimination in employment and occupation in relation to women. There are four key ILO Conventions on gender equality, complemented by a series of recommendations and resolutions, the content of which is binding on EU Member States, insofar as they are party to them. In addition to this important normative work, the ILO has a series of mechanisms for monitoring compliance, which are also described in this study.*

KEYWORDS: *International Labour Organization, gender equality,. international trade, international conventions, monitoring mechanisms.*

1. On the importance of labour standards in international trade

The due respect of core labour standards in international trade is undoubtedly an important issue that has gained increasing political and economic relevance as the process of globalisation has progressed. And it has done so in line with the liberalisation of competition and the opening of markets at an increasingly global level. This is why this issue has become one of the most sensitive and confrontational topics, both in trade negotiations within the World Trade Organization (WTO) and in the

conclusion of regional economic integration agreements and trade agreements such as those concluded by the European Union (EU).

It is worth noting that it was in 1996 that the Organization for Economic Co-operation and Development (OECD) published a study entitled "Trade, employment and labour standards: a study on basic workers' rights and international trade"[1]. This publication was in response to the request of OECD Ministers to analyse areas that might require further progress in liberalisation and strengthening of the multilateral system, the labour standards-international trade nexus being one of them.

Since then, the international community has made significant progress in developing a consensus on the definition and recognition of a set of core labour standards. Among these advances, two are the most noteworthy in this context. On the one hand, there is the inclusion of a paragraph on core labour standards (point four) in the Declaration issued at the First Ministerial Meeting of the World Trade Organization (WTO) in Singapore in December 1996. And, perhaps even more importantly, the adoption in June 1998 of the International Labour Organization (ILO) Declaration on Fundamental Principles and Rights at Work. This Declaration was amended in June 2022 to add a new fundamental principle to the four set out in the 1998 Declaration.

This brings to five the number of fundamental principles and rights at work recognised by the ILO:

- Freedom of association and freedom of association, together with the effective recognition of the right to collective bargaining.
- The elimination of all forms of forced or compulsory labour.
- The effective abolition of child labour.
- The elimination of discrimination in respect of employment and occupation on any grounds such as gender, race, creed or nationality.
- The right to a safe and healthy working environment (incorporated in 2022).

This ILO declaration is of the utmost interest in the context under discussion for two main reasons. First, because the members of the World Trade Organization themselves have recognised it. And it should be borne in mind that all the Member States of the European Union and the European Union itself are Members of the World Trade Organization and are therefore bound in their action by what is affirmed and decided within the WTO. Indeed, as we pointed out earlier, in paragraph four on Core Labour Standards of the Singapore Ministerial Declaration, adopted on 13 December 1996, the members[2]:

- Renewed their commitment to the observance of internationally recognized core labour standards.
- Recognized that International Labour Organization is the competent body to set and deal with these standards, and affirmed their support for its work in promoting them.

[1] https://www.oecd.org/employment/emp/1888610.pdf

[2] Singapore WTO Ministerial 1996: Ministerial Declaration. WT/MIN(96)/DEC. 18 December 1996 (https://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm).

- Affirmed their belief that economic growth and development fostered by increased trade and further trade liberalization contribute to the promotion of these standards.

- Rejected the use of labour standards for protectionist purposes, and agreed that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question.

- In this regard, they noted that the WTO and ILO Secretariats will continue their existing collaboration.

But there is also another very important factor as regards the role of the ILO in this context. When we talk about human rights, and labour rights obviously are, it is absolutely necessary to insist that it is important first of all to recognise rights, because this is the starting point for their protection. But even more important is to establish mechanisms of control and guarantee that these rights are respected by States. If there are no monitoring systems, the proclamation of human rights would remain a dead letter. Along these lines, the ILO declaration establishes a dual monitoring system to promote fundamental labour principles and rights, as well as to control their due respect. These mechanisms will be discussed in more detail below.

Taking up the five labour standards mentioned, universally proclaimed by the ILO and expressly assumed in the framework of international trade by the WTO, of which the European Union is a member, as we have indicated, we are going to focus in this study on one of them. This is the fourth principle: the elimination of discrimination in respect of employment and occupation, referring in particular to the elimination of discrimination on grounds of gender.

In this regard, it should be noted that the adoption of legal measures aimed at eradicating gender discrimination is a constant feature of the international and European legal system which, unfortunately, shows that it has become a structural characteristic of our social model in general and, as far as we are concerned here, of our labour market. Indeed, discrimination in employment is a universal and constantly evolving phenomenon. All over the world, millions of women are denied access to work and training, receive low wages or are relegated to certain jobs simply because of their gender, without taking into account their skills and qualifications.

The realisation of this reality, together with a growing social pressure that considers the persistence of this situation of discrimination against women to be intolerable, justifies the special attention we devote in this paper to the important work carried out in this field by the main international organisation in the field of labour rights: the ILO.

2. ILO normative action in relation to labour standards on gender equality

The International Labour Organization has been at the forefront of the struggle for gender equality. In fact, it was the first international organization to establish the protection of women as one of its objectives from the outset. This is stated in the Preamble and in Article 1 of the ILO

Constitution of 1919 when referring to its founding mandate. This mandate has been subsequently developed through its normative action because ILO considers gender equality a critical element in efforts to achieve its four strategic objectives[3]:

- Promote and realize standards and fundamental principles and rights at work.
- Create greater opportunities for men and women to secure decent employment and income.
- Enhance the coverage and effectiveness of social protection for all.
- Strengthen tripartism and social dialogue.

Normative activity is one of the most significant functions of the ILO in its work to protect social and labor rights[4]. This is an essential action for the Organization's objectives to be effectively achieved. Through the conventions and recommendations – which are the main legal instruments of the Organization[5]-, the ILO establishes the normative parameters intended for application by the Members in their respective internal legal systems with a view to guaranteeing social rights and fundamental freedoms at work. In relation to the obligations that they generate for the Member States, conventions and recommendations have a common obligation: they must be submitted to the appreciation of the competent national authority. Regarding their content, the agreements and recommendations refer, to a large extent, to the guarantee of decent working conditions and the protection of the fundamental rights and freedoms of workers, composing as a whole the broad role of social-labor rights.

2.1. The key gender equality Conventions

The ILO has so far adopted 190 Conventions[6]. The key gender equality Conventions of International Labor Organization are four[7]:

Convention No.100 about Equal Remuneration, June 6, 1951. This fundamental Convention requires ratifying States to ensure that the principle of equal remuneration for men and women workers for work of equal value is applied to all workers. The term remuneration includes the ordinary, basic or minimum wage, as well as any other emoluments in cash

[3] https://www.ilo.org/gender/Aboutus/ILOandGenderEquality/lang--en/index.htm

[4] The competence to elaborate and approve the normative instruments is of the International Labor Conference.

[5] The main difference between conventions and recommendations is of a legal nature. The conventions are international treaties and, therefore, contain mandatory rules for the States that ratify them.

[6] See https://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm

[7] See https://www.ilo.org/gender/Aboutus/ILOandGenderEquality/lang--en/index.htm#:~:text=ILO%20mandate%20on%20gender%20equality&text=The%20four%20key%20ILO%20gender,and%20Maternity%20Protection%20Convention%20(No

or in kind paid to the worker for his or her employment by the employer, directly or indirectly. We return to this standard below.

Convention No.111 about Discrimination (Employment and Occupation), June 4, 1958. This fundamental Convention defines discrimination in Article 1 as "any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation"[8]. The Convention also provides for the possibility of extending the list of prohibited grounds after consultation with representatives of workers' and employers' organisations and relevant bodies. It should be noted that, as noted by the ILO, national laws have in recent years included a wide range of additional prohibited grounds of discrimination. These include sexual orientation and gender identity, but also actual and presumed AIDS, age, disability, or nationality. The Convention covers discrimination in relation to access to education and vocational training, access to employment and to certain occupations, as well as in respect of conditions of employment. It also requires ratifying States to formulate and pursue a national policy which promotes, by methods which are appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation with a view to eliminating any discrimination in respect thereof. Such policies and the measures taken in pursuance thereof should be continually evaluated and reviewed to ensure that they remain appropriate and effective.

Convention No. 156 about Workers with Family Responsibilities, June 3, 1981, and accompanying Recommendation No. 165. The Convention requires ratifying States to include, among their national policy objectives, measures to enable persons with family responsibilities who are engaged or wish to engage in employment to exercise their right to do so without discrimination and, as far as possible, without conflict between their family and professional responsibilities. The aim is to create effective conditions for achieving equality of opportunity and treatment between men and women workers. It also requires States to take into account the needs of workers with family responsibilities in the planning of local or regional communities and to develop community services for this purpose.

Convention No. 183 about Protection of the Maternity, May 30, 2000 and its related Recommendation No. 191. This Convention constitutes one of the most notable advances in maternity protection in the labour sphere, by extending coverage to all employed women, regardless of their occupation or type of establishment, including those who perform atypical forms of dependent work, and often do not enjoy any protection whatsoever. Given its importance and the new features it introduces, we will analyse it in more detail below.

[8] See https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_Ilo_Code:C111

From the perspective of gender equality at work, other Conventions should also be mentioned. This is the case of *Convention No.175 on part-time work* of 1994 and *Convention No.189 on domestic workers* of 2011. On the other hand, other Conventions should be subject to an updated reading: *Conventions on working time* No.1 and No.30, relative to the limitations of the working day; and the *Convention No.177 on home work* of 1996.

The mandate of the International Labor Organization on gender equality is reinforced by related *Resolutions* adopted by its highest decision-making body: the International Labor Conference. The most recent of these are the Resolution concerning Gender Equality at the Heart of Decent Work, adopted in June 2009; and the Resolution concerning the Promotion of Gender Equality, Pay Equity and Maternity Protection, adopted in June 2004. Attention to gender equality in all aspects of the technical cooperation of the International Labor Organzation is mandated by the Governing Body's March 2005 Decision on Gender Mainstreaming in Technical Cooperation[9].

On the other hand, especially relevant is the *Director-General's Circular* No. 164, published on December 1999[10], on gender equality which involved a renewal of the International Labor Organization in all areas, with a special focus on gender equality. As a result, the former Office of the Special Adviser on Women Workers' Issues was transformed and upgraded to the category of Bureau for Gender Equality which role is to advocate for gender equality throughout the organization.

2.2. A note on labour standards on pay equity

Equal pay for women and men is a universal legal principle whose normative recognition was pioneering in the struggle for gender equality, hence its early recognition by the ILO. Since 1946, it has been formulated in Article 46 of the ILO Constitution and, in 1951, it was expressly set out in Convention No. 100, as mentioned above.

In order to identify pay discrimination on grounds of sex, it would not be necessary to find a term of comparison consisting of 'equal' work, but it was sufficient for it to be 'of equal value'. In this sense, the requirement of equal pay for work of equal value is essential to address the traditional undervaluing of women's work and to combat gender segregation in the workplace. Convention No. 100 requires the adoption of measures for the objective evaluation of employment on the basis of the work involved, where the nature of such measures facilitates the application of the Convention (Art. 3). International standards on equal pay impose an obligation on States to ensure that wages are equal for work of equal value and to promote the objective evaluation of jobs on the basis of the work involved.

[9] See https://www.ilo.org/gender/Aboutus/ILOandGenderEquality/lang--en/index.htm

[10] See https://www.ilo.org/wcmsp5/groups/public/@dgreports/@gender/documents/policy/wcms_114182.pdf

The latest ILO *Global Wage Report* (2022-2023) shows how the gender pay gap persists and has even increased as a result of the COVID-19 health crisis, especially in some regions of the world[11]. The wage gap is widening as a result of the growth of atypical forms of employment. Although statistics in this regard are scarce, according to available information, the ILO states that the use of these atypical forms of employment has increased significantly over the last three decades in emerging and developed economies and that, in general, women - together with young workers and migrants - are the preferred groups in these low-wage atypical forms of work. This is indicative of a significant wage gap between atypical workers and regular workers, under identical working conditions.

In this respect, as the ILO points out in this report, the part of the gender pay gap that can be explained by women's attributes in the labour market needs to be addressed through measures such as improving women's educational status and striving for a more equal distribution of women and men across sectors and occupations. Other factors inherent to the gender pay gap should also be addressed, in particular by reducing maternity-related pay gaps, increasing wages in feminised and undervalued sectors and industries, and implementing legal frameworks and policies to promote wage transparency in companies with a view to eradicating discrimination.

2.3. Standards on maternity protection at work

Since its creation, and throughout its more than 100 years of existence, the International Labour Organization has considered the protection of maternity-related situations to be central, undertaking normative - and also political - action that has crystallised in the adoption of Conventions Nos. 3 (1919), 103 (1952) and 183 (2000). These are accompanied by Recommendations Nos. 95 (1952) and 191 (2000).

This important normative action has broadened the scope of maternity protection at work and guided state policy and action. The main concerns have been to enable women to reconcile reproductive and productive roles, and to prevent and sanction unequal treatment in employment because of their reproductive role.

In addition, the *Workers with Family Responsibilities Convention*, 1981 (No. 156), already integrates equality in the reconciliation of work and family, while questioning the traditional role of men and defending their right to care for children and the elderly. Convention No. 183 aims to avoid discrimination by transferring the financial cost of maternity benefits from employers to social security, i.e., to public funds.

In accordance with these rules, international labour standards in this area take the form of the recognition of a 14-week maternity leave, during which the worker is entitled to financial benefits to ensure that she and her child are maintained in adequate conditions of health and with an adequate standard of living. The amount of such benefits shall not be less than two-

[11]See https://www.ilo.org/travail/info/publications/WCMS_878409/lang--en/index.htm

thirds of her previous earnings or a comparable amount and shall preferably be covered by a publicly financed system. The Convention also requires ratifying states to take measures to ensure that pregnant or nursing mothers are not obliged to perform work determined to be harmful to their health or that of their child, and provides that they shall take measures to ensure that maternity is not a ground for discrimination in employment. In addition, it prohibits employers from dismissing a woman during pregnancy, or during her absence on maternity leave, or after she has returned to work, except for reasons unrelated to pregnancy, childbirth and its consequences, or breastfeeding. The woman is guaranteed the right to return to the same or an equivalent job with the same pay. In addition, the Convention grants women the right to one or more breaks per day or a daily reduction in working hours to breastfeed their child.

In 2014, the ILO published the work *Maternity and Paternity at work: Law and practice across the world*[12], a review of national maternity and paternity at work legislation and practice in 185 States, including leave, benefits, employment protection, health protection, breastfeeding at work and childcare provisions. It also analyses the statistical coverage in law and practice of paid maternity leave, as well as legal provisions for paternity, parental and adoption leave.

According to this study, it appears that virtually all States now have maternity protection laws at work and many have measures to support workers with family responsibilities, including fathers[13], in a general context of increasing work for women, growing atypical employment, an ageing population and changing family patterns. There is a progressive shift towards 14-week maternity leave in line with ILO standards: 140 States grant 14 weeks or more leave; 60 countries grant 12-13 weeks of leave which is shorter than the duration provided for in Convention No. 183 but in line with previous Conventions; only 15 per cent (27 countries) grant less than 12 weeks. The longest average compulsory maternity leave durations are in Eastern Europe and Central Asia (almost 27 weeks) and in the Developed Economies (21 weeks). The shortest regional average is in the Middle East (9.2 weeks).

As far as financial benefits are concerned, only two countries out of 185 surveyed do not provide for compulsory financial benefits during such leave: Papua New Guinea and the USA. More than 100 States (107) finance the benefits through social security, thus reducing the employer's responsibility; but in 47 countries the benefits are paid by the employer. This system where the financial burden falls on the employer increases discrimination against women. In just 21 countries - mostly in Europe - more than 90 per cent of employed women would be entitled to some form of income support for having a child. However, the study shows that in

[12] https://www.ilo.org/global/publications/books/WCMS_242617/lang--en/index.htm

[13] According to this survey, the provision of parental leave is most common in Developed Economies, Africa and Eastern Europe, and Central Asia. The length of paternity leave varies, but only five countries (Finland, Iceland, Lithuania, Portugal, Slovenia and Finland) offer leave periods longer than two weeks. In almost all countries that grant paternity leave, the father has the possibility to decide whether or not to take the leave. Such leave is only compulsory in Chile, Italy and Portugal.

more than half of the 185 countries surveyed, benefits are inadequate in terms of finance and duration.

Workers without maternity leave are predominantly self-employed workers, family workers, domestic workers (15.6 million), agricultural workers, workers in atypical employment and in small and medium-sized enterprises. Exclusions from maternity protection do not occur only in developing countries, for example, in Japan the law allows for the exclusion of part-time workers and in Canada of casual workers.

In brief, the lack of access to maternity protection is connected to the number of women in informal and atypical employment. For the approximately 830 million women workers who in practice lack sufficient coverage, especially those in developing countries, it is crucial that coverage be extended in law and practice.

3. The supervisory and monitoring mechanisms of the labour standards set by the ILO

But, as we stated at the beginning of this paper, what is really important in the framework of the protection of human rights is to have an adequate and effective system for guaranteeing them, with which to control the due respect of rights by States.

In this respect, with the aim of guaranteeing the effectiveness of its normative instruments and, with this, obtaining the practical realisation of the rights they recognise, the International Labour Organization provides in its Constitution a system for monitoring the application and compliance of conventions and recommendations that combines two mechanisms: periodic monitoring - automatic and compulsory - based on the examination of state reports; and monitoring of a quasi-contentious nature carried out on the basis of special procedures for claims or complaints against a member state.

3.1. The regular control system: state reports

The technique of regular monitoring of state reports consists of the examination and evaluation by supervisory bodies of the information submitted by states on the legislative, administrative and judicial measures they have adopted with the aim of guaranteeing compliance with and application of the rights enshrined in a treaty. In the ILO, the basis for the regular monitoring of standards lies in three obligations laid down in its Constitution: the obligation for governments to submit reports on the application of ratified conventions; the obligation to report on non-ratified conventions and on recommendations; and the obligation to report on the submission of standards to the competent national authorities.

a*) Annual report*. According to Article 22 of the ILO Constitution, each member State is obliged to submit annual reports on the measures taken to give effect to the provisions of the Conventions it has ratified.

These reports are to be drawn up on the basis of forms prepared by the Governing Body[14], including the information that it requests.

In accordance with Article 23.2 of the Constitution of the International Labour Organization, governments are required to send copies of all reports to workers' and employers' organizations. In turn, these organizations may provide comments on the implementation of the ratified conventions. Regarding the frequency, despite the initial annual provision, practical issues arising from the difficulty of compliance by countries and the immense workload for the supervisory bodies led to a relaxation of the rule, establishing longer deadlines.

Currently, the system of submitting reports is the result of a new formulation carried out by the Governing Body at its 306th meeting in November 2009. According to the new formula, reports for fundamental and governance conventions must be submitted every three years, while for other conventions, the submission is required every five years. This new system has been in effect since the 2012 reports[15].

There are two types of reports required in relation to a ratified convention: detailed reports and simplified reports. Detailed reports are drafted according to the Governing Body's report form and are required in the following cases: the year following the entry into force of the convention; upon request from the Committee of Experts or the Conference Committee; or at the initiative of the State itself when significant changes have occurred in the implementation of the ratified convention.

Simplified reports exclusively contain responses to the comments from the supervisory bodies, information on legislative changes related to the subject matter of the convention, information on the application of the convention (statistics, etc.), and observations from workers' and employers' organizations. These simplified reports must be submitted periodically (every three or five years), depending on the type of convention.

Despite this obligation, exemptions are possible in relation to certain conventions, particularly those that have been abandoned, as long as the conditions and guarantees established by the Governing Body are met[16].

b) *Reports on non-ratified conventions and recommendations*. According to Article 19, paragraphs 5 (e) and 6 (d) of the Constitution of the International Labour Organization (ILO), governments are required to inform the Director-General of the International Labour Office about the status of their legislation and state practice regarding matters addressed in non-ratified conventions and recommendations, as well as the difficulties

[14] https://www.ilo.org/global/standards/WCMS_665198/lang--es/index.htm

[15] INTERNATIONAL LABOUR OFFICE, *Report of the Committee of Experts on the application of Conventions and Recommendations (Report III - Part 1A*), Geneva, 2013, p. 18.

[16] The 25 Conventions currently considered in this category are no. 4, 15, 20, 21, 28, 34, 35, 36, 37, 38, 39, 40, 41, 43, 44, 48, 49, 50, 60, 64, 65, 67, 86, 91 and 104. The fact of setting aside some conventions has no impact on the effects of these conventions in the legal systems of the States that have ratified them. (INTERNATIONAL LABOUR OFFICE, *Informe de la Comisión..., op. cit*. p. 25).

preventing or delaying the ratification of a convention. The frequency at which such information will be demanded is determined by the Governing Body. Generally, the Governing Body annually requests States to report on certain (non-ratified) conventions and recommendations related to previously selected topics, in line with the ILO's most immediate focus.

It is worth noting that this obligation of ILO member States to provide information about the internal compliance with a convention they have not ratified constitutes a particularity of the ILO's control system, which is not found in other systems of international norms monitoring. The usual practice in the international sphere is to monitor only the treaties to which States have committed themselves, hence the importance of this mechanism.

c) *Reports on submission to competent national authorities*. Member States shall communicate to the Director-General all information regarding the measures taken for the internal approval of a convention or recommendation, as well as the information related to the authority or authorities considered competent and their decisions[17].

The need for communication regarding this internal assessment demonstrates, in particular, the International Labour Organization's concern that standards are effectively analyzed within the domestic sphere of Member States. Concerning this latter obligation, the International Labour Office usually adopts a memorandum that outlines the scope of the rule.

To carry out this normative supervision, two bodies were created within the ILO: the Committee of Experts on the Application of Conventions and Recommendations (CEACR) and the Conference Committee on the Application of Standards.

As indicated by Nicolas Valticos[18], the mere submission of reports is not sufficient as a control mechanism. It is through an effective analysis of these reports, by examining the conformity of state practices with the standards, that true control is achieved.

The Committee of Experts was established in 1926 and consists of twenty jurists with recognized technical competence and complete independence, appointed by the Governing Body for a renewable term of three years. The CEACR's role is the first step of the regular procedure. Thus, the Committee of Experts is responsible for the initial examination of the reports sent by governments. It is essential to note that, in addition to the reports submitted by the states, the CEACR can examine other sources, such as observations from workers' and employers' organizations, and related documents.

Furthermore, the Committee of Experts also has the function of monitoring complaints filed with the ILO regarding the non-compliance of a convention. The CEACR is responsible for evaluating the measures taken by the states that have been the subject of a complaint, in compliance with the recommendations given to them. In its assessments, the

[17] Article 19, paragraphs 5, "c" and 6 "c", of the ILO Constitution.
[18] N. VALTICOS, *Derecho Internacional del Trabajo*, Madrid, Tecnos, 1977, pp. 502-503.

Committee of Experts provides two types of comments: observations and direct requests. Observations are directed at specific states and address fundamental issues related to the implementation of a convention. These observations generate a request for additional information from the state and are published in the Committee of Experts' annual report. On the other hand, direct requests pertain to more technical matters or the need for further information. They are not published in the Committee of Experts' report but are sent directly to the state being analyzed by the Director-General on behalf of the CEACR.

The final outcome of the Committee of Experts' work is presented in an annual report, which consists of three parts: a general report describing the work of the CEACR and highlighting the degree of compliance with constitutional obligations by states (Part I); observations regarding specific countries, examining the application of ratified conventions, submission to competent authorities, and the monitoring of complaints filed against a particular country (Part II); and a special study on a convention or group of conventions, previously requested by the Governing Body (Part III)[19].

The *Conference Committee on the Application of Standards* is a tripartite body composed of delegates from governments, employers, and workers. This Committee examines the annual report prepared by the Committee of Experts during the sessions of the International Labour Conference. They select the comments and observations that will be subject to debate. This discussion, along with the conclusions of the Conference Committee, is published in its annual report, which includes special paragraphs highlighting cases of major concern due to serious obstacles to the implementation of conventions.

As can be seen, the periodic control system of the ILO involves a dual examination of state reports: one of a more technical nature by the Committee of Experts, and the other based on tripartite dialogue by the Conference Committee. Through this system, it becomes possible to achieve a better assessment of state practices and reach solutions and conclusions that are widely discussed both by experts in the field and by the stakeholders directly involved in the issues.

3.2. *Special procedures for breach of conventions*

In addition to the regular and automatic control of reports, the Constitution of the International Labour Organization establishes two special quasi-judicial procedures based on the submission of complaints against a Member State for a violation or lack of effective compliance with the standards provided in a ratified convention. These procedures are defined in Articles 24 and 26 of the ILO Constitution[20]. The objective of these control mechanisms is to obtain a conclusion from the Committee handling the case regarding whether there has been a violation of a ratified

[19] http://www.ilo.org/public/libdoc/ilo/P/09663/09663(2013-102-1A).pdf.

[20] There is also a specific procedure for complaints for violations of the exercise of freedom of association that was created in 1951.

convention, and if so, to recommend the measures that the infringing State should adopt.

a) Complaints or Commissions of Inquiry

The complaint against a Member State for non-compliance with a convention is regulated in Articles 26 to 34 of the ILO Constitution. According to Article 26, the following entities have standing to lodge a complaint: a Member State, the Governing Body (GB) - which can do so ex officio - or a delegate of the International Labour Conference (ILC). It should be noted that it is not necessary for the complainant to have suffered prejudice due to the violation of the convention for the complaint to be accepted.

A complaint filed by a State must be submitted to the International Labour Office, which will forward it to the Governing Body for assessment. Similarly, a complaint from an ILC delegate must be presented directly to the GB, and the procedure initiated ex officio also starts with this body. Upon receiving the complaint or identifying a violation within its own scope, the Governing Body may contact the government of the accused country, inviting it to comment on the matter. When communication is deemed unnecessary or when there is no satisfactory response from the accused State within a reasonable period, the GB may appoint a Commission of Inquiry composed of three independent members to thoroughly examine the case and prepare a report with conclusions (determination of facts) and recommendations. The establishment of a Commission of Inquiry represents the most formal procedure of the ILO and is generally initiated when a Member State is accused of committing serious and persistent violations.

In the course of its work, the Commission is free to conduct on-site visits in the accused country, hear from local authorities, unions, neighbouring countries, NGOs, and others. It is important to highlight that during the complaint analysis process, the contradictory nature of the procedure and the comprehensive defense of the involved States must be ensured, as well as the impartiality of the members of the Commission of Inquiry. The final report of the Commission is communicated by the Director-General of the International Labour Office to the Governing Body and the governments involved in the complaint, and subsequently published. After receiving the report, each of the concerned governments must inform the Director-General within three months whether they accept or reject the recommendations outlined in the report. If they do not accept the recommendations, they can opt to submit the matter to the International Court of Justice, whose decision will be final and binding.

Additionally, the ILO Constitution stipulates that in case of non-compliance with the recommendations of the Commission of Inquiry (by the State that accepted them) or with the decision of the International Court of Justice - as the case may be - the GB shall recommend to the Conference the measures it deems appropriate to secure compliance with those

recommendations. This provides a certain level of enforceability to the system, which can be implemented by the ILC.

Indeed, it is also important to mention that, in addition to the complaints regarding non-compliance with a convention that we have discussed, there is also the possibility for a Member State to lodge a complaint against another Member State for non-compliance, not with a convention, but with the obligation to submit conventions and recommendations for the consideration of competent national authorities, as provided for in paragraphs 5(b), 6(b), and 7(b)(i) of Article 19 of the ILO Constitution. In this case, the Governing Body may assess the complaint and inform the International Labour Conference of its findings when the complaint is considered justified.

It should be noted that, apart from monitoring the measures taken by the accused governments in response to a complaint, regular and standing control bodies of the ILO, particularly the Conference Committee on the Application of Standards, can also do so. Through their periodic reports, governments will have to inform about the measures taken to give effect to the recommendations made to them. This establishes a link between the complaints procedure and the regular monitoring procedure, providing greater cohesion and connection to the system of standard control.

b) Representations

Representations are filed by professional organizations of employers and workers against a State for non-compliance with an international labor convention that the State has ratified. They are regulated by Articles 24 and 25 of the ILO Constitution and by a Regulation concerning their procedure, adopted by the Governing Body at its 57th session on April 8, 1932, and subsequently amended three times, with the latest amendment made during its 291st session on November 18, 2004. The criteria for the admissibility of an organization as a complainant are very broad, essentially requiring the organization to have a professional representation, even if only informally, and to have a limited number of affiliates. This allows a wide variety of professional organizations (local, national, or international) to access the mechanism.

The representations must relate to the non-compliance with an ILO convention to which the State in question is a Party, and the non-compliance must have taken place within its jurisdiction. The non-compliance may be based on the substantial violation of one or more provisions of the convention or on the failure to adopt necessary measures for its satisfactory implementation. However, formal obligations concerning conventions and recommendations - such as the duty to submit the norms for consideration by competent national authorities within specified timeframes - cannot be the subject of a representation under Article 24 and can only be alleged by another Member State in accordance with Article 30 of the ILO Constitution.

The representations procedure consists of five phases:

1) *Receipt o*f the representation by the Director-General, who is responsible for informing the government of the accused State about the representation and immediately transmitting it to the Governing Body.

2) *Examination of admissibility*. The Governing Body's Bureau is primarily responsible for this preliminary examination, checking whether the following requirements are met:

- The representation must have been submitted in writing to the International Labour Office.
- It must come from a professional organization of workers or employers.
- It must explicitly reference Article 24 of the ILO Constitution.
- It must concern a Member State of the ILO (or a former Member still bound by the convention).
- It must refer to an ILO convention to which the accused State is a Party.
- It must specify in what sense the accused State has failed to comply with or guarantee the effective implementation of the convention within its domestic jurisdiction.

It is essential to note that the admissibility of the representation does not require the exhaustion of domestic remedies by the complainant, as is the case in some other human rights monitoring procedures. This aspect distinguishes the ILO's mechanism and contributes significantly to its accessibility and utilization. The collective representations envisaged by the ILO are complementary means of protection to national mechanisms and not necessarily a subsidiary mechanism activated only when obtaining state protection becomes impossible. After analyzing these requirements, the Bureau communicates its opinion to the Governing Body through a report. Based on this report, the Governing Body decides on the admissibility of the representation.

3) *Transmission* to a Tripartite Committee, composed of members from the Governing Body itself, with an equal number of representatives selected from the Government Group, the Employers' Group, and the Workers' Group. No nationals from the accused State or any person holding an official position in the complaining organization can be part of the Committee. The meetings are held behind closed doors, and the entire procedure is kept confidential.

4) *In-depth analysis and examination* of the representation. The Tripartite Committee is tasked with conducting a thorough examination of the representation. To achieve this, the Committee reviews the facts presented by the complaining party, the arguments indicating that the State has failed to comply with or satisfactorily implement a convention, as well as the allegations put forth by the involved government and, if applicable, other organizations (such as NGOs, public institutions, etc.). The Committee has various powers in its role, as provided for in Article 4 of the Regulation. Some notable ones include:

- The option to invite the accused government to make statements about the representation.
- The ability to request additional information from the complaining organization or the accused government.

- The capacity to urge a representative of the complaining organization to appear before the Committee and provide supplementary information orally.

The Committee is responsible for setting response deadlines for both the involved government and the professional organization, and it can extend these deadlines upon request from the parties. When the Committee invites the accused government to make statements or provide additional information, the government can choose to do so in writing or orally.

Moreover, the Committee may request a representative from the International Labour Office to visit the country of the accused State and establish "direct contacts" with authorities, institutions, and organizations.

After completing the analysis, the Tripartite Committee presents a report to the Governing Body in which it outlines its conclusions on the issues raised in the representation and formulates recommendations for the Governing Body's decision. The report serves as a comprehensive summary of the Committee's findings and serves as a basis for the Governing Body to make informed decisions regarding the representation.

5) *Examination and decision* by the Governing Body. The Governing Body has the authority to analyze the substantive issues of the representation, based on the report provided by the Tripartite Committee, and make a decision regarding the adoption of the report and its recommendations. The Governing Body can make two types of decisions:

a) Publication of the representation and, if applicable, the statements of the government, as per Article 25 of the ILO Constitution.

b) Referral of the case to a Commission of Inquiry through a complaints procedure against the implicated State, in accordance with Article 26 of the Constitution.

The publication mentioned in Article 25 serves as a form of moral censure with the aim of exerting political pressure on the State, both from other members of the Organization and from its own population, especially civil society organizations. This public disclosure can draw attention to the non-compliance issues raised in the representation and encourage the State to take corrective measures.

Additionally, if the Governing Body deems the situation serious and persistent enough, it may decide to refer the case to a Commission of Inquiry. A Commission of Inquiry is an independent body composed of three experts, and its purpose is to conduct a thorough investigation into the alleged non-compliance with the ratified convention by the State in question. This procedure is more formal and represents a significant step in the process of addressing the violation of labor standards.

Finally, according to Article 9 of the Regulation, the International Labour Office will notify the decisions of the Governing Body to both the complaining organization and the accused government. The transparency of the process ensures that all relevant parties are informed of the outcomes and actions taken by the ILO in response to the representation.

It is true that the representations mechanism within the ILO has been a significant international advancement, enabling class organizations, representing workers and employers, to internationally claim violations or unsatisfactory compliance of rights enshrined in international conventions.

However, it is essential to note that this is not an individual claim but a collective one, meaning that it is not individual individuals who can file the representation, even if they are potential victims of a violation. This is one of the major deficits in the protection of socio-economic rights compared to civil and political rights, for which the possibility of filing an individual lawsuit or complaint against a State for violation is provided.

It should be noted that this deficiency has been partially addressed by the United Nations with the adoption of the *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, New York, 10 December 2008[21], which establishes the possibility of submitting an individual communication against a State for violations of these rights enshrined in the *Covenant on Economic, Social and Cultural Rights*, New York, 16 December 1966[22].

In this regard, we must bear in mind that the Covenant on Economic, Social and Cultural Rights also recognizes a series of labor rights similar to those recognized by the ILO, grounded in gender integration and non-discrimination (Article 3). Therefore, in the event of a violation of any of these rights by a State party to the Optional Protocol, an individual complaint could be lodged against that State. It is important to highlight that nine out of the 27 States parties to this Optional Protocol are also Member States of the European Union: Belgium, Finland, France, Germany, Italy, Luxembourg, Portugal, Slovakia, and Spain[23]. This means that if any of them were to violate labor rights in relation to women, as established in the Covenant on Economic, Social and Cultural Rights, they could be subject to an individual complaint before the Committee on Economic, Social and Cultural Rights, which is the body responsible for monitoring the Covenant.

In addition to the avenue mentioned above, the possibility of filing an individual complaint for discrimination against women also exists under the framework of the *Convention on the Elimination of All Forms of Discrimination against Women*, New York, 18 December 1979, concerning States that have ratified its *Optional Protocol* (6 October 1999) [24]. All Member States of the European Union are parties to this Optional Protocol, so they could also be subject to individual claims in case of a violation of the prohibition of discrimination against women in the context of labor.

These mechanisms and avenues for individual complaints play a crucial role in ensuring accountability and promoting the protection of labor rights and gender equality within the framework of international human rights instruments.

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[21] Entry into force: 5 May 2013, in accordance with Article 18(1).

[22] For an analysis of this Protocol, see A.G. LÓPEZ MARTÍN, "La protección internacional de los derechos sociales. A propósito de la ratificación española del Protocolo Facultativo al Pacto de Derechos Económicos, Sociales y Culturales de 2008", in *Foro. Revista de Ciencias Sociales y Jurídicas*, nº 13/2011, pp.13-59.

[23] https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3-a&chapter=4&clang=_en

[24] Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women tiene 115 Estados parte (https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8-b&chapter=4&clang=_en).

4. Final assessment

It is clear from the foregoing that for the International Labor Organization, the issues related to with equal pay, with access to equal opportunities, reconciliation of work and family responsibilities, and maternity protection, must be part of the general set of policies for the promotion of gender equality.

The ILO standards on equality provide tools to eliminate discrimination in all aspects related to work and provide the foundations on which gender integration strategies must be applied in the workplace. And, as we have already mentioned, this whole body of International Law Organization regulations on gender equality must be present in the European Union's Trade Policy.

However, we cannot fail to point out that equal treatment between men and women has been a primary objective in the field of labor since the beginnings of the European Union; as shown in the Article 119 of the Treaty of Rome establishing the European Community, adopted on 1957. This article already stated that the Member States should ensure and maintain "the application of the principle of equal pay for men and women workers for equal work".

Subsequently, this principle of equality was given concrete form in various directives. An early example is Directive 76/207/EEC, which established in Article 2: "the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex, either directly or indirectly". A principle that has finally been enshrined in Article 23 of the Charter of Fundamental Rights of the European Union, which proclaims: "Equality between women and men shall be ensured in all areas, including employment, work and pay".

It is clear that in recent decades the European Union has made significant progress in the area of gender equality, which is reflected both in the legislation on equality and, also the specific measures it has adopted for the promotion of women, and in the integration of the gender perspective in all its policies, including, of course, trade policy (as set out in its Strategy for Gender Equality 2020-2025).

But we must not stop there because it is obvious that these advances are still not enough. Despite the International, European and National normative and jurisprudential work, reality continues to show statistical data that show a situation of persistent and almost systemic discrimination in all areas of social life. It is therefore necessary to continue working in the fight for women's equality in the workplace.

A NEW ERA OF RESPONSABILE TRADE? A CRITICAL PERSPECTIVE ON ENVIRONENTAL CONSERVATION, HUMAN RIGHTS, RULE OF LAW, AND DEMOCRACY AFFAIRS IN EU-AFRICA AGREEMENTS

JUAN BAUTISTA CARTES RODRIGUEZ

TABLE OF CONTENTS: 1. Introductory Issues. – 2. A look at the Cotonou and Post-Cotonou Agreements. – 3. An Examination at the Association Agreements between the European Union and African States. – 4. Concluding Remarks: Assessing the Effectiveness of the Agreements in the Areas Under Study.

ABSTRACT: *This research paper aims to critically assess the protection of the environment, the rule of law, human rights, and democracy within the trade agreements between African Union Member States and the European Union. Through this study, it is identified significant disparities in the treatment of these crucial issues across various agreements, despite their prominence in the Preamble. Some agreements lack specific provisions, even when designating these issues as 'essential elements' of the agreement. Furthermore, It's also essential to underscore the interconnectedness of these topics within the treaty content.*

KEYWORDS: *Africa, European Union, trade agreements, protection of the environment, rule of law, human rights, democracy.*

1. Introductory Issues

Defined as a «geopolitical priority» by EU institutions, Africa stands as a vast and heterogeneous continent[1]. Owing to its proximity and the intricate web of cultural, social, economic and geographical between the EU and Africa, diverse normative frameworks have been devised to govern relations between the two sides of the Mediterranean. These frameworks have yielded varying degrees of success in effectively managing their interactions.

In the context of this paper, the international organisation of the European Union takes prominence, while on the African side, the institutional focal point lies with the African Union (hereinafter referred to as AU). This international organisation comprises 55 Member States[2] and, differ from its

[1] See https://www.eeas.europa.eu/eeas/africa-and-eu_en (Accessed on 10/07/2023).

[2] The last African state to join the AU was Morocco in 2017. Although Morocco was a founding state of the Organisation of African Unity, it withdrew its membership of the OAU in November 1984 in protest at the accession of the Sahrawi Arab Democratic Republic as a full member.

predecessor, the Organisation of African Unity[3], in its objectives and purposes, which now include the protection and promotion of human rights, the rule of law and democratic principles (Articles 3.g and h; and 4.m of the Constitutive Act of the AU)[4]. Furthermore, environmental concerns hold significant importance as outlined in Article 13 of the Constitutive Act of the AU, which designates the Executive Council to coordinate and make decisions on policies relating to the protection of the environment (Article 13.1.e)[5]. Moreover, the African Charter on Human and Peoples' Rights is one of the first human rights treaties to enact the right to an adequate environment (Article 24), and the first to recognise the right to development (Article 22)[6].

In addition to this continental international organisation, several regional economic communities (RECs) have been established in Africa, with eight of them being officially recognised and maintaining relations with the African Union: the Arab Maghreb Union; the Common Market for Eastern and Southern Africa; the Community of Sahel-Saharan States; the East African Community; the Economic Community of Central African States; the Economic Community of West African States; the Intergovernmental Authority on Development; and the Southern African Development Community[7].

Taking into account the aforementioned context, and revisiting the mentioned normative frameworks, two instruments stand out prominently in EU-Africa relations: the Cotonou Agreement and the Joint Africa-EU Strategy[8]. However, for the purposes of this paper, my attention will be direct on the former. It serves as the umbrella for the various economic partnership agreements signed between the European Union and various African states. Moreover, some of these agreements are signed within the framework of some of the aforementioned regional economic communities.

Regarding the subject matter, as indicated in the title of the paper, my research will focus on the environment, sustainable development, human rights, rule of law and democratic principles. This analysis will center on exploring the interconnectedness between trade and these aspects within the diverse treaties that have been adopted. Furthermore, a critical assessment of the practical effectiveness of these agreements will be conducted[9].The

[3] The founding treaty of the Organisation of African Unity is the Charter of the Organisation of African Unity, adopted in Addis Ababa, Ethiopia, on 25 May 1963.

[4] Constitutive Act of the African Union, adopted in Lomé (Togo) on 11 July 2000.

[5] Doctrinally, it may be of interest to consult J. M. ISANGA, *The Constitutive Act of the African Union, African Courts and the Protection of Human Rights: New Dispensation*, in *Santa Clara Journal of International Law,* Vol. XI, No. 2, 2012, pp. 267-302; E. BAIMU, *The African Union: Hope for better protection of human rights in Africa?*, in *African Human Rights Law Journal*, Vol. I, No. 2, 2001, pp. 299-314.

[6] In this regard, see our work, J. B. CARTES RODRÍGUEZ, *El Sistema Judicial Africano de Protección de los Derechos Humanos. Un análisis de las demandas individuales*, Aranzadi (Estudios Aranzadi), Pamplona, 2023.

[7] A discussion of each appears in, AU, *African Union Handbook 2021*, African Union Commission & New Zealand Crown, Addis Ababa, 2021, pp. 152-167.

[8] In this regard, see https://www.consilium.europa.eu/en/policies/eu-africa/. The Cotonou Agreement is available for consultation at: https://eur-lex.europa.eu/legal-content/ES/TXT/?uri=celex%3A22000A1215%2801%29 (Accessed on 10/07/2023).

[9] Doctrinally, on the articulation of human rights clauses in trade agreements within the EU framework, see generally, S. VELLUTI, *The promotion and integration of human rights in*

correlation between human rights, the rule of law, and the consolidation of democracy has been widely acknowledged and unquestioned for several decades[10], the close relationship between the environment and sustainable development, especially with human rights, is no less so today. This has been understood in this way by international courts[11], doctrine[12], treaties[13] and official documents of a very diverse nature[14]. Likewise, due to their prominent presence in such agreements, as well as their relationship with the aforementioned matters, I will focus on issues such as education and training, terrorism and corruption. In any case, before delving into the subject matter of this paper, it is worth noting the existence of two main types of clauses in the trade agreements concluded by the European Union. Firstly, the *foundation clauses* (or base clauses), according to which «all the provisions of the agreement are based on respect for democratic principles and human rights, which inspire the internal and international policies of the parties». Secondly, since the 1990s, the *essential element clauses*, «whereby democratic principles and human rights inspire the domestic and international policies of the parties and constitute an essential element of the agreement»[15].

Having this in mind, I will proceed to discuss the Cotonou and Post-Cotonou Agreements, which will serve as a foundation for the subsequent analysis of each association agreements concluded between the European Union and the African States. The focus will be directed towards the aspects relevant to our study, facilitating a comparative analysis between the different agreements. The research will conclude with a study of the effectiveness of the agreements in the areas under analysis, as well as with some final reflections.

EU external trade relations, in *Utrecht Journal of International and European Law*, vol. XXXII, No. 83, 2016, pp 41-68; C. J. SÁNCHEZ, *EU, Trading and human rights: consistent framework?* in *The Age of Human Rights Journal*, vol. XVII, 2021, pp. 244-260; N. HACHEZ, *'Essential Elements' Clauses* in *EU Trade Agreements Making Trade Work in a Way that Helps Human Rights? KU Leuven Centre for Global Governance Studies, Working Paper*, No. 158, 2015, pp. 240-260; D. C. HORNG, *The Human Rights Clause in the European Union´s External Trade and Development Agreements*, in *European Law Journal*, vol. 9, No. 5, 2003, pp. 677-701; A. GÓMEZ COSARNAU, *El uso de la cláusula democrática y de derechos humanos en las relaciones exteriores de la Unión Europea,* in *Observatori de Política Exterior Europea Working Paper*, No. 39, 2003.

[10] Cf. e.g. Resolution adopted by the Human Rights Council 28/14, "Human rights, Democracy and the Rule of Law", 9 April 2015.

[11] Cf. e.g., Inter-American Court of Human Rights. Environment and human rights (State obligations in relation to the environment in the framework of the protection and guarantee of the rights to life and personal integrity. Interpretation and scope of Articles 4(1) and 5(1), in relation to Articles 1(1) and 2 of the American Convention on Human Rights). Advisory Opinion OC-23/17 of 15 November 2017. Series A No. 23.

[12] Cf. e.g., *Environmental protection and human rights*, D. K. ANTON, D. L. SHELTON, Cambridge University Press, Cambridge, 2011.

[13] Cf. e.g. Art. 24 of the African Charter on Human and Peoples' Rights.

[14] Cf. e.g., European Parliament resolution of 9 June 2021 on the EU Biodiversity Strategy for 2030: Bringing nature back into our lives.

[15] Cf. A. GÓMEZ CONSARNAU, *El Uso de la cláusula democrática y de derechos humanos en las relaciones exteriores de la Unión Europea*, in *Observatori de Política Exterior Europea*. Working Papers OBS, Nº. 39, p. 5, (own translation).

2. A look at the Cotonou and Post-Cotonou Agreements

As previously mentioned, the relations between the European Union and African states are currently channeled mainly through two instruments: the Cotonou Agreement and the Joint Africa-EU Strategy[16]. Focusing on the first of these, the *Partnership Agreement between the African, Caribbean and Pacific States on the one hand, and the European Community and its Member States on the other*[17], the Agreement was signed in Cotonou on 23 June 2000 and entered into force on 1 April 2003[18]. It was due to expire in 2020, but has been extended until June 2023, while the new agreement to replace it has been blocked by the Hungarian state in the Council[19]. It is also expected to remain in force at least until the provisional application of the new agreement[20].

Regarding the legal framework governing the inclusion of the aforementioned subjects during the adoption process of this Agreement by the European Union, specific reference must be made to Article 21 of the Treaty on European Union (TEU), along with provisions 209.2, 217, and 218 of the Treaty on the Functioning of the European Union (TFEU).

For its part, the Cotonou Agreement is divided into three blocks: political, development, and economic and trade cooperation. This treaty also calls for the conclusion of partnership agreements, which, in the African context, will be studied in the following section.

It should not be overlooked that already in its Preamble, the Cotonou Agreement refers to concepts such as sustainable development and poverty eradication (para. 2), economic, social, and cultural development (para. 3), peace, security and stability, respect for human rights, democratic principles, and the rule of law (para. 5). With an express mention of the treaties of the universal system enacting the rights of women, children, and refugees (para. 7), as well as the three existing regional human rights treaties: the European Convention on Human Rights, the American Convention on Human Rights and the African Charter on Human and Peoples' Rights.

Along these lines, the first article of the Agreement establishes its objectives as promoting economic, cultural, and social development, contributing to peace, security, and a democratic climate, as well as eradicating poverty. Similarly, it cannot be omitted the ninth article, entitled

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[16] For its part, "the Joint Africa-EU Strategy was adopted in 2007 as the formal path for the EU's relations with African countries. This strategy was the result of agreement reached by the African Union and the EU institutions, as well as by African and EU countries. It is implemented through regular action plans". Information available at: https://www.consilium.europa.eu/ (Accessed on: 10/07/2023).

[17] On this organisation, cf. M. CARBONE, *There is life beyond the European Union: revisiting the Organisation of African, Caribbean and Pacific States,* in *Third World Quarterly*, vol. XLII, Nº. 10, 2021, pp. 2451-2468, may be of interest.

[18] It has also been revised twice, in Luxembourg on 25 June 2005 and in Ouagadougou on 22 June 2010.

[19] See https://www.europarl.europa.eu/factsheets/es/sheet/180/africa#:~:text=Las%20relaciones%20entre%20la%20Uni%20Uni%C3%B3n,prorrogado%20hasta%20junio%20de%202023 (Accessed on: 10/07/2023).

[20] Cf. Decision No. 1/2022 of the ACP-EU Committee of Ambassadors of 21 June 2022 amending Decision No. 3/2019 of the ACP-EU Committee of Ambassadors on the adoption of transitional measures in accordance with Article 95(4) of the ACP-EU Partnership Agreement [2022/1102], para. 5.

«Essential elements and fundamental element», the first paragraph of which states that cooperation shall be aimed at achieving sustainable development centered on human beings. Article 9.2 emphasises that respect for human rights, democratic principles and the rule of law constitute an essential element of the Agreement.

Moreover, according to Article 96 of the Agreement, if particularly serious violations occur in relation to any of the three matters referred to above, «appropriate measures» may be taken by the other party in accordance with international law. This may go as far as suspension of the Agreement (Article 96.c). It is not surprising, therefore, that the doctrine has maintained in this respect that: «So far, the so-called Cotonou Agreement between the EU and the ACP countries can be said to have the most complex set of clauses ensuring human rights conditionality. Not only does it have the longest ever 'essential element' clause, it also sets up a detailed process of political dialogue around the essential elements, explicitly in order to pre-empt situations in which a party might deem it justified to activate the non-execution clause»[21].

Similarly, the aforementioned treaty addresses matters pertaining to the environment, dedicating two articles to this subject (Articles 32 and 49). While there is no explicit reference to the connection between human rights and the environment, Article 20.2 stipulates that: «systematic account shall be taken in mainstreaming into all areas of cooperation the following thematic or cross-cutting themes: gender issues, environmental issues and institutional development and capacity building. These areas shall also be eligible for Community support».

Regarding the new Agreement (Post-Cotonou Agreement), which, as previously mentioned, has not yet been signed by the Parties, places significant emphasis on all the aforementioned aspects[22]. The same statement can be made about the Regional Protocol of Africa to the Agreement[23]. In fact, reference is made to matters on which the Cotonou Agreement is silent, such as indigenous populations (Articles 9.2; 37.1; 46.3 of the Agreement, Articles 43; 44.5; 65.2 of the Protocol) or sexual and gender identity (Articles 68 of the Protocol). In addition, an entire title is devoted to human rights, democracy and governance (Part II, Title I) and the environment (Part II, Title V). The same procedure is followed in the Africa Regional Protocol (Part II, Titles III and V). Moreover, provisions such as Article 7.1 of the Post-Cotonou Agreement state more precisely that: «The Parties agree that systematic account shall be taken of the following cross-cutting themes to inform action in all areas of cooperation: human rights, democracy, gender equality, peace and security, environmental protection, the fight against climate change, culture and youth».

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[21] Cf. N. HACHEZ, *Essential Elements' Clauses in EU Trade Agreements Making Trade Work in a Way that Helps Human Rights?* in *KU Leuven Centre for Global Governance Studies, Working Paper*, No. 158, 2015, p. 90.

[22] This agreement is available for consultation at: https://international-partnerships.ec.europa.eu/policies/european-development-policy/acp-eu-partnership_en (Accessed on: 10/07/2023).

[23] The Protocol is available for consultation at: https://international-partnerships.ec.europa.eu/policies/european-development-policy/acp-eu-partnership_en (Accessed on 10/07/2023).

3. *An examination at the association agreements between the European Union and African states*

To facilitate the analysis of the agreements concerning the subjects under investigation and to conduct a comparative evaluation, it is deemed suitable to follow a chronological order based on the date of their signing[24]. In this regard, this section will begin this section by analysing the treaties adopted with Tunisia and Morocco together, as their content is virtually identical concerning the aspects of interest in our study. Thus, on the one hand, it can be referred to the *Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Tunisia, of the other part.* The agreement was signed in Brussels on 17 July 1995, and came into force since 1 March 1998. Negotiations on the modernisation of the treaty began in 2015, but have been on hold since 2019[25] . On the other hand, the *Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part*, it was signed in Brussels on 26 February 1996 and it came into force on 1 March 2000[26]. Negotiations on the modernisation of the Agreement began in 2013, but have been on hold since 2014[27].

Regarding references to the concept of human rights and democratic principles, both agreements state in their third paragraph that the treaty is adopted: «Considering the importance which the Parties attach to the principles of the United Nations Charter, particularly the observance of human rights and political and economic freedom, which form the very basis of the association».

Likewise, in the fifth paragraph of the Preamble, it can be find an express (albeit rather generic) allusion to the concept of democracy in the following terms: «Considering the considerable progress made by Morocco/Tunisia and its people towards achieving their objectives of full integration of the Moroccan economy into the world economy and participation in the community of democratic nations».

More explicitly, the second article of both agreements proclaims respect for democratic principles and fundamental human rights as an essential element. However, in the case of the Agreement with Tunisia, there is no express mention of the Universal Declaration of Human Rights: «Relations between the Parties, as well as all the provisions of the Agreement itself, shall be based on respect for human rights and democratic principles which guide their domestic and international policies and constitute an essential element of the Agreement».

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[24] On the other hand, it should be noted that for reasons of length, additional protocols to the above-mentioned agreements or other instruments adopted within the EU framework will not be included in my analysis. I therefore postpone this subject to a later publication.

[25] Cf. https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/negotiations-and-agreements_en (Accessed on 10/07/2023).

[26] Cf. https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/negotiations-and-agreements_en (Accessed on 10/07/2023).

[27] Idem.

In any case, the Agreement with Morocco specifies that such reference to human rights and democratic principles is to be understood as set out in the Universal Declaration of Human Rights. Nonetheless, the reference to «fundamental» human rights is included with the following wording: «Respect for democratic principles and fundamental human rights, as set out in the Universal Declaration of Human Rights, underpins the internal and external policies of the Community and Morocco and constitutes an essential element of this Agreement».

As is the case with the majority of the treaties under consideration for analysis, such references to human rights and democracy are only found in the preamble and, where appropriate, in the second article as an essential element of the treaty. However, any reference to them is omitted in the subsequent articles, even though they are predicated on the utmost importance of the treaty. As a limited exception to this pattern, within the Agreements currently under examination, we encounter in the Annex dedicated to the Fundamental Principles applicable to data protection in the following terms: «Derogations from the provisions of paragraphs 1, 2 and 4 of this Annex are allowed only in the cases below. Derogations from the provisions of paragraphs 1, 2 and 4 of this Annex may be allowed where provided for in the legislation of the Contracting Party and where such derogation constitutes a necessary measure in a *democratic society* and is intended to: (a) safeguard national security, public order or a State's financial interests or prevent criminal offences; (b) protect the data subjects or the rights and freedoms of others» (emphasis added).

There are also references to environmental protection. Specifically, following the order of the articles, Article 43.4 specifies that within the framework of economic cooperation, special consideration shall be given to the preservation of the environment and ecological balances. In the same vein, Article 45.b of the Agreement states that within the framework of regional cooperation, special consideration shall be given to the environment. Article 48 of the two Agreements is devoted exclusively to this subject in the following terms: «The aim of cooperation shall be to prevent deterioration of the environment, to improve the quality of the environment, to protect human health and to achieve rational use of natural resources for sustainable development. The Parties undertake to cooperate in areas including: (a) soil and water quality; (b) the consequences of development, particularly industrial development (especially safety of installations and waste); (c) monitoring and preventing pollution of the sea».

It should be noted that this is the only provision that refers to the concept of sustainable development, a term that is much more important in other agreements (cf. *ut infra*). However, there is no discernible connection, not even an incidental one, between human rights, democratic principles, peace, and stability on one hand, and the environment and sustainable development on the other.

Article 46 of both treaties is entirely devoted to cooperation between the Parties in the field of training and education. The most specific paragraph of the precept is paragraph b), which emphasises the importance of the female

population at all levels of education[28]. Furthermore, certain precepts are also devoted to cooperation about money laundering (Article 61) and drug trafficking (Article 62).

The subsequent treaty adopted was the *Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Arab Republic of Egypt, of the other part.* Signed on 25 June 2001, it has been in force since 1 June 2004[29]. Therefore, there emerges a new Euro-Mediterranean agreement, the third paragraph of the Preamble of which states that the Parties attach central importance to the principles of the United Nations Charter. With special reference to respect for human rights, democratic principles, and political and economic freedoms, which are said to constitute the foundations of the Agreement. It should be recalled that a similar tenor, as has been explained above, appears in the Preamble of the respective agreements with Tunisia and Morocco.

To make the Preamble clearer, reference should be made to its second article. This provision establishes that both the Agreement and all relations between the Parties must be based on respect for fundamental human rights and the democratic principles promulgated in the Universal Declaration of Human Rights. These aspects which, according to the last part of the precept, constitute a fundamental element of the Agreement.

However, the express mention of respect for the «fundamental» human rights recognised in the UDHR should not go unnoticed –mirroring the exact wording found in the second article of the Agreement with Morocco–. This raises the question of whether the Parties understand that *all the* human rights recognised in this instrument are fundamental or, conversely, only certain rights hold this status, requiring exclusive adherence. Moreover, it should not go unnoticed that in no other provision of the Agreement is there an express reference to the concept of human rights.

On the other hand, in article four, when specifying the areas of dialogue between the Parties, the term democracy is expressly included[30]. Dialogue which, according to Article 5, is intended to occur regularly and at different political and technical levels.

Continuing in the field of the environment, the first paragraph of Article 44 is devoted exclusively to this subject, with the following wording: «Cooperation shall aim at preventing deterioration of the environment, controlling pollution and ensuring the rational use of natural resources, with a view to ensuring sustainable development».

The second section specifies the aspects of cooperation in the field of environmental protection and sustainable development. Thus, desertification, water quality and the prevention of marine pollution, waste management and the impact of agriculture on soil and water are topics of particular importance.

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[28] Along the same lines, cf. art. 71.1.c of both agreements. The gender perspective in the trade agreements signed by the EU will be dealt with in depth in the chapter of this work written by Professor Marta Iglesias Berlanga.

[29] Cf. trade.ec.europa.eu/eu-trade-relationships-country-and-region/negotiations-and-agreements_en (Accessed on 10/07/2023).

[30] Thus, Article 4 of the Agreement reads as follows: «the political dialogue shall cover all issues of common interest, and in particular peace, security, democracy and regional development». A similar precept is not found in the Agreements with Tunisia and Morocco.

In addition to Article 44, we must also take into account two principles concerning the environment. Firstly, Article 54 stipulates that, concerning tourism, one of the main cooperation priorities will be «to ensure the maintenance of an appropriate interaction between tourism and the environment». And, on the other hand, Article 60, which in the framework of regional cooperation also states that such cooperation shall focus, among other aspects, on environmental issues. However, it is significant that, unlike other agreements that will be analysed below, references to the concept of sustainable development are scarce, to say the least. They are only to be found in the aforementioned article 44.1. Likewise, there is no link between human rights, peace, stability and the environment.

The Agreement also focuses on cooperation in the field of education and training. This is the subject of Article 42, which specifies that special attention should be paid to women's access to training in general and to higher education in particular. In this line, and also in the framework of cooperation, in Article 65, the Parties undertake to strengthen cooperation to promote the role of women in economic and social development (Article 65.b)[31].

Finally, linked to the field of education, reference should be made to Article 44.2 where, when specifying the aspects of environmental cooperation, reference is made to «environmental education and awareness-raising».

The analysis of this Agreement can be concluded by pointing out that Articles 57, 58 and 59 deal with issues that are undeniably important for the matters on which this work focus, such as money laundering, the fight against drugs and the fight against terrorism, respectively. The latter does not appear in agreements such as those of Tunisia and Morocco. On these matters, the provisions in question focus on the field of cooperation between the Parties. Thus, by way of example, about the measures taken to combat terrorism, Article 59 states that: «In accordance with international conventions and with their respective national legislations, the Parties shall cooperate in this field and focus in particular on: exchange of information on means and methods used to counter terrorism, exchange of experiences in respect of terrorism prevention, joint research and studies in the area of terrorism prevention».

The trade relations between Europe and Algeria are governed by the *Euro-Mediterranean Agreement establishing an association between the European Community and its Member States, of the one part, and the People's Democratic Republic of Algeria, of the other part.* Signed on 22 April 2022, the Agreement entered into force in 2005[32]. The third paragraph of the Preamble of the treaty expressly mentions respect for human rights, stating that the treaty is adopted: «Considering the importance which the Parties attach to the principles of the United Nations Charter, particularly the observance of human rights and political and economic freedom, which form the very basis of the Association».

Moreover, in its second article, it specifies – very similar in wording to the agreement signed with Tunisia – that respect for human rights and democratic principles constitute an essential element of the treaty, as follows:

[31] As has been explained, the gender perspective in trade agreements will be dealt with in depth in the chapter of this book written by Professor Marta Iglesias Berlanga.

[32] Cf. trade.ec.europa.eu/eu-trade-relationships-country-and-region/negotiations-and-agreements_en (Accessed on 10/07/2023).

«Respect for democratic principles and fundamental human rights, as set out in the Universal Declaration of Human Rights, underpins the domestic and international policies of the Parties and constitutes an essential element of this Agreement».

Likewise, continuing with this generic reference to respect for human rights, Article 74, which begins the chapter dedicated to cooperation actions in social affairs, includes among the priority actions «the promotion of respect for human rights in the socio-professional framework» (Article 74.2.j).

Furthermore, continuing with this article, it can be referred to the importance given in it to social rights. Thus, Article 74 recognises the importance not only of economic development, but also of social development. It goes so far as to consider respect for fundamental social rights as a «priority» and incorporates a list in this sense which includes: favouring the improvement of living conditions, job creation and the development of training, the improvement of the social protection system and the health sector, improving living conditions in disadvantaged areas or improving the vocational training system, among others. Article 76 also stipulates that a permanent working group should be set up to evaluate these provisions on a regular basis.

For its part, another of the matters that is of outstanding importance in the aforementioned treaty is the preservation of the environment. In fact, unlike the Agreements analysed above, it is referred to in the Preamble (para. 11)[33]. In this sense, Article 48.4 establishes that «preservation of the environment and ecological balances shall constitute a central component of the various fields of economic cooperation». This provision is not found in the Agreement with Egypt, but it is found in the respective Agreements with Tunisia and Morocco[34].

Furthermore, article 52 is dedicated to this subject, where it is specified that cooperation between the parties will focus on issues related to desertification, the rational management of water resources, salinisation or the impact of industrial development on the environment in general and on the safety of industrial installations in particular, among others.

Despite the above, however, as in the previous agreements, there is no express or implicit correlation between environmental protection and preservation and human rights. In addition, despite the aforementioned emphasis on the environment, the term sustainable development does not appear even once in the treaty.

Finally, it should not go unnoticed that there are a number of articles on specific subjects which are of interest for the purpose of this work, such as cooperation in the field of education and culture (Articles 77 and 78[35]), the strengthening of institutions and the rule of law (Article 82), cooperation in the field of combating money laundering (Article 87), combating racism and

[33] Under the following wording: «[...] desirous of establishing cooperation sustained by regular dialogue on economic, scientific, technological, social, cultural, audio-visual and environmental issues in order to achieve better mutual understanding».

[34] Cf. Articles 43.4 of both Agreements. Emphasis added.

[35] Article 78 highlights the fact that it establishes as objectives the contribution to improving the education system and training, with special emphasis on the gender perspective, as well as at a managerial level, and to consolidate lasting links between the parties in this field (Article 78.b).

xenophobia (Article 88), combating drugs and drug addiction (Article 89), combating terrorism (Article 90) and combating corruption (Article 91).

Therefore, a notable advancement is evident in this respect, as this marks the first agreement signed by the EU with an African state wherein explicit mention is made of the concept of the 'rule of law'[36]. Likewise, for the first time, it includes precepts dedicated to cooperating in the fight against corruption and the fight against racism and xenophobia «on grounds of race, ethnic origin and religion, in particular in the fields of education, employment, training and housing»[37].

Until now, Euro-Mediterranean agreements signed with certain African States have been analysed. However, since the end of the 2000s, an *Interim Agreement with a view to an Economic Partnership Agreement between the European Community and its Member States, on the one hand, and the Central African Party, on the other,* has come into consideration. This Agreement was signed on 15 January 2009 and, in accordance with its Article 98.4, although not in force, it has been provisionally applied between Cameroon and the EU Member States since 2014[38].

In contrast, for Central African Republic, Chad, Republic of Congo, Democratic Republic of Congo, Equatorial Guinea, Equatorial Guinea, Gabon, Sao Tome and Principe, all Central African bloc states, although EPA negotiations began in 2003, they were halted until further notice in 2011[39]. Looking at the content of the Agreement, there is no reference to concepts such as 'human rights' or 'rule of law' either in the Preamble or throughout its articles. And there is only a brief mention of democratic society in the chapter dedicated to regulating the protection of personal data[40]. On the other hand, there is a reference to the protection of the environment, although, unlike in treaties such as the one signed with Algeria, the references are scarcer.

Thus, the fourth paragraph of the Preamble states that Parties shall not encourage foreign direct investment at the expense of weakening their domestic environmental laws and regulations. It is worth noting that this paragraph also makes an express reference to the fact that Parties shall not encourage the relaxation of their domestic laws aimed at protecting and promoting cultural diversity at the expense of economic investment. However, there is no other reference to this matter in the rest of the Agreement.

Continuing with the theme of the environment, the next reference is found in Article 15 of the Agreement, which is dedicated to the elimination

[36] In fact, we have to go back to the Agreements adopted with Ghana and Côte d'Ivoire to find again an express reference to the term rule of law, and, on this occasion, it is only mentioned in the respective preambles.

[37] Cf. Article 88, para. 1.

[38] Cf. https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/negotiations-and-agreements_en (Accessed on 10/07/2023).

[39] Idem.

[40] Thus, according to Article 63(a)(i), «data must be processed for a specific purpose and shall only be used or communicated where such use or communication is not incompatible with the purpose for which they were sent; the only exceptions to this principle shall be those provided for by law for the defence of *essential public interests in a democratic society*» (emphasis added). In the same vein, there are also references to this concept in Article 63(a)(iii) and (v).

of customs duties on exports. It states that while the Parties undertake not to increase the customs duties on exports in force at the time of entry into force of the treaty, nor to introduce any new customs duties, the following exception is made: «in the event of a serious public finance problem or the need for greater environmental protection, the Central Africa Party may, after consultation with the EC Party, introduce customs duties on exports for a limited number of additional goods» (Article 15.2).

Finally, another reference to this matter is precisely found in Chapter V, which is dedicated to sustainable development and comprises a single generic Article 60. In any case, according to this precept, it does not establish a precise regulation but rather delays it to a later negotiation between the parties, where environmental protection or the promotion of decent work (Article 60.2.b), among other points, must be dealt with.

Regarding sustainable development, additional references to it can be found in various provisions of the Agreement. In fact, it is the agreement analysed so far that contains the most references to this concept – which is also true of subsequent agreements, with the exception of the one signed with the Economic Community for the Development of Southern Africa –. Thus, although the Preamble makes no reference to this subject, the first paragraph of Article 2, which sets out the general objectives of the Agreement, states that it aims to reduce and eradicate poverty through a trade partnership based on sustainable development.

Likewise, in line with this, Article 3, which outlines the specific objectives of the Agreement, states in paragraph e) that:«establish a basis for negotiating and implementing an effective, predictable and transparent regulatory framework for trade, investment, competition, intellectual property, public procurement and sustainable development in the Central African region, thus supporting the conditions for increasing investment and private-sector initiatives, and enhance capacity for the supply of goods and services, competitiveness and economic growth in the region».

More specific references are found in Article 50 of the Agreement, which specifies that trade in timber and other forest products must be subject to sustainable development, for which purpose the Parties agree to establish a system of auditing and independent monitoring of the control chain (Article 50.1.b). These are specific obligations which, as we have seen, are very scarce in this type of agreement. In any case, the protection of the environment and the achievement of sustainable development are neither expressly nor tangentially linked to the notion of human rights.

Nor is there any regulation of matters that were included in the agreements analysed above, such as education and training. And a single provision is devoted to the fight against corruption, money laundering and terrorism, establishing that «the Parties undertake to prevent and tackle fraudulent and corrupt illegal activities, money laundering and the financing of terrorism, and shall take the necessary legislative and administrative measures to comply with international standards» (Article 105).

Reference should also be made to the *Interim Agreement establishing a Framework for an Economic Partnership Agreement between Eastern and Southern African States on the one part and the European Community and its Member States on the other part.* Madagascar, Mauritius, Seychelles and

Zimbabwe signed the Agreement in 2009 and the Union of the Comoros in 2017[41].

Additionally, Article 62(4) should be referenced, as it permits provisional application while awaiting its official entry into force. In this regard, the Agreement has been provisionally applied for Madagascar, Mauritius, Seychelles and Zimbabwe since 2012, and for Comoros since 2019. For all these states, new negotiations on the modernisation of the Agreement have begun in 2019. For Djibouti, Ethiopia, Malawi, Somalia, Sudan and Zambia, negotiations began in 2004 but were paused (without being resumed) in 2011[42].

Once more, the Agreement does not address the concepts of 'human rights,' 'democracy,' and 'rule of law.' However, it significantly emphasizes the importance of the environment and sustainable development. In fact, regarding the former, it can be encountered several more comprehensive provisions compared to agreements like the one signed with Central Africa, as well as those we will assess later.

Following the order of its articles, in relation to inland fisheries and aquaculture, to which Title III of Chapter III is dedicated, in accordance with Article 33, it is expressly established that the purpose of this Title is, among other matters, the protection of the environment. However, it can be found a generic reference to this in Article 35.2, which states that «both Parties shall contribute to measures to ensure that fish trade supports environmental conservation and safeguards against stocks depletion, and to the maintenance of biodiversity». Moreover, in the last part of this article, it provides for «the cautious introduction of exotic species for aquaculture (to be introduced only in managed/closed spaces in consultation with all concerned neighbouring countries) ».

For its part, Title I of Chapter IV, dedicated to economic and development cooperation, specifies that cooperation will focus on «natural resources and the environment, including water resources and biodiversity» (Article 38.3.c). It also considers the integration of environmental aspects into trade and development (Article 38.2.j).

While in Title II of this same Chapter IV, which is aimed at private sector development, Article 41 establishes that cooperation for industrial development and modernisation, as well as to increase competitiveness, must be carried out taking into consideration environmental protection and sustainable development. Similar wording appears in Article 43 in this case in relation to cooperation on mining and minerals (Article 43.1.b).

In any case, the greatest degree of precision is reached in Title IV of Chapter IV, which is entitled «Natural resources and the environment». Thus, Article 49.1 establishes that cooperation in these matters will be carried out taking into account the particular needs of each African State. In any case, two aspects are the focus of cooperation in this Title: water resources in particular (Article 50) and the environment in general (Article 51). The backbone of this cooperation is the achievement of sustainable development.

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[41] Cf. https://eur-lex.europa.eu/ES/legal-content/summary/interim-economic-partnership-agreement-between-the-eu-and-eastern-and-southern-africa-states.html (Accessed on 10/07/2023).

[42] Cf. https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/negotiations-and-agreements_en (Accessed on 10/07/2023).

With regard to water resources, cooperation on transboundary water resources within the framework of sustainable development is established as an objective (Article 50.1). This cooperation includes the establishment of appropriate regulations (Article 50.2.b), the development and transfer of technology (Article 50.2.f), the monitoring of water pollution and sanitation (Article 50.2.g) and the development of sustainable irrigation systems (Article 50.2.h), among other aspects.

Regarding the environment, the objectives to be achieved are to protect and restore the environment, and in particular biodiversity, both in terms of plant, animal and microbial species (Article 51.1.a), to promote the development of industries related to environmental protection (Article 51.1.b), and to tackle environmental degradation, with particular reference to desertification and air pollution.

On their part, these objectives are specified in areas of cooperation, including promoting the implementation of treaties relating to environmental matters (Article 51.2.a), strengthening internal regulations (Article 51.1.d), as well as human resources and the institutional structure in this regard (Article 51.1.e), investing in the prevention of natural disasters and in the maintenance and preservation of biodiversity (Article 51.1.g), supporting environmentally friendly activities (Article 51.1.g), and supporting environmentally friendly activities (Article 51.1.h). 51.1.e), investing in the prevention of natural disasters and in the maintenance and preservation of biodiversity (Article 51.1.g), supporting environmentally friendly activities (Article 51.1.j), involving local communities (Article 51.1.n) and waste and waste management (Article 51.1.o). Furthermore, this title closes with Article 52 on financial commitments, the second paragraph of which states that: «The Parties agree to establish adequate joint institutional arrangements to effectively monitor the implementation of the development cooperation of this Agreement. Such arrangements shall include the establishment of a Joint Development Committee»[43].

Along these lines, Chapter V of the Agreement includes the interrelationship between trade, environmental protection, and sustainable development as areas for future negotiations (Article 53.e.iii). In addition to the emphasis on sustainable development and the environment, reference should also be made to precept 44.2.a, which expressly mentions the importance of establishing alliances with local communities in order to achieve sustainable development in the tourism sector.

Moreover, more generally, the development of a trade partnership that enables the eradication of poverty within the framework of sustainable development is enacted as an overall objective of the Agreement (Article 2).

Finally, there are two references to gender issues in the Agreement. In the aforementioned title dedicated to the development of inland fisheries, it is specified that in the field of cooperation, special attention must be paid to the participation of marginalised groups in the fisheries sector, with an express reference to promoting equality between men and women (Article 35.f.2). Likewise, in the aforementioned title on economic and development

[43] In any case, the third paragraph of this article attempts to give greater flexibility to the above by stating that «the Parties agree that the institutional arrangements shall remain flexible to adapt to the evolving national and regional needs».

cooperation, the areas of cooperation include an express (and generic) reference to gender mainstreaming (Article 38.2.h)[44].

Like the previous agreements, there is no express or tacit link between the environment, sustainable development and human rights. However, unlike the agreements analysed above, there is not even a single provision dedicated to matters such as education and training, the fight against corruption, money laundering or terrorism. It can be now turn to the *Economic Partnership Agreement (EPA) between the European Union and its Member States, on the one hand, and the Southern African Development Community (SADC) EPA States, on the other*. On 15 July 2014, following the conclusion of the negotiations, the agreement was initialled. It allows for its provisional application pending its entry into force in accordance with its article 113.3[45].

Provisional application of the Agreement has been in force for Botswana, Lesotho, Mozambique, South Africa and Eswatini since 2016, for Mozambique since 2018 and for Namibia since 2019. Angola has the option to join the agreement in the future[46]. There is no mention of concepts such as human rights, democracy and the rule of law. As far as this paper is concerned, only two subjects are referred to: environmental protection and the promotion of sustainable development, recognising the close link between the two. And it is the Agreement that gives most importance to the issue of sustainable development, which is mentioned twice in the Preamble (paragraphs 4 and 21).

In this sense, article 6.2 of the Agreement states that the development of international trade between the parties must aim to achieve sustainable development based on three pillars: economic development, social development, and environmental protection. It is emphasised that this objective must be reflected at all levels of trade between the parties. This is further specified in article 7, where the concept of sustainable development is linked to the eradication of poverty (Article 7.1) and to people-centred development (Article 7.3).

In Article 8, the Parties recognise the importance of international agreements ratified by each Party in the field of environmental protection, as follows: «Taking into account the Cotonou Agreement, and in particular its Articles 49 and 50, the Parties, in the context of this Article, reaffirm their rights and their commitment to implement their obligations in respect of the Multilateral Environmental Agreements and the International Labour Organisation conventions that they have ratified respectively».However, the following article reaffirms that each Party has the right to establish its own levels of environmental protection domestically. Furthermore, Article 9.3 *in fine* states that no Party may *persistently* fail to implement its environmental legislation. It is therefore necessary to consider what is to be understood by

[44] As has been advanced, this subject will be dealt with in depth in the chapter of this work written by Professor Marta Iglesias Berlanga.

[45] In this regard cf. Council Decision (EU) 2016/1623 of 1 June 2016 on the signing, on behalf of the European Union, and on the provisional application of the Economic Partnership Agreement (EPA) between the European Union and its Member States, of the one part, and the Southern African Development Community (SADC) EPA States, of the other part, fourth and fifth recitals.

[46] Cf. https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/negotiations-and-agreements_en (Accessed on 10/07/2023).

this concept. Likewise, article 6 specifies that, with the exception of the content of article 7 –which is quite generic–, the content of precepts 6 to 11 is not subject to Part III of the Agreement (Prevention and Settlement of Disputes).

In line with this, Article 10 reiterates the commitment to link trade with the achievement of sustainable development, including its environmental dimension. Article 11, dedicated to specifying cooperation in this regard, establishes that the Parties *may* cooperate on issues such as corporate social responsibility, biological diversity or trade aspects of sustainable forest management and fishing practices.

Finally, except for specific references to cooperation on corruption (Articles 42.1.c, 43.1.c, 43.2.a), there is no mention of issues such as the fight against money laundering, terrorism, education, or training, which do appear in previous agreements. Subsequently, it can be referred to the *2014 Economic Partnership Agreement between the West African States, the Economic Community of West African States (ECOWAS) and the West African Economic and Monetary Union (WAEMU), on the one hand, and the European Union and its Member States, on the other*[47]. This agreement is not yet in force and is not yet provisionally applied[48]. Furthermore, there is no reference to concepts such as human rights, democracy, sustainable development or the environment.

In any case, for Côte d'Ivoire and Ghana there are two treaties that are provisionally applied: *the Preliminary Economic Partnership Agreement between Côte d'Ivoire, on the one hand, and the European Community and its Member States, on the other hand,* and *the Preliminary Economic Partnership Agreement between Ghana, on the one hand, and the European Community and its Member States, on the other hand.* The provisional application of the former began on 3 September 2016, while that of the latter on 15 December 2016[49]. Moreover, these treaties do contain references to the matters under discussion, and in this sense the content of the two agreements is practically identical.

Thus, the seventh paragraph of the Preamble of both Agreements states that they are adopted reaffirming the commitment to respect human rights and the rule of law, which «constitute the main elements of the Cotonou Agreement, and to good governance, which is fundamental to the Cotonou Agreement». In the same vein, the eighth paragraph of the Preamble emphasises that the promotion of economic, social and cultural development is intrinsically linked to the achievement of peace and stable security, as well as a democratic environment. Furthermore, in the following paragraphs, various references are made to the achievement of economic and social development. An explicit reference is made to the concept of sustainable development and the goal of eradicating poverty (paragraph 10).

However, it is significant, to say the least, that despite these declarations in the respective preambles, no reference to such concepts appears throughout

[47] It is available for consultation at: https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/west-africa_en (Accessed on: 10/07/2023).

[48] See https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/negotiations-and-agreements_en (Accessed on 10/07/2023).

[49] Cf. https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/west-africa_en (Accessed on 10/07/2023).

the articles. Only in the second article, when specifying the objectives of the agreements, does it include establishing the basis for the negotiation of an EPA that contributes to poverty reduction, promotes regional integration, economic cooperation and good governance in West Africa (Article 2.b).

In addition, there are two express references to the environment –and none to sustainable Development–. On the one hand, Article 16, entitled «Customs duties on exports», specifies that, for reasons of environmental protection, both Côte d'Ivoire and Ghana may, on a temporary basis and after consultation, impose customs duties on exports. Article 41, which is entitled «Transparency of trading conditions and exchange of information», states that:«The Parties agree to inform each other in writing, as soon as possible, of the measures taken to prohibit the importation of goods in a spirit of collaboration with the aim of addressing a given problem concerning health (public, animal or plant), prevention or the environment, in accordance with the recommendations set out in the SPS Agreement». Finally, there is a reference to cooperation in the fight against corruption, money laundering and terrorism (Article 79 of both Agreements).

The following table summarises what has been said in this section.

Agreements	**Human rights**	**Democracy / democratic principles**	**Environment**	**Sustainable development**	**Other matters**
Tunisia In force since 1998.	No. of references in the Preamble: 1 Body of the Agreement: 2 Essential element: YES	No. of references in the Preamble: 1 Body of the Agreement: 1 Essential element: YES	No. of references in the Preamble: 0 Body of the Agreement: 4 Essential element: NO	No. of references in the Preamble: 0 Body of the Agreement: 1 Essential element: NO	-Training and education -Money laundering -Drug trafficking
Morocco In force since 2000.	No. of references in the Preamble: 1 Body of the Agreement: 2 Essential element of the Agreement: YES	No. of references in the Preamble: 1 Body of the Agreement: 1 Essential element of the Agreement: YES	No. of references in the Preamble: 0 Body of the Agreement: 4 Essential element of the Agreement: NO	No. of references in the Preamble: 0 Body of the Agreement: 1 Essential element of the Agreement: NO	-Training and education -Money laundering -Drug trafficking
Egypt In force since 2004.	No. of references in the Preamble: 1 Body of the Agreement: 2	No. of references in the Preamble: 1 Body of the Agreement: 2	No. of references in the Preamble: 0 Body of the Agreement: 5	No. of references in the Preamble: 0 Body of the Agreement: 1	-Education and training -Money laundering -Drug trafficking -Terrorism

	Essential element of the Agreement: YES	Essential element of the Agreement: YES	Essential element of the Agreement: NO	Essential element of the Agreement: NO	
Algeria In force since 2005.	No. of references in the Preamble: 1 Body of the Agreement: 3 Essential element of the Agreement: YES	No. of references in the Preamble: 1 Body of the Agreement: 1 Essential element of the Agreement: YES	No. of references in the Preamble: 1 Body of the Agreement: 10 Essential element of the Agreement: NO	No. of references in the Preamble: 0 Body of the Agreement: 0 Essential element of the Agreement: NO	-Education and training -Money laundering -Drug trafficking -Terrorism -Corruption -Xenophobia and racism
Central Africa Cameroon, provisional application since 2014.	No. of references in the Preamble: 0 Body of the Agreement: 0 Essential element of the Agreement: NO	No. of references in the Preamble: 0 Body of the Agreement: 1 Essential element of the Agreement: NO	No. of references in the Preamble: 1 Body of the Agreement: 3 Essential element of the Agreement: NO	No. of references in the Preamble: 0 Body of the Agreement: 9 Essential element of the Agreement: NO	-Money laundering -Terrorism -Corruption (Residual references)
Eastern and Southern African States Provisional application: Madagascar, Mauritius, Seychelles, Zimbabwe, implementation since 2012; Comoros, from 2019.	No. of references in the Preamble: 0 Body of the Agreement: 0 Essential element of the Agreement: NO	No. of references in the Preamble: 0 Body of the Agreement: 0 Essential element of the Agreement: NO	No. of references in the Preamble: 0 Body of the Agreement: 20 Essential element of the Agreement: NO	No. of references in the Preamble: 0 Body of the Agreement: 7 Essential element of the Agreement: NO	
Economic Development Community of Southern Africa Provisional application: Botswana, Lesotho, Mozambique, South Africa and Eswatini since 2016; Mozambique since 2018; and Namibia since 2019.	No. of references in the Preamble: 0 Body of the Agreement: 0 Essential element of the Agreement: NO	No. of references in the Preamble: 0 Body of the Agreement: 0 Essential element of the Agreement: NO	No. of references in the Preamble: 0 Body of the Agreement: 17 Essential element of the Agreement: NO	No. of references in the Preamble: 2 Body of the Agreement: 21 Essential element of the Agreement: NO	Corruption

Economic Community of West African States and WAEMU	No. of references in the Preamble: 0 Body of the Agreement: 0 Essential element of the Agreement: NO	No. of references in the Preamble: 0 Body of the Agreement: 0 Essential element of the Agreement: NO	No. of references in the Preamble: 0 Body of the Agreement: 0 Essential element of the Agreement: NO	No. of references in the Preamble: 0 Body of the Agreement: 0 Essential element of the Agreement: NO	
Côte d'Ivoire Provisional application since 2016.	No. of references in the Preamble: 1 Body of the Agreement: 0 Essential element of the Agreement: NO	No. of references in the Preamble: 2 Body of the Agreement: 0 Essential element of the Agreement: NO	No. of references in the Preamble: 0 Body of the Agreement: 2 Essential element of the Agreement: NO	No. of references in the Preamble: 2 Body of the Agreement: 0 Essential element of the Agreement: NO	-Money laundering -Terrorism -Corruption
Ghana Provisional application since 2016.	No. of references in the Preamble: 1 Body of the Agreement: 0 Essential element of the Agreement: NO	No. of references in the Preamble: 2 Body of the Agreement: 0 Essential element of the Agreement: NO	No. of references in the Preamble: 0 Body of the Agreement: 2 Essential element of the Agreement: NO	No. of references in the Preamble: 2 Body of the Agreement: 0 Essential element of the Agreement: NO	-Money laundering -Terrorism -Corruption

Source: own elaboration.

*The term "rule of law" is only mentioned in the Agreement with Algeria (Art. 82). To which is added an express reference in the respective Preambles of the Agreements with Côte d'Ivoire and Ghana (common para. 7).

4. Concluding remarks: Assessing the effectiveness of the agreements in the areas under study

Within the interpretative framework of the preceding section's analysis, a series of considerations must be emphasized.

Firstly, it is significant, to say the least, that in agreements such as those signed with Côte d'Ivoire and Ghana, despite the importance given to human rights, democratic principles and the rule of law, no explicit mention is made of them in the articles.

Secondly, even in agreements where human rights and democratic principles are stated to be 'essential elements' of the agreement, references to

them are conspicuous by their absence (Tunisia, Morocco, Egypt and Algeria). It should not go unnoticed that the term 'rule of law' is not included as an essential element. In fact, we have only found one reference to this concept in the articles of the agreement with Algeria.

Thirdly, we must ask ourselves what the parties understand by the concepts of 'human rights', 'democracy/democratic principles' and 'rule of law'. And, in this regard, why agreements such as those with Morocco and Egypt emphasise respect for 'fundamental' human rights. We must again ask ourselves what the parties mean by 'fundamental' and which human rights do not qualify as such.

In fact – and fourthly – it should not go unnoticed that the most recent agreements (those signed with Central Africa, Eastern and Southern Africa, the Economic Community for the Development of Southern Africa, the Economic Community of West African States and WAEMU, Côte d'Ivoire and Ghana), with the exception of the preamble, make no express mention of the concepts of 'human rights', 'democracy' and the rule of law' in their respective articles. All of this taking into consideration that the Cotonou Agreement, which serves as a framework for the rest, does include respect for human rights, democratic principles and the rule of law as essential elements.

Fifth, turning to the area of environmental protection, although the references to this matter are more abundant, it is also true that they can admit a greater degree of precision. And despite the fact that in agreements such as the one signed with Eastern and Southern Africa or the Economic Community for the Development of Southern Africa, it can be found important references to this matter, in subsequent agreements the author have found a significant regression.

Sixth, we cannot fail to mention the existence of agreements that attach importance to the nexus between sustainable development and the environment (East and Southern Africa or the Economic Community for the Development of Southern Africa). However, in other agreements (Algeria) the emphasis is only on the environment, and in others (Central Africa) only on sustainable development. Paradoxical is the agreement with Algeria, which does not mention the term 'sustainable development' even once in its articles. Additionally, one must consider the implications of the categorization of environmental cooperation as 'central' in agreements with countries like Tunisia, Morocco, and Algeria, as opposed to other agreements where this categorization does not apply.

Seventh, in connection with the first and fourth considerations, the Agreements with Ghana and Côte d'Ivoire also emphasise in the Preamble the importance given to the environment and sustainable development, but these concepts do not appear in their respective articles. This once again raises the questions already raised.

Eighthly, there are agreements which take into account of education and training, as well as the fight against money laundering, drug trafficking, terrorism, corruption and xenophobia and racism. Others remain silent, despite the undeniable importance of these matters, particularly for the achievement of a democratic state governed by the rule of law that respects and protects human rights.

Therefore, and in ninth place, on the one hand, we must highlight both the lack of precision in the regulation of the matters under study, and the

scarcity of control mechanisms to ensure compliance. To this must be added, as certain authors have already analysed, the selective application – in some cases yes and in others no – of the control mechanisms established for similar situations[50].

Tenth, it should be borne in mind that the agreements adopted after the Cotonou Agreement stipulate that, in the event of contradiction or inconsistency, such partnership agreements will prevail over the provisions of the Cotonou Agreement. This may raise the question of whether the complete absence of any mention in some agreements of human rights, democracy, the rule of law, environmental protection or sustainable development is nothing more than a contradiction or inconsistency in these terms (cf. Article 106 of the Agreement with Central Africa; Article 65 with the Eastern and Southern African States; Article 110 of the Agreement with the Southern African Development Community; Article 80 of the Agreements with Côte d'Ivoire and Ghana).

Eleventh, one of the central conclusions that this study has led to is that, despite the importance being attached to the link between human rights protection, sustainable development and human rights, none of the agreements analysed expressly or implicitly make such a link. Pertaining to this, reference should be made to the respective preambles of the agreements with Côte d'Ivoire and Ghana, which emphasise that the promotion of economic, social, and cultural development is intrinsically linked to the achievement of peace and stable security, as well as a democratic environment. However, there is no mention of this link in its articles. Additionally, the Southern African Development Community Agreement makes only a limited reference to sustainable development, asserting that it shall be centered on the human person (Article 7.c). Furthermore, it remains unclear why, despite the significance of the African peoples, no explicit mention is made in this regard. Moreover, there is a noticeable absence of references to gender and sexual minorities, as well as albinos, who face specific persecution on the continent.

It can be hope that the new framework established by the post-Cotonou Agreement will make some difference. However, it is essential not to disregard the considerable discord among EU member states themselves, exemplified by Hungary's two-year obstruction of this new agreement due to concerns related to migration and sexual minorities. This, at least initially, does not augur well for the future.

[50] Cf. e.g. J. DØHLIE SALTNES, *The EU's Human Rights Policy: Unpacking the literature on the EU's implementation of aid conditionality*, Arena Working Paper 2/2013, 2013, p. 7 ss.; L. BARTELS, *Human rights conditionality in the EU's international agreements*, Oxford University Press, Oxford, 2005; E. FIERRO, *The EU's Approach to Human Rights Conditionality in Practice*, Martinus Nijhoff Publishers, The Hague/New York, 2001.

TRADE AND SUSTAINABLE DEVELOPMENT (TSD) CHAPTERS IN FREE TRADE AGREEMENTS CONCLUDED BY THE EU IN 2010-2020[1]

CYPRIAN LISKE

TABLE OF CONTENTS: 1. Introduction and literature review. – 2. Methodology. – 3. Complexity of the EU TSD chapters over time and in relation to parties' level of development. – 4. Distribution of subcodes. Where is the focus of TSD chapters in EU FTAs placed? – 4.1 Distribution of subcodes within the category of "rights and values protected". – 4.2 Distribution of subcodes within the category of "obligations". – 4.3 Distribution of subcodes within the subcategory of "environment protection". – 4.4 Distribution of subcodes within the subcategory of "labour rights". – 5. References to external legal acts and obligations to ratify international conventions. – 6. Dispute settlement & cooperative institutions. – 7. Trade and Sustainable Development Goals. 8. Conclusions.

ABSTRACT: *This paper presents the results of a qualitative comparative study performed on the Trade & Sustainable Development (TSD) Chapters of the new-generation Free Trade Agreements concluded by the EU in 2010-2020, starting from the first model agreement containing a TSD chapter that was executed in 2010 with South Korea, and ending with the EU-UK Trade and Cooperation Agreement concluded in 2020.The paper starts with general remarks as to the complexity of the EU TSD chapters over time and in relation to trade partners' level of economic development, and then focuses on the six main categories identified in the coding structure, i.e. the rights and values protected by the EU FTAs, types and quantity of obligations set out therein, external legal acts referred to in those agreements, dispute settlement systems and cooperative institutions associated with EU TSD chapters, as well as the EU FTAs' provisions on the interconnection of sustainable development and trade.*

KEYWORDS: *EU FTAs, sustainable development, TSD chapters, trade policy, developing countries, labour & environment standards.*

1. Introduction and literature review

While the Trade & Sustainable Development (TSD) chapters of the European Union Free Trade Agreements (EU FTAs) have already been subject to certain comparative analyses, this paper takes a different methodological approach to the subject compared to those studies and offers new insights that build on the existing literature.

The most recent study conducted by the London School of Economics (LSE) focuses on the comparison of the EU TSD chapters with clauses that are present in agreements made outside the EU. The analysis of the EU TSD

[1] This research has been supported from the Anthropocene Priority Research Area budget under the programme "Excellence Initiative – Research University" at the Jagiellonian University.

chapters performed in the LSE study took a mostly quantitative approach and offers general insights into the construction of such clauses. However, it does not introduce a deeper qualitative consideration of the topic[2]. On the other hand, a work by G. Adinolfi offers a valuable qualitative typology of the EU TSD chapters but the documents were not subject to a systematic analysis through a coding procedure, as in the present paper[3]. Other studies have usually focussed on particular cases or certain groups of EU FTAs (e.g. those concluded with Asian countries)[4]. Therefore, the present paper offers a new approach to the topic by presenting the results of an analysis made under the methodological approach outlined in the following section.

2. Methodology

The sample used for this study consists of new-generation free trade agreements concluded by the EU in 2010–2020, starting with the first model agreement containing a TSD chapter that was executed in 2010 with South Korea and ending with the EU-UK Trade and Cooperation Agreement (TCA) concluded in 2020. We may categorise those 10 years as the first generation of the EU modern FTAs. The newest FTA made with New Zealand (2022)[5] has been not included in the sample as it is thoroughly distinguishable as the first sanction-based TSD chapter employed by the EU, therefore possibly heralding a new (second) generation of EU modern trade agreements. However, all the agreements analysed in this paper are in force and there is currently no information about possible renegotiation of their TSD chapters. Furthermore, analysing the 1st generation of modern EU FTAs and their TSD chapters becomes even more important in light of upcoming changes to the design of the EU cooperative system.

Taking into consideration the size of the sample, there was no need to exclude any chapters from the analysis. Typically, new-generation EU FTAs include one chapter devoted to sustainable development, but in some cases, such provisions are divided into parts that separately relate to the environment and labour standards (e.g. the EU-Canada Trade Agreement and the TCA with the UK) – in the latter case, such separate chapters are treated together as one TSD chapter for the purposes of this analysis.

No.	Year	Country/ Region	Type (EU terminology)	Full name of the agreement	Abbreviation
1	2010	South Korea	Free trade agreement	Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part	South Korea FTA

[2] *See*: JB. VELUT ET AL., *Comparative Analysis of Trade and Sustainable Development Provisions in Free Trade Agreements*, LSE Consulting (February 2022).

[3] *See*: G. ADINOLFI, *A Cross-Cutting Legal Analysis of the European Union Preferential Trade Agreements' Chapters on Sustainable Development*, ed. C. Beverelli et al, International Trade, Investment, and the Sustainable Development Goals.

[4] *See e.g.* C. NESSEL, J. ORBIE, *Sustainable Development in EU–Asia Trade Relations, [in:] A Geo-Economic Turn in Trade Policy? EU Trade Agreements in the Asia-Pacific* (eds. J. Adriaensen, E. Postnikov), Palgrave 2022.

[5] *See*: EU Directorate-General for Trade, *Key elements of the EU-New Zealand trade agreement,* available at https://policy.trade.ec.europa.eu/news/key-elements-eu-new-zealand-trade-agreement-2022-06-30_en (last access: 2 May 2023).

2	2012	Central America	Association agreement	Agreement establishing an Association between the European Union and its Member States, on the one hand, and Central America on the other	Central America AA
3	2014	Georgia	Association agreement	Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part	Georgia AA
4	2014	Moldova	Association agreement	Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part	Moldova AA
5	2014	Ukraine	Association agreement	Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part	Ukraine AA
6	2016	Andean countries	Free trade agreement	Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part	Andean Countries FTA
7	2016	Canada	Free trade agreement	Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part	CETA
8	2019	Japan	Free trade agreement	Agreement between the European Union and Japan for an Economic Partnership	Japan FTA
9	2019	Singapore	Free trade agreement	Free Trade Agreement between the European Union and the Republic of Singapore	Singapore FTA
10	2019	Vietnam	Free trade agreement	Free Trade Agreement between the European Union and the Socialist Republic of Viet Nam	Vietnam FTA
11	2020	United Kingdom	Trade and cooperation agreement	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	UK TCA

Table 1. List of analysed trade agreements and abbreviations used.

The analysis was conducted qualitatively with the use of MAXQDA 2022 software. Firstly, the TSD chapters were extracted from the full text of the sample FTAs. Then, the meaningful segments of the text were coded according to the code system attached to this paper as Annex 1. The subcodes formed six categories (main themes) that were recognised by the researcher during the analysis: (1) rights and values protected, (2) obligations, (3) trade & SDGs, (4) dispute settlement, (5) cooperative institutions, and (6) legal acts. The content of the categories is explained in more detail in the sections devoted to their analysis.

The interpretive convergence (intercoder agreement) was ensured by following the procedures suggested in the literature for individual researchers: the initial coding structure was tested by the researcher by coding the same sample agreement again after two weeks and verifying the discrepancies between those two interpretations; additionally, the coding

structure was discussed with other researchers during a seminar[6]. The coding structure was then adjusted to its final version and all of the TSD chapters were coded accordingly.

Several initial remarks should be made to explain the differences in this sociological qualitative method compared to a typical black-letter analysis that is usually conducted in legal sciences. Firstly, the main unit of analysis, in this case, is a segment of text that can form a whole provision of an agreement but may also constitute only its fragment. Secondly, one meaningful segment of text may be attached to many subcodes from different main categories, allowing for further comparison of themes appearing in the analysed documents. Thirdly, rigorous coding of all the sample texts also allows basic quantitative analysis to be performed, e.g. to compare the complexity of certain agreements by analysing the number of codes (themes) attached to them or to display the distribution of subcodes within the main coding categories. "*Coding*" in content analysis means categorising data to facilitate further analysis and to find common themes in the analysed text. So, for example, art. 13.3(2) of the Vietnam FTA ("*A Party shall not waive or derogate from, or offer to waive or derogate from, its environmental or labour laws, in a manner affecting trade and investment between the Parties")* was connected by the researcher to the "*Ban on rise to the bottom*" subcode under the category of "*Trade & SDGs*" and to the "*Primary obligations*" subcode under the category of "*Obligations*".

The following parts of this paper present the results of the analysis performed with regard to the topics that are relevant to the perspectives of the research currently being conducted in the field. The paper starts with general remarks as to the complexity of the EU TSD chapters over time and in relation to trade partners' level of economic development, and then focuses on the six main categories identified in the coding structure, i.e. the rights and values protected by the EU FTAs, types and quantity of obligations set out therein, external legal acts referred to in those agreements, dispute settlement systems and cooperative institutions associated with EU TSD chapters, as well as the EU FTAs' provisions on the interconnection of sustainable development and trade.

3. Complexity of the EU TSD chapters over time and in relation to parties' level of development

The empirical research conducted so far has suggested that, worldwide, (a) the complexity of TSD chapters has risen over time, and (b) FTAs concluded by developed countries with developing ones tend to contain more detailed provisions on sustainable development than those made between countries that are on the same level of development[7]. In the EU context, hypothesis (a) was confirmed in this study while hypothesis (b) seemed not to materialise, i.e. the EU FTAs concluded with developing countries on average did not include more codes attached to text segments (and consequently did not involve more obligations) than those made with

[6] J. SALDAÑA, *the Coding Manual for Qualitative Researchers*, Sage 2013, p. 35-36.

[7] A. BERGER ET AL, *the Trade Effects of Environmental Provisions in Preferential Trade Agreements*, ed. C. Beverelli et al, International Trade, Investment, and the Sustainable Development Goals, p. 114-115; p. 124.

developed states. In many cases, the reverse was true, i.e. the most elaborate TSD chapters were actually included in trade agreements made by the EU with highly developed states (Canada and the UK). As argued below, the existence of this reverse trend is relevant from the perspective of possible economic consequences of the EU TSD chapters for developing countries.

The rising complexity of TSD chapters can be clearly observed when the EU FTAs from different periods are compared, e.g. the first model TSD chapter included in the FTA with South Korea (2010) contained 82 codes (i.e. the analysed segments of text were attached to 82 theme codes in total) while the sustainability-related chapters placed in the agreement with the UK (2020) contained 383 codes. Nevertheless, a significant diversity within the sample can be recognised. For example, the analysed association agreements were attached with 111–208 codes (Georgia, Ukraine, and Moldova – all concluded in 2014) while the CETA, which was concluded only two years later in 2016, had 318 codes. The TSD chapters of new-generation FTAs concluded with Asian states are more elaborate than older model agreements but at the same time do not reach the level of complexity seen in the agreements made by the EU with Canada and the UK: Japan (2019) and Vietnam (2019) contained 234 codes and 236 codes, respectively[8].

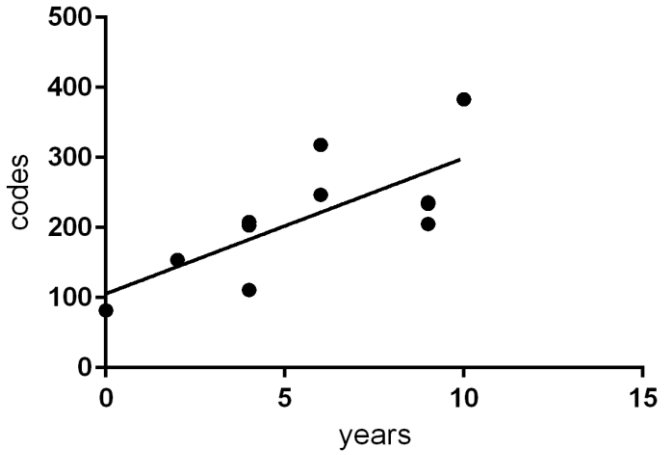


Figure 1. Rising complexity of the EU TSD chapters.
X-axis – years from the conclusion of the first analysed agreement (2010), Y-axis – number of codes attached to a given TSD chapter. The dots represent all the agreements within the sample.

As shown in Figure 1, there seems to be a strong upward trend in the complexity of the EU TSD chapters when compared to the first such model chapter of the FTA made with South Korea (2010), but existing variation may indicate the EU's individual approach to particular negotiations and also point out differences in the stances of the EU's trade partners in regard to the adoption of TSD chapters. These differences may especially stem from certain political and cultural contexts surrounding particular trade partners, as explained in more detail in the following parts of this section.

[8] The excel table presenting the full results of the coding in regard to the analysed agreements is attached to this paper as Annex 2.

When groups of countries are compared after dividing them in terms of their level of development (i.e. developed/developing countries), it is visible that, on average, the FTAs made by the EU with developed countries contained more complex TSD chapters than those made with developing countries. This was true for each of the main categories, including obligations and references to external legal acts, as depicted in Figure 2.

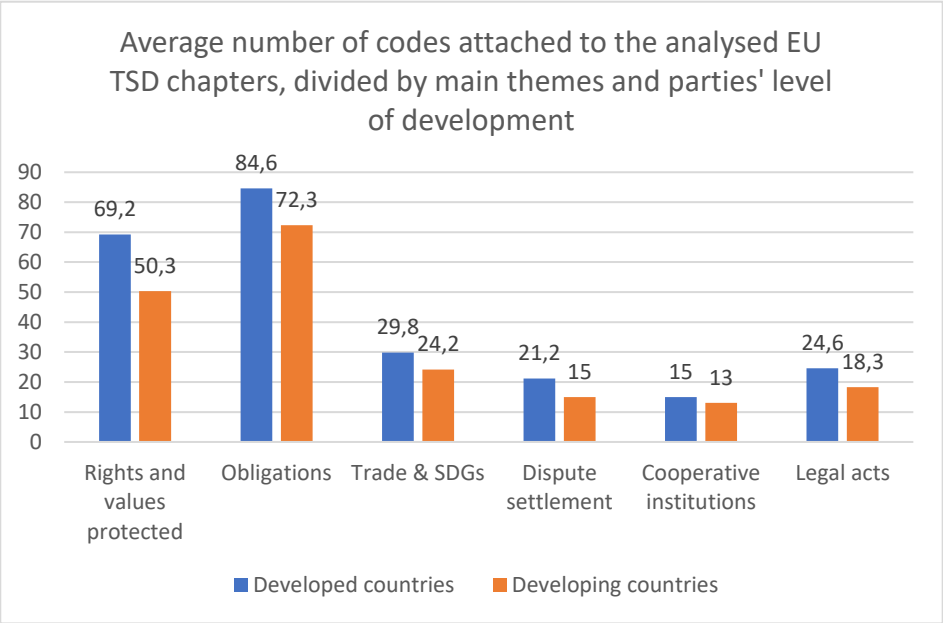


Figure 2. Complexity of the EU TSD chapters among developing and developed trade partners from the sample.

Firstly, we should note here that this result is contrary to the global trend indicated above (i.e. worldwide, FTAs made by countries of different levels of development tend to have more complex TSD clauses than those made by countries at the same level of development – this does not hold true for the EU and its trade partners). Secondly, this result may seem counterintuitive at first sight – is there a need to have such elaborate sustainability-related provisions in agreements with countries that hold a relatively good record on environmental and labour standards?

A possible discrepancy between a trade partner's level of development and the expected level of complexity of sustainability provisions placed in trade agreements was convincingly shown in the example of the CETA by K. L. Meissner et al[9]. In that case, the European Parliament decided to insist in negotiations with Canada to implement a human rights conditionality clause despite Canada's relatively good record in human rights observance[10]. As suggested in the series of interviews conducted by the authors, human rights were deemed a strategic issue by certain actors participating in the EU decision-making process[11]. At the same time, the argument follows that collective actors with limited political resources calculate the utility of taking a specific action by ascribing strategic meaning to the issues at stake and

[9] K. L. MEISSNER ET AL., *The paradox of human rights conditionality in EU trade policy: when strategic interests drive policy outcomes, Journal of European Public Policy* 2019, vol. 29, p. 1273-1291.
[10] *Ibidem*, p. 1275.
[11] *Ibidem*, p. 1286-1287.

considering the visibility of their actions in public[12]. For the purposes of this research, this may stand as one of the possible explanations why two FTAs concluded by the EU with highly developed countries – Canada and the UK – have such complex and elaborate TSD chapters and human rights provisions, as they were both negotiated with a prominent level of public engagement.

Furthermore, the literature has established that while there is high support in developed societies for inserting sustainability provisions in trade agreements, the situation differs in developing countries. In the latter, although the public is still generally in favour of free trade, it also tends to see environmental and labour provisions of FTAs as a tool of "*disguised trade protectionism*" employed by developed countries to impose certain standards on less wealthy societies[13]. At the same time, empirical research convincingly suggests that environmental standards may be – and indeed often are – used strategically by developed countries as a tool of protectionism, i.e. to level the playing field with developing countries regarding environmental and labour standards. For example, L. Lechner found a correlation between more complex labour and environmental clauses and larger differences in the levels of standards existing in countries negotiating an FTA[14]. Such a discrepancy may trigger NGOs and other interest groups in developed countries to lobby for placing higher societal standards in FTAs in cases of strong import and wage pressure from a given developing country[15]. While it would require further qualitative verification, it is plausible that the EU, being aware of those arguments and facing them in negotiations with developing countries, systematically allows for the adjustment of requirements to the development level of its trade partners. In turn, this would result in less complex TSD chapters in the FTAs concluded by the EU with developing countries, as suggested by this study.

Such a tendency is particularly important from the perspective of possible negative economic effects from sustainability provisions on aggregate trade flows. As shown in the empirical research conducted by A. Berger et al., (1) generally, environmental provisions in trade agreements decrease trade between partner countries (on average, each additional environmental provision decreases trade flows by 0.2%), and (2) when analysed further in a division by developing/developed and exporting/importing countries, such negative effects of environmental provisions on aggregate trade flows seem to occur only for trade relationships involving exports from a developing country to a developed one, while there is no significant influence on trade between developed countries and exports

[12] *Ibidem*. p. 1286-1287.
[13] I. BASTIAENS, E. POSTNIKOV, *Social standards in trade agreements and free trade preferences: An empirical investigation, "The Review of International Organizations",* vol. 15, Springer 2019, p. 19-21.
[14] L. LECHNER, *The domestic battle over the design of non-trade issues in preferential trade agreements, "Review of International Political Economy"* vol. 23, iss. 5, Routledge 2016, p. 25-27.
[15] *Ibidem*.

from developed countries to developing ones[16]. This proves that developing countries' objections to the high complexity of TSD chapters may be justified from an economic perspective since they bear the heaviest burden of implementing such provisions. In such cases, the approach of the EU might be assessed positively as lowering such a burden, provided that it is systemic and not only reliant on the political/publicity-related factors indicated above.

4. *Distribution of subcodes. Where is the focus of TSD chapters in EU FTAs placed?*

The distribution of subcodes within certain code categories may indicate what topics receive the most attention from drafting parties. For example, through the analysis of coding frequency, we may find out what rights and values are most present in the analysed agreements under the code category of "*rights and values protected*". The graphs presented below depict the distribution of subcodes in analysed FTAs within four chosen categories: (a) "*rights and values protected*", (b) "*obligations*", (c) "*environmental protection*", and (d) "*labour rights*" (points [c] and [d] are themselves subcategories of the "*rights and values protected*" category).

4.1 Distribution of subcodes within the category of "rights and values protected"

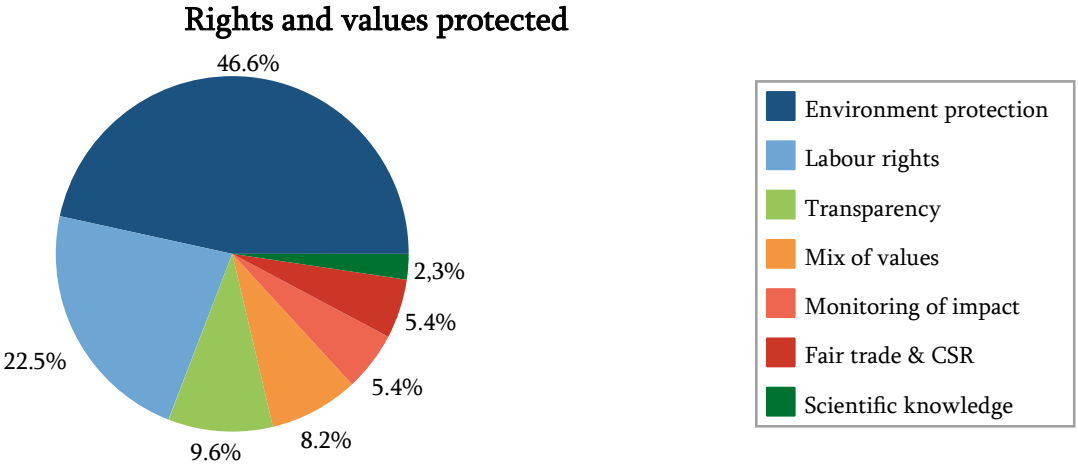


Figure 3. Distribution of subcodes within the category of "rights and values protected".

The distribution of subcodes within the category of "*rights and values protected*" indicates that the environment was by far the most frequently indicated protected value in the analysed FTAs (i.e. the majority of the protective provisions concerned ecological aspects such as the climate crisis, CO_2 emissions, fisheries, forests, and biodiversity). Workers' rights came second in frequency, amounting to 22.5% of the coded segments in this

[16] A. BERGER ET AL, *the Trade Effects of Environmental Provisions in Preferential Trade Agreements*, ed. C. Beverelli et al, International Trade, Investment, and the Sustainable Development Goals, pp. 123-127.

category. This seems to contradict the actual scope of provisions disputed so far between the EU and its trading partners.

Such disputes issued under the EU TSD chapters focus primarily on violations of labour laws (see the EU vs. South Korea), not on ecological aspects[17] Workers' rights seem to form the most sensitive category of rights protected under TSD chapters, leading to a launch of disputes under EU FTAs. At the same time, labour law obligations are relatively easier to enforce as they are better defined than environmental obligations as well as remaining directly related to trade (through a ban on the "*rise to the bottom"* and the risk of using weak labour regulations as a comparative advantage). Therefore, despite a considerable proliferation of provisions related to the environment in the EU TSD chapters, labour-related obligations so far remain the main subject of legal controversy and enforcement.

4.2 Distribution of subcodes within the category of "obligations"

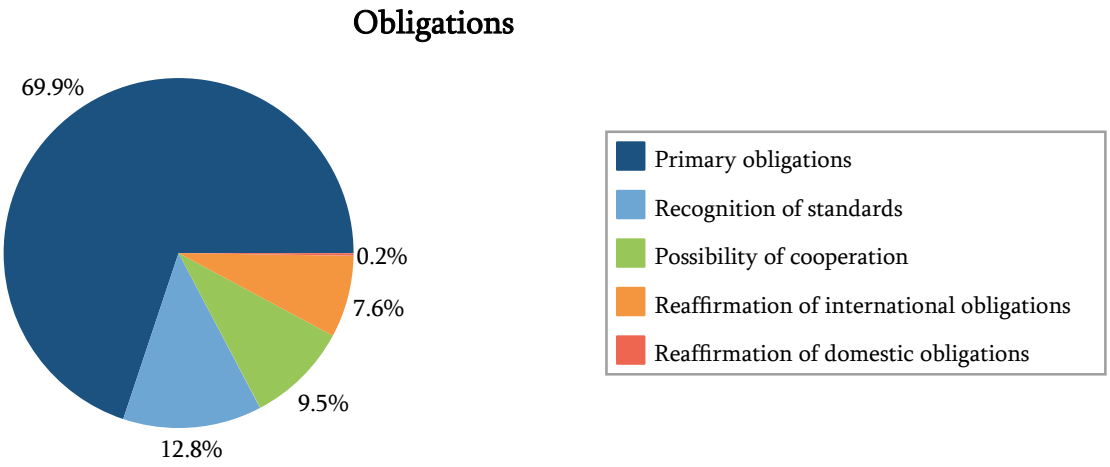


Figure 4. Distribution of subcodes within the category of "obligations".

Although the EU TSD chapters are largely based on the international legal system and existing conventions (e.g. the International Labour Organization (ILO) conventions, the Paris Agreement, and the Fisheries Convention), most of the obligations contained in those chapters are of a primary nature (i.e. they require the parties to behave in a specific way by the use of the "*will*" and "*shall*" operators and they do not directly refer to obligations that are external to a given agreement). This indicates the important normative role of the EU TSD chapters. Nevertheless, substantive primary obligations (i.e. those shaping the rights and obligations of the parties) contained in the analysed FTAs often set out general objectives and lack a specific standard of conduct, which makes them difficult to enforce. At the same time, a significant part of the commitments refers to the recognition of already existing standards and reinforces the implementation of

[17] *See*: Report of the Panel of Experts (20th January 2021), Panel of Experts proceedings constituted under Article 13.15 of the EU-Korea Free Trade Agreement.

conventions adopted by the parties prior to the conclusion of an agreement (with the use of terms such as "*recognise*" and "*reaffirm*").

A separate category of TSD terms is formed by non-categorical provisions on possible cooperation ("*may cooperate*") – they specify the areas of possible (optional) cooperation of parties, sometimes being accompanied by a binding obligation to exchange information. Such cooperation provisions should be understood as a guideline for further action by the parties in the realisation of sustainable development, which, however, cannot be legally enforced.

4.3 Distribution of subcodes within the subcategory of "environment protection"

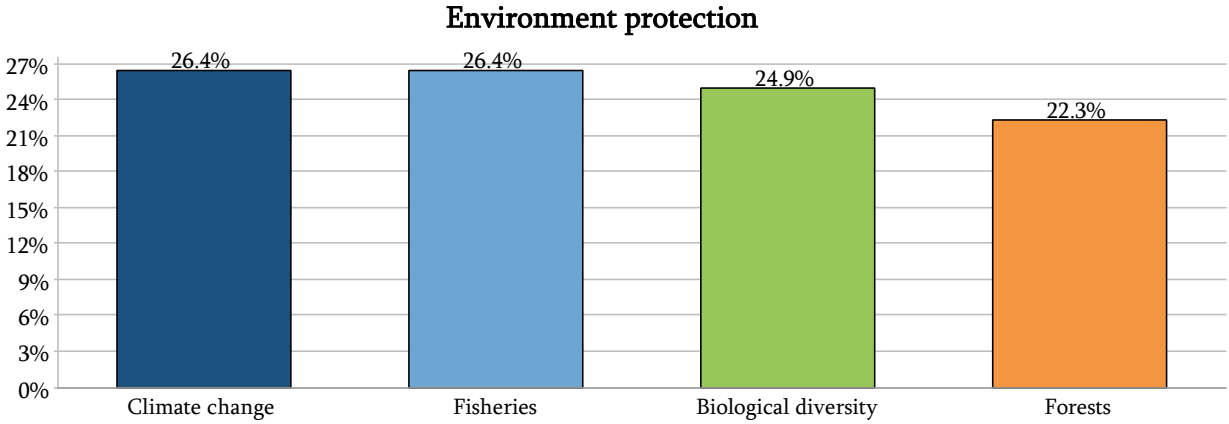


Figure 5. Distribution of subcodes within the subcategory of "environment protection".

For environmental protection, the internal distribution of subcodes in the agreements was relatively equal with minor differences – most attention was paid to the protection of fisheries and addressing climate change, and relatively less to the protection of forest resources. The distribution of provisions on environmental protection was often dictated by a particular political and economic context of a country signing an FTA with the EU and has also changed over time. For example, the agreement with Central American countries (concluded only 2 years after the agreement with South Korea) contains specific provisions for trade in timber products and fish, which were not present in the agreement with South Korea. On the other hand, the same agreement emphasises that the purpose of the TSD chapter is not to enforce harmonisation between legal systems.

4.4 Distribution of subcodes within the subcategory of "labour rights"

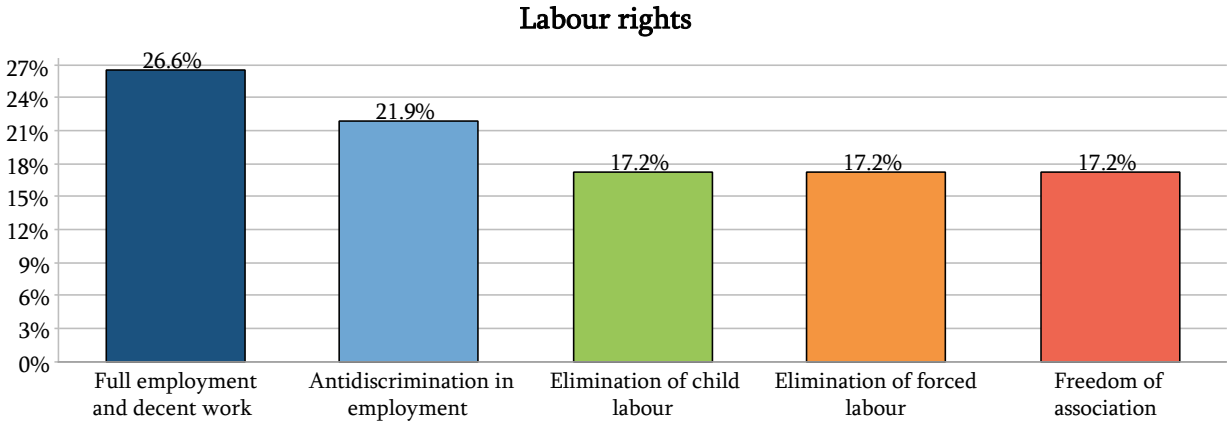


Figure 6. Distribution of subcodes within the subcategory of "labour rights".

In the case of workers' rights, issues related to full employment and anti-discrimination were referred to most frequently. Nevertheless, the design of the TSD clauses in regard to labour matters has not changed significantly over recent years. This can be confirmed by the distribution of subcodes relating to the "*labour rights*" subcategory: starting with six coded segments for the agreement concluded by the EU with South Korea and five segments for the Association Agreement with Central American countries, further FTAs typically contained 10–14 segments related to this category – the only exceptions being the TCA with the UK (26 segments) and CETA (27 segments).

Typically, the parts devoted to labour standards in the EU TSD clauses contain "*reaffirmation*" obligations deriving from the International Labour Organisation membership and they enlist the rights that ought to be protected (within the categories present in the subcodes displayed in Figure 6). Over time, the EU TSD chapters have gained more provisions, preventing the use of labour standards as a tool of protectionism, e.g. article 269(5) of the FTA with the Andean countries stipulates as follows: "*the Parties stress that labour standards should not be used for protectionist trade purposes and in addition, that the comparative advantage of any Party should in no way be called into question.*" Additionally, the more recent EU TSD chapters have strengthened cooperation on international fora and transparency regarding labour standards. However, despite several minor enhancements, the design of such labour requirements continues encompassing rather "*minimalist obligations*", as suggested in the study made by J. Harrison et al., and has been criticised in the literature both as to its substantive scope and enforcement[18].

5. References to external legal acts and obligations to ratify international conventions

[18] J. HARRISON ET AL, *Governing Labour Standards through Free Trade Agreements: Limits of the European Union's Trade and Sustainable Development Chapters, Journal of Common Market Studies* 2018, p. 13-15.

The analysed FTAs differ significantly in the number of legal acts to which they directly refer. This affects the level of their embedment in the system of international law. In principle, the more extensively specified external legal acts are in an agreement, the easier it is in the event of a dispute to specify the scope of substantive obligations and determine the standard of care.

To illustrate the degree of variety among the analysed agreements, the agreement with South Korea (2010) refers to external legal sources only six times while the agreement with the UK (2020) states them 57 times. Interestingly, the economic status of a state (developed/developing) and the overall volume of an agreement do not seem to directly translate into the number of legal acts referred to in each FTA. For example, the CETA contains only 10 external legal references in its TSD chapters while the agreement with Vietnam contains 35. The upward tendency is nevertheless visible over time.

	EU-Japan FTA (2019)	**EU-Singapore FTA (2019)**	**EU-Vietnam FTA (2019)**	**EU-UK TCA (2020)**
Number of references to external legal acts	23	27	35	57

Table 2. The number of references to external legal acts in the four most recent analysed FTAs.

Apart from the reaffirmation of international standards through references to particular external legal acts, the analysed EU FTAs also include obligations by both parties to ratify certain international conventions. However, the wording of such provisions varies significantly between particular agreements and has already proved to be highly contentious.

Several analysed agreements do not explicitly require any particular action to be taken in order to ratify international conventions, e.g. the association agreement with Georgia stipulates that the Parties will *"consider the ratification of the remaining priority and other conventions*"[19]. However, most analysed agreements, such as the FTA with South Korea (2010), directly require the undertaking of "*sustained efforts*" by both parties to ratify enlisted international conventions[20]. Even though such wording of this requirement seems to be stronger, it still does not provide for a clearly defined obligation with an explicit standard of care. In the case of the EU vs. South Korea before the Panel of Experts, the parties argued about the level of care required by the phrase "*sustained efforts*" which suggests that such provisions lack a clear establishment of a reference point in regard to what is (and what is not) expected from the involved states[21].

[19] Art. 299(4) of the AA with Georgia.

[20] Art. 13.4(3) of the FTA with South Korea.

[21] Report of the Panel of Experts (20th January 2021), Panel of Experts proceedings constituted under Article 13.15 of the EU-Korea Free Trade Agreement, pp. 73-74.

6. Dispute settlement & cooperative institutions

The potential strength of the EU TSD chapters seems to lie especially in their procedural obligations, which, on the basis of newly introduced or already existing (present in international conventions) standards, create (1) procedures for resolving disputes arising from the TSD chapters, (2) rules for the participation of non-governmental organisations in intergovernmental consultations and dispute settlement, and (3) establishment of permanent intergovernmental monitoring bodies (which, for example, is not the case under human rights conditionality clauses present in EU partnership agreements). At the same time, the dispute settlement system introduced under the EU TSD chapters is highly criticised due to its lack of sanctions and the alleged unwillingness of EU bodies to issue proceedings in cases of violations[22]. This matter is, however, beyond the scope of this paper.

In principle, all FTAs in the examined sample, regardless of the complexity of their substantive provisions (which differs widely), create a procedural environment according to the model replicated by the EU in FTAs without significant differences. Several features of this model may be extracted when the clauses are compared.

Firstly, all the agreements call for the complying party to begin with a request for intergovernmental consultations. Such a request must, obligatorily, precede a formal opening of the procedure. The agreements set a minimal time frame for the consultations period, so as to, in a way, force the parties to attempt to resolve the issue at question amicably. In the vast majority of the agreements, this period amounts to 90 days that have to lapse from the request for intergovernmental consultations to the date of a submission of a formal complaint to the panel of experts. Minor exceptions include the FTA with Japan (75 days) and the FTAs with Singapore and Vietnam (120 days each).

Secondly, the composure of the panels of experts under all the analysed agreements takes the "*2+1*" format (i.e. each party selects one expert to the panel and then those two experts choose the third member of the panel). In all cases, the panels are temporary (i.e. there is no single, permanent adjudicating body dealing with complaints under the EU TSD chapters); to some extent this solution mimics the first level of the dispute settlement system known under the WTO regime.

However, all the agreements provide for the lists of potential experts that can be appointed during the dispute. Usually, such a list comprises of 15 experts, with several exceptions: the FTA with Central America (17 experts for labour matters, 17 experts for environmental matters), CETA (9 experts), the FTA with Japan (10 experts), the FTA with Singapore (12 experts).

The solution employed in the FTA with Central America seems promising due to the division into two separate expert specialisations that can allow for a better quality of potential verdicts; it has been not, however, replicated in any other analysed agreement despite the visible need for professionalisation of such panels. As was assessed based on the interviews conducted by Harrison et al., experts listed for participation in panels often

[22] *See, for example*, S. VELLUTI, *The promotion of social rights and labour standards in the EU's external trade relations, "Centre for the Law of EU External Relations Papers"* 2016, vol. 5, pp. 83-113.

appeared not to have been "*well-briefed about the role they had taken on*" and some of them did not have a basic knowledge of the procedure and their functions; several interviewees even did not know that they had been appointed for the position[23].

Regarding the formal procedure before panels of experts, most of the agreements provide for the issuance of an interim report by a panel. The parties may then refer their comments as regards such an interim report to the panel within the deadline set out in the agreement. The timeframe for the whole procedure varies from one agreement to another, as presented in the tables below (from 90 to 180 days in total from the date of establishing the panel)

EU FTA trade partner	South Korea	Central America	Georgia	Moldova	Ukraine
interim report	no	yes	yes	Yes	no
deadline for the interim report	–	60 days for a panel to convene + 120 days	15 days for a panel to convene + 90 days	15 days for a panel to convene + 90 days	–
deadline for the final report	2 months for a panel to convene + 90 days	180 days from establishing the panel	120 days from establishing the panel	120 days from establishing the panel	60 days for a panel to convene + 90 days

EU FTA trade partner	Andean Countries	Canada (CETA)	Japan	Singapore	Vietnam	UK (TCA)
interim report	yes	yes	Yes	yes	Yes	yes
deadline for the interim report	60 days	120 days	45 for a panel to convene + 90 days	90 days	90 days	100 days
deadline for the final report	45 days from interim report	60 from interim report	180 days from establishing the panel	150 days from establishing the panel	150 days from establishing the panel	175 days from establishing the panel

While the name of such bodies may slightly differ from one agreement to another, the EU TSD chapters consistently establish two types of cooperative bodies that are involved in the proceedings. Firstly, the Committee on Trade and Sustainable Development that is formed out of senior officials from

[23] J. HARRISON ET AL, *op. cit.*, p. 11.

within the administrations of the Parties and is charged with overseeing the implementation of the EU TSD chapters, as well as with verifying the parties' compliance with verdicts of panels of experts. Secondly, the Domestic Advisory Groups (DAGs) that comprise of independent representative organisations of the Parties' civil society. Members of such DAGs meet together at a Civil Society Forum to conduct a dialogue on sustainable development aspects of trade relations between the Parties, usually minimum once per year.

While the Committees on Trade and Sustainable Development are vested with the obligation to oversee the implementation of the EU TSD chapters (as intergovernmental bodies), the DAGs (as the instrument of civil society) hold certain rights that allow them to exercise pressure on the Parties' governments, most notably: 1) the right to receive information from the Parties about the implementation of the EU TSD chapters, 2) the right to submit their "*views, opinions or findings*" directly to the Parties, 3) limited possibilities to participate in the proceedings before panels of experts (at such panels' discretion), and 4) the right to be provided with the content of the verdicts[24]

While the formal framework for the procedure before panels of experts seems to be well-established, the parties (especially the complaining state) have no legal possibilities to force the panel to observe the deadlines established in the EU TSD chapters. The EU v. South Korea case was meant to be adjudicated by the panel in 90 days, yet in fact it took 479 days from convening the panel to the day of issuing the verdict[25]. While certain unforeseeable circumstances were involved (the illness and death of one of the Panel members, spread of COVID-19[26]), this situation suggests that there is a need for a professionalisation of the dispute management in case of future cases issued before the panels of experts.

7. Trade and Sustainable Development Goals

The "Trade & SDGs" code category developed during the analysis encompasses those provisions that directly interlink trade matters with sustainable development under the EU TSD chapters. As part of that category, the following subcategories of provisions were established: 1) anti-protectionism, 2) non-harmonisation, 3) ban on "rise to the bottom", and 4) trade promoting SDGs. The short definitions and examples of these subcategories are provided in the table below.

[24] See the provisions of the EU-South Korea FTA: art. 13.12 (4) and (5), art. 13.13 (2), art. 13.14 (4), art. 13.15 (1) and (2).

[25] The panel was officially convened on 30th September 2019, the ruling was issued on 20th January 2021.

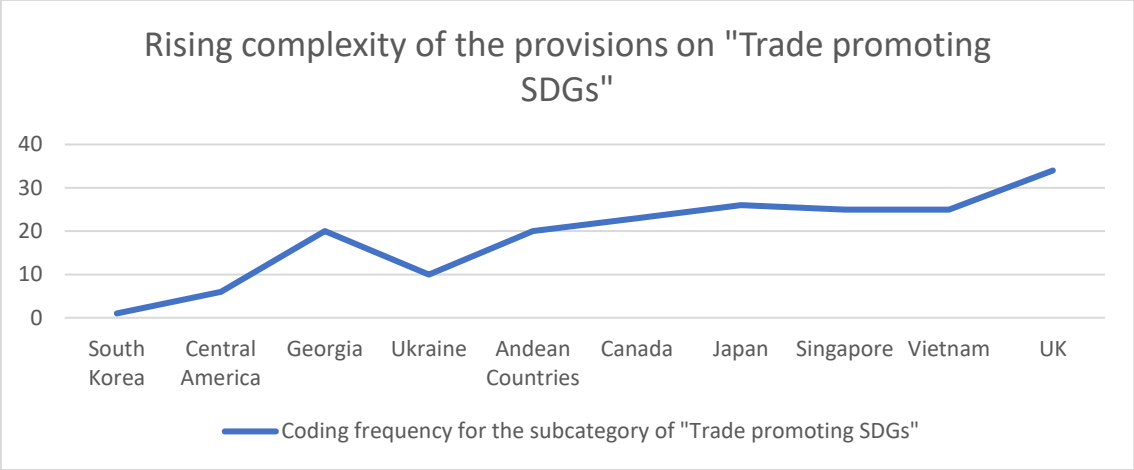
[26] Report of the Panel of Experts (20th January 2021), Panel of Experts proceedings constituted under Article 13.15 of the EU-Korea Free Trade Agreement, pp. 7-8.

Subcode category	Anti-protectionism	Non-harmonisation	Ban on „rise to the bottom"	Trade promoting SDGs
Definition	Provisions (or their fragments) that aim to forbid employing high sustainability standards as a tool of protectionism (i.e. to protect the domestic market from import).	Provisions (or their fragments) that aim to underline that the EU TSD chapters leave a regulatory freedom to the parties as regards their domestic policies.	Provisions (or their fragments) that aim to forbid lowering of sustainability standards by the Parties to gain advantage in trade (so called "rise to the bottom").	Provisions (or their fragments) that aim to underline the connection between trade and SDGs, i.e. a possibility of employing trade in realisation of sustainability.
Example	*"The Parties stress that labour standards should never be invoked or otherwise used for protectionist trade purposes and that the comparative advantage of any Party should not be questioned."*	*"The Parties recognise that it is not their intention in this Chapter to harmonise the labour or environment standards of the Parties, but to strengthen their trade relations and coop-eration in ways that promote sustainable development in the context of paragraphs 1 and 2."*	*"The Parties recognise that it is inappropriate to encourage trade or investment by weakening or reducing the levels of protection afforded in their labour law and standards."*	*"[...]In view of these instruments, the Parties reaffirm their commitment to developing and promoting international trade and their bilateral trade and economic relationship in such a way as to contribute to sustainable development."*
Source	Central America AA, art. 286(4)	South Korea FTA, art. 13.1(3)	CETA, art. 24.5(1)	Singapore FTA, art. 12.1(1)

Such provisions point out both to the tensions and mutual enforcement recognised by the parties as regards international trade and sustainability. Interestingly, certain subcategories seem to contradict themselves while protecting competitive interests. For example, the rules on anti-protectionism aim to prevent using high sustainability standards as a way of protecting parties' domestic markets but at the same time a ban on "*rise to the bottom*" forbids encouraging trade through reduced sustainability standards. The former one (along with the provisions on non-harmonisation) serves the interests of developing countries that are wary of the possibility that high sustainability standards may be used to reduce their exports or force their domestic laws into compliance with developed countries' standards; the latter one (along with the provisions on trade promoting SDGs) attempts to address the concern of developed countries that lower labour and environmental standards may allow developing countries to use an unfair advantage in trade and additionally enforces sustainability as part of existing trade relations. Clearly, the rationale behind trade & SDGs provisions is based mostly on arguments appealing to economic reasons; in that way they are a good acid test as regards the current shape of a blurred border between economic and sustainability-related objectives of comprehensive trade agreements.

While the rest of the subcategories have remained stagnant over the years under a design similar to the one established in the FTA with South Korea (2010), the subcategory of "*Trade promoting SDGs*" has expanded significantly, as shown in the graph below. The new provisions focus on facilitating the cooperation of the Parties at the international fora and agreeing on their common approach towards sustainability. Such provisions also encourage trade and investment in environment-friendly goods and services, as well as in those that contribute to enhanced social conditions. The TCA with the UK even directly obliges the Parties to cooperate on carbon pricing (see art. 7.3 of the TCA).

While some of such newly introduced provisions are vague and soft enough to be not enforceable in practice, many of them set strong obligations (using operators such as "*shall*" and "*will*") and refer to measurable objectives and international conventions. This may prove to be a source of disputes in the future provided that there is a political will on the side of any of the parties to the recent EU FTAs to press these issues further.



8. Conclusions

The results of the study show that the complexity of the EU TSD chapters has been rising over time, following the global trend. However, contrary to the tendency established by empirical research made regarding FTAs with global samples, the EU FTAs concluded with developing countries are not more complex on average than the agreements made by the EU with developed states. In many cases, the opposite is true.

This may firstly stem from the EU being aware of the arguments of developing countries that complex TSD chapters are a disguised tool of protectionism that imposes an economic burden on them (a notion that is partly justified by empirical research). Facing this kind of opposition in negotiations, the EU may systematically allow the adjustment of requirements to the level of development of its trade partners. Secondly, qualitative research has suggested that collective actors with limited political resources calculate the utility of taking a specific action by ascribing strategic meaning to the issues at stake and considering the visibility of their actions in public. This may stand as one of the possible explanations as to why two FTAs concluded by the EU with highly developed countries – Canada and the UK

– have such complex and elaborate TSD chapters and human rights provisions despite those states having a relatively good record of human rights protection and sustainable development initiatives.

The analysis of the distribution of subcodes shows which topics received the most attention from the drafting parties and how the obligations were formulated. Firstly, most of the obligations contained in the EU TSD chapters are of a primary nature (i.e. they require the parties to behave in a specific way by the use of the "*will*" and "*shall*" operators and they do not directly refer to obligations that are external to a given agreement). This indicates the important normative role of the EU TSD chapters. Secondly, the distribution of subcodes within the category of "*rights and values protected*" shows that the environment was by far the most frequently specified protected value in the analysed FTAs, even though violations of workers' rights have proven to be the most disputed issue. The design of the EU TSD chapters regarding labour rights has not changed significantly over time in comparison to the considerable proliferation of environmental provisions.

In principle, all FTAs in the examined sample, regardless of the complexity of their substantive provisions (which differs widely), create a procedural environment according to the model replicated by the EU in FTAs without significant differences. This model includes: (1) procedures for resolving disputes arising from the TSD chapters, (2) rules for the participation of non-governmental organisations in intergovernmental consultations and dispute settlement, and (3) establishment of permanent intergovernmental monitoring bodies. While the formal framework for the procedure before panels of experts seems to be well-established, the Parties have no legal possibilities to force the panel to observe the deadlines established in the EU TSD chapters. Furthermore, the composition of the panels of experts and dispute management suffer from a lack of professionalisation that has not been overcome in the majority of the analysed agreements.

The provisions analysed under the category of "*trade & SDGs*" point out both to the tensions and mutual enforcement recognised by the parties as regards international trade and sustainability. As explained in the paper, certain subcategories as part of this category seem to contradict themselves while protecting competitive interests. Moreover, the subcategory of "*Trade promoting SDGs*" has expanded significantly over the recent years, adding new types of provisions with the aim of facilitating the cooperation of the parties at the international fora and agreeing on their common approach towards sustainability. This may prove to be a source of tensions in the future.

Finally, the analysed FTAs differed significantly in the number of legal acts they directly refer to, which, in turn, affects the level of their embedment in the system of international law. The number of external sources referred to in the EU TSD chapters seems to have grown over time; however, the obligations of ratifying certain international conventions are, at times, of a "*soft*" nature and their scope varies between agreements.

Annex 1: Code System (MAXQDA 2022)

Code System	Frequency
Code System	2381
Rights and values protected	0
Rights and values protected\Labour rights	82
Rights and values protected\Labour rights\Antidiscrimination in employment	14
Rights and values protected\Labour rights\Elimination of forced labour	11
Rights and values protected\Labour rights\Freedom of association	11
Rights and values protected\Labour rights\Elimination of child labour	11
Rights and values protected\Labour rights\Full employment and decent work	17
Rights and values protected\Monitoring of impact	35
Rights and values protected\Transparency	62
Rights and values protected\Scientific knowledge	15
Rights and values protected\Fair trade & CSR	35
Rights and values protected\Mix of values	53
Rights and values protected\Environment protection	105
Rights and values protected\Environment protection\Climate change	52
Rights and values protected\Environment protection\Fisheries	52
Rights and values protected\Environment protection\Forests	44
Rights and values protected\Environment protection\Biological diversity	49
Obligations	0
Obligations\Possibility of cooperation	81
Obligations\Recognition of standards	110
Obligations\Reaffirmation of international obligations	65
Obligations\Reaffirmation of domestic obligations	2
Obligations\Primary obligations	599
Trade & SDGs	0
Trade & SDGs\Anti-protectionism	25
Trade & SDGs\Non-harmonisation	28
Trade & SDGs\Ban on "rise to the bottom"	31
Trade & SDGs\Trade promoting SD	210
Dispute settlement	0
Dispute settlement\No-sanction	17
Dispute settlement\Panel of experts	126

Dispute settlement\Governmental consultations	53
Cooperative Institutions	0
Cooperative Institutions\Committe on Trade & SD	89
Cooperative Institutions\Civil Society Forum	28
Cooperative Institutions\Domestic Advisory Group	36
Legal acts	233

THE CURRENT EUROPEAN UNION'S FREE TRADE AGREEMENTS: A FIRST LOOK AT THE GENDER PERSPECTIVES?[1]

MARTA IGLESIAS BERLANGA

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ABSTRACT: *Under the umbrella of Open Strategic Self-Government, the European Union's new Trade Policy has the opportunity to enhance gender mainstreaming in its design, implementation and monitoring, as well as in the vast network of agreements through which the organisation manages its trade relations. From this perspective, the main objective of this paper is to map the latest free trade agreements concluded by the EU with third countries in order to identify what progress has been made in terms of gender equality and what difficulties still need to be overcome for this challenge to truly cease to be a purely ethical or moral concern and to contribute to the development of an innovative, competitive and prosperous European economy that is consistent with the United Nations Sustainable Development Goals (SDGs).*

KEYWORDS: *Open Strategic Self-Government, European Union´s trade policy, free trade agreements, gender equality, United Nations Sustainable Development Goals (SDGs).*

1. The European Union´s new trade policy strategy

1.1. The European Union Trade Policy in the light of Open Strategic Autonomy

Trade is one of the European Union's most important tools, an engine driving its economic prosperity and competitiveness, while fostering a dynamic internal market and strong external action. As a result of the openness of its trade regime, the EU is the world's largest trader of services and agricultural and manufactured goods, which puts it in first place in terms

[1] This work has been carried out within the framework of the implementation of the Research Project "CEDAW 40 years later: Women´s Liquid Rights?" (PID2021-1227880B-100) financed by the Ministry of Science and Innovation under the State Programme for Scientific, Technical and Innovation Research 2021-2023.

of international inward and outward investment[2]. Since the Common Commercial Policy is an exclusive competence of the EU, the Organization speaks with one voice on the international stage, exerting a unique leverage[3]. If Trade Policy is the set of rules and requirements that affect trade, trade openness in policy[4], which is distinct from trade openness in practice[5],

[2] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Trade Policy Review - An Open, Sustainable and Assertive Trade Policy*, COM (2021) 66 final, Brussels, 18.2.2021.

[3] In accordance with the founding treaties and their successive revision treaties, the Member States have progressively transferred to the EU the exercise of certain normative, executive or judicial powers. Consequently, the competences exercised by the Union are competences of conferral, this idea being intentionally highlighted in Articles 5(1) and (2) TEU, in Article 7 TFEU, and/or in Declaration 17 "Concerning the delimitation of competences" annexed to the Treaties, following the entry into force of the Lisbon Treaty. In order to clarify the division of powers between the EU and the Member States, the Treaty of Lisbon classifies, for the first time, the competences that the EU may exercise and the matters covered by each of them. Title I TFEU, "Categories and areas of competence of the Union", sets out this issue in Articles 2 to 6. The treaty thus identifies when the EU acts exclusively, when it acts jointly with the Member States, or when it does so merely in order to support or coordinate them. It is common ground that the general principles guiding the operation of these competences are the principle of subsidiarity, the principle of proportionality and the principle of loyal cooperation. Consequently, the European Union can only exercise the competences assigned to it by the Member States for the achievement of its objectives. Although this understanding of the nature of the Union's competences limits the specific capacities for action of each of its institutions, Article 352 TFEU ("unforeseeability or flexibility clause") makes it possible to extend the Union's powers more than before. This very extensive subsidiary competence extends to all EU policies and, therefore, to the Common Commercial Policy (CCP). The exclusive competences of the Union are those that allow it to exercise the principal legislative power in certain substantive areas without the Member States being able to carry out, in this area, first-level legislative action. The role of the States is therefore limited to implementing what has been adopted by the EU, unless the latter authorizes them to legislate *ad hoc* (Article 2.1 TFEU). In the case of the Common Commercial Policy, this material sphere has been the exclusive competence of the Union since December 31, 1969, namely the date that marked the end of the twelve-year transition period established by the Treaty of Rome (in force in 1958) for the construction of a common market among the Member States of the then European Economic Community (EEC) allowing the free movement of goods, persons, services and capital. The coherence of the whole required that liberalization at the internal level should not be in contradiction with liberalization efforts in the external sphere and, hence, the Common Commercial Policy constituted an exclusive competence of the Community from the end of the transition period. The fact that, until 1970, the Member States were responsible for coordinating their trade relations with third countries did not, however, prevent the EEC from concluding bilateral agreements (*e.g.*, with Israel in 1964) or from participating, as such, in the Kennedy Round negotiations between 1963 and 1967. *Vid*. JIMÉNEZ DE PARGA MASEDA, Patricia, REGUEIRO DUBRA, Raquel, IGLESIAS BERLANGA, Marta, GONZÁLEZ MARÍN, Ana María, LIÑÁN HERNÁNDEZ, Patricia, SUÑÉ CANO, Juan Emilio, en LÓPEZ MARTÍN, Ana Gemma (ed.), *Historia e instituciones de la Unión Europea*, Servicio de Publicaciones, Facultad de Derecho, Universidad Complutense de Madrid, Madrid, 2021, pp. 42-46.

[4] Trade openness in politics is the set of public measures, including laws, regulations and requirements, which determine the extend to which countries are open to international trade. Policy openness is defined in relation to barriers to international trade imposed by States, which may include tariff and non-tariff measures (such as quotas, import licensing systems, health regulations, bans, etc.).

[5] Trade openness in practice indicates the degree of integration of a country into the world economy and, therefore, the importance of international trade in relation to national activities. Trade openness in practice may result from political and non-political factors aimed at

depends on the existence of measures aimed at limiting or increasing trade and its scope. In this context, the current internal and external challenges that the EU must face (among them, the antagonistic impact arising from globalization and technological evolution on economies and societies[6], the rapid rise of China and its one-state capitalism model, the acceleration of climate change and/or the digital transformation[7]) call for a new strategy for its Trade Policy that contributes to the achievement of its tactical objectives both within and beyond its borders and to promote greater sustainability in line with its commitment to fully implement the UN Sustainable Development Goals (SDGs)[8]. Without losing sight of the fact that the nature of trade will continue to evolve, the new EU Trade Policy must reflect the political ambition of the Organization, *i.e*., the desire to become "A Stronger Europe in the World"[9].

To this end, the EU is prepared to combine its internal and external action in a multiplicity of policy areas, harmonizing and using all available trade instruments. This is the spirit of "open strategic autonomy", a policy choice based on openness, to intensify global cooperation, to take advantage of international opportunities without ignoring self-interest and to support domestic policies to strengthen the EU economy and establish a reformed regulatory system of global trade governance. In fact, with regard to gender mainstreaming[10], the multilateral space of the World Trade Organization (WTO) currently has several limitations that make it difficult to integrate current concerns in this area. Thus, taking into account that the negotiating sector requires the consensus of all members to make any amendments or additions to existing laws and that its judicial function is at a crossroads[11], it

increasing trade. Trade openness in practice is measured through the value of imports and exports or the sum of both as a percentage of GDP. *Vid*. MCCULLOCH, Neil, WINTERS, Alan, and CIRERA, Xavier, *Trade Liberalization and Poverty: A Handbook*, Centre for Economic Policy Research, London, 2001.

[6] *Vid*. BLACK, Sandra, and BRAINERD, Elizabeth, *"Importing equality? The impact of globalization on gender discrimination", Industrial and Labor Relations Review*, 57 (4), 2004, pp. 540–559.

[7] *Vid*. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Trade Policy Review - An Open, Sustainable and Assertive Trade Policy, op. cit.,* pp. 1-4.

[8] These are 17 goals with 169 targets set by the United Nations in 2015. The 198 States Members of the UN agreed to make every effort to achieve these goals by 2030. The SDGs represent an universal call for action to end poverty, protect the environment and ensure peace and prosperity for all. The SDGs were preceded by the Millennium Development Goals (MDGs).

[9] *Vid*. Political Guidelines for the European Commission 2019-2024.

[10] That is the process of evaluating the consequences for women and men of any planned activity, including laws, policies or programmes in all sectors and at all levels. On the projection of gender in trade, *vid*. ECHEVERRY RODRÍGUEZ, Valeria, *"Enfoque de género en el comercio internacional: una condición necesaria para la lucha contra la desigualdad", Universitas Estudiantes*, nº 19, 2019, pp. 147-158.

[11] *Vid*. BAHRI, Amrita, "*Appellate Body Held Hostage: Is Judicial Activism at Fair Trial*? *Journal of World Trade*, 53(2), 2019, pp. 293-315.

does not seem easy to reach an understanding at the WTO in the near future to draft a new agreement, legal provisions or a gender-related exception[12].

The EU's openness and involvement on the international stage are the ingredients that, in addition to making its advocacy of international cooperation, multilateralism and the rules-based order credible, also contribute to supporting the Organization's vital interests, namely that functioning international institutions support global economic recovery, decent work, sustainable development and ecological transition. In the medium term, the three key objectives of EU Trade Policy are to support the recovery and radical transformation of the EU economy in line with its green and digital goals; to shape global rules for a more sustainable and fairer globalization; and to enhance the EU's capacity to defend its principles, values and interests (democracy, human rights, preservation of the environment, social rights...), enforcing these rights where necessary, including autonomously. To achieve these objectives, the Commission has identified six specific areas for action[13]:

- Reform of the World Trade Organization (WTO)[14]
- Support for the ecological transition and the promotion of responsible and sustainable value chains
- Supporting the digital transition and trade in services
- Reinforcing the EU's regulatory impact
- Strengthening the EU's partnerships with neighboring and candidate countries and Africa; and
- Encouraging greater EU focus on implementing and enforcing trade agreements and ensuring a level playing field.

At this point, although the European Commission has made progress in mainstreaming gender equality[15] in some EU policies (*e.g.*, in education), this process has traditionally left Trade Policy aside, with the result that DG Trade has not systematically addressed gender-related issues. The current Common Commercial Policy and its "Trade for All" strategy are based on efficiency, transparency and values, but lack a gender perspective[16]. This clashes with one of the fundamental objectives of the EU's external action, at the heart of

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[12] We understand by gender the differences of socially constructed attributes and opportunities associated with being a woman or a man. Gender aspects vary greatly depending of the socio-cultural context and determine the behaviour that is expected, valued and allowed for women and girls and men and boys. *Vid*. Centro de Comercio Internacional, *La incorporación de la perspectiva de género en los tratados de libre comercio*, 2020, Ginebra, p. 1.

[13] *Vid*. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Trade Policy Review - An Open, Sustainable and Assertive Trade Policy, op. cit.,* pp. 4-12.

[14] On WTO reform, see Annex to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Trade Policy Review - An Open, Sustainable and Assertive Trade Policy, op. cit.,* 21 pp.

[15] Namely, the enjoyment of equal rights, responsibilities and opportunities for different sexual categories in social, economic and political life. Gender equality does not mean that women and men are equal, but that the rights, responsibilities and opportunities of women and men do not depend on whether they were born with a certain sex.

[16] *Vid*. European Parliament, *"The EU's Trade Policy: from Gender Blind to Gender Sensitive?"* 2015. Document available online at the URL: http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/549058/EXPO_IDA(2015)549058_EN.pdf.

whose material action the Common Commercial Policy[17] is situated, since in addition to combating gender-based violence and gender stereotypes[18], gender equality and the empowerment of women are, to this day, some of the unfinished battles of the Organization.

As an essential element of an innovative, competitive and prosperous European economy, gender equality is a potential that the EU must realize in order to meet demographic challenges and new internal and external challenges that are fuelled by political and geo-economic tensions. All these major challenges have a gender dimension and, according to Article 8 Treaty on Functioning of the European Union (TFEU), gender equality is (or should be) firmly instituted in all Union policies, including the Common Commercial Policy. According to that provision: *In all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women*. With this vision, trade rules and trade itself can be a useful mechanism for expanding women's entrepreneurial opportunities and facilitating their access to learning and employment, boosting economic growth and poverty reduction. Since no issue is gender-neutral[19], both trade and trade policies have gender-specific effects[20]. Indeed, trade policymakers are increasingly recognizing that while trade regulations are the same for all businesses and traders, this body of regulations has an unequal impact on different segments of the population, including men and women[21]. Mainstreaming this approach into trade policy means ensuring that gender inequalities and their consequences are adequately taken into account at all stages of the trade policy formulation process: design, implementation and monitoring[22].

On the other hand, although it is true that many actors (ministries and other public bodies, negotiators, researchers and statisticians in the field of

[17] The EU´s Global Strategy on Foreign and Security Policy adopted by the Council in 2016 affirms, in effect, that human rights must be systematically integrated into any institutions and policy areas, including international trade and trade policy.

[18] *Vid*. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A Union of Equality: Gender Equality Strategy 2020-2025*, COM (2020) 152 final, Brussels, 5 March 2020, pp. 4-8.

[19] Gender-neutral refers to a policy, programme or situation that does not have differential positive or negative effects on gender relations or equality between women and men.

[20] This is underlined by the European Parliament's reports on the implementation of Parliament's 2010 recommendations on social and environmental standards, human rights and corporate social responsibility (2015/2038 (INI), 27 June 2016) and on the impact of international trade and EU trade policies on global value chains (2016/2301 (INI), 20 July 2017).

[21] For example, Trade Policy affects women-owned firms differently from male-owned firms, as women-owned firms tend to be smaller and therefore less able to deal with complex and non-transparent import and export administrative procedures; they have less track record and are less well financed. Women entrepreneurs have less access to professional networks (which can provide support and advice) and less management experience than men, mainly as a result of the "glass ceiling". See OECD, Trade Policy Brief, *Trade and Gender*, May 2021, pp. 1-2.

[22] Gender mainstreaming in Trade Policy is the set of measures to ensure that gender inequalities and their consequences are adequately taken into account at all stages of the trade policy-making process, *i.e*. at the stages of: 1) generating evidence to inform trade policy decisions; 2) designing policies based on that evidence; and 3) supporting interventions on the ground to facilitate their successful implementation.

trade, international organizations, civil society organizations) are involved in the inclusion of this approach in trade policy, it is no less true that one of the main challenges facing the EU in this regard is precisely to ensure this plural participation and the correct interconnection and coordination of its actions. To this end, both the European Parliament[23] and the Commission have committed themselves to study and better understand the gender equality[24] implications of the various parts of trade policy in order to improve the gender perspective in both CTP and Aid for Trade[25].

1.2. The economy as a gender structure

1.2.1. Gender equality and women's empowerment. Related but distinct concepts

Having passed the 25th anniversary of the *Beijing Declaration and Platform for Action*, namely the first universal commitment and action plan to advance gender equality[26], the European Union must continue to respond, among others[27], to SDG 5[28] on gender equality which, despite being one of the three least funded SDGs globally, constitutes a cross-cutting priority in all of them[29]. Gender equality is a universal objective[30] and a core value of the European Union[31], a fundamental right and a key principle of the European Pillar of Social Rights[32]. Indeed, as regards the implementation of SDG 5, the

[23] In 2018, the European Parliament adopted a decision to include a gender equality provision in all future EU trade agreements. *Vid*. European Parliament Resolution of 13 March 2018 on gender equality in EU trade agreements (2017/2015(INI)). https://www.europarl.europa.eu/doceo/ document/TA-8-2018-0066_EN.html

[24] *Vid*. European Commission. *Strategy for gender equality*. https://ec.europa.eu/info/policies/justiceand-fundamental-rights/gender-equality/gender-equality-strategy_es

[25] *Ibid*em, pp. 24-25.

[26] The Beijing Declaration and Platform for Action was adopted by 189 states at the Fourth World Conference on Women on 15 September 1995. It is the first international legal instrument with a detailed plan of action setting out strategies to ensure equality and full human rights for women in twelve areas of concern: poverty, education and training, health, violence against women, armed conflict, the economy, power and decision-making, institutional mechanisms for the advancement of women, human rights, the media, the environment and the girl child. Other outcome documents have been adopted at the UN Special Sessions on Beijing +5 (2000), Beijing +10 (2005) and Beijing +15 (2010). *Vid*. https://beijing20.unwomen.org/es/about.

[27] Thus, for example, the EU must also assume its obligations with regard to the UN Convention on the Rights of Persons with Disabilities. *Vid*. https://www.un.org/esa/socdev/enable/documents/tccconvs.pdf

[28] *Vid*. Gender Index of the SDGs EM2030 in 2019: https://data.em2030.org/em2030-sdg-gender-index/.

[29] *Vid*. https://ec.europa.eu/europeaid/policies/sustainable-development-goals_en.

[30] No Member State has yet achieved full gender equality and progress is slow. Member States scored an average of 67.4 out of 100 in the 2019 EU Gender Equality Index, a score that has improved by only 5.4 points since 2005. *Vid.* The European Institute for Gender Equality (EIGE): https://eige.europa.eu/gender-equalityindex/2019

[31] This is confirmed by Articles 2, 3 (3), 8, 10, 19, 153 (1) (2), 157 and 207 TFEU and Articles 23 and 33 of the Charter of Fundamental Rights of the European Union.

[32] *Vid*. https://ec.europa.eu/commission/sites/beta-political/files/social-summit-european-pillar-social-rightsbooklet_es.pdf.

EU is an outstanding world leader thanks to its strong legislation and jurisprudence on equal treatment[33], its efforts to mainstream gender in all its policy areas (ad extra/ad intra) and its regulations to address specific inequalities. SDG 5, the successor to Millennium Development Goal 3 (MDG 3)[34], takes a broader approach to gender equality and envisions nine concrete targets:

- Eliminate all forms of discrimination;
- Eradicate violence against women and girls;
- To do the same with respect to harmful practices;
- Recognize and value unpaid care and domestic work[35];
- Support women's decision-making power;
- Ensure access to sexual and reproductive health and reproductive rights;
- Provide women with equal rights and access to economic resources;

[33] Among the Directives on equality between men and women we can highlight: Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation; Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions; Council Directive 96/97/EC of 20 December 1996 amending Directive 86/378/EEC on the implementation of the principle of equal treatment for men and women in occupational social security schemes; Council Directive 79/7/EC of 19 December 1978 on the implementation of the principle of equal treatment for men and women in matters of social security, Council Directive 86/613/EEC of 11 December 1986 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood; and Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services. Together, these Directives have gradually established a Europe-wide legal benchmark ensuring comprehensive protection against discrimination. A large number of rulings by the Court of Justice of the European Union have reinforced the principle of equality and enabled justice to be done for victims of discrimination.

[34] The Millennium Declaration, adopted at the United Nations Millennium Summit on 8 September 2000 to shape the international development agenda for the 21st century, set a series of time-bound targets known as the Millennium Development Goals. The deadline for meeting these goals was 2015. The MDGs were succeeded by the 2030 Agenda for Sustainable Development and its Sustainable Development Goals (SDGs).

[35] According to the 1993 United Nations System of National Accounts, unpaid work is classified into three categories: (a) household chores, childcare and other family-related services not recognised by the System of National Accounts as economic activity; (b) subsistence and non-market activities, such as agricultural production for household consumption and the imputed rental value of owner-occupied housing; and (c) family enterprises producing for the market to which more than one household member contributes unpaid work. Unpaid work is usually performed by women in the household without any remuneration in return. On this issue, see among others, RAZAVI, Shahra and STAAB, Silke, "The Social and Political Economy of Care: Contesting Gender and Class Inequalities", EGM/ESOR/2008/BP.3, United Nations Division for the advancement of Women, Department of Social and Economic Affairs, 2008, New York; ANTONOPOLOUS, Rania, "The Unpaid Care Work - Paid Work Connection", ILO Working Paper 86, International Labour Organization, Geneva, 2009. Available at: http://www.ilo.org/wcmsp5/groups/public/---dgreports/---integration/documents/publication/wcms_119142.pdf.

- Utilize technology to support women; and
- Approve and strengthen policies and laws to promote gender equality.

Considering that the main criticisms of MDG 3 were both its narrow (mainly social) interpretation of gender equality and women's empowerment and its scant attention to the influence of economic factors on women's well-being, we would like to clarify, before delving into the discussion on trade and gender and, in more detail, the debate on the current EU free trade agreements and gender, that this paper will focus primarily on the definition of gender equality and not on the concept of women's empowerment, which, although a very close notion, is equally distinct; second, in the idea that the economy, and with it trade policy and the conclusion of trade agreements, is part of a system of social relations in which gender is already inscribed, whose links can also be transformed and remade within this system[36]; and third, in the fact that this study does not consider certain cross-cutting disciplines, such as intellectual property rights, agriculture, fisheries, public procurement[37] and the protection of SMEs because, although they may affect women, they are also areas that go beyond the specific limits of this paper.

As for the expression gender equality, while this concept is a system of norms and practices that attributes specific functions, characteristics and behaviors to men and women according to their sex and that, in general terms, assigns to those born as women a condition of subordination in society, that is, while gender equality refers to the situation of women in comparison with that of men[38], women's empowerment is identified with the capacity of women to control their lives and their options and alternatives in making practical and strategic decisions. Women's empowerment can therefore be economic, enabling them to make their own decisions on the use of their resources and income; social, facilitating their access to good quality education, so that they are independent in society and in the family; and political, enabling them to participate in public life. Women's empowerment is therefore a more controversial and more difficult concept to measure than

[36] *Vid*. United Nations Conference on Trade and Development (UNCTAD), *Analysis of the Trade and Gender Nexus from a Development Perspective: A Brief Overview. Concepts, definitions and analytical frameworks*, United Nations, 2022, p. 3.

[37] *Vid*. GONZÁLEZ, Ángeles, *La contratación pública, una herramienta para impulsar el empoderamiento económico de la mujer.* [Speech] Delivered by the Executive Director of ITC in 2017 at the Scuola di Politiche, Milan. https://www.intracen.org/noticias/La-contratacion-publica-una-herramienta-para-impulsarel-empoderamiento-economico-de-las-mujeres/.

[38] Gender differences are not based on "natural" distinctions but are socially constructed and learned through socialisation processes, also structuring the social, economic and political power relations between people of different genders in the household, the market and society at large, and are context- or time-specific and subject to change. In this context, gender equality means considering the interests, needs and priorities of both men and women. We would also like to point out that, in terms of gender, there are men, women, non-binary people and people who identify with a gender other than the one they were assigned at birth. However, in this paper we will talk about men and women. See UN Women, "Concepts and definitions", available at: http://www.un.org/womenwatch/osagi/conceptsandefinitions.htm. In the light of Article 3(c) of the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention), "gender" means the socially constructed roles, behaviours, activities and attributions that a particular society considers to be those of women or men.

gender equality, as it involves many complex dimensions such as, for example, social norms and institutions that are highly context-specific[39].

1.2.2 The impact of trade on economic development and gender equality

Trade affects the economy by altering its production structure and patterns of employment and income as a result of changes in relative prices for goods and services. The fact that these changes take place within economic structures and institutions that are usually shaped by different gender biases[40] has several significant consequences: one, that the distributional outcomes of trade vary by gender, given the different economic sectors and roles played by women and men (wage and salary workers, self-employed workers and employers, own-account workers[41], contributing family workers[42] or members of producers' cooperatives)[43], which, in the case of women, may be even more disparate because of their ethnicity, age, income, educational level, migration status or social obligations in their households and communities; and two, that gender inequalities in different spheres of economic and social life can affect the competitiveness and performance of state exports[44].

As regards the first impact, in the countries of the Organisation for Economic Co-operation and Development (OECD) women tend, for example, to work more in services than in industry or agriculture, and often make up the majority of the workforce in services that are unsuitable for trade, such as health, education and public administration. If, however, "indirect" participation in trade is taken into account, i.e., if sectors that provide input to other export sectors are included, the percentage of women involved in

[39] See United Nations Conference on Trade and Development (UNCTAD), Analysing the Trade and Gender Nexus from a Development Perspective: A Brief Overview. Concepts, Definitions and Analytical Frameworks, op. cit., p. 3; OECD Technical Report "Enhancing Women's Economic Empowerment through Entrepreneurship and Business Leadership in OECD Countries", http://www.oecd.org/gender/Enhancing%20Women%20Economic%20Empowerment_Fin_1_Oct_2014.pdf.

[40] Namely, actions or ideas that respond to prejudices, often against women, based on the sexist perception that women and men are not equal in terms of rights and dignity.

[41] A self-employed person is a self-employed person who has not engaged any employees on a continuous basis and who works on his or her own account or with one or more partners. Contributing family workers and own-account workers are the two categories that make up vulnerable employment, which is characterised by inadequate income (if any), low productivity and difficult working conditions that undermine workers' fundamental rights.

[42] A contributing family worker is a self-employed worker in a market-oriented establishment run by a person in his or her family living in the same household. Contributing family workers cannot be considered partners, because the level of dedication to the operation of the establishment in terms of working time or other factors is not comparable to that of the head of the establishment. Together with own-account workers, contributing family workers constitute the two categories of vulnerable employment.

[43] For more detailed information on these issues, see, United Nations Conference on Trade and Development (UNCTAD), *Analysing the Trade and Gender Nexus from a Development Perspective: A Brief Overview. Concepts, definitions and analytical frameworks*, *op. cit*., pp. 9-19.

[44] *Ibidem*, p. 8.

trade more than doubles exponentially[45]. A quick look at the gender structure of an economy and the type of gender biases that women face in their roles as workers, producers, traders, consumers and taxpayers leads to the conclusion that, while women are generally concentrated in fewer economic sectors (horizontal segregation)[46] and are under represented in positions of power and decision-making (vertical segregation)[47], men are more evenly distributed across a wide range of occupations and productive activities[48]. Moreover, although we will not go into these issues in depth, trade can impact gender inequalities at the "macro"[49], "meso"[50] and "micro"[51] levels, as stated by the British economist, Diane Elson[52].

2. The European Union´s trade agreements and the gender perspective

2.1. The European Union's free trade agreements as vehicles for promoting gender equality

2.1.1. Legal basis, concept and types of trade agreements

As a subject of international law[53], the EU has the power to conclude international treaties with third States or with other international

[45] OECD Secretariat estimates based on OECD Global Employment and Value Chains database, 2019: http://oe.cd/io-emp.

[46] Horizontal segregation occurs where workers in a specific economic sector or occupation are predominantly women or men. It is understood as the under- or over-representation of women or men in occupations or sectors, regardless of any hierarchy. For example, in many countries, construction is a male occupation, while childcare is an almost exclusively female occupation.

[47] Vertical segregation is a situation in which some people do not obtain positions in an organisation above a certain level because of their race, age, gender, etc. Vertical segregation means that the opportunities for career advancement in a company or sector for a certain group of people are limited. In the literature, vertical gender segregation is also referred to as the "glass ceiling effect", which indicates that there are visible or invisible obstacles that prevent women from moving up to higher level positions; DILTS MARSHALL, Elizabeth, *Goldman Sachs to companies: Hire at least one woman director if you want to go public*, Reuters, 2020.

[48] *Ibíd*., p. 5; Banco Mundial, Informe sobre el desarrollo mundial 2012: Banco Mundial, Washington DC. *Igualdad de género y desarrollo,* 2012.

[49] Macro-level analysis examines the gender division of labour between the productive (market or paid) and reproductive (household or unpaid) spheres of the economy.

[50] Meso-level analysis examines the institutions and structures responsible for the distribution of resources, the provision of public services and the functioning of labour, goods and other markets.

[51] Micro-level analysis provides an in-depth examination of the gender division of labour, resources and decision-making, particularly in the household.

[52] *Vid*. ELSON, Diane, "Labor Markets as Gendered Institutions: Equality, Efficiency and Empowerment Issues", *World Developmen*t, 27 (3), pp. 611-627.

[53] As is well known, the notion of legal personality has meaning only in relation to a specific legal system. Thus, in addition to their capacity to create law at the internal level (legal personality *ad intra*), international organizations may also establish relations with other subjects in the performance of their functions and subject part of their activities to the international body of law, being affected, in this sense, by certain international rights and obligations. Although the concept of "international legal personality" is not necessarily identified with the importance or value that an entity has in international relations, it can be stated that a subject of international law is, in general, one that has all or some of the

organizations in order to achieve one of the objectives set out in the Treaties. The legal basis justifying the *ius ad tractatum* or *treaty making power* of the EU lies in Article 3.2 of the TFEU. This provision expressly contemplates the EU's capacity to conclude international treaties, although not in a generic way but in matters in which the Organization has explicit or implicit competences. In this sense, Articles 216 to 219 TFEU are the legal bases that specify the specific material areas in which the EU may conclude the above agreements. As we shall see below, one of these areas is the Common Commercial Policy (CCP) which, according to Articles 206 and 207 TFEU, is an exclusive competence of the European Union.

The expansion of international trade has made the Common Commercial Policy one of the most important policies of today's European Union. At the same time, successive enlargements and the consolidation of the common market have also strengthened the EU's position as a pole of attraction and influence in trade negotiations. Gradually, the Union has developed a dense network of trade relations on a global scale, making it today the leading global player in international trade, ahead of the United States of America and Japan. As is well known, the EU manages these trade relations with third countries through a wide range of trade agreements that differ in content but share certain fundamental principles of the WTO[54]. Thus, a distinction can be made between:

- Economic partnership agreements (EPAs), aimed at supporting the development of ACP (African, Caribbean and Pacific) trading partners;
- Free trade agreements (FTAs), which allow for a reciprocal opening of markets with developed states and emerging economies by granting preferential market access; and
- Association agreements (AAs), which are those that reinforce broader political agreements.

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following prerogatives: Normative capacity to create international rights and obligations; a) ownership of rights and obligations conferred by international legal norms; b) power to assert those rights at the international level, which means being entitled to claim international responsibility before international institutions (*active standing*); and c) competence to be internationally responsible in case of violation of its international obligations (*passive standing*). In accordance with the Advisory Opinion of the International Court of Justice on *Reparation for Injuries Suffered in the Service of the United Nations* (1949), not all subjects have, however, the same degree of subjectivity, since not all of them enjoy the same powers. International Organizations, such as the European Union (EU), have a personality derived and restricted by the principle of specialty. In other words, international organizations are subjects of a secondary nature, created by States, whose competences are limited to those attributed to them by the States through the relevant constituent treaties (functional nature). In the light of these basic premises, the express confirmation of the international legal personality of the European Union came with the Treaty of Lisbon, in force since December 1, 2009. Article 47 of the Treaty on European Union (TEU) as consolidated by the Treaty of Lisbon is, in fact, the first provision that openly declares that "the Union has legal personality". As an international organization, the EU therefore enjoys the following manifestations of the international legal personality limited, as is logical, to the range of its functions and the purposes for which it was created: a) the capacity to conclude international treaties (*ius ad tractatum*); b) the right to receive and send representatives (*ius legationis*); c) the power of representation in international forums or instances (*ius representationis*); d) the possibility of incurring active and passive liability; and e) the power to impose restrictive measures (sanctions).

[54] We are talking about pollution control, predictability and fair competition.

The EU also participates, in any case, in non-preferential trade agreements integrated into larger treaties, such as partnership and cooperation agreements (PCAs). As regards the negotiation of these agreements, their legal basis rests on Article 218 TFEU, although in May 2018 the Council adopted Conclusions on the negotiation and conclusion of EU trade agreements that set out the fundamental principles that have since underpinned the institution's new approach. This perspective is essentially the result of both the 2017 Opinion 2/15 of the Court of Justice of the European Union[55] regarding the division of competences between the EU and its Member States in the framework of the free trade agreement between the Organization and Singapore, and the 2017 State of the Union speech of former European Commission President Jean-Claude Juncker entitled "A balanced and progressive Trade Policy to harness globalization"[56]. Thus, just as the CJEU ruling dictates that only provisions relating to non-direct foreign investment and investor-state dispute settlement are shared competences, Juncker stressed the need to ensure the legitimacy and inclusiveness of the negotiation and adoption processes in Trade Policy regardless of whether the final decision on enactment occurs only at EU level or also at Member State level. In its Conclusions, the Council also endorses the Commission's suggestion to divide into separate agreements the investment provisions, which require the approval of the EU and all its member states, and other trade provisions that fall within the exclusive competence of the Organization. The Conclusions further focus on the role of the Council at all stages of negotiations[57] and the need to reach consensus decisions as far as possible to ensure that trade agreements take due account of all member states' interests and concerns. In this direction, the Council favors transparency of information on the evolution and content of trade agreements under negotiation to all interested parties (e.g., national parliaments and civil society)[58].

Of all the agreements mentioned, our interest will focus on the free trade agreements (FTAs) [Box 1] as platforms for enhanced cooperation through which the EU defends its values and interests. These agreements not

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55 *Vid*. https://eur-lex.europa.eu/legal-content/ES/TXT/?uri=CELEX%3A62015CV0002%2801%29

56 *Vid*. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A Balanced and Progressive Trade Policy to Harness Globalisation*, COM (2017) 492 final, Brussels, 13 September 2017.

57 The Council plays a key role in shaping a new trade agreement. In the initial stages, the Council authorises the European Commission to negotiate a new trade agreement on behalf of the EU. This is done through a 'negotiating mandate'. Along with the corresponding authorisation, the Council provides negotiating directives that include the objectives, scope and possible timing of the negotiations. The Commission then negotiates with the partner country on behalf of the EU and in close cooperation with the Council and the European Parliament. Once agreement on the text has been reached with the partners, the Commission presents formal proposals to the Council for adoption. Following discussions, the Council adopts a decision to sign the agreement on behalf of the EU. It then sends the signed agreement to the European Parliament for approval. In the final stages, once the European Parliament has given its consent, the Council adopts the decision to conclude the agreement.

58 *Vid*. Council of the European Union, *Draft Council Conclusions on the Negotiation and Conclusion of the EU Trade Agreements*, Brussels, 8 May 2018, document available online at the URL: https://data.consilium.europa.eu/doc/document/ST-8622-2018-INIT/en/pdf

only provide the Union with the opportunity to deepen economic integration but also the occasion to develop integrated production and services networks with markets and important states worldwide, particularly in the Asia-Pacific region, Latin America and the Caribbean. Opening up new markets for EU goods and services, making trade cheaper by eliminating customs duties and reducing bureaucracy, speeding up trade by facilitating customs transit and establishing common rules, or increasing opportunities for investment and investment protection are indeed some of the important and debated[59] advantages facilitated by trade agreements, including FTAs. Precisely in order to encourage and retain investment, the EU has proposed the activation of a permanent body to resolve investment disputes: a contested multilateral investment court that would replace the court systems involved in the Union's trade and investment agreements[60].

BOX 1

FREE TRADE AGREEMENTS OF THE EUROPEAN UNION WITH THIRD STATES

SEVEN FREE TRADE AGREEMENTS IN FORCE
• **Canada** [the EU-Canada Comprehensive Economic and Trade Agreement provisionally entered into force on September 21, 2017][61].
• **South Korea** [since 2015]
• **Japan** [since 2019][62]
• **Mexico** [since 2000. The FTA is part of the Mexico-EU Economic Partnership, Political Coordination and Cooperation Agreement]
• **United Kingdom** [since 2021]
• **Singapore** [since 2019] Vietnam [since 2020] Japan [since 2019] Mexico [since 2000][63].
• **Vietnam** [since 2020]
TWO FREE TRADE AGREEMENTS IN THE PROCESS OF ADOPTION/RATIFICATION
○ **Chile**[64]
○ **New Zealand** [concluded in June 2022].
SIX FREE TRADE AGREEMENTS UNDER NEGOTIATION
✓ **Australia** [negotiating directives adopted in 2018].

[59] On the disputed virtuality of free trade agreements, see ARÉVALO, Julián, "Acuerdo de comercio preferencial: más allá del libre comercio", *Revista de Economía Institucional*, vol. 12, nº 23, Segundo Semestre 2010, pp. 377-382.

[60] On this debated issue, see among others: SÁENZ DE JUBERA HIGUERO, Beatriz, *"Protección de las inversiones en la Unión Europea: el fin del arbitraje de inversiones (de la sentencia "Achmea" a la propuesta de un tribunal multilateral de inversiones", Revista Electrónica de Direito*, vol. 21, nº 1, 2020, pp. 150-177; PÉREZ DE LAS HERAS, Beatriz, *"¿Hacia un Tribunal multilateral de inversiones? Propuestas de la Unión Europea para reformar la resolución internacional de conflictos", Unión Europea Aranzadi*, nº 8-9, 2018.

[61] The areas that have not yet entered into force are: investment protection and the investment court system (ICS); market access for portfolio investment; provisions on camcords; two provisions on transparency of administrative procedures, review and redress in Member States. The agreement will enter fully into force once all Member States' parliaments have formally ratified it. The countries that have not yet ratified the agreement are: Belgium, Bulgaria, Cyprus, France, Greece, Hungary, Ireland, Italy, Poland and Slovenia.

[62] The negotiating directives were adopted in 2017 and the agreement was ratified at the end of 2018.

[63] The EU has also negotiated an investment protection agreement with Singapore, which will enter into force once it has been ratified by all EU Member States in accordance with their respective national procedures.

[64] The negotiating guidelines were adopted in 2017.

✓ **China** ✓ **Philippines** [negotiations started in 2015] o India [negotiations started in 2007, interrupted in 2007]. ✓ **India** [negotiations started in 2007, were interrupted in 2013, resumed again in 2022, and are scheduled to be completed by the end of 2023] ✓ **Indonesia** [negotiations were launched in 2016]. ✓ **MERCOSUR** [the EU and MERCOSUR have been negotiating a bi-regional free trade area since April 2000][65].
EIGHT FREE TRADE AGREEMENTS IN SUSPENSION
▪ **Bahrain** [negotiations started in 1990 and have been suspended since 2008]. ▪ **United Arab Emirates** [negotiations started in 1990 and have been suspended since 2008] ▪ **Kuwait** [negotiations started in 1990 and have been suspended since 2008] ▪ **Malaysia** [negotiations started in 1990 and have been suspended since 2008] ▪ **Oman** [negotiations were launched in 1990 and have been suspended since 2008] ▪ **Qatar** [negotiations saw the light of day in 1990 and have been suspended since 2008] ▪ **Saudi Arabia** [negotiations started in 1990 and have been suspended since 2008] Thailand [negotiations started in 1990 and have been suspended since 2008] ▪ **Thailand** [negotiations started in 2013 and there has been no progress since 2014]

Source: Own elaboration based on data from the official EU website.

2.1.2. Gender mainstreaming in EU FTAs

At this stage, although the gender perspective is slowly emerging as a policy norm in FTAs[66], the first explicit provision on gender dates back to Article 157 of the TFEU. According to this provision: *Each Member State shall ensure the application of the principle of equal pay for male and female workers for equal work or work of equal value*. The idea of using FTAs as a leveling field for women and redistribution of benefits of free trade equally between women and men is therefore not an innovative proposal[67]. The willingness to introduce gender considerations in the drafting and implementation of FTAs, which in turn is a way to achieve gender equality, constitutes a glimpse of commitment, understanding and political will aimed at eradicating/reducing such inequality, maximizing the positive effects and minimizing the negative consequences of these agreements for women in trade[68]. In this last respect, trade and investment agreements affect women and men differently, for example, because of the main structural gender inequalities: first, the wage gap to the detriment of women[69]; second, the

[65] Negotiations on a trade agreement, integrated into the Association Agreement, with the South American trading bloc of Argentina, Brazil, Paraguay and Uruguay were concluded on 28 June 2019. The negotiating directives were adopted in 1999.

[66] *Vid*. GARCÍA TRUJILLO, Andrés*, "El TLC visto desde una perspectiva de género", Papel Político*, vol. 12, nº 2, 2007, pp. 511-533.

[67] International Trade Center, *From Europe to the World: Understanding Challenges for European Businesswomen*, ITC, 2019, Geneva.

[68] *Vid*. BAHRI, Amrita, *"Making Trade Agreements Work for Women Empowerment", Latin American Journal of Trade Policy*, vol. 4, nº 11, 2021, pp. 6-24.

[69] The gender pay gap is the difference between the average wages or salaries of women and men. The unadjusted gender pay gap has two parts: the explained part and the unexplained or residual part. The explained part reflects differences in workers' productivity or skills due to factors such as education, experience, occupation, professional sector, etc. The unexplained or residual part is the result of gender discrimination (unequal pay for male and female workers with the same qualifications). It should be noted that the lack of equal opportunities between men and women (e.g. in education) may also result in lower qualifications for women that do not necessarily reflect their own choice. The gender pay gap

existing global gender gap[70]; and third, the disparate economic sectors in which women and men participate[71]. Agriculture and informal and unpaid care are some of the areas "specific" (emphasis added) to women workers that, despite not being visible in trade policies, are affected by current trade and investment practices[72]. *Verbi gratia*, free trade agreements (FTAs) can precipitate changes and losses in employment, especially in export-related sectors where the majority of workers are women. Thus, there is still much work to be done and this is attested to by the new trade agreements which, although they do include a chapter on Trade and Sustainable Development, still do not refer to human rights, giving the impression of prioritizing the conclusion of such agreements over the need to ensure sustainable trade and/or the protection of human rights. Furthermore, commitments made in the area of sustainability are not binding, unlike trade obligations[73]. To achieve the goal of gender equality, it is not only indispensable to comply with the relevant international conventions of the United Nations (UN) and the International Labor Organization (ILO), i.e. the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, 1979)[74] and Conventions No. 100 on Equal Remuneration (1951)[75], No. 111 on Discrimination in Respect of Employment and Occupation (1958)[76], No. 189 on Domestic Workers (2011)[77], No. 156 on Workers with Family Responsibilities (1981)[78] and/or Convention No. 183 on Maternity Protection

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can be measured as the difference between average male and female earnings expressed as a percentage of male earnings.

[70] The gender gap is the distance between women and girls and men and boys in terms of their levels of participation, access to resources, rights, remuneration or benefits in different spheres of economic, social and political life. HAUSMANN, Ricardo, TYSON, Laura. and ZAHIDI, Saadia, *The Global Gender Gap Report*, World Economic Forum, 2010. Available at: http://www3.weforum.org/docs/WEF_GenderGap_ Report_2010.pdf

[71] Women make up the majority of workers in certain sectors such as garment and textile manufacturing, telecommunications, tourism, care work and agriculture. They are usually in jobs (formal or informal) that are poorly paid or under-recognised.

[72] Women face gender-specific constraints, such as limited access to and control over resources, legal discrimination and the burden of unpaid care work as a result of traditional gender roles. *Vid*. European Parliament, *Report on gender equality in the Union's trade agreements*, 6 February 2018, (2017/2015 (INI), p. 11.

[73] *Ibíd.*

[74] The text of this Convention can be found in BOE no. 69, 21 March 1984, pp. 7715 to 7720. While respecting the provisions of this Convention, the Union must lay the foundations for achieving equality between men and women by ensuring equal access for women to political, economic and public life, as well as to education, health and employment, and equal opportunities in all these areas.

[75] *Vid*. https://www.ilo.org/dyn/normlex/es/f?p=NORMLEXPUB:12100:0::NO::P12100_Ilo_Code:C100

[76] The text of this treaty can be consulted in BOE no. 291, 04 December 1968.

[77] The text of this treaty can be consulted at the URL: https://www.ilo.org/dyn/normlex/es/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C189

[78] The text of this treaty can be consulted at the URL: https://www.ilo.org/dyn/normlex/es/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C156

(2000)[79] respectively, but that such equality should also be advanced in the framework of a revised Trade Policy that turns its gaze towards the negotiation and/or ratification of a new generation of EU trade agreements with third States (including FTAs) and export promotion policies. The broader scope of these agreements, compared to previous ones, should include greater implications for human rights and go beyond their traditional focus on trade and services liberalization[80]. According to the European Parliament, only 20% of agreements with non-European trading partners refer to women's rights and, although 40% of these agreements do include references to the promotion of women's empowerment, these references are mainly voluntary, and exceptionally binding. Moreover, when the references are mandatory, they are often not applied in practice. The same institution maintains, however, that the empowerment of women could increase the world's Gross Domestic Product (GDP) by US$28 billion by 2025[81]. This potential is essential from all perspectives (economic, social, poverty eradication...)[82] and both the Commission and the European External Action Service (EEAS) should have sufficient human and material resources to ensure that the gender perspective is integrated into the Union's trade policies and, more specifically, into trade negotiations, joint committees, expert groups, internal advisory groups, joint consultative committees and dispute settlement bodies[83]. On the other hand, given that the EU's Generalised System of Preferences (GSP and GSP+[84]) is another trade-related tool that provides preferential access to the EU market for developing countries and includes human rights provisions[85], it would be highly desirable that compliance with the UN and ILO international treaties referred to above continues to be an indispensable requirement under the new GSP Regulation that will enter into force in 2024.

Yet FTAs also have a number of limitations. Inter alia, a lack of knowledge to use trade agreements and policies to empower women, an

[79] The text of this treaty can be consulted at the URL: https://www.ilo.org/dyn/normlex/es/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C183

[80] Trade liberalisation refers to the removal or reduction of barriers and restrictions to international trade. Trade liberalisation measures include the elimination or reduction of tariffs (such as import duties) and non-tariff barriers (quotas, import licensing rules, etc.). Trade liberalisation can be the result of bilateral, regional or multilateral commitments adopted by a country, or it can be implemented unilaterally. Trade liberalisation falls under the category of "trade opening in policy".

[81] *Vid*. McKinsey Global Institute, *The power of parity: How advancing women's equality can add $12 trillion to global growth*, 2015.

[82] *Vid. European Parliament, Report on Gender Equality in EU Trade Agreements, op. cit.* p. 4.

[83] Taking into account both positive and negative impacts throughout the process, from the negotiation phase to implementation, and considering appropriate measures to prevent or compensate for possible negative effects. *Ibidem*, pp. 6-8.

[84] GSP+ includes conditions aimed at ensuring ratification and implementation of the 27 international conventions on human rights and labour rights, environmental protection and good governance by eligible developing countries. The Convention on the Elimination of All Forms of Discrimination against Women is one of the most important conventions under GSP+.

[85] *Vid*. 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 (GSP Regulation), OJ L 303, 31 October 2012, p. 1.

absence of gender expertise in government departments responsible for conducting trade negotiations, insufficient political will and, as we will see below, a dearth of gender-disaggregated data to inform negotiations on how trade disciplines affect women.

2.1.3. The ex-ante gender impact assessment of FTAs

The gender impact assessment of trade agreements measures the actual or projected effects of FTAs on women in EU Member States, facilitating the identification of measures that should be taken to support gender equality. This tool should not be confused with gender mainstreaming in free trade agreements, which seeks to include gender considerations in the drafting and implementation of FTAs. Ex-ante assessments, which vary in scope and purpose, are a valuable tool for ensuring gender-sensitive trade policy formulation. Canada, for example, has developed a Gender-Based Analysis Plus (GBA+)[86], with the intention of integrating it into all policies and policy proposals, including FTAs. The EU, as an economic bloc, has been conducting Sustainability Impact Assessments (SIAs) of trade agreements since 1999 and, as of 2012, all SIAs include an analysis of the potential human rights impacts of trade agreements under negotiation. In SIAs, gender considerations are introduced into social issues under the heading of "equality", and gender equality is assessed in employment, employment opportunities, education, social protection and social dialogue. The latest version of the EU-Chile[87] free trade agreement provides a good example of how gender considerations can be incorporated more robustly into SIAs[88]. In this regard, on December 9, 2022, the European Union and Chile concluded negotiations on the EU-Chile Advanced Framework Agreement which, inter alia, places a range of shared values such as human rights, sustainable trade and gender equality at the core of their relations[89]. This modernized Agreement, which will consist of two parallel legal instruments (the

[86] *Vid*. https://women-gender-equality.canada.ca/en/gender-based-analysis-plus.html.
[87] The first agreement entered into force on 5 July 1997.
[88] *Vid. Estudio comparativo: Incorporación de las mujeres al comercio internacional* 121, Instituto de la Mujer y para la Igualdad de Oportunidades, Ministerio de la Presidencia, Relaciones de las Cortes e Igualdad, 2019, p. 21.
[89] The EU and Chile concluded an Association Agreement in 2002, which includes a comprehensive trade agreement that entered into force in February 2003 and covers trade relations between the EU and Chile. Thus, while trade in goods between the EU and Chile grew by 163% between 2002 and 2021, exports of goods from the EU to Chile increased by 284% in the same period. The EU and Chile agreed to upgrade the Association Agreement and replace it with the new generation Advanced Framework Agreement that strengthens and deepens their bilateral relationship. The Agreement is a concrete expression of the political will of the EU and Chile to work more closely together and a key element of a renewed bi-regional partnership in the framework of the EU roadmap for Latin America and the Caribbean in 2023. This Agreement responds to the new priorities and global challenges that have emerged since the signature of the current Association Agreement more than 20 years ago.

Advanced Framework Agreement[90] and an Interim Free Trade Agreement[91]) will include, for the first time for the European Union, a specific chapter on trade and gender, as well as various commitments aimed at eliminating discrimination against women. Just as Chapter 14 on gender in the 2016 treaty between Chile and Uruguay[92] served as a model for the successive gender chapters of the regional trade agreements (RTAs) Chile-Argentina (Additional Protocol to ACE 35 between Chile and Mercosur), Chile-Brazil (Additional Protocol to ACE 35 between Chile and Mercosur), Chile-Ecuador (2020), Canada-Chile (Appendix II, Chapter N bis, 2016/17) or Canada-Israel[93] (Chapter 13), let us hope that this EU-Chile agreement is the first rung of a conventional ladder in which trade and investment commitments do not prevail over human rights, women's rights or environmental protection and do consider the local, social and economic environment. UNCTAD's Trade and Gender Toolbox (2017a) is also, on the other hand, a useful pre-assessment framework for gendered impacts of trade reforms[94]. These assessment tools have, however, some shortcomings. Thus, with exceptions such as the EU SIAs, the measurement devices are often not based on qualitative[95] but only quantitative[96] analyses and also do not examine the unpaid work that falls mainly on women, according to the traditional gender division of labor[97], impacting their participation in paid work. Moreover, once concluded, it is also essential to monitor the effects of the agreements on women's empowerment and gender equality in order to improve future treaties or modify existing ones from a gender perspective (ex post impact assessment). At this juncture, an additional shortcoming of impact assessments is, as we shall see below, the weak capacity of States to collect disaggregated data on gender equality and to conduct studies for trade policy analysis purposes[98].

2.1.4. The scarcity of gender-disaggregated data

[90] The Advanced Framework Agreement will include: a) the political and cooperation pillar; and b) the trade and investment pillar (including investment protection provisions), subject to ratification by all Member States.

[91] The Interim Free Trade Agreement covers only those parts of the trade and investment pillar of the Advanced Framework Agreement that fall within the exclusive competence of the EU, *i.e*. it does not include the investment protection provisions. This Agreement will expire when the Advanced Framework Agreement enters into force.

[92] *Vid*. http://www.sice.oas.org/trade/CHL_URY/CHL_URY_Text_s.pdf.

[93] *Vid*. MONTEIRO, José Antonio, *"Gender related Provisions in Regional Trade Agreements"*, *WTO Staff Working Paper*, Worl Trade Organization, Geneva, 2021.

[94] *Vid*. United Nations Conference on Trade and Development (UNCTAD), *UNCTAS Toolbox. Getting Results*, United Nations, Geneva, 3rd edition, 2020. Document available online at URL: https://unctad.org/system/files/official-document/tc2015d1rev2_es.pdf

[95]The qualitative analysis is the result of input received in a consultation process with representatives of all stakeholders.

[96] The quantitative review focuses on a computable general equilibrium analysis model to simulate the impact of a trade agreement, accompanied by case studies where appropriate.

[97] Gender division of labour is the way in which different tasks, jobs or types of work are assigned to men or boys and women or girls according to gender roles, conventions, institutional norms and practices or other principles about what is considered appropriate for each sex. It is not a static concept and may change over time.

[98] International Trade Centre, *Gender Mainstreaming in Free Trade Agreements*, Geneva, 2020, pp. 21-22.

The EU must ensure that gender aspects of trade are adequately addressed in agreements, also considering their impact on business initiatives. To this end, while sectoral and country gender assessments represent an undoubted added value in the drafting of such agreements, a number of outstanding issues still need to be addressed, inter alia, related to the lack of rigorousness of States in collecting and/or publishing gender equality data and/or the fact that some SDG indicators, such as on female genital mutilation, are classified as "not relevant"[99]. According to a report by Access Info Europe entitled "Unlocking SDG 5: What do we know about Gender Equality?", only six EU Member States - Austria, Croatia, France, Germany, Hungary, Spain, and Austria - publish on average just over half of the data related to gender equality (57%), with Croatia having the lowest level of disclosure at 32%. In addition, there are no common international standards to help States publish SDG data, which generates a wide variety of formats and dissemination systems. For example, while countries such as Germany use an open source and user-friendly platform called Open SDG, in Spain data is published on statistical websites that are usually outdated, and in other States, such as Croatia, there is not even a centralized tool to publish SDG data. In order to collect and disseminate sufficient and appropriate data on the impact of trade disaggregated by sex[100] and, in this way, establish a methodology with clear and measurable indicators at regional, national and sectoral levels, improving the analysis and definition of the targets to be achieved, as well as the measures that need to be taken to ensure that women and men benefit equally from trade, it would be desirable, e.g., that: (a) EU Member States publicize the full set of SDG data (including SDG 5), in line with the UN indicators, on dedicated, easily accessible, usable and understandable websites; (b) the data be made available in open source, machine-readable format and not limited in terms of reusability, in line with the principles of the Open Data Charter[101]; (c) EU Member States legislate to require the collection and publication of all SDG data; (d) EUROSTAT, the EU statistical agency, to centralize data related to all SDG indicators; (e) guidelines be adopted at the international level through, for example, the UN, which could provide guidance to States on how to publish SDG data; and (f) UNESCO to analyze the publication of SDG data as part of the measurement

[99] Despite estimates that up to 600,000 women in Europe are affected by this illegal practice.
[100] These are the separately collected and tabulated data on men and women that allow the measurement of differences between men and women in different social and economic dimensions and are one of the prerequisites for gender statistics. However, disaggregating data by sex does not guarantee, for example, that the concepts, definitions and methods used to produce such data are designed to reflect gender roles, relations and inequalities that may exist in society.
[101] The Charter principles were developed in 2015 by governments, civil society and experts from around the world as a set of globally agreed standards on how to publish data. These principles are basically the following six: 1. Open by default; 2. Timely and Comprehensive; 3. Accessible and Usable; 4. Comparable and Interoperable; 5. For more information, see https://opendatacharter.net/principles-es/

of indicator 16.10.2[102] on the right of access to information[103]. In this regard, the WTO launched in July 2022 a database compiling over three hundred gender equality provisions included in over one hundred regional trade agreements (RTAs), representing almost one third of the existing RTAs notified by Members to the WTO[104]. This database is one of a dozen gender-sensitive policy tools of the WTO Trade and Gender Unit that complements the work of the Informal Working Group on Trade and Gender[105] and is therefore to be welcomed.

2.2. The degree of commitment of current free trade agreements to the gender perspective

The gender perspective is the level of involvement, sensitivity, information and commitment of a free trade agreement, and more precisely of its material or substantive content, to gender equality. This level, which does not assess the impact of an FTA on women's empowerment or its positive or negative impact on the state of gender in a given country, can vary significantly in trade agreements. Thus, while some FTAs contain a full chapter on trade and gender equality, but no legal obligations, others contain only a provision on the subject that is nonetheless binding on the Parties. Moreover, while some FTAs include such clauses in their main text, others incorporate them in a supplementary agreement, annex or protocol. Moreover, just as in some FTAs only general statements recognize the importance of inclusive trade and the role of women in industry and the marketplace, others contain only reaffirmation provisions whereby members reiterate legal commitments they have made under other international instruments such as CEDAW, ILO conventions or the UN SDGs. On the other hand, both general declarations and reaffirming standards are almost always presented as best-effort pledges rather than enforcement clauses. And, furthermore, just as some FTAs envisage cooperation as an instrument for improving women's access to trade[106], many others add a structural element, giving rise to the creation of commissions or institutions to monitor compliance with gender-related rules. The problem is that these commissions often do not have the power, authority or even the funds to carry out their functions properly. Ultimately, the provisions on dispute settlement do not

[102] Number of countries adopting and implementing constitutional, legal or regulatory guarantees for public access to information.

[103] *Vid*. https://www.access-info.org/wp-content/uploads/Opening-Up-SDG-5_How-much-do-we-know-about-Gender-Equality.pdf.

[104] For more detailed information on this database, see: https://www.wto.org/spanish/tratop_s/womenandtrade_s/gender_responsive_trade_agreement_db_s.htm.

[105] In 2017, on the margins of the 11th WTO Ministerial Conference in Buenos Aires, 118 WTO Members and observers expressed their support for the informal Buenos Aires Declaration on Trade and Women's Economic Empowerment, which, as is well known, aims to promote women's economic empowerment through their participation in international trade, focusing on the discussions in the workshops and the exchange of experiences and best practices. On 23 September 2020, participants in Buenos Aires established the Informal Working Group on Trade and Gender Issues at the WTO (WT/L/1095/Rev.1). For more information on the work of the Trade and Gender Unit at the WTO, see: https://www.wto.org/english/tratop_e/womenandtrade_e/tradeandgendermc12622_e.pdf.

[106] However, the implementation of these commitments is subject to the willingness and available resources of the Parties.

apply to gender-related provisions in most current FTAs[107], making their unfortunate unenforceability glaringly obvious and ignoring the fact that, although non-compliance with commitments does not entail sanctioning effects, all the provisions of a treaty are binding on its addressees, subject to their express written consent. This is provided for in Article 26 of the 1969 Vienna Convention on the Law of Treaties concluded between States, according to which: Every treaty in force is binding upon the parties and must be performed by them in good faith (*Pacta sunt servanda*).

Of the eleven free trade agreements concluded by the European Union with third countries, including both FTAs in force and those in the process of being concluded, only the European Union-Chile FTA is, for the time being, an advanced FTA. The remaining ten are FTAs in evolution, i.e., free trade agreements with a more limited gender perspective. Indeed, the new version of the EU-Chile FTA is the treaty that, to date, reflects best practices in the area of gender for several reasons. First, the FTA contains a separate chapter on trade and gender equality (Chapter 27, Articles 27.1 to 27.7), which reflects the willingness of the Parties to incorporate a gender perspective into their economic growth and development. In addition, the text alludes to different international legal instruments directly related to gender issues. For example, the UN SDGs and, in particular, SDG 5 (Article 27.1.4), the 2017 Buenos Aires Declaration (Article 27.1.5)[108], the 1948 Universal Declaration of Human Rights and other human rights tools related to gender equality binding on the Parties (Article 27.1. 6), the Beijing Declaration and Platform for Action (article 27.1.7), the 1979 CEDAW (article 27.2.1), or the various ILO Conventions on gender equality and the elimination of discrimination in respect of employment and occupation, ratified by Chile and the Member States of the European Union (article 27.2.2.2). On the other hand, the EU-Chile FTA also specifically lists the cooperation activities to which the Parties commit themselves in order to promote the empowerment of women and inclusive trade, projecting an image of women that, beyond their status as employees or workers, can also be entrepreneurs, leaders, scientists and/or decision-makers (Article 27.4). Moreover, given the need to ensure the implementation of Chapter 27, the EU-Chile FTA grants this task to the Subcommittee on Trade and Sustainable Development established in Article X.4 (Subcommittees) of the agreement (Article 27.5). Finally, with regard to dispute settlement, Article 27.6 of the FTA refers Chapter 27 to the mechanisms provided for in Chapter 26 on Trade and Sustainable Development and, more specifically, to Articles 26.20 (Dispute Settlement), 26.21 (Consultations) and 26.22 (Panel of Experts)[109].

As for the other ten EU FTAs with third States, which can be qualified as evolving FTAs, the most advanced are the EU-India FTA and the EU-New Zealand FTA. These agreements, in addition to promoting anti-discrimination

[107] International Trade Centre, *La incorporación de la perspectiva de género en los tratados de libre comercio*, *op. cit*., p. 2; MONTEIRO, José Antonio, *op. cit*.

[108] The text of the 2017 Buenos Aires Declaration is available online at the following URL: https://www.wto.org/spanish/thewto_s/minist_s/mc11_s/genderdeclarationmc11_s.pdf

[109] The text of the EU-Chile FTA is available online at the following URL: https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/chile/eu-chile-agreement/text-agreement_en

in employment and occupation[110], also contain an explicit provision on trade and gender equality in Articles X.4 and 19.4, respectively. As regards the remaining eight agreements, as well as the EU-Canada (Article 23.3.1(d)), EU-Indonesia (Article X.3 .2(d), EU-Japan (Article 16.3.2(d)), EU-Mercosur (Article 4.3(d)), EU-Mexico (Article 3.2(d)), EU-Singapore (Article 12.3.3(d)) and EU-Vietnam (Article 13.4. 2, letter d) only contain implicit provisions on gender issues such as sustainable development, human rights and labor or general anti-discrimination commitments, the EU-Australia and EU-UK FTAs have a broader scope, including a more explicit clause on gender equality. Thus, Articles X.3.9 (b) and 399.8 (b) of these agreements provide, respectively, that: The Parties shall cooperate on trade aspects of labor policies and measures, including in multilateral fora, such as the International Labor Organization, where appropriate. This cooperation could cover, inter alia, the following: (b) Trade-related aspects of the ILO Work Programme or, in particular, the linkages between trade and full and productive employment, labor market adjustment, core labor standards, decent work in global supply chains, social protection and social inclusion, and gender equality. In the case of the EU-Canada FTA, it is curious that, Canada being one of the most avant-garde countries in the negotiation of gender-sensitive trade agreements, its FTA with the European Union is not more ambitious. As is well known, Canada has concluded and modernized two advanced FTAs, one with Chile[111] and the other with Israel[112] (CIFTA). In fact, the Canada-Israel treaty is probably the more advanced of the two FTAs, as it subjects gender-related provisions to a mandatory dispute settlement mechanism (Chapter 13, Article 6)[113].

3. Concluding remarks

Understood as an important challenge for economic development, and not as a purely ethical or moral concern, gender inequality has been increasingly positioned in trade policy, both in the WTO and in trade agreements as well as in other international organizations, including the European Union. The inclusion of the gender perspective in current EU free trade agreements is still, however, an incipient practice whose effects on women and trade will become visible over time. This means that work still needs to be done, both at the international level and in the European regional

[110] Occupation is the type of activity carried out in a job. The International Labour Organisation (ILO) defines the concept of occupation as a "set of jobs whose main tasks and duties are characterised by a high degree of similarity". The ILO classifies occupations through the International Standard Classification of Occupations (ISCO), which among other things is used for statistical purposes.

[111] *Vid*. https://www.aduana.cl/aduana/site/docs/20070228/20070228101053/tlc_chile___canada.pdf.

[112] *Vid*. http://www.sice.oas.org/Trade/can-isr/CAN_ISR_2018_index_e.asp.

[113] Such jurisdiction is, however, not compulsory and must be agreed upon by the Parties in case of conflict (Chapter 19). See International Trade Centre, *Gender Mainstreaming in Free Trade Agreements*, *op. cit*., pp. 11 and 20.

framework, to design treaties that, right from their preambles, breathe the gender perspective[114].

In order for women to benefit from the opportunities offered by FTAs at national and international levels, the EU and its Member States also need to promote, from an economic and productive approach, both their education and the development of their skills in areas that favor their access to high-paying professional opportunities, such as aerospace, transportation, information technology, systems design, engineering, business services, leadership roles and professional services. Furthermore, FTAs need to encourage research and internships as potential tools for cooperation on gender issues and include provisions that promote the collection and sharing of sex-disaggregated data to support ex ante and ex post evaluations of the gender impact of FTAs.

In this chapter of difficulties, an additional problem currently lies in the unwillingness of governments to include in FTAs any gender-related provisions that would imply a modification of their domestic regulations. Such is the case, for example, of the wage gap between women and men for the same job. Political will and the necessary resources are, in this regard, the two main keys for LACs to contribute to change. On this path, the possibility that free trade agreements may allow the formulation of reservations, exemptions and exceptions that are unequivocally worded and have clearly defined scope and requirements may also be an incentive for their texts to introduce the gender perspective to a greater extent. Finally, another important element related to the viability of gender-sensitive agreements is that future FTAs submit gender provisions to the binding dispute settlement systems of the treaties or to a specialized ex novo mechanism to ensure compliance with gender-related obligations. This requires, however, that explicit gender clauses in FTAs abandon their traditional wording, i.e., move away from best intentions to evolve into binding commitments.

In short, the European Union must continue to work to popularize free trade agreements that reflect the principle of non-discrimination between women and men, that contain a clear mandate on gender, that are based on data on differentiated impact, that specify their gender targets, that provide for market access in sectors sensitive to women's employment, that eliminate legal restrictions and discriminatory barriers and barriers to access to financing, that include reservations in areas sensitive to gender equality, that promote entrepreneurship and facilitation and training measures (workshops), that protect women's basic labor rights, that promote interstate cooperation on gender equality, as well as consultation with civil society actors and women's organizations, and that consider the inclusion of professional gender experts in the technical and negotiating teams of the agreements. In short, the EU is challenged to insist on the planning of trade agreements (including

[114] Since the preamble is an essential part of any international instrument, insofar as it uncovers the objectives and intentions of the Parties, and since texts must be interpreted in light of their context, object and purpose, the wording of the preamble can indeed be very helpful in identifying the objectives and motivations of stakeholders on gender issues when resolving a dispute.

FTAs) that, based on an adequate procedural, institutional and dispute settlement structure, are gender-sufficient and gender-efficient.

THE APPROACH OF THE LAST GENERATION OF EU'S FREE TRADE AGREEMENTS IN THE PROMOTION OF GENDER EQUALITY AND WOMEN EMPOWERMENT

KLARISSA MARTINS SCKAYER ABICALAM

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ABSTRACT: *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 provisions - enshrined in the UN's 5th SDG - have not been a priority. This scenario would start to change after the Resolution "Gender Equality in EU trade Agreements" adopted by the European Parliament in 2018. Nevertheless, the last FTAs with negotiations concluded by the EU within June 2022 to June 2023 (EU-New Zealand, EU-Chile and EU-Kenya) revealed considerable different approaches regarding the place, structure, commitments, cooperative actions and dispute settlement concerning explicit gender-related provisions. This paper analyses these provisions and consider what could be improved to make EU FTAs more effective for a sustainable international trade system that leaves no women behind.*

KEYWORDS: *EU trade policy, free trade agreements, 5th SDG, women empowerment.*

1. Introduction

Equality between men and women is a core value and overarching principle in the EU legal order. As enshrined in Article 2 of the Treaty of the European Union (TEU)[1] «*The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities*, (…) *in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail*». In fact, the EU's concern with gender equality has been present in an incipient form since the Treaty of

*This paper is updated as of December 2023.

[1] Consolidated Version of the Treaty on European Union, Official Journal of the European Union [2012] OJ C 326, p. 1–390 [hereinafter TEU]

Rome, which included «*the principle that men and women should receive equal pay for equal work* »[2], as a way of equalizing production costs across the single market. Although this provision was more concerned with guaranteeing fair competition, the expansion and development of the EEC into the European Union (EU), in a deep economic, political and social integration among European states, has been accompanied by a strengthening of commitments to equality between the sexes.

As enshrined in Article 8 of the TFEU « in all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women » consequently applying to the EU's external action[3], including the common commercial policy (CCP) or simply trade policy, which with the exception of indirect foreign investment[4] falls under the exclusive competence of the EU[5]. 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» which comprises, *inter alia*, the safeguard of EU's values and fundamental interests, consolidate human rights, and promote sustainable development. Hence, mainstreaming equality between women and men in the international trade agreements negotiated by the EU can be doubly justified, as a way of achieving a fundamental objective of the Union through international trade[6] - equality between men and women - and through the promotion of the principle of sustainable development[7], as gender equality

[2] Article 199 of the Treaty Establishing the European Community. Consolidated Version of the Treaty of Rome Treaty [2002], *OJ C 325, p. 33–184. [hereinafter Treaty of Rome]*

[3] According to Article 21, para. 1, TEU, "The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law." Paragraph 2 complements that "The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to: (a) safeguard its values, fundamental interests, security, independence and integrity; (…)"

[4] In the Opinion 2/15 issued on 16 May 2017 [ECLI:EU:C:2017:376] the full Court of the ECJ [hereinafter Opinion 2/15] concluded that provisions related to non-direct investment and on the ISDS are not part of the CCP and neither can be considered EU's exclusive competence under Article 3 (2) TFEU, falling within the shared competence between the EU and the Member States. See the commentary of Cremona, Marise. "Shaping EU Trade Policy Post-Lisbon: Opinion 2/15 of 16 May 2017." *European Constitutional Law Review* 14.1 (2018): 231-60.

[5] Article 3.1 (2) of the Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326, p. 1–390 [hereinafter TFEU].

[6] The ECJ has not yet specifically analysed the objective of gender equality within the CCP. But considering its case law, we can conclude that gender-related provisions are able to fall within the scope of the CCP when they are "intended to promote, facilitate or govern trade and has direct and immediate effects on trade". Judgment of 18 July 2013, Daiichi Sankyo Co. Ltd, Sanofi-Aventis Deutschland GmbH v DEMO Anonimos Viomikhaniki kai Emporiki Etairia Farmakon, C-414/11, EU:C:2013:520, para. 51-52; and Opinion 2/15, para. 157-158.

[7] For the various currents on the legal nature of the principle of sustainable development, see Longo, Nico and Attila Massimiliano Tanzi. *Il Diritto Internazionale Degli Investimenti Tra Tutela Dell'investitore e Prerogative Statali Nel Perseguimento Del Principio Dello Sviluppo Sostenibile*, 2021. [PhD Dissertation thesis] Alma Mater Studiorum Università di Bologna. Dottorato di Ricerca in Scienze Giuridiche, Phd in Legal Studies, 33 Ciclo, p. 85-105 DOI 10.6092/unibo/amsdottorato/9599. See also Voigt, Christina. *Sustainable Development as a*

integrates the social aspect of sustainable development, which is the fifth goal of the UN's 2030 Agenda from 2015[8]. As highlighted in the ECJ Opinion 2/15 on the EU-Singapore FTA, the objective of sustainable development – a non-trade objective *per se* - forms an integral part of the CCP[9], and so the Trade and Sustainable Development (TSD) Chapters included in the new generation of EU FTAs.

2. Gender-Equality, Sustainable Development and International Trade

The term "gender equality" does not appear in EU primary law, however with the development of the gender theory in the international community[10], followed by the *United Nations Conferences on Women*, the interpretation of the principle of equality between men and women – the affirmative side of the principle of non sex discrimination - was superseded by the principle of gender equality. Although it is commonly misused the word "gender" as a synonym for "women" or "female"[11], the term "gender" has been accepted by the majority[12] to denote a non-stable social construction that «refers to the roles, behaviours, activities, and attributes that a given society at a given time considers appropriate for men and women».[13] As a matter of fact, neither the Convention on the Elimination of all Forms of

Principle of International Law: Resolving Conflicts between Climate Measures and WTO Law. Martinus Nijhoff Publishers, 2009.

[8] 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].

[9] Opinion 2/15, para. 146-147.

[10] See "Gender Equality for Who?" in Abicalam, Klarissa M. S. "Women's Empowerment Through International Trade: Current Challenges and Perspectives". Diritto Comunitario e Degli Scambi Internazionale, n. 3/2022, Ed. Scientifica, ISSN 0391-6111, p. 329-332.

[11] Dharamkar, Karthik. *Textbook on Gender and Women Empowerment*. New Delhi, Astral International Pvt Ltd, 2021.

[12] However, the issue is still controversial, with some neuroscientists claiming that even gender is related to biological conditions, specifically the level of exposure of the unborn child to testosterone during pregnancy. See Soh, Debra. *The *end of Gender: Debunkig the Myths About Sex and Identity in Our Society*. Threshold, 2020.

[13] The definition given by the *UN Women Gender Equality Glossary* continues: "In addition to the social attributes and opportunities associated with being male and female and the relationships between women and men and girls and boys, gender also refers to the relations between women and those between men. These attributes, opportunities and relationships are socially constructed and are learned through socialization processes. They are context/ time-specific and changeable. Gender determines what is expected, allowed and valued in a woman or a man in a given context. In most societies there are differences and inequalities between women and men in responsibilities assigned, activities undertaken, access to and control over resources, as well as decision-making opportunities. Gender is part of the broader socio-cultural context, as are other important criteria for socio-cultural analysis including class, race, poverty level, ethnic group, sexual orientation, age, etc." In *Gender Equality Glossary* of the *UN Women Training Centre*. Available at: https://trainingcentre.unwomen.org/mod/glossary/view.php?id=36&mode=search&hook=gender&sortkey&sortorder=asc&fullsearch=1&page=-1 Last access 20.09.2023.

Discrimination Against Women (CEDAW)[14] adopted in 1979[15], considered the Women's Bill of Rights, neither its Optional Protocol[16] do employ the term gender[17]. Later, on 1995, during the *Fourth World Conference on Women* promoted by the UN in Beijin – it was adopted the *Beijing Declaration and Platform for Action* (BDPA)[18] addressing the need to promote a "gender perspective" in all spheres of society with the aim to empower all women.[19] From then on the term *women empowerment*[20] has been consecrated in the international agenda bringing the idea that all women shall have the power and control over all aspects of their lives, inside and outside the home, sharing not just "de jure" but "de facto" equality with men to enjoy the same opportunities to fully and actively participate in all spheres of public life, such as social, political, economic, cultural, and more recently, digital[21], especially in decision-making positions.

As the EU has a constitutional duty to contribute with the strict observance and development of international law[22], the EU has participated in the evolution of women's rights agenda led by the United Nations, which also has been accompanied by the evolution of the principle of sustainable development. Indeed in 1992 the *Rio Declaration on Environment and*

[14] 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.

[15] Up to date, 189 states have ratified the Convention. However, approximately one-third of the ratifications has reservations, predominantly in Muslim countries. Although the US was one the first signatories of the Convention in 1979, the US Senate has still not ratified it. The six States that haven't even signed the CEDAW are the Holy See, Iran, Niue, Somalia, Sudan and Tonga. Available at https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CEDAW&Lang=en Last Access 10.10.2023. On the issue of US resistance to ratifying CEDAW, see Baldez, Lisa. *Defying Convention: US Resistance to the U.N. Treaty on Women's Rights*. Cambridge University Press, 2014.

[16] Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women. G.A. res. 54/4, annex, 54 U.N. GAOR Supp. (No. 49) at 5, U.N. Doc. A/54/49 (Vol. I) (2000), entered into force Dec. 22, 2000. [hereinafter OP-CEDAW].

[17] However, the CEDAW Committee, entitled, among other roles, to interpret the Convention, has considered that the CEDAW covers a gender-based approach[17].

[18] Beijing Declaration and Platform for Action, Fourth World Conference on Women, 15 September 1995, A/CONF.177/20.

[19] Idem, p.05,08.

[20] According to *Gender Equality Glossary* of the *UN Women Training Centre* «the empowerment of women and girls concerns their gaining power and control over their own lives. It involves awareness-raising, building self-confidence, expansion of choices, increased access to and control over resources and actions to transform the structures and institutions which reinforce and perpetuate gender discrimination and inequality. This implies that to be empowered they must not only have equal capabilities (such as education and health) and equal access to resources and opportunities (such as land and employment), but they must also have the agency to use these rights, capabilities, resources and opportunities to make strategic choices and decisions (such as is provided through leadership opportunities and participation in political institutions)» Available at: https://trainingcentre.unwomen.org/mod/glossary/view.php?id=36&mode=search&hook=women+empowerment&fullsearch=1 Last Access 10.10.2023.

[21] The promotion of gender equality in the digital sector was the theme chosen by *UN Women* to celebrate the International Women's Day on 8 March 2023: *DigitALL Innovation and Technology for Gender Equality.* Available at: https://unric.org/en/international-womens-day-2023/ Last Access 11.11.2023.

[22] Article 3, para. 5, TFEU.

Development[23] explicitly stated in Principle 20 that «Women have a vital role in environmental management and development. Their full participation is therefore essential to achieve sustainable development». Few years later, the already mentioned *Beijing Declaration and Platform for Action*[24] established a plan of action to promote *women's empowerment* on the basis of equality in all spheres of society, including participation in the decision-making process and access to power envisaging to achieve equality, development and peace.[25]

The interdependence of women's rights, gender equality and sustainable development was magnified when the UN General Assembly adopted in 2015 the Resolution Transforming our world: 2030 Agenda for Sustainable Development[26] which enshrined 17 goals and 169 specific targets to be fulfilled in order to reach global sustainable development in all its dimensions: social, economic and environmental. The Resolution established at goal 5 to «achieve gender equality and empower all women and girls» issue that had already been highlighted in the occasion of the *United Nations Millennium Declaration* in 2000, when Member States reaffirmed their commitment «to promote gender equality and the empowerment of women, as effective ways to combat poverty, hunger and disease and to stimulate development that is truly sustainable»[27].

The UN's 2030 Agenda in a pioneer way set out also concrete targets to ensure «women's full and effective participation and equal opportunities for leadership at all levels of decision-making in political, economic and public life». To effectively promote women's economic empowerment, the Resolution addresses the means to achieve this under Goal 5, including: «5.a undertake reforms to give women equal rights to economic resources, as well as access to ownership and control over land and other forms of property, financial services, inheritance and natural resources, in accordance with national laws; 5.b Enhance the use of enabling technology, in particular information and communications technology, to promote the empowerment of women, [and] 5.c Adopt and strengthen sound policies and enforceable legislation for the promotion of gender equality and the empowerment of all women and girls at all levels».

A concrete tool for women's economic empowerment is international trade, bearing in mind that the overarching objective of trade liberalisation, as set up in the preamble of the Marrakesh Agreement establishing the World Trade Organisation[28], is to raise people's standards of living «while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development». However, the WTO Agreements have been considered by many as 'gender blind' or 'gender neutral', because they do not

[23] UN Conference on Environment and Development 'Rio Declaration on Environment and Development' (14 June 1992) UN Doc A/CONF. 151/26/Rev 1 vol I, 3.
[24] Idem note 18.
[25] Idem, Annex I, pp. 13.
[26] United Nations General Assembly Resolution of 25 September 2015, *Transforming Our World: the 2030 Agenda for Sustainable Development*, A/RES/70/1. [hereinafter UN 2030 Agenda].
[27] United Nations Millennium Declaration, UN General Assembly Resolution, A/RES/55/2, 18 September 2000, paragraph 6.
[28] WTO, Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, 1867, UNTS 154. [hereinafter Marrakesh Agreement].

make explicit reference to women and do not take into consideration the different impacts and barriers women face in international trade. This would start to change with the *Joint Declaration on Trade and Women's Economic Empowerment*[29], adopted in the occasion of the 2017 WTO Ministerial Conference in Buenos Aires, and signed by 127 WTO up to the moment (including the EU and its member states)[30].

The so-called *Buenos Aires Declaration* highlighted for the first time in the WTO the need to evaluate the impacts of trade in women, and to identify the barriers that limit women's participation in international trade, which encompass not only cultural biases but lack of technical and digital know-how, lack of access to productive resources and financing, and disproportionate household burdens. The Declaration also underlined the need to collect sex-disaggregated data to identify these barriers and to address positive policies to overcome them. From then, many initiatives have been developed within the WTO to address the objectives of the Declaration, as the Informal *Working Group on Trade and Gender*, the *WTO Gender Research Hub* and even a specific database to track gender-related provisions in RTAs.[31]

It is important to clarify that fact that the WTO Agreements does not provide for specific provisions related to women's rights or gender equality, does not mean it could not be invoked under the name of "public morals" (line "a" first part)[32] or "human health" (line "b" first part) as a general exception to trade liberalisation provided for Art. XX of the General Agreement on Tariffs and Trade 1994 (GATT 1994)[33] and Art. XIV of the General Agreement on Trade in Services (GATS)[34], since objectively demonstrated that they were necessary to achieve a legitimate objective pursued to protect women's labour, human or economic rights. However, In practice, the general exceptions have never been invoked to protect women's rights, and there are

[29] 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]. Available at: https://www.wto.org/english/thewto_e/minist_e/mc11_e/genderdeclarationmc11_e.pdf.

[30] Available at https://www.wto.org/english/tratop_e/womenandtrade_e/buenos_aires_declaration_e.htm Last Access 30.09.2023.

[31] See more at https://www.wto.org/english/tratop_e/womenandtrade_e/womenandtrade_e.htm. Last Access 30.09.2023.

[32] "The public morals exception operates as a 'catch-all' exception for measures that do not squarely fit under any of the other exceptions. This catch-all exception is found not only in the WTO's agreements but also in nearly all FTAs. Hence, a country may invoke this exception in a multilateral, bilateral or regional trade dispute to argue that the imposition of a measure or trade restriction to protect women's economic interests amounts to the protection of the country's moral interests. However, this is an ambitious interpretation of the morality exception, and such an expansive view of this exception comes with various associated challenges and risks." in Bahri, Amrita, and Daria Boklan. "Not Just Sea Turtles, Let's Protect Women Too: Invoking Public Morality Exception or Negotiating a New Gender Exception in Trade Agreements?" *European Journal of International Law* 33.1 (2022): 237-69. Web.

[33] General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) [hereinafter GATT 1994].

[34] General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994) [hereinafter GATS].

many challenges to doing so[35]. Moreover, even if the challenge of general exceptions were sufficient to protect women's rights, positive policies would still be necessary to address the main barriers and difficulties women face, from the biological limitations many of them experience as a result of motherhood, to the cultural, technical, digital and financial barriers that prevent them from operating on an equal footing with men and reaching high paid and managerial positions.

Confirming the important role international trade has on women's economic empowerment, a Report published on 2020 by the World Trade Organization and the World Bank named *Women and Trade*[36] assessed that businesses involved in international trade employ more women, trade creates better jobs for women, and that countries that are more open to trade, as measured by the *ratio* of trade to gross domestic product, have higher levels of gender equality. Moreover, it was accessed that women-led business tend to employ more women, promoting their economic independence and raising their welfare.

Another study convened in 2019 by the European Commission to the International Trade Centre (ITC) - an agency of the WTO and the United Nations – named "*From Europe to the World: Understanding Challenges for European Businesswomen*"[37] – also confirmed that there is a virtuous cycle of women-led businesses employing more women, but that women are still largely underrepresented in international trade - the number of EU exporting companies managed by women is as low as 18%, and less than one out of three companies reaches at least 30% of women in senior executive positions"[38]. The same study revealed that the deficit of women in senior executive positions is an outcome of women's lack of access to skills and lack of funding from commercial banks and networks. The study also confirmed and that women-led companies are most present in the clothing subsector which face higher tariffs than similar manufactured goods, which «strike a double blow against women as both the biggest consumers and the most frequent workers in the sector»[39], impacting women's final income and welfare. It is important to mention that in 2021 the International Organisation for Standardisation (ISO) provided for the definition of women's entrepreneurship (IWA 34:2021)[40], which can facilitate precise data collection and policymaking in favour of women entrepreneurs.

[35] Idem note 34.
[36] World Bank and World Trade Organization. 2020. Women and Trade: The Role of Trade in Promoting Gender Equality. Washington, DC: World Bank. doi:10.1596/978-1-4648-1541-6. License: Creative Commons Attribution CC BY 3.0 IGO
[37] International Trade Centre. From Europe to the World: Understanding Challenges for European Businesswomen. ITC, Geneva, 2019.
[38] Idem, p. XIV.
[39] World Bank and World Trade Organization. 2020. Women and Trade: The Role of Trade in Promoting Gender Equality. Washington, DC: World Bank. doi:10.1596/978-1-4648-1541-6.
[40] ISO/TMB, Technical Management Board - IWA 34:2021, Women's entrepreneurship – Key definitions and general criteria. Available at: https://www.iso.org/standard/79585.html. Last Access 25.02.2023.

3. EU Trade Policy on Gender Equality and Women's Empowerment

Shortly after the signature of the WTO Buenos Aires Declaration, in 2018 the European Parliament (EP) adopted the Resolution *Gender Equality in EU Trade Agreements*[41] stating that «the new generation of trade agreements should promote relevant international standards and legal instruments, including on gender equality, such as the CEDAW, the Beijing Platform for Action, the core ILO Conventions and the SDGs». The Parliament also called on the Commission to continue its efforts to support MSMEs, with specific focus on, and measures for, women led MSMEs. In addition, the EP insisted that binding and enforceable provisions in EU trade agreements were needed to ensure respect for human rights, including gender equality and environmental and labour protection. 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 the EU, a specific chapter on gender and trade, and called on the Commission and the Council to promote and support the inclusion of a specific gender chapter in the EU trade and investment agreements, building on the existing examples of Chile-Uruguay and Chile-Canada FTAs.

In November 2020 the Commission issued the GAP III - *Action Plan on Gender Equality and Women's Empowerment in External Action* (*2021-2025)*[42] - according to which the EU would continue to promote gender equality through its trade policy, stressing that new FTAs would include strong provisions on gender equality, including compliance with relevant ILO and UN Conventions. Moreover, the Commission reinforced that compliance with these conventions should remain a requirement under the new *Generalised Scheme of Preferences*[43], 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. In a recent communication issued on 20 February 2023 by the EU to the WTO[44] in middle of the crisis multilateralism is facing, it was highlighted the need to better use trade to improve inclusiveness "*including its gender dimension"*

[41] European Parliament Resolution: Gender Equality in EU Trade Agreements. Official Journal of the European Union, C 162/9.

[42] 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. Brussels, 25.11.2020 JOIN (2020) 17 final. Since 2010 the Commission has issued a (five) years Gender Action Plan (GAP) addressed to EU's external relations. About the former GAPs, see https://international-partnerships.ec.europa.eu/policies/gender-equality/gender-equality-and-empowering-women-and-girls_ Accessed 12.04.2023

[43] "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 12.04.2023.

[44] World Trade Organization. Communication From the European Union. Reinforcing the Deliberative Function of the WTO to Respond to Global Trade Policy Challenges. 22.02.2023, WT/GC/W/864.

focusing on how to better integrate developing countries into global and sustainable supply chains and achieve increased diversification. Also in the OECD context, the EU through the Commission has contributed to improve policies and practices to strengthen gender equality in development programmes and to secure girls' and women's rights, being an active member of the *DAC Network on Gender Equality.*[45]

3.1 Gender-Related Provisions in the new generation of EU FTAs

The new generation of EU Free Trade Agreements (FTAs) - which include regulatory standards covering 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 considerable explicit "gender-related" provisions. It is important to clarify that there is no legal definition of what is meant by explicit "gender-related" provisions[46]. But they have been imprecisely accepted as provisions which include the word "gender" or "gender-equality", or make reference to attributes of the female gender, as "women", "girl", "maternity", "mother", "pregnancy", or make reference to the international instruments addressed to women's rights and gender equality, as the CEDAW, the Beijing Declaration and Platform for Action, the 5th SDG, and the considered four key International Labor Organization (ILO) Conventions on gender equality – Conventions n. 100 (Equal Remuneration Convention)[47], n. 111 (Discrimination in Employment and Occupation Convention)[48] n. 156 (Convention concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities)[49] and n. 183 (Maternity Protection Convention)[50]. The new ILO Convention No. 190[51] concerning the *elimination of violence and harassment in the world of work* may also be considered a key convention to protect women's rights in the workplace, as it

[45] About the Gender Net http://www.oecd.org/dac/gender-development/about-gendernet.htm
[46] "Given its broad socio-cultural context, there is no single approach to define what constitutes a provision related to "gender" in RTAs. (…) The following keywords have been used to identify gender-related provisions: Beijing Declaration (Platform for Action); Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); diversity; female; gender; girl/boy; inclusive; male; maternity; mother; pregnancy/pregnant; sex; and woman/women" in Monteiro, José-Antonio. *Gender Related Provisions in Regional Trade Agreements*. WTO Staff Working Paper ERSD-2021-8 24 February 2021, p. 3.
[47] ILO Equal Remuneration Convention (n.100). Adopted on 29 June 1951 [entry into force 23 May 1953].
[48] ILO, Discrimination (Employment and Occupation) Convention (n. 111). Adopted on 25 June 1958 [Entry into force 15 June 1960].
[49] ILO, Workers with Family Responsibilities Convention (n. 156). Adopted on 23 June 1981 [Entry into force 11 August 1983].
[50] ILO, Maternity Protection Convention (n. 183). Adopted on 15 June 2000 [Entry into force 07 February 2002].
[51] ILO, Elimination of violence and harassment in the world of work (n. 190) Adopted on 21 June 2019 [Entry into force 25 June 2021].

comprises "gender-based"[52] harassment and violence, which is mostly faced my women, especially young immigrant ones[53].

On the other hand, implicit gender-related provisions can be understood as those that indirectly refer to women, such as those that generally deal with the protection of human rights, labour rights, vulnerable groups, the social dimension of sustainable development, and sectors in which the number of women is significant, such as micro and small and medium-sized enterprises (MSMEs).[54]

In EU FTAs, the quantity and quality of explicit gender-related provisions have been low and limited to ensure non-discrimination in labour relations. Since the EU-South Korea FTA[55], considered the first new generation of FTA (2011)[56], the term "women" and "gender equality" when it appears, is only in general terms within the TSD chapter in relation to commitments to multilateral labour standards and agreements.[57]According to 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

[52] According to Article 1 (b) of the ILO Convention n. 190, "the term "gender-based violence and harassment" means violence and harassment directed at persons because of their sex or gender, or affecting persons of a particular sex or gender disproportionately, and includes sexual harassment."

[53] "Women were particularly exposed to sexual violence and harassment at work. The data around sexual violence and harassment demonstrate the largest gender difference by far (8.2 per cent of women compared to 5.0 per cent of men) among the three forms of violence and harassment. (…) survey results show that young women were twice as likely as young men to have experienced sexual violence and harassment, and migrant women were almost twice as likely as non-migrant women to report sexual violence and harassment." in Experiences of Violence and Harassment at work: A Global First Survey, Geneva: ILO, 2022. ISBN 9789220384923 (web PDF) https://doi.org/10.54394/IOAX8567

[54] *"most female-dominated sectors are made up of micro and small firms* in World Bank and World Trade Organization. 2020. Women and Trade: The Role of Trade in Promoting Gender Equality. Washington, DC: World Bank. doi:10.1596/978-1-4648-1541-6. License: Creative Commons Attribution CC BY 3.0 IGO

[55] 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]

[56] Before the EU-South Korea, there is the EU-Cariforum trade agreement in 2008 containing provisions on trade and sustainable development, but this agreement is not considered part of the new generation of EU trade agreements, which contain a specific TSD chapter. In Barbara Cooreman and Geert van Calster, *Trade and Sustainable Development Post-Lisbon*, in Hahn, Michael J., and Guillaume Van der Loo. *Law and Practice of the Common Commercial Policy the First 10 Years after the Treaty of Lisbon*. Brill/Nihjoff, 2020, p.190/192.

[57] Article 13.4.2 of the EU-South Korea FTA: "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." (...) Annex 13 "Cooperation on Trade and Sustainable Development" 1. In order to promote the achievement of the objectives of Chapter Thirteen and to assist in the fulfilment of their obligations pursuant to it, the Parties have established the following indicative list of areas of cooperation: (...) k) cooperation on trade-related aspects of the ILO Decent Work Agenda, including on the interlinkages between trade and full and productive employment, labour market adjustment, core labour standards, labour statistics, human resources development and life-long learning, social protection and social inclusion, social dialogue and **gender equality**."(highlighted)

the fundamental rights, including the «elimination of discrimination in respect of employment and occupation». The subsequent article states that «each Party shall make continued and sustained efforts on its own initiative to pursue ratification of the fundamental ILO Conventions and other ILO Conventions which each Party considers appropriate to ratify». It is noteworthy to highlight that 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.[58] On that occasion, the Panel of Experts concluded that the labour commitments made by the parties under the agreement were not limited to trade-related aspects of labour[59], and that the commitment made under Article 13.4.3 created to the parties a binding 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.[60] As a result, the experts concluded that «the fact that Korea has yet to ratify four fundamental ILO Conventions does not in itself serve as evidence of its failure to comply with the EU-Korea FTA»[61].

The same approach on explicit gender-related provisions limited to commitments with the fundamental principles of the ILO was adopted in the EU and Japan's Economic Partnership Agreement[62] in force since February 2019; in the EU-Singapore FTA with negotiations concluded 19 October 2018 and in force from 21 November 2019[63]; in the EU-Vietnam FTA[64], signed on 30 June 2019 and in force from 1st August 2020; and in 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.[65] Nor the *Comprehensive Economic and Trade Agreement* (CETA)[66] with Canada, considered a global leader on gender equality, provided for considerable explicit gender-related provisions, even though Canada has included stand-alone trade and gender chapters in the modernised

[58] 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.

[59] 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. See more in Baroncini, Elisa, "L'Approccio Al Contenzioso Internazionale per il Libero Scambio Dell'Unione Europe" *in* Baroncini Elisa, et al. *Enforcement & Law-Making of the EU Trade Policy*. Dipartimento Di Scienze Giuridiche, 2022. Web.

[60] Panel Report, Korea – Labour Commitments, par. 269, 274.

[61] Idem, par. 280.

[62] Official Journal of the European Union, Agreement between the European Union and Japan for an Economic Partnership, 27 December 2018, L 330/3. [EU-Japan FTA]

[63] Article 12.4 (e) of the EU-Singapore FTA and Article

[64] Article 13.4 and 13.14 of the EU-Vietnam FTA. Official Journal of the European Union, Free Trade Agreement between the European Union and the Socialist Republic of Viet Nam, 16.06.2020, L 186/1.

[65] 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.

[66] Official Journal of the European Union, Comprehensive Economic and Trade Agreement between Canada and the European Union (CETA), 14 January 2017, L 11/23.

FTAs it concluded with Chile[67] and with Israel[68] in 2019. In the case of CETA, only after following 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»[69], which was followed by an action plan[70].

3.2 Gender-Related Provisions in the Last Generation of EU FTAs

As we have seen, in the 2018 Resolution *Gender Equality in EU Trade Agreements* the EP called on the Commission to take gender equality seriously in the EU trade policy to include explicit gender-related provisions in the free trade agreements, following the example of the stand-alone chapters on trade and gender included in the FTAs concluded between Chile and Uruguay in 2016[71], and between Chile and Canada in 2019[72].

In the Chile-Uruguay FTA, the trade and gender chapter[73] is divided in six sessions: *1. General Provisions; 2. International Conventions; 3. Cooperation Activities; 4. Gender Committee; 5. Consultations; 6. Non-application of Dispute Resolution*. In the general provisions the agreement highlights the link between gender equality and sustainable development, addressing the need to eliminate all forms of discrimination against women in an intersectional way, considering «sex, ethnicity, race, colour, national or social origin, sexual orientation, gender identity, age, creed, political or other opinion, economic status, or any other social, family, or personal condition», and recognizing the parties right to regulate on the matter with a considerable degree of discretion «in accordance with its priorities». The article on international conventions does not mention any specific international agreement, but sets out a commitment for the parties to use their best endeavours to implement their respective international commitments on gender, «in particular, those priority agreements related to equal pay for men and women, maternity protection, reconciliation of work and family life,

[67] 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. Text of the Agreement available at: http://www.sice.oas.org/trade/chican_e/CAN_CHL_Index_2019_e.asp. Last Access 20.02.2023.

[68] 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. Available at: http://www.sice.oas.org/ Accessed 20.02.2023.

[69] Recommendation 002/2018 of 26 September 2018 of the CETA Joint Committee on Trade and Gender. More about the Canada-EU plan for Implementing the CETA Trade and Gender Recommendation at: https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/ceuwp-ptceu.aspx?lang=eng .

[70] CETA Trade and Gender Recommendation: EU-Canada Work Plan 2021-2021. Available at: 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 Last Access 10.10.2023.

[71] Chile-Uruguay Trade Agreement. Signed on 04 October 2016, entered into force on 13.12.2018. Text of the Agreement [hereinafter Chile-Uruguay FTA] Available at: http://www.sice.oas.org/Trade/CHL_URY/

[72] Idem n. 67.

[73] Chapter 14 of the Chile-Uruguay FTA.

decent work for domestic workers, family responsibility, among others». Under the article on cooperation activities, a wide range of activities are listed in a promotional language to enhance women's capacity as workers, entrepreneurs and businesspersons in order to take full advantage of the benefits and opportunities created by the Agreement. The non-exhaustive list of cooperation activities includes the need to improve women's access to technology, science and innovation, financial inclusion and education, women's leadership networks, and female entrepreneurship. It was agreed that the Parties would decide on a case-by-case basis which cooperative activities would be funded, which would exchange lists on their areas of interest and specialisation.[74]

The Chile-Uruguay FTA also provides for a specific committee on gender, composed of government representatives of the parties and entitled to facilitate the exchange of information and experiences between the parties in advancing their gender policies and implementing the chapter's provisions, setting contact points[75]. With regard to any disputes that may arise over the interpretation and application of the Chapter, the Agreement expressly excludes the application of the dispute settlement mechanisms provided for in the Agreement (Article 14.6) and stipulates (Article 14.5) that the Parties shall make every effort through dialogue, consultation and cooperation, thus adopting a purely cooperative approach to resolving disputes regarding trade and gender.

The modernised FTA between Chile and Canada that entered into force in 2019[76] followed the structure of the Chile-Uruguay, with some modifications and relevant content additions. However, gender equality is not addressed in an intersectional way. Among the general provisions the parties expressly recall the 5th SDG, and the commitment with the OECD Guidelines for Multinational Enterprises[77], including the duty to establish a national contact point.[78] In the article on international conventions, the agreement reaffirms the parties' commitment to effectively implement the CEDAW and more broadly «obligations under other international agreements addressing gender equality and women's rights». The cooperation activities addressed to improve the capacity and conditions for women workers, businesswomen and entrepreneurs are even wider than the ones provided for the Chile-Uruguay FTA, adding skills to reach senior levels in all sectors of society (including in corporate boards), science, technology, engineering, mathematics (STEM) and business, and open to the interaction with non-governmental stakeholder,

[74] Article 14.3.6 of the Chile-Uruguay FTA.
[75] According to Article 14.4.10 in the case of Chile, the contact point is the Directorate General of International Economic Relations, and in the case of Uruguay, the Ministry of Foreign Affairs through the General Directorate for International Economic Affairs, or its successor.
[76] Idem note 67.
[77] OECD (2023), *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct*, OECD Publishing, Paris, https://doi.org/10.1787/81f92357-en. Last Access 30.09.2023.
[78] The national contact points assist enterprises and their stakeholders to take appropriate measures to promote compliance with the Guidelines, providing for a mediation and conciliation platform for resolving issues that may arise during the implementation of the guideline.

as «businesses, labour unions, education and research organizations, other non-governmental organizations, and their representatives»[79]. The chapter also establishes a committee on trade and gender and contact points, but also excludes the chapter from the dispute settlement mechanism provided for in the agreement, stating that the parties shall make all possible efforts through dialogue, consultation and cooperation to resolve any matter that may arise with regard to the interpretation and application of the trade and gender chapter.[80] The Chile-Canada FTA also added an article stating that in the event of inconsistency between the trade and gender chapter and the labour cooperation agreement existent between the parties, the latter shall prevail.

In the same year, Canada concluded with Israel a modernised FTA[81] which also included a stand-alone chapter on trade and gender that is very similar in structure, content, commitments and cooperation activities to the Canada-Chile FTA, but conversely, in the agreement with Israel, the parties have the possibility to submit conflicts that may arise in the implementation of the trade and gender chapter - «they may agree to submit» - to the dispute settlement provided for in the agreement if prior consultations fail.[82] Because of the possibility of enforcement, the gender-related provisions in the Canada-Israel FTA can be considered the most advanced of its kind to date in force.

As required by the European Parliament, following the example of Chile and Canada, the EU included for the very first time a specific section on *Trade and Gender* (Article 19.4) within the TSD chapter[83] of the FTA with New Zealand,[84] which had negotiations concluded on 30 June 2022. In the innovative article the parties expressly recognise the need to promote gender equality and women's economic empowerment and to address a gender perspective in the parties' trade and investment relations, reaffirming their commitment to the 5th SDG of the UN 2030 Agenda and the objectives of the WTO Buenos Aires Declaration.[85] In addition, the Parties assume 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 cooperative activities to increase women's participation in

[79] Article N bis-03, Chile-Canada FTA.
[80] Article N bis-05 and N bis-06, Chile-Canada FTA.
[81] 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.
[82] Article 13.6, Canada-Israel FTA.
[83] Chapter 19 of the EU-New Zealand FTA.
[84] The Commission and New Zealand published the text of the Agreement following the announcement of conclusion of the negotiations on 30 June 2022 and having completed legal revision. Text of the Agreement available at: https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/new-zealand/eu-new-zealand-agreement/text-agreement_en. Last access 03.03.2023.
[85] Article 19.4, para 2, EU-New Zealand FTA.

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 regarding 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.[86]

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»[87]. It is interesting to note that the EU has not mentioned or expressed its willingness to join the multilateral initiative called *Global Trade and Gender Arrangement* (GTGA)[88] launched in 2020 by New Zealand, Canada and Chile, which has been considered a bound soft-law instrument to improve in a cooperative way women's access to trading opportunities.[89]

Another relevant innovation in the EU-New Zealand FTA is that the TSD chapter is subject to the general dispute settlement mechanism (DSM) for settling disputes arising from the agreement (in previous FTAs, the TSD chapter had its own separate DSM)[90]. This approach is in accordance with the Commissions' Communication issued on 22.06.2022[91] (one week before the conclusion of the negotiations). The EU-New Zealand FTA introduced for the first time in EU trade agreements enforcement mechanism relating some subjects of the TSD chapter, with the possibility to apply as a matter of last resort trade sanctions in case of non-compliance with a panel report that conclude for the violation of multilateral labour standards or agreements or for an action or omission that materially defeats the object and purpose of the Paris Agreement.[92] Hence, non-compliance with gender-related provisions

[86] Article 19.4, para. 8, EU-New Zealand FTA.
[87] Article 19.9, EU-New Zealand FTA.
[88] *GTGA: The Global Trade and Gender Arrangement.* Available at: http://www.sice.oas.org/TPD/GTGA/GTGA_e.asp Last Access 10.10.2023.
[89] See the commentary of the International Institute for Sustainable Development. *GTGA: The Global Trade and Gender Arrangement decoded.* Available at: https://www.iisd.org/articles/deep-dive/global-trade-and-gender-arrangement Last Access 10.10.2023.
[90] The EU-New Zealand FTA is the first of the new generation of EU FTAs to include a compliance mechanism for TSD provisions. In previous EU FTAs, starting with the one with South Korea, there was a specific dispute settlement mechanism in the TSD chapter, which has been considered a "medium" or "balanced" approach compared to other DSMs, requiring the parties to use their best efforts to implement the recommendations issued by an *ad hoc* Panel of experts (entitled to solve the issue by the Parties' request when consultations failed) without the possibility of applying sanctions in case of non-compliance.
[91] 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.
[92] Article 26.16 (2), EU-New Zealand FTA.

continue to be not subject to trade sanctions at all under this new enforcement approach.

As in the other 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[93] 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[94]. 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.

In the modernised trade agreement with Chile[95], with negotiations concluded just after 6 months of the EU-New Zealand, the EU finally included a stand-alone chapter *on Trade and Gender* (Chapter 27) - separated from the TSD chapter, clearly following Chile's approach. The structure of the chapter indeed has a very similar approach to the previous FTAs concluded by Chile but can be considered more complete in terms of content and enforcement. The chapter starts with an article of "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*, listing the objectives of the chapter: « a. enhance their trade relations, cooperation and dialogue in ways that are conducive to equal opportunities and treatment for women and men, as workers, producers, traders or consumers, in accordance with their international commitments. b. facilitate cooperation and dialogue with the aim of enhancing women´s capacity, conditions and access to opportunities created by trade. c. further improve their capacities to address trade-related gender issues, including through exchange of information and best practices».

In Article 27.2 "Multilateral Agreements", the Parties reaffirm 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. However, it is not clear whether this provision includes the Convention n. 156 (Workers with Family Responsibilities) the Convention n. 183 (Maternity Protection), and the Convention 190 (elimination of violence and harassment in the world of work). Subsequently, there are the "General Provisions"[96] containing a vast list of positive and negative obligations, as the wording of the article uses the term "shall" to address them. Differently from Chile's intersectional approach, the EU has given more emphasis on eliminating discrimination

[93] 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.
[94] Article 24.6, EU-New Zealand FTA.
[95] EU-Chile Advanced Framework Agreement. Available at: EU-Chile: Text of the agreement (europa.eu). Last access 10.10.2023.
[96] Article 27.3, EU-Chile Advanced Framework Agreement.

based on sex, addressing the need to eliminate discrimination against women in employment and occupation, «including for reasons of pregnancy and maternity»[97]. In this section, and similar to the provisions regarding environmental protection in EU FTAs, there is an explicit obligation prohibiting the Parties from weakening or reducing the protection afforded by their respective laws to ensure gender equality or equal opportunities for women and men in order to encourage trade or investment.[98]

Furthermore, the agreement improved the already extensive 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, addressing the situation of women in different scenarios, as labours, entrepreneurs, traders, including the needs of mothers and caregivers.[99] However, different from the EU-New Zealand FTA, and different form the other FTAs concluded by Chile, 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[100], which follows the EU's traditional approach on disputes arising from the TSD

[97] "The Parties shall encourage trade and investment by promoting equal opportunities and participation for women and men in the economy and international trade. This includes inter alia measures that aim at: progressively eliminating all types of discrimination on grounds of sex, promoting the principle of equal pay for work of equal value in order to addressing the gender pay gap; as well as facilitating that women are not discriminated in employment and occupation, including for reasons of pregnancy and maternity." Article 23 (6), EU-Chile Advanced Framework Agreement.

[98] Article 23 (7) and (8), EU-Chile Advanced Framework Agreement.

[99] EU-Chile Article 27.4 (5). The article explicitly addresses the need to: a) promote women's financial inclusion and education as well as access to financing and financial assistance; b) advance women's leadership and developing women's networks; c) promote women's full participation in the economy by encouraging their participation, leadership and education, in particular in fields in which they are underrepresented such as science, technology, engineering, mathematics (STEM), as well as innovation and business; d) promote gender equality within enterprises; e) promote women's participation in decision-making positions in the public and private sectors; f) undertake public and private initiatives aimed at the promotion of female entrepreneurship, including the integration of women in the formal sector of the economy, enhancing the competitiveness of women-led enterprises to allow them to participate and compete in local, regional, and global value chains, and activities to promote the internationalisation of small and medium sized enterprises (SMEs) led by women; g) promote policies and programmes to improve women's digital skills and access to online business tools and e-commerce platforms; h) advance care policies and programmes as well as work-life balance measures with a gender perspective; i) explore the link between increased women's participation in international trade and the reduction of the gender pay gap; j) undertake gender-based analysis of trade policies, including design, implementation and monitoring of their effects; collect sex-disaggregated data and use of indicators to monitor and evaluate methodologies, and the analysis of statistics related to trade from a gender perspective; l) explore linkages between women's participation in international trade and areas such as decent work, occupational segregation, and working conditions of women, including the safety and health at work of pregnant workers and workers who have recently given birth (which is also mentioned in the labour cooperative activities within the TSD Chapter); and m) develop policies and programs to prevent, mitigate and respond to the differentiated economic impact that crises and emergencies have on women and men.

[100] Article 27.6, EU-Chile Advanced Framework Agreement.

chapter[101], which provides for consultations, and in case it fails for an adjudication procedure by a Panel of experts, entitled to issue recommendations according to which the parties must take their *best efforts* to implement, without the possibility to suspend concessions in case of non-compliance. Also, in the EU-Chile FTA, the TSD Committee has the role of monitoring the implementation of the panel.[102]

After the agreement with Chile, the EU concluded on 19 June 2023 an FTA with Kenya[103], that differently from the agreement with Chile, does not contain a Trade and Gender Chapter, but a section inside the TSD chapter (Article 4), as the EU-New Zealand FTA, in which the parties reinforce its commitments with the CEDAW and ILO Conventions related to gender equality and the elimination of discrimination in respect of employment and occupation, making reference to the *WTO Buenos Aires Declaration* and the 5th SDG. However, the article does not provide for a list of cooperation activities addressed to increase women's participation in international trade, as the EU-Chile and EU-New Zealand provides, nor include the duty to not weak or reduce the protection afforded by their respective laws on gender equality to encourage trade or investment, as the FTA with Chile did. Another substantial difference under the EU-Kenya, is that the TSD chapter is subject to the general DSM provided for the agreement[104], and in this case, the possibility to apply temporary remedies in case of non-compliance with a panel's reports comprise all the subjects contained in the TSD chapter[105], making non exceptions with regards to the article on gender equality. Under the terms of the agreement, no later than 21 days after the date of the arbitration panel ruling, the Party complained against shall inform its Domestic Advisory Group (DAG)[106] of the compliance measures it has taken or intends to take in response to the arbitration panel ruling, and the TSD

[101] To date, dispute settlement mechanisms in FTAs has followed three different approaches of DSM: a cooperative approach, which encourages parties to resolve disputes amicably and solely through diplomatic means (the Canada-Chile FTA has followed this approach with regard to trade and gender provisions); a sanctions-based approach, which resolves the matter through binding decisions by a panel of arbitrators, backed up by trade sanctions in case of non-compliance (considered the USMCA's model); and a mixed procedure whereby an attempt is first made to resolve the dispute amicably through intergovernmental consultations, and whether consultations fail, the matter is referred to a panel of experts competent to issue recommendations according to which the Parties must make their *best efforts* to implement, without the possibility of imposition of sanctions in case of non-compliance with the panel's report. See VELUT JEAN-BAPTISTE ET AL. Comparative Analysis of TSD Provisions for Identification of Best Practices to Support the TSD Review. London School of Economic (LSE), September 2021.

[102] Idem. Article 26.22 (16). *If the Panel of Experts finds in the final report that a Party has not conformed with its obligations under this Chapter, the Parties shall discuss appropriate measures to be implemented taking into account the report and recommendations of the Panel of Experts. (…).*

[103] EU-Kenya Economic Partnership Agreement [hereinafter EU-Kenya FTA] Text of the Agreement available at: https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/east-african-community-eac/eu-kenya-agreement/text-agreement_en Last Access 10.10.2023.

[104] Article 18 of the TSD Chapter of the EU-Kenya FTA.

[105] Article 118 of the EU-Kenya FTA.

[106] About the composition and role of the Domestic Advisory Groups, see the chapter written by Dr. Andrea Mensi in this e-book.

Committee is responsible for monitoring the implementation of the compliance measures, taking into account the observations of the DAG.[107]

4. Concluding Remarks: What else to improve?

As a global regulatory power, the EU has an important role to play in leading trade policies to effectively promote equality between man and women and achieve the 5th SDG globally. The quantitative and qualitative improvement of explicit gender-related provisions in EU FTAs is undeniable, especially in the modernised EU-Chile FTA, which has the most complete stand-alone chapter on trade and gender, comprising positive and negative obligations, commitments with important international agreements as the CEDAW and the ILO Conventions related to gender equality, a wide list of cooperation activities to promote women's economic empowerment, as well as a dispute settlement mechanism. However, the EU trade policy on gender provisions has not been homogeneous, as the comparison between the EU-Zealand, EU-Chile and EU-Kenya FTAs, with negotiations concluded within less than one year and a half of difference, reveals. Furthermore, in other FTAs under negotiations with "agreements in principle" achieved, as the EU-Mercosur FTA and the EU-Mexico, the EU has not included further trade and gender explicit gender-related provisions, maintaining the traditional general approach adopted since the EU-South Korea FTA, relating to general multilateral labour standards inside the TSD Chapter.

Although the notable advances in the *Trade and Gender Equality* chapter included in the EU-Chile FTA, much still need to be done and evaluated. Concerning commitments with international conventions, it could be evaluated the possibility to include the Optional Protocol to the CEDAW (OP-CEDAW) which allows the CEDAW's Committee to carry out administrative proceedings from individual communications received from women or on behalf of women claiming to be victims of a violation of any of the rights set out in the Convention[108], and to carry out inquiry procedures[109] in cases of grave and systematic violations of women's rights.[110] Up to now, no WTO member, not even Chile or Canada, has included the OP-CEDAW among the international commitments in their FTAs.

Moreover, the development of a standard *Trade and Gender Equality* chapter in EU FTAs could even improve the list of cooperation activities to exchange best practices and promote women's entrepreneurship and participation in global value chains, considering common definition of the

[107] Article 18.6 and 18.7 of the EU-Kenya FTA.

[108] The Committee performs its attributions issuing Concluding Observations, General Recommendations and Inquiry Reports.

[109] OP-CEDAW Article 8.

[110] On the occasion of the *Human Rights Day 2020* it was accessed that the OP-CEDAW had been ratified only by 114 States. United Nations: Twenty years from the entry into force of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (OP-CEDAW): *A universal instrument for upholding the rights of women and girls and for their effective access to justice.* Available at: https://www.ohchr.org/en/statements/2020/12/20-years-entry-force-optional-protocol-convention-elimination-all-forms.

standardization of women entrepreneurship given by International Organisation for Standardisation (ISO) on 2021 (IWA 34:2021)[111]. But more than this, the agreements shall adopt a holistic approach on women, considering their welfare not only as workers, traders, and entrepreneurs, but also as consumers, mothers and caregivers. For example, regarding tariffs barriers, by gathering sufficient sex-disaggregated data, the EU should consider the feasibility of reducing tariffs in sectors where women are the main traders, workers and consumers - such as textiles - as it could positively impact women's income and welfare.

Last but not least, it is also important that gender-related provisions in all EU FTAs are subject to a common model dispute settlement mechanism (DSM) - as the EU has used different approaches in recent agreements, with negotiations concluded with New Zealand, Chile and Kenya - or that the use of different models of DSM is objectively justified in light of the trading partner's commitment to women's rights. At this point, it is important to consider very carefully whether or not the possibility of imposing trade sanctions in cases of reiterated non-compliance with women-related provisions would be beneficial in persuading a trading partner to comply with the EU's gender equality standards. As a matter of fact, there has not been sufficient time nor cases to evaluate whether a sanctions-based approach would be more effective in ensuring compliance[112], and the only case-law under the traditional model of the EU's TSD dispute settlement mechanism, proved to be sufficient in persuading South Korea to implement the panel of experts report and to ratify the ILO conventions it had not yet done so.[113] A sanction-based approach to enforce compliance with gender-related provisions can lead to a result that is completely opposite to the one expected, undermining trade liberalisation and leading the "guilty" State to trade with other partners that do not respect even basic standards on women's rights and gender equality, leading to externalities as unfair competition, social-dumping, protectionism and aggravation of geopolitical tensions, without in any way contributing to the promotion of women's empowerment worldwide.

[111] Idem, n. 38.

[112] There is not enough evidence to compare the effectiveness of EU TSD in relation to the U.S. and Canadian models which include the possibility of trade sanctions in case of non-compliance, and there are certainly pros and cons to every system. See more at COOREMAN, BARBARA AND GEERT VAN CALSTER, *Trade and Sustainable Development Post-Lisbon*, in HAHN, MICHAEL J., AND GUILLAUME VAN_DER_LOO. *Law and Practice of the Common Commercial Policy the First 10 Years after the Treaty of Lisbon*. Brill/Nihjoff, 2020, p. 199.

[113] "At a meeting of the TSD Sub-committee in April 2021, the South Korea authorities explained progress in implementing the recommendations from the panel of experts report and outlined plans for a research project for a path to ratifying the final fundamental ILO Convention (No. 105 on Abolishment of Forced Labour)" LSE, *Comparative Analysis of TSD Provisions for Identification of Best Practices to Support the TSD Revie*w, September 2021.

EU TRADE AGREEMENTS AND DISPUTE SETTLEMENT MECHANISMS ON SUSTAINABLE DEVELOPMENT: REMARKS ON THE EU-NEW ZEALAND FTA

SUSANNA VILLANI

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ABSTRACT: *The work pays a special attention to the Free Trade Agreement between the EU and New Zealand (EU- New Zealand FTA) whose negotiation terminated on 30 June 2022. In February 2023, the agreement was issued to the Council for signature, paving the way for its final approval by the European Parliament under art. 207 TFEU in combination with art. 218 TFEU. Concluded just a week later the Communication of the European Commission entitled The power of trade partnerships: together for green and just economic growth, the EU- New Zealand FTA represents the first attempt to include a sanctioning mechanism in case of a breach of the TSD provisions. As stated by the Commissioner for Trade, Valdis Dombrovskis, such a new FTA «contains the most ambitious sustainability commitments in any trade agreement ever». Nonetheless, the latter also includes some shortcomings that deserve to be addressed: the scope of application of the trade sanctions, the procedure for demonstrating an infringement of the obligations, the nature of the trade sanctions to be imposed.*
KEYWORDS*: TSD chapters, trade sanctions, EU-New Zealand FTA, Paris Agreement, proportionality, environmental obligations.*

1. Introduction

The European Union (EU), within the framework of the Common Commercial Policy (CCP) as exclusive competence, is oriented to ensure a certain balance between interests of liberalisation and protection of values of a non-commercial nature[1]. In particular, the European Commission has exponentially strengthened its commitment to a model of trade functional to improving the sustainable development objectives set in the UN 2030 Agenda

[1] W.T. DOUMA, *The Promotion of Sustainable Development through EU Trade Instruments*, in *Eur. Bus. Law Rev*., vol. 28, 2017, p. 197 ff.; C. BEVERELLI - J. KURTZ - D. RAESS (eds), *International Trade, Investment, and the Sustainable Development Goals: World Trade Forum*, Cambridge University Press, Cambridge, 2020; G. ADINOLFI, *A Cross-Cutting Legal Analysis of the European Union Preferential Trade Agreements' Chapters on Sustainable Development: Further Steps Towards the Attainment of the Sustainable Development Goals?*, in C. BEVERELLI - J. KURTZ - D. RAESS (eds), *International Trade, Investment, and the Sustainable Development Goals: World Trade Forum*, op. cit., p. 15 ff.; M. BRONCKERS, G. GRUNI, *Retooling the Sustainability Standards in EU Free Trade Agreements*, in *Journal of Int. Economic Law*, vol. 24, 2021, p. 25 ff.

for Sustainable Development[2]. In the wake of that, in 2015 the European Commission adopted the *Trade for All* strategy, arguing the need for an increasingly close link between trade policy instruments and the objective of protecting the environment in the context of a value-based agenda[3]. Later, in its Communication of 2021 entitled *An open, sustainable and assertive trade policy*, the Commission has repeatedly reaffirmed the contribution of international trade to the objectives of sustainable development but also to the protection of health and the environment[4]. These were then consolidated in the 2022 Communication from the Commission *The power of trade partnerships: together for green and just economic growth*[5], where the need to support trade partnerships in such a way as to aim for their more effective implementation was strongly highlighted, also by virtue of the commitments undertaken by the Union at international level and consolidated in the *European Green Deal*[6].

The confirmation of the close and mutual interaction between sustainable development and CCP also came from the EU Court of Justice in Opinion 2/15 on the free trade agreement (FTA) between the EU and Singapore[7]. In developing its reasoning, the Court argued that the provisions of the chapters on trade and sustainable development (TSD Chapters) have a «direct and immediate effect on trade»[8] when intended to reduce disparities between partners and to avoid policies that do not respect social and environmental standards in order to increase trade. Essentially, these provisions represent a *conditio sine qua non* for trading with and investing in the EU[9]. In other words, by applying art. 31 of the Vienna Convention on the Law of the Treaties, the provisions on sustainable development should not be

[2] The 2030 Agenda for Sustainable Development was adopted by all United Nations Member States in 2015. It includes 17 Sustainable Development Goals (SDGs), which are an urgent call for action by all countries of the international community in a global partnership, including in the field of trade as an engine for inclusive economic growth and poverty reduction.

[3] European Commission, *Trade for all: Towards a more responsible trade and investment policy*, COM (2015) 0497 final, 14.10.2015.

[4] European Commission, *Trade Policy Review - An Open, Sustainable and Assertive Trade Policy*, COM(2021) 66 final, 18.02.2021. For comments, M. COLLI VIGNARELLI, *The European Commission Trade Policy Review: The Effectiveness of Sustainable Development Chapters in EU FTAs*, in *European Papers*, vol. 6, 2021, p. 1 ff.

[5] European Commission, *The power of trade partnerships: together for green and just economic growth*, COM(2022) 409 final, 22.06.2022.

[6] European Commission, *The European Green Deal*, COM(2019)640 final, 11.12.2019.

[7] ECJ, Opinion 2/15 of 16 May 2017, Free Trade Agreement with Singapore, ECLI:EU:C:2017:376. For comments, C. BEAUCILLON, *Opinion 2/15: Sustainable Is the New Trade. Rethinking Coherence for the New Common Commercial Policy*, in *European Papers*, vol. 2, 2017, p. 819 ff.; M. CREMONA, *Shaping EU Trade Policy post-Lisbon: Opinion 2/15 of 16 May 2017: ECJ, 16 May 2017, Opinion 2/15 Free Trade Agreement with Singapore*, in *European Constitutional Law Review*, vol. 14, 2018, p. 231 ff.

[8] ECJ, Opinion 2/15, cit., point 157. For comments, J. LARIK, *Trade and Sustainable Development: Opinion 2/15 and the EUs Foreign Policy Objectives*, in *Europe and the World: A Law Review Blog*, 2017; G. GRUNI, *Towards a Sustainable World Trade Law? The Commercial Policy of the European Union After Opinion 2/15 CJEU*, in *Glob. Trade Cust. J.*, vol. 13, 2018, p. 4 ff.; . S. VILLANI, *Settling Disputes on TSD chapters of EU FTAs: recent trends and future challenges in the light of CJEU's Opinion 2/15*, in A. BIONDI - G. SANGIUOLO (eds), *The EU and the Rule of Law in International Economic Relations. An Agenda for an Enhanced Dialogue*, Edward Elgar, Cheltenham, 2021, p. 106 ff.

[9] ECJ, Opinion 2/15, cit., point 166.

read in isolation but systemically, as a means of interpreting the scope and object of the whole agreement and supporting the verification of the compatibility of national measures with the rules on trade liberalization[10].

The fact that the provisions on trade and sustainable development permeate the agreements as a whole has contributed to consolidate the idea that it would be almost counterproductive to provide for coercive mechanisms and trade sanctions in the event of a breach of the TSD provisions. As a matter of fact, the Union has generally based sustainable development goals upon a bilateral system of dialogue and cooperation, rather than the traditional dispute settlement mechanism operating in relation to the other chapters and providing for an arbitration procedure. In fact, with the exception of the EU-Cariforum agreement[11], the disputes arising in connection with the TSD Chapters respond to a conciliation procedure assigned to a panel of experts which shall adopt not binding recommendations for the parties in such a way as to reach a satisfactory settlement of the dispute, but not to a potential suspension of certain commercial benefits. In recent times, however, a much more ambitious and assertive approach to dispute settlement as of trade and sustainable development has been called on several sides, especially by the European Parliament[12]. As a consequence, in the Communication issued in

[10] In this regard, it is essential to recall the Panel's decision in dispute concerning the Ukraine's export restrictions on raw timber and sawn wood of ten specific wood species referred to in the relevant Ukrainian law as «rare and valuable species» and all «unprocessed timber» for a period of ten years. While the EU invoked the violation of art. 35 of the EU-Ukraine Association Agreement setting the prohibition on import/export restrictions, Ukraine argued that the adopted measures were justified by the content of the TSD Chapter (chapter 13). The Panel, however, found that the dispute only concerned the alleged incompatibility of the Ukrainian legislation with the provisions on the free movement of goods. This notwithstanding, chapter 13 shapes the relevant context to clarify the scope of the measures and to assess the applicability of the derogations to the general obligations. See, Final Report of the Arbitration Panel, *Restrictions applied by Ukraine on exports of certain wood products to the European Union (Ukraine – Wood Products)*, 11.12.2020. For comments, T. DOLLE – L. MEDINA, *The EU's Request for Arbitration Under the EU-Ukraine Association Agreement*, in *Global Trade and Customs Journal*, vol. 15, 2020, p. 104 ff.; A. MAKHINOVA - M. SHULHA, *The Arbitration Panel Ruling on Ukraine's Certain Wood Restrictions under the EU-UA Association Agreement*, in *Global Trade and Customs Journal*, vol. 16, 2021, p. 355 ff.; I. POLOVETS, *Report of Arbitration Panel in Restrictions Applied by Ukraine on Exports of Certain Wood Products to the European Union*, in *Legal Issues of Economic Integration*, vol. 48, 2021, p. 95 ff.

[11] The Agreement allows the Parties to submit disputes relating to employment and the environment under the classic dispute settlement mechanism, consisting in an arbitration panel. If the Panel finds that the provisions of the Agreement have been violated, the Appellant Party may take appropriate measures including trade sanctions. M. GALLIE, *Le droit international du travail dans la coopération Européenne au développement. Le cas de l'Accord Cariforum-CE,* in *Revue Belge de Droit International*, vol. 1, 2009, p. 195 ff.. Moreover, it should be noted that art. 9.4 of the Trade and Cooperation Agreement between the Union and the United Kingdom, contained in Title XI Level Playing field for open and fair competition and sustainable development, allows the Parties to impose rebalancing measures in the event of significant divergences in employment, social, environmental or climate policies and priorities, or on the control over subsidies that may cause material impacts over trade and investment. The TCA, however, represents a *sui generis* agreement, considered the level of harmonization due to the previous membership of the UK to the European Union.

[12] European Parliament resolution of 5 July 2016 on implementation of the 2010 recommendations of Parliament on social and environmental standards, human rights and corporate responsibility (2015/2038(INI)), OJ C 101, 16.3.2018.

2022, it was welcomed a review of certain aspects relating to the implementation and application of the chapters on trade and sustainable development in order to enhance the effectiveness of the current engagement-based approach to TSD. In particular, the Commission proposes the introduction of a specific monitoring mechanism on the adequate implementation of the measures provided for in the panel of experts' report and, in addition, the possibility of trade sanctions, as last resort instruments, for material breaches of the Paris Climate Agreement and the ILO fundamental labour principles[13].

Against this background, the present intervention intends to pay a special attention to the Free Trade Agreement between the EU and New Zealand (EU- New Zealand FTA) whose negotiation terminated on 30 June 2022[14]. In February 2023, the agreement was issued to the Council for signature, paving the way for its final approval by the European Parliament under art. 207 TFEU in combination with art. 218 TFEU. Concluded just a week later the mentioned Communication, the EU- New Zealand FTA represents the first attempt to include a sanctioning mechanism in case of breach of the TSD provisions. As stated by Commissioner for Trade, Valdis Dombrovskis, such a new FTA «contains the most ambitious sustainability commitments in any trade agreement ever»[15]. Nonetheless, the latter also includes some shortcomings that deserve to be addressed.

2. The EU-New Zealand FTA: substantive issues on the TSD Chapter

Chapter 19 of the EU- New Zealand FTA, that is the TSD Chapter, binds the parties to protect and promote both labour and environmental interests, by recognising that «sustainable development encompasses economic development, social development and environmental protection, all three being interdependent and mutually reinforcing»[16].

In the first place, the Parties agree to observe core labour standards, to effectively implement the fundamental ILO Conventions and to abstain from waiving or derogating national labour statutes in order to encourage trade and investments[17]. To this end, each Party shall respect, promote and realise the principles concerning the fundamental rights at work, namely (a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination

[13] European Commission, *The power of trade partnerships: together for green and just economic growth*, cit., pp. 4 and 11.

[14] The text of the Agreement can be found here: https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/new-zealand/eu-new-zealand-agreement/text-agreement_en. For preliminary comments, C. CERETELLI, *EU – New Zealand FTA: Towards a new approach in the enforcement of trade and sustainable development obligations*, in *EJIL:Talk! Blog of the European Journal of International Law*, 28 September 2022.

[15] European Commission, Press release, *EU – New Zealand Trade Agreement: Unlocking sustainable economic growth*, 30 June 2022.

[16] EU-New Zealand FTA, art. 19.1.

[17] For detailed comments, see L. ORBIE - J. VAN DEN PUTTE, *EU Bilateral Trade Agreements and the Surprising Rise of Labour Provisions,* in *Int. J. Comp. Labour Law Ind. Relat.*, vol. 31, 2015, p. 263 ff.; A. TYC, *Global Trade, Labour Rights and International Law: A Multilevel Approach*, Routledge, 2021.

in respect of employment and occupation[18]. In addition, each Party shall, with due regard to national conditions and circumstances, promote through its laws and practices the strategic objectives of the ILO through which the Decent Work Agenda is expressed, set out in the 2008 Declaration on Social Justice for a Fair Globalization[19]. In a parallel way, the agreement requires the incorporation of provisions on the adoption of good practices on corporate social responsibility, taking into account the main (soft) instruments of international law, such as the Guidelines approved within the framework of the OECD, the Tripartite Declaration of Principles on Multinational Enterprises and Social Policy and the UN Guiding Principles on Business and Human Rights[20].

As of environmental protection, the effective implementation of multilateral environmental agreements (MEAs) already ratified is requested and the Parties are committed in exchanging periodically information on their respective situations. Particular attention is devoted to mutual supportiveness in the adoption of policies and measures aimed at encouraging circular economy with a view to increasing sustainable and aware consumption[21]. In addition, the agreement refers to the conservation of the ecosystem and biodiversity under the Convention on Biological Diversity and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), by also recognising the importance of respecting, protecting, preserving and maintaining knowledge, innovations and practices of indigenous peoples and local communities[22]. To this end, the Parties shall fight against illegal trade in protected species and, instead, promote the long-term conservation and sustainable use of biological resources in order to contribute to the conservation of biodiversity and prevent the spread of invasive alien species[23]. Moreover, the Parties shall cooperate in the sustainable use of natural resources and in the conservation of forests[24] and marine ecosystems, by refraining – *inter alia* – from granting or maintaining harmful fisheries subsidies[25].

In line with the commitments taken at the international level, the Parties then dedicate a specific article to trade and climate change, by recognising the urgent need to address the latter, as outlined in the Intergovernmental Panel on Climate Change (IPCC) Special Report on Global Warming of 1.5°C[26]. In order to comply with the Paris Agreement on climate change and

[18] EU-New Zealand FTA, art. 19.3.3.
[19] EU-New Zealand FTA, art. 19.3.2.
[20] EU-New Zealand FTA, art. 19.12.2. For comments, L. BORLINI, *The EU's Promotion of Human Rights and Sustainable Development through PTAs As a Tool to Influence Business Regulation in Third Countries*, Bocconi Legal Studies Research Paper, 2018; M. BUSCEMI - N. LAZZERINI - L. MAGI - D. RUSSO (eds), *Legal Sources in Business and Human Rights: Evolving Dynamics in International and European La*w, Brill, 2020.
[21] EU-New Zealand FTA, art. 19.5.
[22] EU-New Zealand FTA, art. 19.8.3.
[23] EU-New Zealand FTA, art. 19.8.
[24] EU-New Zealand FTA, art. 19.9.
[25] EU-New Zealand FTA, art. 19.7.
[26] IPCC, *Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty*, Cambridge University Press, Cambridge, 2018.

the pledges concerning the Nationally Determined Contributions (NDCs), it is explicitly included the obligation «to refrain from any action or omission that materially defeats the object and purpose of the Paris Agreement»[27]. Specific examples of appropriate intervention by the Parties are then proposed as follows: (a) to promote the mutual supportiveness of trade and climate policies and measures, thereby contributing to the transition to a low greenhouse gas emission, resource-efficient and circular economy and to climate-resilient development; (b) to facilitate the removal of obstacles to trade and investment in goods and services of particular relevance for climate change mitigation and adaptation, such as renewable energy and energy efficient products and services, for instance through addressing tariff and non-tariff barriers or through the adoption of policy frameworks conducive to the deployment of best available technologies; and (c) to promote emissions trading as an effective policy tool for reducing greenhouse gas emissions efficiently, and promote environmental integrity in the development of international carbon markets. Alongside such individual commitments, the article also indicates a not exhaustive list of interventions the Parties should perform in cooperation, like policy dialogue to promote best-practices, technical exchanges on carbon pricing, support in the reduction of greenhouse gas emissions[28].

Finally, it deserves to be mentioned that the chapter contains a dedicated trade and gender equality article, which requires to advance gender equality and women's economic empowerment and to promote a gender perspective in the Parties' trade and investment relationship, in alignment with target 5 of the UN 2030 Agenda on Sustainable Development and the Ministerial Conference in Buenos Aires on 12 December 2017[29].

The content of these provisions, besides being especially novel in addressing some not common issues, demonstrates that the Parties are strong promoters of progressive and sustainable development initiatives; however, the real novelty - not devoid of critical points - is that the entire TSD Chapter is subject to the agreement's dispute settlement provisions, as detailed in the following section.

3. The dispute settlement mechanism applying to trade and sustainable development: a critical analysis

The general procedure for settling disputes on interpretation and application of the agreement is set in Chapter 26 of the EU-New Zealand FTA, which explicitly applies also to the TSD Chapter, thus representing the Copernican revolution of such an agreement. As usual, such a procedure is composed of different phases which, interestingly, comprehensively apply to the TSD provisions by specifying characters and modalities.

At first, the Parties are required to enter into consultations in good faith, with the aim of reaching a mutually agreed solution[30]. In disputes concerning the provisions of the TSD Chapter relating to multilateral agreements or instruments, the Parties shall take into account the information from the ILO,

[27] EU-New Zealand FTA, art. 19.6.3.
[28] EU-New Zealand FTA, art. 19.6.5.
[29] EU-New Zealand FTA, art. 19.4.
[30] EU-New Zealand FTA, art. 26.3.

relevant bodies or organisations established under MEAs in order to promote coherence between the work of the Parties and those organisations or bodies. In this regard, the Parties shall seek advice from those organisations or their relevant bodies, or any other expert or body they deem appropriate, and also the views of the domestic advisory groups or other expert advice[31].

In case of not activation or failure of the consultation procedure, the party claiming an infringement of the FTA may request the establishment of a panel of experts, composed of three panellists to be selected from different lists of candidates depending on the issue of the dispute[32]. The agreement specifies that for disputes under the TSD chapter, the panellists should be chosen from the sub-list of individuals having specialised knowledge or being experts in a) labour or environmental law; b) issues addressed in Chapter 19; c) the resolution of disputes arising under international agreements.

The panel is asked to make an objective assessment of the facts and the applicability of the covered provisions in order to provide adequate opportunities for the development of a mutually agreed solution. For these purposes, it shall present a first interim report, open to the parties' comments within a due timeframe[33], and then a final report that establishes the violation by recommending certain behaviours to the responsible Party. The latter has to take any measure necessary to comply promptly with the findings and recommendations in the final report in order to bring itself in compliance with the covered provisions. As regards disputes under the TSD Chapter, the Party complained against shall, no later than 30 days after the delivery of the final report, inform its civil society mechanism established pursuant to art. 24.6 and the contact point of the other Party established pursuant to art. 19.20 of the measures which it has taken or which it envisages to take to comply. The Specialised Committee on Trade and Sustainable Development shall be responsible for monitoring the implementation of such compliance measures.

If, however, the Party complained against is unwilling or unable to comply with the final report before the date of expiry of the reasonable period of time, the complaining Party may take «temporary remedies», consisting of a claim for compensation or, in extreme cases, a proportional suspension of the application of other obligations of the Agreement[34]. Upon a duly notification of the measures adopted in compliance with the report and the agreement, the complaining Party shall terminate the suspension of obligations within 30 days after the date of delivery of the notification. In general terms, for any kind of disagreement concerning nature or review of any measure, the Parties may deliver a written request to the original panel to decide on the matter. As of TSD provisions, the adoption of these measures of last resort is expressly linked to the findings contained in the final report. Indeed, compensation or trade sanctions can be applied when the Panel of experts has found: 1) a violation of the multilateral labour standards and agreements or 2) a failure to refrain from any action or omission that materially defeats the object and purpose of the Paris Agreement[35]. Definitely,

[31] EU-New Zealand FTA, art. 26.3.6.
[32] It deserves to be stressed that the panellists have also to demonstrate to meet the requirements set in art. 26.7.
[33] EU-New Zealand FTA, art. 26.11.
[34] EU-New Zealand FTA, art. 26.16.
[35] EU-New Zealand FTA, art. 26.16.2.

the extension of temporary measures to these circumstances reveals that the recommendations made in the report should be regarded as legally binding and that the party should take the necessary actions to comply with them in a timely manner; otherwise, a mechanism of enforcement could be applied.
Such a procedure, upon which both the Parties have consented, surely represents a step forward in the strengthening of the TSD provisions in terms of enforcement. This notwithstanding, three main critical points cannot be neglected, especially with regard to the protection of environmental interests, broadly intended.

Firstly, it seems curious that the adoption of trade sanctions is appropriate as a last resort instrument to promote the compliance with the Paris Agreement, but not for other multilateral environmental agreements. This selection seems to betray a kind of hierarchical order, as if to say that the Paris Agreement is worthy of an enforcement action while the same does not apply to the other environmental agreements, although their relevance and the still existing gaps in terms of implementation. In other words, all the provisions of the TSD chapter (e.g., trade and gender equality, fishing subsidies, the conservation of biodiversity) can be covered by the dispute settlement procedure, but the failure to comply with them cannot be 'sanctionable' by means of temporary remedies.

Secondly, while recognising the prominence of the Paris Agreement and the signal behind this choice, it appears difficult to establish the behaviours that can «materially defeat the object and purpose of the Paris Agreement» thus allowing the application of temporary remedies. As a matter of fact, the latter is essentially programmatic in nature thus making quite problematic to demonstrate an infringement of its provisions in substantive terms. It is recognised a sort of flexibility in the implementation of the Paris Agreement, essentially based upon long-term perspectives and a mix of mandatory and non-mandatory provisions. In particular, it shall be recalled that, according to art. 4 of the Paris Agreement, NDCs shall «reflect [Parties] highest possible ambition, reflecting [their] common but differentiated responsibilities and respective capabilities, in the light of different national circumstances». Moreover, it is necessary to take into account that the TSD Chapter of the EU-New Zealand FTA expressly mentions the right to regulate, by stressing that the parties have the right to (a) determine its sustainable development policies and priorities; (b) establish the levels of domestic environmental and labour protection, including social protection, that it deems appropriate; and c) adopt or modify its relevant law and policies[36]. Ultimately, the combination between the programmatic nature of the Paris agreement, on the one hand, and the Parties' discretion guaranteed by the right to regulate, on the other one, makes it quite difficult to imagine situations in which the Parties could really argue about the goodness of the measures taken internally by the counterparty to implement the provisions of the Paris Agreement.

Thirdly, it should be recalled the proportional nature of the temporary remedies. Indeed, according to art. 26.16 of the Chapter setting the dispute settlement procedure, such a remedies «must not exceed the level equivalent to the cancellation or impairment caused by the infringement». To confirm the relevance of this clause, it is also set that «if the Party complained against

[36] EU-New Zealand FTA, art. 19.2.

considers that the notified level of suspension of obligations exceeds the level equivalent to the nullification or impairment caused by the violation […], it may deliver a written request to the original panel […] to decide on the matter». This proportionality requirement therefore limits the degree of intensity of the response and requires that the countermeasure to be applied is calculated upon the injury caused by the violation. However, one could wonder: how to calculate the damage suffered by an individual State as a result of the failure of another State to comply with the Paris Agreement? How to determine the level of economic injury suffered by a State when we are talking about a collective interest, such as climate change?

In general terms, these observations reveal that likely neither the Parties consciously meditated on such potential substantive limits and that, from its side, the Union was more intent on consolidating that assertiveness recalled in the last Communication on the future of trade policy, rather than on tracing an effective enforcement mechanism for securing the implementation of the TSD chapters.

4. Concluding remarks

The agreement between the EU and New Zealand represents a positive example of effective implementation of the Sustainable Development Goals fostered in the 2030 Agenda. It has set a bold precedent for the sustainability aspects of future FTA negotiations by, *inter alia*, suggesting the incorporation of mutually sanctionable commitments to the Paris Agreement as an important contribution to fulfilling the Union's leadership ambitions in the climate space. Moreover, such an orientation underlines the ambition to send a powerful message which anchors trade and sustainable development from a substantial point of view, by opening to setting a system of enforcement going beyond dialogue, cooperation, and best endeavours and providing potential trade sanctions in case of serious violation of environmental and labour obligations.

Nonetheless, there are some critical points that cannot be denied and that could affect the effective application of temporary remedies as of trade and sustainable chapters. Moreover, it has to be recalled that New Zealand and the EU share the same awareness about environmental interests as well as imperatives of sustainable development, but the same cannot be taken for granted for the other EU trading partners. It is not surprising that this approach was not followed in the free trade agreement with Chile, which was concluded in December 2022[37], and the more recent agreement with Kenya appears quite confusing[38]. In this respect, it is to be expected the orientation taken by the European Commission in the current negotiations with India and Indonesia, where is likely some challenges will arise in the light of their national labour and environmental protection policies. Ultimately, the pathway towards an

[37] The text of the Agreement can be found here: https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/chile/eu-chile-agreement/text-agreement_en

[38] The text of the Agreement can be found here: https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/east-african-community-eac/eu-kenya-agreement_en

assertive but also coherent and thoughtful mechanism of dispute settlement concerning trade and sustainable provisions is still quite long.

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

ELISA BARONCINI

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

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

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

1. Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. The dispute settlement mechanisms of the new EU TAs

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4.1 Amicus curiae and domestic advisory groups

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4.2 Scope and binding force of the TSD provisions

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

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

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

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

(c) the effective abolition of child labour; and

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

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

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

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

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

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

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

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

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

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

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

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

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

4.3 Emphasizing the sustainability nature of the EU TAs

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

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

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

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

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

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

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

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

5. The disputes with Algeria

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

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

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

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

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

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

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

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

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

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

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

[99] *Ibid.*

[100] *Ibid.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7. Conclusions

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

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

[152] *Ibid.*

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

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

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

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

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

THE ROLE OF THE CIVIL SOCIETY IN PROMOTING THE EFFECTIVENESS OF SUSTAINABLE DEVELOPMENT STANDARDS IN EU PTAS

ANDREA MENSI

TABLE OF CONTENTS: 1. Introduction. – 2. The advisory role of the DAGs to implement sustainable development principles in EU PTAs. – 2.1 Preliminary Remarks. 2.2 The composition of the EU DAGs. – 2.3 The advisory role of the DAGs. – 3. The role of the DAGs in disputes concerning the TSD chapters. – 3.1 Participation of the DAGs in dispute settlement mechanisms. – 3.2 The role of the EU DAG in the EU-South Korea dispute. – 3.3 The adoption of the Single Entry Point (SEP). – 4. EU Commission next strategies to improve the effectiveness of the DAGs. – 5. Concluding remarks.

ABSTRACT: *The European Union (EU) represents a key international actor in achieving sustainable development at the global level. The preferential trade agreements (PTAs) concluded by the EU with its trading partners include provisions on sustainable development and represent a distinctive feature of the EU trading policy. However, the drafting and enforceability of such provisions varies depending on the agreements, thus potentially diminishing in many instances their effectiveness. In their TSD chapters, EU trade agreements allow the participation of civil society in the implementation of their commitments through institutionalized bodies, namely the domestic advisory groups (DAGs) and the civil society forums (CSFs). Civil society may contribute to advising the Parties and in monitoring the implementation of TSD commitments and may also have a decisive role in the conceptualization of more efficient enforcement mechanisms, as proved by the introduction of the Single Entry Point (SEP) which allows EU-based stakeholders to lodge complaints on violations of TSD chapters. Nonetheless, the potential role of civil society in implementing TSD commitments requires further investigation. The paper is based on a comparative study of 12 PTAs concluded by the EU where these bodies have been already established, as well as the two most recent trade agreements concluded with the New Zealand and Kenya, to investigate on the current role played by civil society and on its possible future contribution to improve the effectiveness of TSD chapters.*

KEYWORDS: *sustainable development, civil society, Single Entry Point, Domestic Advisory Groups, Civil Society Forum, dispute settlement, enforcement.*

1. Introduction

Since the conclusion of the preferential trade agreement (PTA) with South Korea, the inclusion of sustainable development chapters (TSD chapters) into the EU PTAs represents one of the most important features of the EU trade policy[1]. The most recent initiatives of the EU Commission aim to improve the

[1] This paper is updated as of September 2023.

effectiveness of the sustainable development provisions in its PTAs, including through the involvement of civil society, generally represented by the domestic advisory groups (DAGs), composed by the representatives of the Parties labour, business and environmental sectors. The PTAs establish also transnational mechanisms, whose members include the components of the DAGs and other stakeholders, generally known as civil society forums (CSFs). However, the advisory role played by civil society and its involvement vary among different PTAs, and their contribution and influence are overall still limited. Indeed, the Parties of the PTAs do not have any obligation to comply with the DAGs or CSFs' views and these bodies cannot demand the EU Commission to request consultations on possible violations of TSD commitments. It was only with the creation in 2020 of the Single Entry Point (SEP) that the EU Commission introduced the possibility for civil society to lodge a complaint on violations of trade and sustainable development commitments. However, the implementation of the SEP is still far from being fulfilled.

In such context, the goal of this paper is to investigate on the contribution of the DAGs in promoting the implementation of sustainable development provisions stated in EU PTAs and to inquire into possible new strategies to improve their involvement. The paper is based on a comparative study of 12 PTAs concluded by the EU where these bodies have been already established, as well as the two most recent trade agreements concluded with the New Zealand and Kenya[2].While previous studies[3] and database[4] provided

[2] EU-South Korea Free Trade Agreement (FTA) (2009), EU-Peru-Colombia Trade Agreement (2010), EU-Central America Association Agreement (2010), EU-Ukraine Association Agreement (2011), EU-Moldova Association Agreement (20313), EU-Georgia Association Agreement (2013), EU-Peru, Colombia and Ecuador Trade Agreement (2014), EU-Canada Comprehensive Economic and Trade Agreement (CETA) (2014), EU-Singapore Free Trade Agreement (2014), EU-Vietnam Free Trade Agreement (2016); 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 (TCA) (2020); EU-New Zealand Free Trade Agreement (2022); EU-Kenya Economic Partnership Agreement, whose TSD Chapter is contained in Annex V. In the paper all the agreements will be referred as PTAs.

[3] D. MARTENS, L. VAN DEN PUTTE, M. OHERI, J. ORBIE, *Mapping Variation of Civil Society Involvement in EU Trade Agreements: a CSI Index* in *European Foreign Affairs Review*, 2018, 1, pp. 41–62; D. MARTENS, D. POTJOMKINA, J. ORBIE, *Domestic Advisory Groups in EU Trade Agreements. Stuck at the Bottom or Moving up the Ladder*, Friedrich Erbert Stiftung, 2020. On the involvement of civil society in PTAs, see also E. BARONCINI, *L'approcio al contenzioso Internazionale per il Libero Scambio dell'Unione Europea*, in *Enforcement & Law-Making of the EU Trade Policy* edited by E. BARONCINI, I. ESPA, M. L. MARCEDDU, L. MULAS, S. SALUZZO, Bologna, AMS ACTA Institutional Research Repository - ALMA DL University of Bologna Digital Library, 2022, pp. 11-40; J. XU, *The Role of Civil Society in EU Preferential Trade Agreements*, in *ESIL Conference Paper Series*, *Conference Paper 17/2016*, 2016; M. PEREZ-ESTEVE, *The Influence of International Non-State Actors in Multilateral and Preferential Trade Agreements: A Question of Forum Shopping?* in *Governments, Non-State Actors and Trade Policy-Making: Negotiating Preferentially or Multilaterally?* edited by A. CAPLING, P. LOW, New York, CUP, 2010; D. RAESS, A. DÜR, D. SARI, *Protecting labor rights in preferential trade agreements: The role of trade unions, left governments, and skilled labor* in *Review of International Organizations,* 2018, pp. 143–162; J. ORBIE, D. MARTENS, L. VAN DEN PUTTE, C*ivil Society Meetings in European Union Trade Agreements: Features, Purposes, and Evaluation*, Centre for the Law of EU External Relations 2016.

[4] http://www.designoftradeagreements.org (last access 18 July 2023); https://www.chaire-epi.ulaval.ca/en/trend (last access 18 July 2023).

useful insights on different aspects concerning PTAs provisions on sustainable development and the involvement of civil society, the new strategy approved by the EU in 2022 with the adoption of a new dispute settlement mechanism based on the possibility to adopt sanctions also for violations of TSD chapters, the conclusion of the new PTAs with the United Kingdom, New Zealand and Kenya, as well as the adoption of the SEP in 2020, require new investigations in this field.

The paper aims to provide an updated analysis on the advisory role played by the EU DAGs in the context of TSD chapters implementation[5]. In doing so, the paper is composed of four sections. While section 2 focuses on the involvement of civil society in EU PTAs, part 3 analyses the advisory role played by the DAGs. Part 4 investigates on the role of civil societies in disputes on TSD commitments in EU PTAs, including through the adoption of the SEP. Finally, part 5 outlines the strategies adopted by the EU Commission in 2022 and part 6 provides concluding remarks.

2. The advisory role of the DAGs to implement sustainable development principles in EU PTAs

2.1 Preliminary remarks

Since the conclusion of the PTA with South Korea in 2011, TSD chapters represent the main instruments adopted by the EU to promote sustainable development principles at the international level[6].

In their TSD chapters most of the EU trade agreements allows the participation of civil society in the implementation of their commitments through institutionalized bodies, namely the DAGs and the CSFs. Despite certain provisions regarding the involvement of civil society were already part of previous PTAs[7], it is only since the agreement with South Korea that the involvement of civil society became a standard of EU trade agreements. Indeed, most recent EU PTAs include in their TSD chapters several provisions concerning the participation of civil society. In general, such clauses aim to ensure the participation of the DAGs and CSFs in the implementation of sustainable development principles. However, the many differences in the several EU PTAs require further investigation.

2.2 The composition of the EU DAGs

In general, the DAGs are composed of a representation of independent stakeholders in the business, labour and environmental field and their participants are established by each Party of the PTA.

[5] The EU partners' DAGs are not part of this analysis.

[6] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Trade for all. Towards a more responsible trade and investment policy, COM(2015) 497 final. Some general provisions on sustainable development were included in the economic partnership agreement (EPA) concluded between the EU and the CARIFORUM countries in 2008: EU-CARIFORUM, art. 1, lett. a), para. 3 and arts. 183-196.

[7] See EU-Mexico, arts 33(3), 39(2)(a); EU-Iraq, art. 85; EU-South Africa, art. 66(1)(c); EU-Chile, arts. 32 and 48.

While the membership and competence of the DAGs are essential to properly fulfil their advisory role, the Parties normally enjoy much flexibility in choosing their components. According to the most recent PTAs concluded by the EU with New Zealand and Kenya, the DAGs include a balanced representation of independent civil society organizations, such as NGOs, business and employers' organizations, trade unions active on economic, sustainable development, social, human rights, environmental and other matters. Moreover, the DAG of New Zealand may also comprise representatives of the Maori people[8]. The identical conceptualization is shared by the TCA concluded by the EU with the United Kingdom[9]. In the CETA, the DAGs are constituted by independent representative organizations of civil society in a balanced representation of environmental groups, business organizations and other relevant stakeholders[10]. The same composition is confirmed in the PTAs concluded with South Korea[11], Georgia[12], and Ukraine[13]. The latter agreement, however, does not mention expressly environmental stakeholders. In the EU-Japan PTA, the DAGs are defined as a balanced representation of independent economic, social and environmental groups[14]. By contrast, the PTAs concluded with Vietnam and Singapore do not use the term 'civil society' and refer to economic, social and environmental 'stakeholders'[15]. Representations of local public authorities are considered only in the PTA between EU and Central America[16].

Despite the requirement for a 'balanced representation', mentioned in all PTAs, except than in the TCA, environmental organizations are generally underrepresented[17]. The TCA between the EU and the UK is the only agreement where the three categories are equally represented, while only in the PTAs with Colombia, Peru and Ecuador, NGOs and different interest groups, which include environmental stakeholders, are more represented than other groups. It is evident how such situation may limit the concrete impact and advisory role of the DAGs on complex global environmental issues, such as climate change[18].

[8] EU-Kenya, Annex V, art. 15; EU-New Zealand, Preamble, art. 24.6.1.
[9] TCA, art. 13.
[10] CETA, art. 24.13.5.
[11] EU-South Korea, art. 13.12.4.
[12] EU-Georgia, art. 240.4.
[13] EU-Ukraine, art. 299.1, referring to 'advisory groups'.
[14] EU-Japan, art. 16.15.2. See also art. 16.13.2(c), n. 1: 'for the purposes of this Chapter, 'civil society' means independent economic, social and environmental stakeholders, including employers' and workers' organizations and environmental groups'.
[15] In the EU-Singapore, art. 13.15.4; EU-Vietnam, art 15.4.
[16] EU-Central America, art. 25(c).
[17] The last call for expression in participating in EU DAGs seems to provide further guidance on the organizations that may apply, namely: a) civil society organizations, b) not-for-profit organizations, c) representing or defending EU interests and d) being registered in the EU Transparency Register and in DG Trade's civil society database: DG Trade, Call for Expression of Interest in participating in EU Domestic Advisory Groups, Brussels, 11 April 2023, p. 3.
[18] The new dispute settlement includes the possibility to adopt sanctions in case of violation of object and purpose of the Paris Agreement, thus making essential a proper involvement of civil society in this context.

2.3 The advisory role of the DAGs

In general, the DAGs play an advisory role in the implementation of the TSD chapters. However, there are differences among the various PTAs concluded with the EU trade partners.

Most of the DAGs are entitled to make recommendations concerning the implementation of TSD chapters on their own initiative while in other cases they may do so on a periodic basis, or when required by the Parties or by the TSD Committee. The possibility for these bodies to provide inputs influence positively their independence and impact. However, only in the TCA and in recent PTAs concluded with the New Zealand and Kenya it is declared that each Party 'shall' meet with its DAG at least once a year and 'consider' its views and recommendations on the implementation of the agreement[19]. By contrast, the CETA states that the Party shall seek views and advice by civil society consultative mechanisms and that the stakeholders may submit opinions and make recommendations on any matter concerning the TSD chapter 'on their own initiative'[20]. According to the CETA, each Party 'shall give due consideration' to submissions from the public concerning the TSD chapter, including communications on implementation concerns, and shall inform its respective advisory bodies[21]. The DAGs may submit communications 'on their own initiatives' both to the Parties and to the Committee on trade and sustainable development also in the PTAs with South Korea, Singapore, Vietnam, Moldova and Georgia[22]. In the PTA with Ukraine, the EU DAG may address communications and recommendations if it has been convened by the Trade and Sustainable development sub-committee[23].

In such framework, the outputs of the DAGs seem still very limited. Indeed, only the EU DAG established under the PTA between the EU and South Korea produced three opinions[24], while two letters have been submitted in 2014 and 2016 on the situation of labour rights in South Korea. The EU DAG established under the EU-Central America agreement published three thematic reports containing proposals on decent work and compliance with ILO standards, business opportunities and challenges within the framework of the EU-Central America Association Agreement and on corporate social responsibility. The EU DAG under the EU PTA with Colombia, Peru and Ecuador published two declarations in 2021 and 2022 concerning various

[19] EU-Kenya, Annex V, art. 15.2; EU-New Zealand, art. 24.6.2; TCA, art. 13.2.
[20] CETA, art. 23.8.4.
[21] Ibid., art. 23.8.5.
[22] EU-South Korea, arts. 13.12.4, 13.14.4; EU-Singapore, art. 12.15.5; EU-Georgia, art. 240.4; EU-Vietnam, art. 13.15.4; EU-Moldova, art. 376.4; EU-Colombia, Peru, Ecuador, art. 281.
[23] Rules of procedure of the EU Advisory Group created under Article 299 of the EU-Ukraine Association Agreement, adopted on 22 November 2016, p. 3.
[24] EU Domestic Advisory Group under the EU-Korea FTA, Opinion on The European Union's vision and practice of Corporate Social Responsibility (CSR): contribution of the EU Domestic Advisory Group under the EU-South Korea FTA, 10 November 2014; EU Domestic Advisory Group under the EU-Korea FTA, Opinion on The green economy and trade in the context of sustainable development: contribution of the Domestic Advisory Group under the EU-Korea FTA, 3 July 2013; EU Domestic Advisory Group under the EU-Korea FTA, Opinion on the Fundamental rights at work in the Republic of Korea, identification of areas for action, 29 May 2013.

aspects of trade and sustainable development, such as labour and environmental standards and the role of civil society and the EU DAG established by the TCA published a report where it outlines certain issues and recommendations on the TCA implementation and EU-UK relations[25]. Further joint statements have been published in occasion of DAG-to-DAG meetings[26], which represent an opportunity to provide a structured discussion on the implementation of TSD chapters and for cooperation between the DAGs[27].

3. The role of the DAGs in disputes concerning the TSD chapters

3.1 Participation of the DAGs in dispute settlement mechanisms

The involvement of the DAGs differs also with respect to their participation in dispute settlements. In the phase of consultations, only the PTA concluded with South Korea mentions that the communications of civil society bodies may form the basis for governmental consultations[28]. In case the Committee on trade and sustainable development is convened to consider the matter, the Committee and the Parties may seek, when appropriate, the advice of the DAGs. Differently, the PTAs with Kenya New Zealand, the UK, Canada, Georgia, as well as other PTAs, state that during the consultations, the Parties or the Committee on trade and sustainable development and equivalent bodies, may seek when appropriate the views or the advice of the DAGs[29], while this principle is not explicitly affirmed in agreement with Central America[30].

[25] EU DAG under the Trade & Cooperation Agreement (TCA), EU-UK relations Issues Tracker December 2022. Three general statements have been published also by the EU DAG under the EU-Vietnam PTA.

[26] These have been published especially under the EU-Central America (six), EU-Georgia (five) and EU-Moldova (five) PTAs.

[27] EU-South Korea, art. 13.13. By contrast, art. 15.4. of Annex V of EU-Kenya PTA, art. 24.6.4 of the PTA with New Zealand and art. 13.4 of the TCA, state that the Parties shall promote interaction between their respective domestic advisory groups, without explicitly referring to joint meetings. See also, Rules of procedure of the EU Domestic Advisory Group created under Article 240.4 of the EU-Georgia Association Agreement, p. 4; Rules of procedure of the EU Domestic Advisory Group created under Article 376.4 of the EU-Moldova Association Agreement, p. 4; Rules of procedure of the EU Advisory Group created under Article 299 of the EU-Ukraine Association Agreement, p. 4; Rules of procedure of the EU Advisory Group created pursuant to Title VIII (Article 294) of the EU-Central America Association Agreement, p. 4. Rules of procedure of the EU Domestic Advisory Group created pursuant to Title IX (Article 281) of the EU-Colombia and Peru Trade Agreement, p. 5; Rules of procedure of the EU Domestic Advisory Group created pursuant to the Trade and Sustainable Development chapter (Chapter 16 – Article 16.15) of the EU-Japan Economic Partnership Agreement (EPA), p. 6.

[28] EU-South Korea, art. 13.14.

[29] EU-Kenya, Annex V, art. 17.3; EU-New Zealand, art. 26.6; TCA, art. 408.4; CETA, art. 23.9.4; EU-Georgia, art. 242.5; EU-Vietnam, art. 13.15.5; EU-Singapore, art. 12.6.5, stating that the Board may consult relevant stakeholders; EU-Moldova, art. 378.5.

[30] Indeed, according to art. 296.2, the Parties involved in consultations may, by mutual agreement, seek advice or assistance from any person or body they deem appropriate, thus implicitly including also the DAGs.

With regard to the participation in the Panel of experts, the PTAs with South Korea[31], Georgia[32], Ukraine[33] and Moldova[34] declare that the Panel of experts 'should' seek the advice and information from the DAGs and how its report shall be made available to such bodies. By contrast, the same provision is not included in the CETA and in the PTAs with Japan, Vietnam, Singapore and Central America. Some PTAs state how the Panel report shall be made available to the DAGs of the Parties[35], while in other agreements it is more generally affirmed that the report shall be made publicly available[36].

In monitoring the implementation of the Panel of experts' report, the PTAs with New Zealand, the TCA, the CETA, as well as to other agreements, declare that the responding Party shall inform its DAG on the measures to be adopted to implement it[37]. Other PTAs, including those with New Zealand, Canada Georgia, Vietnam and Japan, affirm how the DAGs may submit observations to the Committee on trade and sustainable development on the follow-up of the implementation of the Panel report recommendations[38]. The PTA with New Zealand states also how the Party complained against shall inform its DAGs and the other Party contact point no later than 30 days after the delivery of the final report; the trade and sustainable development Committee shall monitor the implementation of the compliance measures and that the DAGs may submit observations in this phase[39]. Finally, the EU-South Korea FTA declares how the report of the Panel of experts shall be monitored by the Committee on trade and sustainable development and make available to the DAG[40].

3.2 The role of the EU DAG in the EU-South Korea dispute

The influence of the DAGs in disputes concerning TSD chapters seems today still limited. Nevertheless, in the litigation between the EU and South Korea, which refers specifically to TSD chapter commitments on labour standards, the DAGs played a significant role in influencing the EU to request consultations to South Korea, as well as in the monitoring phase.

First, in its 2013 opinion the EU DAG outlined for the first time the lack of ratification by South Korea of the four ILO fundamental labour

[31] EU-South Korea, art. 13.15.1-2.
[32] EU-Georgia, art. 243.6.
[33] EU-Ukraine, art. 301.3.
[34] EU-Moldova, art. 379.6.
[35] EU-South Korea, art. 13.15.2; EU-Ukraine, art. 201.2.
[36] EU-Kenya, art. 124.2; EU-New Zealand, art. 26.23.3; TCA, art. 409.15; CETA, art. 23.10.11; EU-Georgia, art. 243.7; EU-Singapore, art. 12.17.8; EU-Central America, art. 301.1; EU-Japan, art. 16.19.5; EU-Moldova, art. 379.7.
[37] EU-New Zealand, art. 26.13.3(a); TCA, art. 409.16; CETA, art. 23.10.12; EU-Georgia, art. 243.8; EU-Vietnam, art. 13.17.9; EU-Singapore, art. 12.17.9; EU-Japan, art. 16.18.6; EU-Moldova, art. 379.8; EU-Ukraine, art. 301.2.
[38] EU-New Zealand, art. 26.13.3(b); TCA, art. 409.17; EU-Vietnam, art. 13.17.9, mentioning also the same faculty of the Joint forum; EU-Singapore, art. 12.17.9; EU-Japan, art. 16.18.6, mentioning also the Joint Dialogue, CETA, art. 23.10.12, mentioning also the CSF; EU-Georgia, art. 243.8, mentioning also the Joint civil society dialogue; EU-Moldova, art. 379.8, mentioning also the Joint Civil Society Dialogue Forum.
[39] EU-New Zealand, art. 26.13.2-3. The same is prescribed in the PTA with Kenya but the term is reduced to 21 days: EU-Kenya, Annex V, art. 18.6-7.
[40] Rules of procedure of the EU Domestic Advisory Group created pursuant to Chapter 13 (Article 13.12) of the EU-South Korea FTA, p. 3.

conventions[41]. The opinion was followed by two letters, where the EU DAGs advised the EU commissioner for trade to request consultations for possible serious violations of South Korean obligations under different provisions of the FTA[42]. However, considering that the DAG letters did not have any binding effect, the EU Commission preferred initially to conduct informal talks and only in December 2018 it initiated formal consultations regarding South Korean obligations under art. 13.4.3 of the FTA. The Panel in its report stated that the EU has failed to establish that art. 12.1.3 of the Korean Trade Union and Labour Relations Adjustment Act (TULRAA), in connection with arts. 2(4) and 10, are contrary to South Korea's obligations under art. 13.4.3 of the FTA; the Panel declared also how under art. 13.4.3 the Parties are bound to respect, promote and realize the principles concerning freedom of association in their laws and practices, and recommended the Panel request to be referred to the DAGs established under the FTA for continued consultations[43]. According to the EU Commission, in doing so the Panel reiterated the importance of the role played by the DAGs in the implementation of its reports[44].

3.3 The adoption of the Single Entry Point (SEP)

The SEP was created in 2020 to provide a centralized contact point for all EU based stakeholders that aim to lodge a complaint on violations of TSD commitments, as well as on the Generalized Scheme of Preferences (GSP) rules and on potential trade barriers in EU trade partners.

The SEP, managed by the Chief Trade Enforcement Officer (CTEO), has been operationalized in 2022 through new operational guidelines[45]. As established by these guidelines, complaints against potential violations of TSD commitments may be lodged by different stakeholders, including among others EU DAGs formed in accordance with EU PTAs[46]. The DAGs, like

[41] EU DAG, Opinion on the Fundamental Rights at Work in the Republic of Korea, Identification of Areas for Action,
Doc. CES746–2013_00_01_TRA_TCD (2013), at 3.1.6.1.

[42] In a 2014 letter the EU DAG claimed a violation by South Korea of Article 13.4.3 of the PTA regarding the respect of the right to freedom of association: EU DAG, Serious Violations of Chapter 13 of the EU-South Korea FTA: Letter to Karel De Gucht, Member of the European Commission DB-REX/2014/D/109 (2014); In the second letter in 2016, the EU's DAG referred also to a violation of arts. 13.3, 13.9 and 13.7.2 of the PTA and underlined that the lack of action by the EU would have undermined the effectiveness of the TSD chapter: EU DAG, Government Consultations Pursuant to the EU-Korea FTA: Letter to Cecilia Malmström, Member of the European Commission (2016).

[43] Panel Report, Korea-Labour Commitments, para. 258.

[44] Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Implementation and Enforcement of EU Trade Agreements, Brussels, 27.10.2021 COM(2021) 654 final, p. 34.

[45] European Commission, Revised Operating Guidelines for the Single Entry Point and Complaints Mechanism for the Enforcement of EU Trade Agreements and Arrangements, 22 June 2022.

[46] The list of subjects that may lodge complaints includes: a. EU Member States; b. entities having their registered office, central administration or principal place of business within the Union; c. industry associations of EU companies; d. associations of EU employers; e. trade unions or trade union associations formed in accordance with the laws of any EU Member State; f. EU DAGs formed in accordance with EU trade agreements; g. NGOs formed in accordance with the laws of any EU Member State; h. citizens or permanent residents of an EU Member State.

other stakeholders, may jointly lodge a collective complaint, including both among different categories and complainants within one or more categories. Furthermore, the guidelines state that the complainants may represent the interests of other entities based in the trade partner. In such case, however, the EU based stakeholders have the duty to declare whether they are representing their own or other interests[47].

After a preliminary evaluation, the EU Commission, directly or through the DG trade, other Commission services or EU Delegations, may adopt different measures, such as international monitoring, formal bilateral or WTO dispute settlement or unilateral measures. Therefore, the Commission enjoys great flexibility in this phase and may consider different factors, including the likelihood of resolving the dispute, the legal basis, and the seriousness of the violation for TSD commitments[48]. So far, only a complaint regarding sustainable development has been filed through the SEP on 17 May 2022 by the Dutch NGO CNV International on behalf of certain trade unions organizations from Colombia and Peru. The NGO claimed a violation by Colombia and Peru' on certain provisions on labour rights, including regarding art. 2 of the ILO Convention No. 87 and art. 4 of ILO Convention No. 98, stated in the TSD chapter of the PTA between the EU and Colombia, Peru and Ecuador[49].

The EU DAG, in its Declaration of 22 June 2022, noted the lodging of the complaint and welcomed the updated operational guidelines, encouraging the adoption of further updates to clarify the standards, the collection of evidence on allegations by the SEP and the role of the DAGs in the investigation and follow-up process. According to the DAG, the roadmap based on restitution and non-repetition measures proposed by the Dutch NGOs in its petition may become a key tool to increase adherence to the TSD chapter commitments and to support their development in cooperation with EU trade partners.

4. EU Commission next strategies to improve the effectiveness of the DAGs

In 2018, the EU Commission declared 15 concrete actions to improve the implementation and enforcement of TSD chapters, including enabling civil society to fully perform its monitoring functions[50]. In the same year, a common non-paper of EU DAGs stated 28 recommendations to strengthen the role of these bodies, including the duty to consult the DAGs since the negotiations of the PTAs, to regulate better their composition and to ensure

[47] Ibid., p. 2.

[48] Ibid., pp. 1-2.

[49] Complaint - Single Entry Point, On Non-Compliance by the Colombian and Peruvian Governments of Chapter IX, on Sustainable Development, of the Trade Agreement with the European Union, Submitted by: CNV Internationaal, in support of the Trade Unions: Sintracarbon, Sintracerrejón and Union of Metallurgical Mining Workers of Andaychagua Volcan Mining Company and of the Specialised Companies, Contractors and Intermediary Companies that provide services to Volcan Mining Company – Andaychagua; Submitted to: Chief Trade Enforcement Officer CTEO, 17 May 2022, p. 6. The complaint claimed a violation of arts. 267, 269, 271 and 277 of the PTA including obligations to comply with fundamental labour rights, freedom of association and the right to equality.

[50] Non-paper of the European Commission of 26.2.2018, *Feedback and Way Forward on Improving the Implementation and Enforcement of Trade and Sustainable Development Chapters in EU Free Trade Agreements*, 2018, pp. 7-8.

organizational and financial support to the DAGs. Moreover, the DAGs recommended that the Commission should incorporate their priorities in its ones for the implementation of the TSD Chapter and justify in case such priorities are not included. The DAGs recommended also to extend their competence to all aspect of PTAs, as provided by the new agreements since the TCA, and to ensure their right to submit views in meetings of the TSD Committee and meetings between the Parties. The DAGs affirmed also that the CTEO should be required to investigate cases submitted by a DAG through the SEP and motivate in case a complaint is not considered.

In 2022, the EU Commission started a review of its trade strategy to strengthen the ability of its PTAs to promote sustainable development[51]. The Commission identified 6 policy priorities, including increasing the monitoring of the implementation of TSD commitments and reinforcing the role of civil society[52]. These actions are conceived as part of the new strategy adopted by the Union which includes the extension of the general State to State dispute settlement compliance to the TSD chapter and the possibility to adopt trade sanctions as a means of last resorts in case of non-compliance with the object and purpose of the Paris Agreement, or in case of serious non-compliance with the ILO fundamental principles and rights[53].

The Commission declared also 7 action points to improve the participation of civil society in the PTAs implementation, such as strengthening the role of EU DAGs by providing resources for their logistical support, capacity building and functioning and invite their representative to Member States' Expert Groups led by the Commission, where they will be able to contribute specific expertise, and closely associate DAGs in preparing the TSD Committee meetings, as well as facilitating the interaction between EU and partner countries' DAGs and improving the transparency on their composition. The Commission stated its intention to extend the role of the DAGs to cover the entirety of trade agreements[54]. Finally, it supported a stronger involvement of the DAGs in monitoring the implementation of TSD commitments through the possibility for all the DAGs to submit observations to the panel[55].

On the SEP, the Commission recognized its important role to allow stakeholders to lodge a complaint on violations of TSD chapters but acknowledged also its current limited impact due to lack of clarity and transparency. Therefore, the Commission declared its intention to clarify how the DAGs can also submit collective complaints and how EU-based complainant may also represent the trade and sustainable development-related concerns of an entity located in a partner country[56].

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[51] 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 power of trade partnerships: together for green and just economic growth*, Brussels, 22.6.2022 COM(2022) 409 final; 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*, COM(2019) 640 final, p. 21.
[52] Ibid, p. 4.
[53] Ibid. p. 12.
[54] Ibid., p. 10.
[55] Ibid., pp. 8, 11, at n. 29.
[56] Ibid., p. 9.

5. Concluding remarks

Overall, the involvement of the DAGs in the implementation of TSD commitments seems limited compared with the action points declared by the Commission in 2022.

There is a lack of coherence among different PTAs on the composition of the DAGs, on the formal and substantial characteristics of their opinions, views and statements and on their capacity to concretely influence the Parties. The rules on their membership need more precise requirements to ensure a balanced representation among different stakeholders, especially with reference to environmental stakeholders, which are normally underrepresented compared with the business and labour groups. On the other hand, the little number of acts approved by the DAGs limit their influence as advisory bodies. This is due both by structural issues and by the provisions of certain PTAs which do not contain strong obligations for the Parties to consider the DAGs views.

Nonetheless, the DAGs may have a more significant impact in the future if the Commission will fully implement its strategies and will ensure more organizational, technical and transparent financial support to these bodies. On the other hand, it would be necessary to strengthen the provisions regulating civil society bodies in certain PTAs, especially the less recent ones. On dispute settlement, all PTAs should include the duty for the Parties to consider the views of the DAGs. The creation of the SEP may represent a turning point that would allow the DAGs, as well as other stakeholders, to fill complaints in case of possible violation of sustainable development commitments. However, the flexibility enjoyed by the Commission in deciding the measures to be adopted limit the predictability of the SEP and future guidelines should intervene in these aspects. For example, the DAGs and other stakeholders should have the possibility to formally demand the Commission to request consultations and, at the same time, the Commission should be obliged to properly motivate its decision not to request such proposed consultations.

To conclude, despite the DAGs current limited influence, the strategy of the EU Commission to improve their effectiveness and operationalization will increase their role in the next future, potentially having important consequences on the international promotion and respect of TSD commitments affirmed in the EU PTAs.

HUMAN RIGHTS DUE DILIGENCE OBLIGATION AND THE ARMS TRADE TREATY

RAQUEL REGUEIRO DUBRA

TABLE OF CONTENTS: 1. Introduction. – 2. The Arms Trade Treaty as a Toll for Sustainable Development. – 3. Human Rights protection as ATT substantive obligations (Articles 6 and 7). – 4. Due diligence as a state obligation regarding arms companies. – 5. Private companies as actors of arms trade. – 6. Conclusions.

ABSTRACT: *Despite being the first legally binding instrument that regulates arms trade, the Arms Trade Treaty lacks rules regarding the obligations and the responsibility of private companies. The study assesses the private companies' due diligence obligations regarding arms trade activities and its relevance for the realization of the Sustainable Development Goals. It also addresses the required degree of compliance of the due diligence obligation in order determine the scope of the fulfilment of State's duties under International Law.*
KEYWORDS: *Arms Trade Treaty, due diligence, private companies, illicit trade.*

1. Introduction

The Arms Trade Treaty (ATT) is the first legally binding instrument that aims to regulate international arms trade. As a major milestone, it nevertheless remains silent or only partially regulates issues such as small arms and light weapons (SALW) and armament diversion. As an essential legal tool for the achievement of the 17 Sustainable Development Goals (SDG), the treaty contains substantive obligations related to the protection of human rights. However, no mention is made of one of the relevant non-state actors in the arms trade: the private corporations that participate in the business. The major role these companies have forces to determine the scope of their human rights obligations to assess states duties under the ATT. The state's obligation to exercise due diligence regarding the business activities of the corporations under its jurisdiction is a continuous process that requires monitoring of the effectiveness of the national regulations and policies and an obligation to remedy the detected deficiencies.

This study is divided into four parts. The first one introduces the Arms Trade Treaty as a relevant tool for sustainable development, particularly for SDG 16, and highlights the role of the European Union in the drafting and universalization of the instrument. The second part addresses Articles 6 and 7 of the ATT, two provisions that state substantive obligations related to human rights protection. The last two sections of the chapter discuss human rights state duties, with specific input on the due diligence obligation, and the

due diligence obligation of private corporations to prevent or repair negative impacts on human rights resulting from their business activity[1].

2. The Arms Trade Treaty as a Toll for Sustainable Development

Adopted on 2 April 2013 by the United Nations General Assembly[2], the Arms Trade Treaty (ATT) entered into force on 24 December, 2014. Among the 113 states that are currently parties to the treaty are three out of the five permanent members of the United Nations Security Council (France, the United Kingdom and China)[3]. As the first legally binding instrument that regulates the arms trade, the relevance of the treaty is beyond doubt. Indeed, in the period 2018-2022, five countries supplied 76% of the global arms exports[4], and two of them – France and Germany – are European Union member states. Even though the United States of America is by far the largest world exporter (around 40% of the global trade), France has grown as an arms exporter by 44% since 2013. Regarding arms imports by the European Union and NATO countries, those increased by 47% in the period 2018-2022 for the EU, and by 65% in NATO states[5]. However, all European Union member states have ratified the treaty, though a lower membership *ratio* is found in the Middle East, where roughly 15% of the states are parties to the ATT. The impact on the standardization (or lack thereof) of state practices and the promotion of responsible arms transfer regulations may vary greatly[6] from one region to another.

The treaty has been the result of several decades of negotiations, and the civil society played a key role in the laying out the human security agenda in the final text. As Stavrianakis points out, «they [the civil society] won several victories during the drafting of the treaty: the inclusion of the reduction of human suffering in its object and purpose; the mention of «armed violence» as well as «armed conflict» in the Preamble, which broadens the obligations on states beyond legal definitions of conflict; the first inclusion of GVB [gender-based violence]; and the inclusion of SALW [small arms and light weapons] in the scope of the treaty. »[7]

However, the treaty does not address (or does only partially) several issues that are of high significance as for instance the arms trade for internal

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[1] This study is linked to the project "Criminalidad organizada transnacional y empresas multinacionales ante las vulneraciones de los derechos humanos", Spanish Ministry of Cience and Innovation, No. PID-2020-117403RB-100.

[2] Doc. A/67/L.58 (2013), with 156 votes in favor, 3 against (Iran, North Korea and Syria) and 23 abstentions.

[3] The United States signed the Treaty but did not yet ratify it; the Russian Federation did not sign the Treaty. The vote in the UN General Assembly on 2 April 2014 only found three states opposing the acceptance of the resolution approving the text of the treaty: Syria, North Korea and Iran (A/67/L.58).

[4] «Trend in international arms transfers, 2022«, SIPRI Fact Sheet, March 2023, available in https://www.sipri.org/publications/2023/sipri-fact-sheets/trends-international-arms-transfers-2022#:~:text=There%20were%20decreases%20in%20arms,%2C%20Qatar%2C%20Australia%20and%20China.

[5] *Ibidem*.

[6] See R. STOHL, *Taking stock of the Arms Trade Treaty: Universalization*, in *Stockholm International Peace and Research Institute*, August 2021.

[7] A. STAVRIANAKIS, *Controlling weapons circulation in a postcolonial militarized world*, in *Review of International Studies*, 2019, 45, 1, pp. 57-76, here p. 67.

repression in the recipient states, the promotion of violent conflict may this be an armed conflict or the use of private violence such as organized crime, and the issue of corruption, which is prevalent in arms trade[8]. Moreover, SALW (small arms and light weapons) are of particular concern. The UN Security Council recalled that «the illicit transfer, destabilizing accumulation and misuse of small arms and light weapons fuel armed conflicts and have a wide range of negative human rights, humanitarian, development and socioeconomic consequences, in particular on the security of civilians in armed conflict, including the disproportionate impact on violence perpetrated against women and girls, and exacerbating sexual and gender-based violence and the recruitment and use of children by parties to armed conflict in violation of applicable international law»[9]. The organ underlined the responsibility of states to prevent threats posed by the transfer, accumulation and misuse of those arms and weapons to international peace and security, and the devastating impact on civilians in armed conflict[10] and acknowledged the relevance of the private sector regarding the effective implementation of its decisions[11]. Although civilian possession of arms and weapons is not included in the Arms Trade Treaty, the impact of SALW on human rights has been highlighted by the Human Rights Council based on the submissions received from states following calls for contributions to the 2016 report of the United Nations High Commissioner for Human Rights on Human Rights and the regulation of civilian acquisition, possession and use of firearms[12]:« It was stated that firearms were »the primary medium» of human rights violations and abuses and that violence was often encouraged by the ready availability and abundance of firearms. States argued that the listed forms of violence and crime, and the harm they caused, often constituted violations of the rights to life, security and physical integrity and of the rights to liberty and protection from torture, among others. One state pointedly stated that the misuse of firearms affected the entire spectrum of human rights. Economic, social and cultural rights affected by firearms include the rights to health, education, an adequate standard of living and social security and the right to participate in the cultural life of the community […]. There is also a concern that insecurity caused by firearm-induced violence leads to the diversion of investment, a negative impact on productive assets such as tourism and family disintegration. Insecurity has been identified as a main cause of poverty. Moreover, states asserted that the misuse and availability of firearms could have an indirect and continued impact on access to the right to an adequate standard of living as a result of the economic burden on families of those injured and killed. »

The illicit transfer of SALW is closely related to diversion, understood as the practice when the arms and weapons and their ammunition do not reach their end-user, or are used for a different (and unauthorized) purpose. Under Article 11 of the Arms Trade Treaty, even though the states shall take measures to prevent diversion by assessing the risk, they are under no

[8] L. LUSTGARTEN, *The Arms Trade Treaty: Achievements, failings, future*, in *International Comparative Law Quarterly*, 64, July 2015, pp. 569-600.
[9] S/RES/2117 (2013), 26 September 2013.
[10] S/RES/2220 (2015), 22 May 2015.
[11] S/RES/2616 (2021), 22 December 2021.
[12] A/HRC/32/21, 15 April 2016.

obligation to not authorize the export in the event of risk of diversion. However, despite the strong discussion regarding the inclusion of the definition of ammunition in the scope of Article 2, the final text of the treaty does not include a definition, simply stating in Article 3 that state parties shall establish and maintain a national control system for the export of ammunition fired, launched or delivered by the arms covered under Article 2 and shall apply the requirements stated in Articles 6 and 7 prior to authorizing the export of such ammunition. However, regarding imports, states are not required to regulate the import, transit, trans-shipment, brokering or diversion of ammunition. As Lustgarten points out, «at first blush, exclusion of ammunition whilst including the weapons that fire them seems absurd. Guns do not kill; bullets do».[13] Moreover, the diversion of ammunition is even harder to control than the diversion of SALW.

The third issue that remains unclear, at first sight, is the connection of the ATT with development. As a burden, arms trade in purchasing states often means the spending of billions instead of much-needed investment in favor of the local population. The 2004 Report of the Group of Governmental Experts on the relationship between disarmament and development outlined that «excessive armament and military spending can have negative impact on development and divert financial, technological and human resources from development objective»[14] It is understood that «the irresponsible and poorly regulated arms trade is paralyzing the universal attainment of the development goals».[15]

Thus, the ATT is found to be a crucial legally binding instrument in the implementation of the 17 Sustainable Development Goals, although the treaty does not explicitly refer to sustainable development. Namely, the ATT must be read in connection[16] to SDG Goal 5 and its target 5.2 «Eliminate all forms of violence against women and girls in the public and private spheres, including trafficking and sexual and other types of exploitation» as Article 7.4 of the ATT states that «prior to an arms transfer, exporting states must consider the risk of serious acts of gender-based violence or violence against women and children. » Regarding SDG Goal 11 «Make cities and human settlements inclusive, safe, resilient and sustainable», Articles 1, 5, 6, 7 and 11 of the treaty are essential, particularly about SALW. In the same sense, the requirement of comprehensive, transparent and public reporting stated in Article 13 of the ATT is linked to SDG Goal 17 and target 17.4 «Assist developing countries in attaining long-term debt sustainability through coordinated policies aimed at fostering debt financing, debt relief and debt restructuring, as appropriate, and address the external debt of highly indebted poor countries to reduce debt distress. » Finally, the ATT is clearly connected to SDG Goal 16, specifically target 16.1 «Significantly reduce all forms of violence and related death rates everywhere» and target 16.4 «By 2030, significantly reduce illicit financial and arms flows, strengthen the recovery

[13] L. LUSTGARTEN, *op. cit.*, p. 584. See also Gh. Y. JALIL, *Arms Trade Treaty: A critical analysis*, in *Strategic Studies*, 36, 3, Autumn 2016, pp. 78-94.
[14] A/59/119, 23 June 2004, para. 18.
[15] E. NAVE, *The Importance of the Arms Trade Treaty for the implementation of the Sustainable Development Goals*, in *Journal of Conflict and Security Law*, 24, 2, 2019, p. 298.
[16] See *The Arms Trade Treaty and the Sustainable Development Goals*, Control Arms, available in https://controlarms.org/wp-content/uploads/2018/07/CA-Practical-measures-SDGs-Final.pdf

and return of stolen assets and combat all forms of organized crime» as the object of the ATT is to prevent and eradicate the illicit trade in convention arms and prevent their diversion (Article 1), and Article 5 and 11 lay out the obligations to establish and maintain national control systems and to establish measures to combat diversion.

The ATT is not the first treaty to make the connection between the regulation of the arms trade and sustainable development. The Preamble of the 1969 Inter-American Convention against the illicit manufacturing of and trafficking in firearms, ammunition, explosives and other related materials acknowledges the danger those practices pose to the well-being of people, their social and economic development, and their right to live in peace. The 2005 UN Protocol against the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition and the Preamble of the 2004 Nairobi Protocol for the prevention, control and reduction of small arms and light weapons in the Great Lakes Region and the Horn of Africa use similar wording. Article 6.4.c) of the 2006 ECOWAS Convention on Small Arms and Light Weapons, their ammunition and other related materials states that an arms transfer shall not be authorized if it is destined to «hinder or obstruct sustainable development and unduly divert human and economic resources to armaments of the states involved in the transfer. »

The European Union also contributed through Criterion Eight (Article 2) of the 2008 Council Common Position: «Member states shall take into account, in the light of information from relevant sources such as the United Nations Development Program, World Bank, International Monetary Fund and Organization for Economic Cooperation and Developments reports, whether the proposed export would seriously hamper the sustainable development of the recipient country»[17]. The 2018 Council Conclusions on the Adoption of an EU Strategy against illicit firearms, small arms and light weapons and their ammunition declare that «illicit small arms and light weapons continue to contribute to instability and armed violence, thwarting sustainable development and crisis management efforts»[18].

The role of the European Union in the making process of the ATT has indeed been relevant, as the organization has participated in the discussions

[17] Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment. The 2008 Common Position has been amended by the 2019 Council Common Position to include provisions related to the international obligations of the member states as the ones of the ATT. See Council Decision (CFSP) 2019/1560 of 16 September 2019 amending Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment. See also Council Decision (CFSP) 2020/1464 of 12 October 2020 on the promotion of effective arms export controls, Official Journal of the European Union, L335/3.

[18] Council Conclusions on the adoption of an EU Strategy against illicit firearms, small arms & light weapons and their ammunition, doc. 13581/18, 19 November 2018. See also the Proposal for a Regulation of the European Parliament and of the Council on import, export and transit measures for firearms, their essential components and ammunition, implementing Article 10 of the United Nations' Protocol against the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition, supplementing the United Nations Convention against transnational organized crime (UN Firearms Protocol), Doc. COM(2022) 480 final, 27 October 2022.

since the inception of the negotiations, adopting a maximalist approach[19], including the necessary connection with sustainable development, human rights protection, gender-based violence and international humanitarian law. The EU also promoted the inclusion of small arms and light weapons in the scope of the treaty, as well as the creation of an implementation mechanism and a transparency scheme with public reporting on the arms sales. The position of the EU is in accordance with Article 3.5 of the Treaty on European Union that states that the Union shall, in its international relations, uphold and promote its values and contribute to peace and security, as well as to the protection of human rights, and to the strict observance and development of international law. This article is part of the «international identity» of the Union, as Khaliq[20] points out, an organization that traditionally presents itself as a normative power. In this sense, one can still subscribe to the author's words when he points out that:[This is] the rationale upon which the Union wishes to legitimize its practices and identify some of the ethical values it considers itself founded upon and those which it wishes to promote. «Ethical values» in this sense refer to the Union's perception of its disposition concerning a purpose and way of conducting itself in international affairs[21].

As Lucarelli[22] mentions, the security discourse in the European Union tends to relegate the issue of the use of force to the realm of extreme measures that can only be conceived in very limited circumstances. However, discrepancies between ideals and practice are frequent within the EU. In this sense, the role of the EU as a political actor in international society is affected by its limitations, one of the main ones being its - sometimes resounding - internal divisions in foreign policy[23]. This, together with the fact, described as *bizarre* by Amato[24], that the Union is expected to have both a single voice and multiple voices in the international community and that this does not impede the organization's coherent external action[25]. However, the Council Working Group on Conventional Arms, the European Parliament and the European Commission managed to exercise a considerable level of external cohesion to pursue the final objectives of the EU regarding the ATT, including negotiations with China and the United States to promote their participation

[19] See I. ROMANYSHYN, *The European Union and the Arms Trade Treaty: An analysis of the European Union's effectiveness in multilateral security governance*, in *Journal of Common Market Studies*, 53, 4, 2015, pp. 875-892.
[20] U. KHALIQ, *Ethical dimensions of the foreign policy of the European Union*, Cambridge University Press, Cambridge, 2008, p. 10.
[21] *Ibidem*.
[22] S. LUCARELLI S. and R. MENOTTI R., *The use of force as coercive intervention. The conflicting values of the European Union's external action*, in S. LUCARELLI y I. MANNERS (Ed.), *Values and principles in European Union Foreign Policy*, Routledge, New York, 2006, pp. 147-163.
[23] G. AMATO, *Foreword*, in F. BINDI (Ed.), *The Foreign Policy of the European Union. Assessing Europe's role in the world*, Brookings Institution Press, Washington, 2006, pp. IX-XV.
[24] *Ibidem*.
[25] J. BERGMANN J., *The European Union as international mediator. Brokering stability and peace in the neighbourhood.* Palgrave MacMillan, Cham, 2020, p. 38.

in the treaty, seeking the universality of the instrument and the inclusion of the most powerful arms exporters[26].

Although, as stated before, the ATT does not expressly refer to the SDG, the substantive obligations contained in Articles 6 and 7 of the Treaty make the instrument a fundamental tool for sustainable development and the respect of human rights.

3. Human Rights protection as ATT substantive obligations (Articles 6 and 7)

Articles 6 and 7 are seen as the «heart» of the ATT[27] as they are the cornerstones of the duties imposed on exporting states and include the respect of human rights and International Humanitarian Law as substantive obligations in arms trade. As Article 6 states absolute bans, Article 7 calls for a risk assessment if a transfer is not prohibited. Article 6 of the ATT states the prohibition for state parties to authorize the transfer of conventional arms (including SALW), if the transfer would violate (1) their obligations under measures adopted by the UN Security Council acting under Chapter VII of the UN Charter (even if that state – permanent member or not of the UN Security Council voted against the decision) or (2) any other relevant international obligations under international agreements to which it is a party (which excludes customary international law), and (3) if the state has knowledge at the time of authorization that the arms or items would be used in the commission of genocide, crimes against humanity, or war crimes defined in international instruments to which it is a party. The «knowledge» requirement makes it difficult to assess if the state knows or ought to have known what uses weapons are to be put to[28]. What seems to be expected is for the state to seek relevant information on the matter and exercise its obligation diligently.

If the arms export is not prohibited under Article 6, states have to make a risk assessment prior to authorization of the export (Article 7) and determine if the arms or items would contribute to undermining peace and security and/or could be used to (1) commit or facilitate a serious violation of international humanitarian law or of international human rights law, and/or (2) commit or facilitate an act that would constitute an offense under international agreements relating to transnational organized crime to which the exporting state is a party. Article 7 is seen as a victory for the human security agenda, as the ATT follows the precedents set by other international instruments and texts. Article 1 of the Code of Conduct of Central American States on the transfer of arms, ammunition, explosives and other related material prohibits transfers to or from states which commit and/or sponsor human rights violations or commit serious violations of International

[26] See EU Statement on the Arms Trade Treaty, OSCE Forum for Security Co-operation Nr 751, Vienna, 2 April 2014, Doc. FSC.DEL/64/14 in which the EU stated the active role the organization was going to play in supporting the effective implementation and universalization of the treaty. See also the 2022 Statement of the Working Group on Effective Treaty Implementation that underlines «the essential contribution that a responsible arms trade policy makes to the maintenance of international peace and security and respect for human rights and international humanitarian law«, 15 February 2022.

[27] A. STAVRIANAKIS, *op. cit.*, p. 71.

[28] L. LUSTGARTEN, *op. cit.*, pp. 588-589.

Humanitarian Law as do or recommend Article 6 2006 ECOWAS Convention of small arms and light weapons, their ammunition and other related material and Criteria Two and Six of the EU Code of Conduct on arms exports[29].

Despite the fact that the wording of Article 7 leaves wide latitude for states to make decisions based on a large variety of factors as long as the risk assessment is made in an objective and non-discriminatory manner, the state exporter should also consider, if there are risks, what existing measures could mitigate them, although if there is an overriding risk, it shall not authorize the export. Therefore, the state exporter shall make a preliminary assessment on the prohibition of transfers (Article 6), then, if not forbidden, make a risk assessment under Article 7, considering the mitigation measures available and, should these exist, the subsistence of an overriding risk.

However, despite the substantive states' obligations stated in the treaty, no international specific enforcement mechanism has been set out under the ATT (Article 14). Moreover, the ATT remains silent on the obligations and accountability of private actors, particularly private companies related to the arms industry. Nevertheless, the determination of the obligations of private companies is necessary to clarify the scope of states obligations. There is *momentum* on the matter not only promoted by the discussion in international society on the relationship between business and human rights but also at the regional level regarding small arms and light weapons, as shown by the request for an advisory opinion submitted by Mexico to the Inter-American Court on Human Rights on 11 November, 2022 under Article 64 of the American Convention on Human Rights regarding the responsibility of private entities engaged in the manufacture, distribution, and sale of firearms, in relation to violations of the protection of the rights to life and humane treatment arising from their negligence when developing their commercial activities[30].

4. Due diligence as a state obligation regarding arms companies

States have the obligation to respect and guarantee human rights. The duty to respect human rights entails that the state must refrain from infringing the norm, whether by action or omission. As noted by the Inter-American Court on Human Rights in *Velásquez Rodríguez v. Honduras:* «According to Article 1 (1) [of the American Convention of Human Rights], any exercise of public power that violates the rights recognized by the Convention is illegal. Whenever a state organ, official or public entity violates one of those rights, this constitutes a failure of the duty to respect the rights and freedoms set forth in the Convention»[31].

Whether an arms company is owned in majority or in full by a state, any conduct of the enterprise that would constitute a breach of an international human rights obligation shall be attributed to the state under Articles 4 and 5 of the Final Draft Articles on the Responsibility of states for internationally

[29] Doc. 8675/2/98, 5 June 1998.

[30] I/A Court H. R., Request for an Advisory Opinion submitted by Mexico before the Inter-American Court of Human Rights of November 11, 2022, available in https://www.corteidh.or.cr/solicitud_opiniones_consultivas.cfm?lang=en.

[31] Inter-American Court of Human Rights. Case of Velásquez-Rodríguez v. Honduras. Judgment of July 29, 1988 (Merits), para. 169.

wrongful acts. The European Court of Human Rights considers the corporation's national legal status, the rights conferred upon the corporation, the institutional independence of the company, its operational independence, the nature of the corporate activity and the context in which that business activity is carried out[32].

The business activities of private companies with minority public participation deserve special attention regarding the duty to protect and guarantee human rights. Although the state cannot fully direct the commercial activities of such enterprises because it does not have a majority in their decision-making bodies, it can decisively influence those decisions. Thus, the state should be expected to use its domestic capacity to influence and prevent or mitigate the impact of arms activities.

In the same vein, in the case of private companies, the state's lack of participation in the decision-making structure of such entities does not exempt it from its duty to ensure that these companies located in its territory or under its jurisdiction refrain from carrying out commercial activities that violate human rights and from adopting the necessary domestic measures to that end. Principle 1 of the United Nations Guiding Principles on Business and Human Rights states that: «States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication»[33].

The obligation to protect set out in Principle 1 is echoed in the General Comment No. 24 on state obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities in which the treaty body confirmed the obligation to protect – as well as the duties to respect and to fulfil human rights - and noted that this obligation requires the state to establish appropriate domestic regulations, as well as monitoring, investigation and accountability procedures to establish and enforce the rules for companies.[34] This implies, in the context of the commercialization of firearms, the existence of an internal *corpus of rules* for commercial activities and accountability in cases of non-compliance.

Thus, although the state is not directly responsible for the violations of human rights resulting from the commercial activities of companies, its failure to comply with the obligations to prevent, investigate, punish and remedy such violations entails international responsibility. In this regard, General Comment No. 31 of the Human Rights Committee states that states parties have an obligation to protect civil and political rights against acts committed by private persons or entities. Thus, failure to take appropriate measures or exercise the obligation of due diligence to prevent, punish, investigate or redress harm resulting from such acts is a violation of the 1966 International Covenant on Civil and Political Rights.

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[32] D. AUGENSTEIN, State responsibilities to regulate and adjudicate corporate activities under the European Convention on Human Rights. Submission to the Special Representative of the United Nations Secretary-General on the issue of Human Rights and Transnational Corporations and Other Business Enterprises, April 2011.

[33] Guiding Principles on Business and Human Rights. Implementing the United Nations «Protect, Respect and Remedy« Framework, HR/PUB/11/4, 2011.

[34] Doc. E/C.12/GC/24, 10 August 2017.

Therefore, the state has an obligation of due diligence (obligation of conduct) that requires a proactive attitude with respect to the balance between the regulations and policies of arms export control and its international obligations in the field of human rights, which requires continuous monitoring by the state of the effectiveness of such regulations and policies and an obligation to remedy any deficiencies detected in them, including with respect to the monitoring mechanisms. In this sense, the state must be diligent in the execution of these obligations of supervision and control in all cases and, with greater demand, with respect to those entities that are owned or under state control.

The degree of due diligence to the state will depend on the capabilities of the State, as noted by the International Court of Justice in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro):* «The notion of «due diligence», which calls for an assessment *in concreto*, is of critical importance. Various parameters operate when assessing whether a state has duly discharged the obligation concerned. The first, which varies greatly from one state to another, is clearly the capacity to effectively influence the action of persons likely to commit, or already committing, [here, genocide]. »[35]

The Inter-American Court of Human Rights established the following state obligations with respect to business activity and its negative impact on human rights: «States should adopt measures designed to ensure that companies: (i) have appropriate policies for the protection of human rights; (ii) incorporate good corporate governance practices with a stakeholder *approach,* which involve actions aimed at guiding business activity towards compliance with standards and respect for human rights; (iii) have due diligence processes in place to identify, prevent and correct human rights violations [...]; and (iv) have processes that allow the company to remedy human rights violations that occur as a result of the activities they carry out [...]»[36].

In the case of private arms trading companies – which often receive significant support and assistance from the state in the negotiation of contracts – the state must take special care in fulfilling its due diligence obligation since the state knows or should know the obvious risk of social and human rights danger involved in the commercialization of arms in another state. This implies not only establishing a regulatory system for export licensing but also a system of civil and criminal liability for unlawful conduct. In this sense, failure to exercise its obligation of due diligence would imply a violation of the obligation to prevent harm in third states. The home state of the private company should «set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations» (Principle 2)[37].

[35] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007, p. 43, para. 430.

[36] I/A Court H.R., Case of Olivera Fuentes v. Peru. Preliminary Objections, Merits, Reparations and Costs. Judgment of February 4, 2023. Series C No. 484, para. 99 (the text of judgement is only available in Spanish. Passage translated to English).

[37] Guiding Principles on Business and Human Rights. Implementing the United Nations «Protect, Respect and Remedy« op. cit.

The limited territorial scope of human rights treaties - which remain silent as to their extraterritorial application - and the obligation of non-intervention in the internal affairs of another state stated in Article 2.7 of the Charter of the United Nations do not allow the conclusion that there is an obligation not to exercise extraterritorial jurisdiction for the protection of human rights. States may decide to exercise due diligence with respect to the commercial activities of their companies abroad and/or decide to establish, based on the principle of nationality, the jurisdiction of national courts over situations of human rights violations resulting from the commercial activities of their companies abroad. In this regard, the Committee on Economic, Social and Cultural Rights stated that: «States parties should also take steps to prevent human rights contraventions abroad by corporations which have their main offices under their jurisdiction, without infringing the sovereignty or diminishing the obligations of the host states under the Covenant»[38].

5. Private companies as actors of arms trade

Current international rules do not remain silent on the international responsibility of private companies for the breach of human rights, allowing only the assumption of state responsibility in the event of application of Article 8 of the Draft Articles on Responsibility of states for internationally wrongful acts. International instruments neither directly impose obligations on corporations to protect human rights. However, the identification of the human rights obligations of private companies is necessary to clarify the scope of the state's obligations in its duty to protect and guarantee these rights, as stated by the Inter-American Court of Human Rights: «Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved. The responsibility of business enterprises to respect human rights refers to internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labor Organization's Declaration on Fundamental Principles and Rights at Work.

The responsibility to respect human rights requires that business enterprises:

a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;

b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.

The responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure. Nevertheless, the scale and complexity of the means through which enterprises meet that responsibility may vary according to these factors and the severity of the enterprise's adverse human rights impacts.

[38] Statement on the obligations of States parties regarding the corporate sector and economic, social and cultural rights, E/C.12/2011/1, 12 July 2011.

To meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances»[39]. There is certainly an intense discussion on how the moral requirements made to companies in various international instruments should be strengthened to promote that they take responsibility for human rights violations resulting from their business activity. This discussion is reflected, among other documents, in the UN Guiding Principles on Business and Human Rights, the OECD Guidelines for Multinational Enterprises[40] and the OECD Due Diligence Guidance for Responsible Business Conduct[41].

Principle 17 of the Guiding Principles on Business and Human Rights states that «business enterprises should carry out human rights due diligence» which includes «assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed»[42]. This continuous process must not only cover the negative consequences that the company itself has caused but also those that are directly related to its operations.

Private companies' due diligence requires that the company takes responsibility for the negative impact on human rights resulting from its activity – in this case, the arms business - as well as for the negative impact resulting from the activities of third parties with whom they have business relationships. Thus, the company's involvement in the human rights violations must be assessed (Principle 19 of the UN Guiding Principles on Business and Human Rights). The company is under an obligation to prevent any human rights violation and, if so, to take appropriate measures to repair the damage resulting from that breach. Thus, the company must prevent the violation of human rights and, if it does, take appropriate measures to repair the damage caused by said violation. If the negative human rights impact is linked to the company's operations with another corporation (existing business relationship), the appropriate course of action should be assessed, taking into consideration:

- If the company has leverage to prevent or mitigate the adverse impact, it should use the leverage;
- If the company lacks leverage, it must assess the possible ways to increase it;
- If the company lacks leverage and cannot increase it, it should consider ending the relationship with its commercial partner.

The United Nations Working Group on Business and Human Rights highlighted the added difficulties generated in the arms sector by the failure of arms companies to comply with due diligence, considering that their commercial activities should comply only – where they exist – with national regulations on the matter and that, in case of a violation of human rights, the state will assume the resulting responsibility[43]. However, there is consensus regarding the responsibility of companies to respect human rights even when

[39] Inter-American Court of Human Rights, Case of the Miskito Divers (Lemoth Morris et al.) v. Honduras, Judgment of August 31, 2021, para. 47.
[40] OECD Guidelines for Multinational Enterprises on Responsible Business Conduct, 2023.
[41] OECD Due diligence guidance for responsible business conduct, 2018.
[42] UN Guiding Principles on Business and Human Rights, *op. cit.*
[43] Responsible business conduct in the arms sector: Ensuring business practice in line with the UN Guiding Principles on Business and Human Rights. Information Note by the UN Working Group on Business and Human Rights. 30 August 2022.

the state does not comply with its obligations in this area: «A state's failure either to enforce relevant domestic laws, or to implement international human rights obligations or the fact that it may act contrary to such laws or international obligations does not diminish the expectation that enterprises respect human rights»[44].

6. Conclusion

The lack of international regulation of the obligations and responsibility of private companies as non-state actors involved in the arms trade does not impair the existence of human rights obligations under the national legal order. The compliance of the private corporations with their obligations with respect to human rights includes a due diligence obligation whose achievement will allow to determine the scope of the fulfillment of the state's obligations.

The negative impact of the arms trade on human rights, specifically the illicit trade of small arms and light weapons, is a threat to the realization of the sustainable development goals. The ATT is found to be a useful tool to attain the SGD, although it contains flaws that shall be addressed at the national level. The universalization of the treaty, although desirable, has not been yet achieved, which gives limited impact to the substantive rules it states, namely the ban on the transfer of weapons and the risk assessment obligation under Articles 6 and 7 of the instruments. The lack of an enforcement mechanism and the sometimes very general wording of the provisions of the treaty give a wide range of latitude to the states in the execution of their obligations under the treaty.

Nevertheless, the connection between the ATT and the due diligence obligation towards the protection and the fulfillment of human rights requires national regulations, plans and policies regarding arms trade to comply with the substantive obligations stated in the treaty. The human security perspective, which is at the heart of the treaty, requires a proactive attitude that not all states are willing to achieve, but the international legal framework for the trade in arms in the ATT represents an historic milestone.

[44] OECD Guidelines for Multinational Enterprises on Responsible Business Conduct, *op. cit.*, para. 43.

PUBLIC GOALS AND PRIVATE DUTIES IN THE CORPORATE SUSTAINABILITY DUE DILIGENGE DIRECTIVE

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TABLE OF CONTENTS: 1. Corporate sustainability due diligence laws in context. – 2. The integration of public goals in the Directive. – 2.1. The UNGPs and the OECD Due Diligence Guidance. – 2.2. The UN Sustainable Goals. – 2.3. The Paris Agreement. – 2.4. The international agreements and conventions listed in the Annex. – 3. Concluding remarks.

ABSTRACT: *This paper aims at assessing how the proposed Corporate Sustainability Due Diligence Directive incorporates public objectives set by international organisations and state actors into the governance of large E.U. companies. In particular, it outlines the roots of the due diligence process enshrined in the proposed text, to then assess how the UNGPs and the OECD Due Diligence Guidance, the UN Sustainable Goals, the Paris Agreement, and the international agreements and conventions listed in the Annex are integrated within the legal instrument.*

KEYWORDS: *sustainability due diligence; human rights due diligence; environmental due diligence; UN Sustainable Goals; Paris Agreement; sustainable corporate governance; Corporate Law; Company Law.*

1. Corporate sustainability due diligence laws in context

We are witnessing a considerable interinstitutional convergence on the introduction of corporate sustainability due diligence legislation in the European Union. First, the Council Conclusions on Human Rights and Decent Work in Global Supply Chains of December 1, 2020, called on the European Commission to propose cross-sector corporate due diligence obligations along global supply chains. Then, the European Parliament resolution of March 10, 2021, with recommendations to the Commission on corporate due diligence and corporate accountability, stressed that «[i]n order to ensure a level playing field, the responsibility for undertakings to respect human rights under international standards should be transformed into a legal duty at Union level». Subsequently, on February 23, 2022, the European Commission published the proposal for a Directive on the matter[1]. The Council and the Parliament adopted their positions on November 30, 2022, and on June 1, 2023, respectively. Lastly, on December 14, 2023, the negotiators of the Council and Parliament reached a compromise deal[2].

[1] EUROPEAN COMMISSION, *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.

[2] EURACTIV, *EU Parliament and member states reach deal on corporate due diligence law*,

Due diligence laws are currently proliferating throughout the world. Indeed, the European Union laid down due diligence obligations for the operators who place timber and timber products on the market[3], and both the E.U. and the United States already introduced supply chain obligations for importers of certain minerals originating from conflict-affected and high-risk areas[4]. The E.U. also adopted a Regulation on deforestation-free supply chains[5]. The California Transparency in Supply Chains Act, passed in 2010, focuses on slavery and human trafficking[6], and the United Kingdom, Australia and Canada have legislated on the same topic in 2015, 2018 and 2023, respectively[7].

Moreover, the Dutch Child Labour Due Diligence Law was promulgated in October 2019[8] and the Norwegian Transparency Act on fundamental human rights and decent working conditions entered into force

December 14, 2023, available at <https://www.euractiv.com/section/economy-jobs/news/eu-parliament-and-member-states-reach-deal-on-corporate-due-diligence-law>.

[3] *Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010*, OJ L295/23. According to Art. 4(2) of the Regulation, «operators shall exercise due diligence when placing timber or timber products on the market». The framework of procedures and measures referred to as «due diligence system» is defined in Art. 6 and «includes three elements inherent to risk management: access to information, risk assessment and mitigation of the risk identified» (Recital 17).

[4] In the U.S., see Section 1502 of the Dodd-Frank Act, introduced by the *Dodd-Frank Wall Street Reform and Consumer Protection Act signed in July* 2010; for the E.U., see the *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 L130/1. While the U.S. regulation focuses on companies that source conflict minerals from the Democratic Republic of Congo, the E.U. Regulation has a broader geographical scope. See R. CHAMBERS, A. Y. VASTARDIS, *Human Rights Disclosure and Due Diligence Laws: The Role of Regulatory Oversight in Ensuring Corporate Accountability*, in *Chicago Journal of International Law* 21(2), 2021, pp. 323 ff., at 341; J. LETNAR CERNIC, *The Human Rights Due Diligence Standard-Setting in the European Union: Bridging the Gap between Ambition and Reality*, in *Global Business Law Review* 10(1) 2022, pp. 1 ff., at 10; M. CONWAY, *A New Duty of Care - Tort Liability from Voluntary Human Rights Due Diligence in Global Supply Chains*, in *Queen's Law Journal* 40(2), 2015, pp. 741 ff., at 751; G. A. SARFATY, *Shining Light of Global Supply Chains*, in *Harvard International Law Journal* 56(2), 2015, pp. 419 ff.; O. MARTIN-ORTEGA, *Human Rights Due Diligence for Corporations: From Voluntary Standards to Hard Law at Last*, in *Netherlands Quarterly of Human Rights* 32(1), 2014, pp. 44 ff.

[5] *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*, OJ L150/206. See P. ŠKVAŘILOVÁ-PELZL, A. ADAMS, *The Duty of Due Diligence: A European Race to Corporate Responsibility and Sustainability?*, in *European Business Law Review* 34(2), 2023, pp. 193 ff., at 207.

[6] See S. W. GAMBLE, *A Corporate Human Rights Due Diligence Law for California*, in *UC Davis Law Review* 55(4), 2022, pp. 2421 ff., at 2427. Under the Act, in effect from 2012, companies shall disclosure to what extent they engage in the verification «of product supply chains to evaluate and address risks of human trafficking and slavery» (see Section 1714.43 of the California Civil Code).

[7] See R. MCCORQUODALE, L. SMIT, S. NEELY, R. BROOKS, *Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises*, in *Business and Human Rights Journal* 2(2), 2017, pp. 195 ff., at 201.

[8] Law of 24 October 2019 ('*Wet Zorgplicht Kinderarbeid*'). Under the Child Labour Due Diligence Law adopted by the Dutch Parliament in May 2019, companies must investigate whether their goods or services have been produced exploiting child labour and, if so, devise a plan to eradicate it from their supply chains.

in July 2022[9] – whereas the French Duty of Vigilance Law of 2017[10] and the German Supply Chain Due Diligence Act effective as of 1 January 2023[11] are broader in scope and integrate also environmental concerns[12] (for instance, in Germany, the new obligations are aimed at addressing both human rights and environmental violations such as those related to the use of mercury and hazardous wastes).These laws vary in terms of scope of application (*i.e.* in number of companies affected)[13], level of cross-sectoriality, and enforcement mechanism[14].

The spread of national mandatory due diligence regulation finds its roots in international soft law standards, that lawmakers are now embodying into hard law. For instance, in 2010 the UN Group of Experts on the Democratic Republic of Congo proposed a five-step due diligence approach that was later endorsed by the UN Security Council in a legally binding resolution, and by the OECD in the Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-affected and High-risk Areas[15];

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[9] LOV-2021-06-18-99 ('*Lov om virksomheters åpenhet og arbeid med grunnleggende menneskerettigheter og anstendige arbeidsforhold*').

[10] Law n. 2017-399 of 27 March 2017 ('*Loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*'). See V. RUSINOVA, S. KOROTKOV, *Mandatory Corporate Human Rights Due Diligence Models: Shooting Blanks?*, in *Russian Law Journal* 9(4), 2021, pp. 33 ff., at 62; A. LAFARRE, *The Proposed Corporate Sustainability Due Diligence Directive: Corporate Liability Design for Social Harms*, in *European Business Law Review* 34(2), 2023, pp. 213 ff., at 216.

[11] Law of 11 June 2021 ('*Lieferkettensorgfaltsgesetz*').

[12] The two aspects are not unrelated. As noted by 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* 6, 2021, pp. 93 ff., at 108, «climate change is a direct and serious threat to the enjoyment of human rights», and thus climate change-related human rights impacts are a necessary dimension of human rights due diligence processes.

[13] The Californian Act applies to retail sellers and manufacturers that have annual worldwide gross receipts exceeding 100'000'000 dollars and that satisfy the legal requirements for «doing business» in California; the UK Act applies to commercial organisations that carry on a business, or part of it, in the UK, that supply goods and services and that have an annual turnover of 36'000'000 pounds or more; the Australian Act applies to entities based or operating in Australia, with an annual consolidated revenue of more than 100'000'000 dollars; the scope of application of the Canadian Act is more complex: the Act applies to entities that are listed on a Canadian stock exchange, have a place of business in Canada, do business in Canada or have assets in Canada and that, based on their consolidated financial statements, meet at least two of the following conditions for at least one of their two most recent financial years: 20'000'000 dollars or more in assets, 40'000'000 dollars or more in revenue, and 250 or more employees; the French Law applies to companies employing more than 5'000 employees in France or 10'000 employees worldwide, including subsidiaries; from 2024, the German Act applies to companies with at least 1'000 employees in Germany.

[14] For a comparison between national due diligence laws, see A. LAFARRE, *The Proposed Corporate Sustainability Due Diligence Directive: Corporate Liability Design for Social Harms*, *cit.*, p. 226; A. LAFARRE, B. ROMBOUTS, *Towards Mandatory Human Rights Due Diligence: Assessing its Impact on Fundamental Labour Standards in Global Value Chains*, in *European Journal of Risk Regulation*, 13, 2022, pp. 567 ss., p. 577; M. RAJAVUORI, A. BAVARESI, H. VAN ASSELT, *Mandatory due diligence laws and climate change litigation: Bridging the corporate climate accountability gap?*, in *Regulation & Governance* 17, 2023, pp. 944 ss., p. 946.

[15] Due diligence legislation focused on the mining sector was later introduced in the Democratic Republic of Congo and Rwanda, and in 2015 China launched the *Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains*. See C. M. O'BRIEN, S.

when the E.U. introduced the Conflict Minerals Regulation, it directly made reference to the OECD Guidance[16].

Similarly, the approach adopted by the draft Directive on Corporate Sustainability Due Diligence can be traced back to the mandate of Professor John Ruggie as UN Special Representative of the Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises[17]. Building on the 'Protect, Respect and Remedy' framework for Business and Human Rights, the UN Guiding Principles envisaged due diligence as a process of risk and impact assessment, action on the findings of the assessment through appropriate measures, evaluation of the effectiveness of such measures, communication to the public, and remediation of any adverse impacts of companies' activities on rights-holders[18].

To be sure, Professor Ruggie did not articulate the business 'responsibility to respect' as a new legal obligation: conversely, he grounded it on voluntarism and ethical rather than legal basis, guaranteeing the success of the Framework[19]. However, the initiative was aimed at generating a mix of voluntary and mandatory, national and international measures[20], and to point

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DHANARAJAN, *The corporate responsibility to respect human rights: a status review*, in *Accounting, Auditing & Accountability Journal* 29(4), 2016, pp. 542 ff., at 546.

[16] V. RUSINOVA, S. KOROTKOV, *Mandatory Corporate Human Rights Due Diligence Models: Shooting Blanks?*, *cit.*, at 45, 53. J. LETNAR CERNIC, *The Human Rights Due Diligence Standard-Setting in the European Union: Bridging the Gap between Ambition and Reality*, *cit.*, at 12.

[17] See I. LANDAU, *Human Rights Due Diligence and the Risk of Cosmetic Compliance*, in *Melbourne Journal of International Law* 20(1), 2019, pp. 221 ff., at 223. For instance, as mentioned in D. HESS, *The Management and Oversight of Human Rights Due Diligence*, in *American Business Law Journal* 48(4), 2021, pp. 751 ff., at 757, according to the UN Guiding Principles «[i]f the company causes or contributes to a human rights violation, then it 'should take the necessary steps to cease or prevent its contribution,' as well as provide, or cooperate in the provision of, remediation. If the company is only directly linked to the violation, then the necessary response will depend on such factors as its leverage over the entity causing the abuse and the severity of the abuse. If the company lacks leverage to end the other entity's abuse, then it should consider ending the relationship (in a manner that does not cause adverse human rights consequences)».

[18] See C. M. O'BRIEN, S. DHANARAJAN, *The corporate responsibility to respect human rights: a status review*, *cit.*, at 545.

[19] See D. CASSEL, *Outlining the Case for a Common Law Duty of Care of Business to Exercise Human Rights Due Diligence*, in *Business and Human Rights Journal* 1(2), 2016, pp. 179 ff., at 184; M. FASCIGLIONE, *The Enforcement of Corporate Human Rights Due Diligence: From the UN Guiding Principles on Business and Human Rights to the Legal Systems of EU Countries*, in *Human Rights & International Legal Discourse* 10(1), 2016, pp. 94 ff., at 98; J. LETNAR ČERNIČ, *European Perspectives on the Business and Human Rights Treaty Initiative*, in J. LETNAR CERNIC, N. CARRILLO-SANTARELLI (eds), *The future of business and human rights*, Cambridge University Press, Cambridge, 2019, pp. 229 ss., at 232; C. M. O'BRIEN, S. DHANARAJAN, *The corporate responsibility to respect human rights: a status review*, *cit.*, at 545. For instance, the 'Protect, Respect and Remedy' framework used the expressions «corporate culture» (paragraph 29 and 31), «market pressures on companies to respect rights» (paragraph 30). As recalled by T. LAMBOOY, *Corporate Due Diligence as a Tool to Respect Human Rights*, in *Netherlands Quarterly of Human Rights* 28(3), 2010, pp. 404 ff., at 431, Professor Ruggie's model for 'complementary governance' relied on the concept of 'common but differentiated responsibilities' for social actors.

[20] S. W. GAMBLE, *A Corporate Human Rights Due Diligence Law for California*, *cit.*, at 2425. See also the *Summary of the report of the Working Group on Business and Human Rights to*

out what corporate due diligence should look like.[21] Given that, as it has been noted, several factors undermine the capacity of states to establish a strong regulatory mechanism at the domestic level[22], and that the level of compliance to the soft law has proven to be suboptimal, lawmakers are progressively mandating the due diligence process devised in the Second Pillar[23] by introducing duties on large[24] E.U.-based companies, thus turning soft law into hard law[25]. In this sense, the expression «*In addition* to compliance with national laws, the baseline responsibility of companies is to respect human rights»[26] contained in the 'Protect, Respect and Remedy' framework (paragraph 54)[27] is today upstaged, because the respect of human rights and the environment is being imposed through company law.

Although business 'responsibility' was thus conceived as distinct from,

the General Assembly, October 2018 (A/73/163) Corporate human rights due diligence: emerging practices, challenges and ways forward: «The Working Group recommends that States use all available levers to address market failures and governance gaps to advance corporate human rights due diligence as part of standard business practice, ensuring alignment with the Guiding Principles, including by [u]sing legislation to create incentives to exercise due diligence, including *through mandatory requirements*, while taking into account elements to drive effective implementation by businesses and promote level playing fields» (emphasis added). See M. B. TAYLOR, *Due Diligence: A Compliance Standard for Responsible European Companies*, in *European Company Law* 11(2), 2014, pp. 86 ff., at 88 on how the 2011 revision of the European Union strategy for Corporate Social Responsibility (CSR) changed the definition of CSR to follow the UN Guiding Principles.

[21] I. LANDAU, *Human Rights Due Diligence and the Risk of Cosmetic Compliance*, *cit.*, at 224.

[22] S. DEVA, *Guiding Principles on Business and Human Rights: Implications for Companies*, in *European Company Law* 9(2), 2012, pp. 101 ff., at 103. See also K. BUHMANN, *Business and Human Rights: Understanding the UN Guiding Principles from the Perspective of Transnational Business Governance Interactions*, in *Transnational Legal Theory* 6(2), 2015, pp. 399 ff.

[23] K. BUHMANN, *Business and Human Rights: Understanding the UN Guiding Principles from the Perspective of Transnational Business Governance Interactions*, *cit.*, at 401 remarks that «the UN Guiding Principles are a novelty which connects elements of the state-centred international law not only to national law and legal institutions, but also to the forces of the market which drives many of the non-state business governance initiatives in order to gain maximum influence on business conduct».

[24] On the scope of application see Art. 2 of the proposed legal text.

[25] R. CHAMBERS, J. MARTIN, *Reimagining Corporate Accountability: Moving beyond Human Rights Due Diligence*, in *New York University Journal of Law and Business* 18(3), 2022, pp. 773 ff., at 796 underlined how in Europe there is a gradual movement towards the adoption of HRDD laws, indicating a process of translation of this concept from the UNGPs from soft into hard law. This is encountering the favor of the U.N. Working Group on Business and Human Rights, that in its report to the U.N. General Assembly praised the French Duty of Vigilance Law as a development that other Governments should learn from, see V. RUSINOVA, S. KOROTKOV, *Mandatory Corporate Human Rights Due Diligence Models: Shooting Blanks?*, *cit.*, at 39.

[26] Emphasis added.

[27] According to the Commentary to Principle 11 of the UN Guiding Principles, «[t]he responsibility to respect human rights is a global standard of *expected conduct* for all business enterprises wherever they operate. It exists independently of States' abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations. And *it exists over and above compliance with national laws* and regulations protecting human rights» (emphasis added).

albeit complementary to[28], the state 'duty' to protect human rights[29], due diligence laws are now developing a new business *duty*[30]; through mandatory due diligence a state can attribute to private actors themselves the task to detect and mitigate adverse impacts, and national authorities can then monitor the companies and impose fines in case of non-compliance[31]. In doing so, lawmakers can also address the Third Pillar of the UN Framework ('access to remedy'), but the main focus remains company-centred, revolving around companies' obligations, not victims of human rights abuses[32].

1. The integration of public goals in the Directive

The proposed legal text is a company law directive, well inscribed in the Sustainable Corporate Governance Initiative[33]. However, the abovementioned conceptual origins of the due diligence process that it advances are key to interpret the obligations laid down therein. Indeed, the Directive blurs the boundaries between public goals and private duties and, to a certain extent, between international and corporate law, hetero-integrating corporate governance and private autonomy with global policy objectives determined by international organisations and state actors.

Four level of integration can be distinguished: the first attains to the UNGPs and the OECD Due Diligence Guidance, the second to the UN Sustainable Goals, the third to the Paris Agreement, and the fourth to the international agreements and conventions listed in the Annex.

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[28] K. BUHMANN, *Business and Human Rights: Understanding the UN Guiding Principles from the Perspective of Transnational Business Governance Interactions*, *cit.*, at 25.

[29] S. W. GAMBLE, *A Corporate Human Rights Due Diligence Law for California*, *cit.*, at 2430.

[30] The topic is extensively explored in 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* 41(3), 2023, pp. 1 ff. See also C. MACCHI, *The Climate Change Dimension of Business and Human Rights: The Gradual Consolidation of a Concept of 'Climate Due Diligence'*, *cit.*, at 94.

[31] For instance, the remedy for violations of the Californian Act is an action brought by the Attorney General for injunctive relief (see Section 1714.43(d) of the California Civil Code), while the enforcement of the Norwegian Act is left to the Consumer Authority (see its Section 9) and violations are punished with penalties (Section 14). Similarly, the Canadian Modern Slavery Act relies on a system of penalties in case of non-compliance, with fines of up to 250'000 dollars (see its Section 19). Under the French Law, when a company is given formal notice to comply, but it omits to do so within a period of three months, the competent court may impose penalties. Moreover, the company is liable for non-compliance vis-à-vis any person, demonstrating an interest, that bring an action in court: the company is obliged to repair the damages that the execution of those obligations would have avoided (L. 225-102-5 of the '*Code de Commerce*'). The Dutch Law establishes a complaint system, allowing companies to resolve the issue within a period of six months. However, if they fail to do so, the regulator intervenes as a mediator: in case of violations, the regulator provides the company with a legally binding course of action, and further violations result in fines and even in criminal liability for directors.

[32] V. RUSINOVA, S. KOROTKOV, *Mandatory Corporate Human Rights Due Diligence Models: Shooting Blanks?*, *cit.*, at 37-38.

[33] EUROPEAN COMMISSION, *Sustainable Corporate Governance*, available at <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporategovernance_en>.

1.1. The UNGPs and the OECD Due Diligence Guidance

Recital 5 of the proposed Directive refers to the UNGPs. In particular, the text adopted by the European Parliament on June 1, 2023 reads: «Well-established existing international standards on responsible business conduct such as the United Nations Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises clarified in the OECD Due Diligence Guidance for Responsible Business Conduct specify that companies should protect human rights and set out how they should respect and address the protection of the environment across their operations and value chains. The United Nations Guiding Principles on Business and Human Rights recognise the responsibility of companies to exercise human rights due diligence by identifying, preventing and mitigating the adverse impacts of their operations on human rights and by accounting for how they address those impacts. Those Guiding Principles state that businesses should avoid infringing human rights and should address adverse human rights impacts that they have caused, contributed to or are linked with in their own operations, subsidiaries and through their direct and indirect business relationships»[34].

As a matter of fact, the proceduralisation[35] enshrined in the Directive is consistent with the one proposed by the UNGPs and OECD Guidance[36]. In particular, Recital 16 of the Commission's proposal reads: «The due diligence process set out in this Directive should cover the six steps defined by the OECD Due Diligence Guidance for Responsible Business Conduct, which include due diligence measures for companies to identify and address adverse human rights and environmental impacts. This encompasses the following steps: (1) integrating due diligence into policies and management systems, (2) identifying and assessing adverse human rights and environmental impacts, (3) preventing, ceasing or minimising actual and potential adverse human rights, and environmental impacts, (4) assessing the effectiveness of measures, (5) communicating, (6) providing remediation».

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[34] The Parliament also added Recital 6a, which reads: «All companies should respect human rights, as enshrined in the international conventions and instruments listed in the Annex, Part I, Section 2, and those under the scope of this Directive should be required to conduct due diligence and should take appropriate measures to identify and address adverse human rights impacts along their value chain. The extent and nature of due diligence can vary according to the size, sector, operating context, and risk profile of the company».

[35] The term 'proceduralisation' is here borrowed from A. OLLINO, *Due Diligence Obligations in International Law*, Cambridge University Press, Cambridge, 2022, at 232 that defines it as «the process that progressively erodes the 'reasonable' standard traditionally linked to due diligence and substitutes it with more specific legal parameters. Through proceduralisation, the content of due diligence obligations is spelled out into a series of 'sub'-duties, technical standards or direct obligations (including procedural ones) whose fulfilment is required for assessing compliance with the standard of due diligence of the 'principal' obligation». The Author argues that «[i]nternational environmental law and human rights are among the international legal areas in which the proceduralisation of due diligence obligations is more evident» (*ibid*, at 242). See also L. VENTURA, *Corporate Sustainability Due Diligence and the New Boundaries of the Firms in the European Union*, in *European Business Law Review* 34(2), 2023, pp. 239 ff., at 257.

[36] See L. VENTURA, *Corporate Sustainability Due Diligence and the New Boundaries of the Firms in the European Union*, *cit.*, at 251 and 254.

The articles of the Directive embed this proceduralisation into company law[37] by covering the adoption of due diligence policies (Art. 5), identification of actual and potential adverse human rights and environmental impacts (Art. 6), prevention (Art. 7), contrast to actual adverse impacts (Art. 8), complaints procedures (Art. 9), monitoring (Art. 10), and communication (Art. 11)[38]. In this sense the Directive, albeit not explicitly referring to the UN

[37] C. PATZ, *The EU's Draft Corporate Sustainability Due Diligence Directive: A First Assessment*, in *Business and Human Rights Journal* 7, 2022, pp. 291 ff., at 293 notes that «[t]he draft directive effectively divides the active due diligence duty into two parts: preventing potential adverse impacts and bringing actual adverse impacts to an end. Here the dynamic process of due diligence foreseen in the international standards has been distilled to an exhaustive subset of specific actions to be taken by the company 'where relevant'».

[38] Moreover, the European Parliament's position of June 1, 2023, stressed how companies should prioritize impacts on the basis of their severity and likelihood, in line with Principle 24 of the UNGPs. As for Article 11 on communication, this provision establishes that the companies that are not subject to reporting requirements under Directive 2013/34/EU should publish an annual statement on their website. Indeed, the Non-financial statement *ex* Art. 19a, para 1, lett. b) of the *Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups*, OJ L330/1, contained «a description of the policies pursued by the undertaking in relation to those matters, including due diligence processes implemented». Recital 31 of the *Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting*, *OJ L322/15 ('CSRD'), that superseded the Non-Financial Reporting Directive of 2014 ('NFRD'), states:* «To ensure consistency with international instruments such as the UN 'Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework' ('UN Guiding Principles on Business and Human Rights'), the OECD Guidelines for Multinational Enterprises and the OECD Due Diligence Guidance for Responsible Business Conduct, the due diligence disclosure requirements should be specified in greater detail than is currently the case in point (b) of Article 19a(1) and point (b) of Article 29a(1) of Directive 2013/34/EU. Due diligence is the process that undertakings carry out to identify, monitor, prevent, mitigate, remediate or bring an end to the principal actual and potential adverse impacts connected with their activities and identifies how undertakings address those adverse impacts. Impacts connected with an undertaking's activities include impacts directly caused by the undertaking, impacts to which the undertaking contributes, and impacts which are otherwise linked to the undertaking's value chain. The due diligence process concerns the whole value chain of the undertaking including its own operations, its products and services, its business relationships and its supply chains. In line with the UN Guiding Principles on Business and Human Rights, an actual or potential adverse impact is to be considered a principal impact where it ranks among the greatest impacts connected with the undertaking's activities based on: the gravity of the impact on people or the environment; the number of individuals that are or could be affected, or the scale of damage to the environment; and the ease with which the harm could be remediated, restoring the environment or affected people to their prior state». The Sustainability report *ex* CSRD, according to Art. 19a, para. 1, lett. f), shall contain «a description of: (*i*) the due diligence process implemented by the undertaking with regard to sustainability matters, and, where applicable, in line with Union requirements on undertakings to conduct a due diligence process; (*ii*) the principal actual or potential adverse impacts connected with the undertaking's own operations and with its value chain, including its products and services, its business relationships and its supply chain, actions taken to identify and monitor those impacts, and other adverse impacts which the undertaking is required to identify pursuant to other Union requirements on undertakings to conduct a due diligence process; (*iii*) any actions taken by the undertaking to prevent, mitigate, remediate or bring an end to actual or potential adverse impacts, and the result of such actions». On the complementary between the CSDDD and the CSRD, see V. CORIC, A. K. BOJOVIC, M. V. MATIJEVIC, *Potential of the*

Guiding Principles nor to the OECD Guidance in its norms, certainly constitutes a direct implementation of international standards into company law[39].

Other lawmakers have already mandated similar due diligence processes. According to the French Duty of Vigilance Law, for instance, companies shall set up a 'Vigilance plan' that includes risk mapping, procedures for regular assessment of the situation of subsidiaries, subcontractors or suppliers, appropriate actions to mitigate risks and prevent serious harm, and mechanisms for monitoring and evaluating the implemented measures (L. 225-102-4 of the *Code de Commerce*).

As for the German Supply Chain Due Diligence Act, this defines a multi-step due diligence process that consists of establishing a risk management system (see its Section 4), performing regular risk analyses (Section 5), laying down preventive measures (Section 6), taking remedial action (Section 7), establishing a complaints procedure (Section 8), and documenting and annually reporting on the outcomes (Section 10).

Not dissimilarly, the Norwegian Act contains a multi-step due diligence process comprised of the identification and assessment of actual and potential adverse impacts (directly caused by the enterprise, or nonetheless linked with the enterprise's operations, products or services via the supply chain); implementation of measures to cease, prevent or mitigate adverse impacts, on the basis of the enterprise's prioritisation and assessment; monitoring of the implementation and outcomes of such measures; communication with affected stakeholders, remediation and compensation (see its Section 4).

These due diligence processes are detailed and comprehensive. Other lawmakers have included due diligence obligations into narrower disclosure requirements: for instance, according to Section 54 of the UK Modern Slavery Act, companies shall disclose a yearly Statement that indicates «the steps the organisation has taken during the financial year to ensure that slavery and human trafficking is not taking place in any of its supply chains», «or a statement that the organisation has taken no such steps». The Statement *may* also include information on the organisation's supply chains, its due diligence processes in relation to slavery and human trafficking in its supply chains,

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EU Draft Directive on Corporate Sustainability due Diligence to Contribute to a Coherent Framework of Corporate Accountability for Human Rights Violations, in *Regional Law Review*, 2023, pp. 133 ss., p. 138.

[39] A. RÜHMKORF, *The German Supply Chain Law: A First Step Towards More Corporate Sustainability*, in *European Company Law Journal* 20(1), 2023, pp. 6 ff., at 7 outlined how the concept of due diligence proposed by the Guiding Principles offered the basis for the obligations contained in the German Due Diligence Act, that was adopted as part of the National Action Plan for implementing the Principles, see also D. WEIHRAUCH, S. CARODENUTO, S. LEIPOLD, F*rom voluntary to mandatory corporate accountability: The politics of the German Supply Chain Due Diligence Act*, in *Regulation & Governance*, 17, 2023, pp. 909 ss.; D. JURIC, A. ZUBOVIC, E. CULINOVIC-HERC, *Large Companies Saving People and the Planet*, in *InterEULawEast: Journal for International and European Law, Economics and Market Integrations* 9(2), 2022, pp. 1 ff., at 14. For an overview of the similarities and differences between the international soft law steps-based approach, the articles of proposed Directive, and the French Duty of Vigilance Law, see A. LAFARRE, B. ROMBOUTS, *Towards Mandatory Human Rights Due Diligence: Assessing its Impact on Fundamental Labour Standards in Global Value Chains*, *cit*. According to I. LANDAU, *Human Rights Due Diligence and the Risk of Cosmetic Compliance*, *cit.*, at 233, human rights due diligence «is emerging as a form of public process- based regulation, through which improved management of specific risks is sought in order to meet public goals or objectives».

and the parts of its supply chains where there is a risk of slavery and human trafficking taking place, alongside with the eventual steps the organisation has taken to assess and manage that risk. Under Section 16 of the Australian Modern Slavery Act, a Statement must describe the risks of modern slavery practices in the supply chains of the reporting entity and its subsidiaries; such Statement must also describe the actions taken by the entity and its subsidiaries to assess and address those risks, including due diligence and remediation processes. Lastly, according to Section 11 of the Canadian Modern Slavery Act, the Annual Report must include the steps the entity has taken to prevent and reduce the risk that forced labour or child labour is used at any step of the production of goods by the entity or of goods imported into Canada by the entity. The Report must also include information on the entity's supply chains, its policies and its due diligence processes, the parts of its supply chains that carry a risk of forced labour or child labour being used and the steps it has taken to assess and manage that risk, and the measures taken to remediate the loss of income to the most vulnerable families that results from any measure taken to eliminate the use of forced labour or child labour in its supply chains (see its Section 11).

From this perspective, the Corporate Sustainability Due Diligence Directive is modelled around a due diligence process already outlined in international soft law instruments and transposed into existing national, continental-European (*i.e.* German and French)[40] due diligence laws. The Directive is wide in scope, encompassing both human rights and environmental impacts, and it relies on substantive obligations rather than just disclosure requirements, thus diverging from the obligations introduced in common law countries (*i.e.* the UK, Australian and Canadian Modern Slavery Act).

1.2. The UN Sustainable Goals

According to Recital 7 of the European Commission's proposal, «[t]he United Nations' Sustainable Development Goals, adopted by all United Nations Member States in 2015, include the objectives to promote sustained, inclusive and sustainable economic growth. The Union has set itself the objective to deliver on the UN Sustainable Development Goals. *The private sector contributes to those aims*»[41]. In a similar fashion, the Explanatory Memorandum accompanying the proposal states that «[t]he behaviour of companies across all sectors of the economy is key to succeed in the Union's transition to a climate-neutral and green economy […] and in delivering on the UN Sustainable Development Goals, including on its human rights- and

[40] D. JURIC, A. ZUBOVIC, E. CULINOVIC-HERC, *Large Companies Saving People and the Planet - Reflections on the Personal Scope of the Application of the Corporate Sustainability Due Diligence Directive*, *cit.*, at 12, 34 noted that the French model largely inspired the European Commission in its proposed Directive, albeit there are significant differences between the two in terms of scope, the content of obligations, and enforcement, given that the European proposal appears more comprehensive, extensive and detailed.

[41] Emphasis added. According to C. PONCIBÒ, *The Contractualisation of Environmental Sustainability*, in *European Review of Contract Law* 12(4), 2016, pp. 335 ff., at 337, «[a]s a globally agreed blueprint for 2015-2030, the SDGs are likely to become the major point of reference for development actors at all levels and will have a significant impact on the human rights agenda for years to come».

environment-related objectives». Useful interpretative guidance is offered by Recital 14 of the proposed legal text, that posits: «This Directive aims to ensure that companies active in the internal market contribute to sustainable development and the sustainability transition of the economies and societies through the identification, prevention and mitigation, bringing to an end and minimisation of potential or actual adverse human rights and environmental impacts».

The legal obligations contained in the draft Directive indirectly orient the private sectors towards certain objectives provided for in the 2030 global agenda[42]. On this point, it has been argued that sustainable supply chains could aid in delivering the following Goals: 'no poverty' (n. 1), 'good health and well-being' (n. 3), 'gender equality' (n. 5), 'clean water and sanitation' (n. 6), 'decent work and economic growth' (n. 8); 'industry, innovation and infrastructure' (n. 9); 'reduced inequalities' (n. 10); and 'peace, justice and strong institutions' (n. 16)[43]. Moreover, target n. 12.6 mentions the encouragement of sustainable corporate practices. In addition, Goal n. 17 designates a role for businesses in assisting governments in addressing the other state-centred Goals[44], and corporate sustainability due diligence seems precisely oriented towards, and inspired by, this principle.

However, the year 2030 is upcoming. According to Art. 30 of the European Commission's proposal, the deadline for the transposition of the Directive is set at two years from the day of its entry into force – namely the twentieth day following that of its publication in the Official Journal of the European Union[45]. Member States shall apply the provisions from two or four years from its entry into force on the basis of different thresholds related to

[42] See K. BUHMANN, J. JONSSON, M. FISKER, *Do no harm and do more good too: connecting the SDGs with business and human rights and political CSR theory*, in *Corporate Governance* 19(3), 2019, pp. 389 ff., at 390: «While connections between business human rights and the Sustainable Development Goals have been identified, the argument has mainly been that by respecting human rights (and avoiding human rights risks), companies also contribute to the SDGs». The Authors argue that «companies can draw on the insights on human rights risks that they obtain through exercising due diligence in such a manner that they can identify opportunities for active SDG contributions».

[43] K. MCCALL-SMITH, A. RÜHMKORF, *Sustainable global supply chains: From transparency to due diligence*, Research Paper Series No 2018/31. The European Parliament, in the text adopted on June 1, 2023, introduced Recital 25b that states: «Companies should also be responsible for using their influence to contribute to an adequate standard of living in value chains. This is understood as a living wage for employees and a living income for self-employed workers and smallholders, which they earn from their work and production and must meet their needs and those of their family», Recital 25c on health, and Recital 25d that posits: «Adverse human rights and environmental impacts can be intertwined or underpinned by factors such as corruption and bribery, hence their inclusion in the OECD Guidelines for Multinational Enterprises. It therefore may be necessary for companies to take into account these factors when carrying out human rights and environmental due diligence». See also Recital 28b.

[44] According to K. BUHMANN, J. JONSSON, M. FISKER, *Do no harm and do more good too: connecting the SDGs with business and human rights and political CSR theory*, *cit.*, at 390, the SDGs are innovative because they directly designate a role for businesses through SDG 17 on global partnerships; SDG 17 calls on business to step up partnerships for sustainable development and assist governments in addressing SDGs 1-16, that technically address states.

[45] Art. 31.

the companies' size[46].

The new regime will not produce immediate effects. Compliance to the obligations contained in the Directive will first and foremost entail an organizational effort to set up a system capable of detecting adverse impacts, and even assuming that companies will promptly formalize plans into due diligence policies and strengthen existing monitoring systems, the mitigation of the adverse impacts identified by the new alerts will require whole series of business decisions that will not intervene nor discharge their effects overnight. In other words, it simply takes years to implement and adjust the system of sustainability due diligence effectively: it is thus unlikely that the Directive will promptly discharge its effects and contribute to the achievement of the 2030 Goals.

1.3. The Paris Agreement

Recital 8 of the proposed Directive refers to the international agreements adopted under the United Nations Framework Convention on Climate Change, such as the Paris Agreement and the recent Glasgow Climate Pact, which «set out precise avenues to address climate change and keep global warming within 1.5 C degrees». Once again, the proposed legal text underlines that «[b]esides specific actions being expected from all signatory Parties, the role of the private sector, in particular its investment strategies, is considered central to achieve these objectives».

Art. 15, ambitiously titled «Combating climate change», states that the companies that fall under the scope of application of the Directive «shall adopt a plan to ensure that the business model and strategy of the company are compatible with the transition to a sustainable economy and with the limiting of global warming to 1.5 °C in line with the Paris Agreement». The European Parliament's position further developed the provision as follows: «Member States shall ensure that companies referred to in Article 2 develop and implement a transition plan in line with the reporting requirements in Article 19a of Regulation (EU) 2021/0104 (CSRD), to ensure that the business model and strategy of the company are aligned with the objectives of the transition to a sustainable economy and with the limiting of global warming to 1.5°C in line with the Paris Agreement and the objective of achieving climate neutrality as established in Regulation (EU) 2021/1119 (European Climate Law) as regards its operations in the Union, including its 2050 climate neutrality target and the 2030 climate target»[47].

Art. 15 has been intensively discussed by the Council and the Parliament, because the Council wanted to limit the obligation to the

[46] Art. 30. The European Parliament in the text adopted on June 1, 2023 proposed three different terms (three, four and five years depending on the company's size).

[47] The Sustainability report *ex* CSRD, according to Art. 19a, para. 2, lett. a), shall disclose «the plans of the undertaking, including implementing actions and related financial and investment plans, to ensure that its business model and strategy are compatible with the transition to a sustainable economy and with the limiting of global warming to 1,5 °C in line with the Paris Agreement under the United Nations Framework Convention on Climate Change adopted on 12 December 2015 (the 'Paris Agreement') and the objective of achieving climate neutrality by 2050 as established in Regulation (EU) 2021/1119 of the European Parliament and of the Council and, where relevant, the exposure of the undertaking to coal-, oil- and gas-related activities».

formulation of plans (thus excluding an obligation to actually implement them)[48]. This is an indication of the intrusiveness of the measure within the 'private sphere' of E.U. companies.

In this sense, the proposed Directive aims at aligning corporate behaviour to a legally binding international agreement, so that the public goal established in the latter will perimeter the entire business model and strategy of large E.U. companies, keeping each corporation that falls within the scope of application of the Directive into planetary boundaries[49].

1.4. The international agreements and conventions listed in the Annex

Art. 3 of the Directive defines the adverse environmental and human rights impacts that companies must identify, prevent and mitigate by referencing to the Annex: indeed, the proposed legal text, as a company law directive, shows peculiar, even odd features, containing a six-pages list of international agreements and conventions[50].

In particular, the Annex is divided into a first part that lists the violations of rights and prohibitions included in international human rights agreements, and human rights and fundamental freedoms conventions, and a second part that lists the violations of internationally recognized objectives and prohibitions included in environmental conventions.

Of course, these accords were not signed by companies.

Paragraph 24 of the UN 'Protect, Respect and Remedy' framework stated that «[b]ecause companies can affect virtually all internationally recognized rights, they should consider the responsibility to respect in relation to all such rights»[51]. In a 2010 interview on *In-House Perspective*, John

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[48] EURACTIV, *EU Parliament and member states reach deal on corporate due diligence law*, *cit.*

[49] On this topic see B. SJÅFJELL, *Sustainable Value Creation Within Planetary Boundaries – Reforming Corporate Purpose and Duties of the Corporate Board*, University of Oslo Faculty of Law Research Paper No. 2020-20.

[50] Similarly, the German Due Diligence Act lists eleven internationally recognized human rights conventions, alongside with the Minamata Convention on Mercury of 10 October 2013, the Stockholm Convention of 23 May 2001 on Persistent Organic Pollutants, and the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal of 22 March 1989. See D. JURIC, A. ZUBOVIC, E. CULINOVIC-HERC, *Large Companies Saving People and the Planet*, *cit.*, at 15.

[51] S. DEVA, *Guiding Principles on Business and Human Rights: Implications for Companies*, *cit.*, at 103 notes that «instead of trying to resolve complexities in cataloguing human rights responsibilities of companies, the GPs adopt an easier path of referring companies to international instruments that were drafted with states as the duty bearers. This process of transplantation would neither be easy nor free from conceptual problems. Let us consider a few examples to understand this point. Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) states that the 'States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health'. How can this right be translated into responsibilities of the business?». At 105 the Author goes on by highlighting «one major difficulty in this circular approach of cataloguing human rights responsibilities of companies – companies would have to surf through many state-centred human rights instruments to glean their responsibilities. Another difficulty is that the minimalist definition of 'internationally recognized human rights' excludes many crucial norms that cannot be ignored by the business today […]. In short, the intentional flexibility of the GPs has resulted in them not offering concrete guidance to companies in ascertaining their human rights responsibilities. Companies would thus have to look elsewhere for the much-needed guidance».

Ruggie recounted: «Many businesses have asked us, 'give us the definitive list that you think we're responsible for…' We did extensive research on what rights companies can actually have an impact and have had an impact on, and there's virtually no right that companies cannot affect»[52]. The draft Directive transposes this principle into hard law and, through a list of international agreements and conventions, enumerates the negative impacts that companies need to address.[53]

The press release accompanying the proposal linked the obligations to the effective protection of human rights included in international conventions, and added that «[s]imilarly, this proposal will help to avoid adverse environmental impacts contrary to key environmental conventions»[54]. On this point, it has been argued that the precise reference to international human rights and environmental instruments set out in the Annex to the proposal is justified on the basis of legal certainty, but it also removes more general sustainability considerations from the scope of due diligence[55].

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[52] *Business and Human Rights*, in *In-House Perspective* 6(3), 2010, pp. 20 ff., at 21.

[53] According to V. RUSINOVA, S. KOROTKOV, *Mandatory Corporate Human Rights Due Diligence Models: Shooting Blanks?*, *cit.*, at 43, «there are no binding international instruments that directly impose human rights obligations on companies. International human rights treaties are underpinned by the structural division between state (all bodies, entities, and individuals whose behaviour can be attributed to the state) as an addressee of the obligations, and individuals or groups of individuals (including NGOs or even sometimes companies), as non-state bearers of such obligations. Human rights provisions are thought of as vertical relations and presuppose that the addressee of these obligations possesses public power, a monopoly to use force, as well as legislative, executive and judicial competencies. Hence, many human rights formulations are underpinned by the balancing of human rights and the legitimate pursuits of states, or the balancing of different rights; some presuppose a wide margin of interpretation. The language, internal structure, and nature of these constructions cannot, without any changes, be applied with respect to companies. The transposition of these types of obligations onto companies, if not accompanied by relevant details, will either remain a dead letter or will lead to distortions in human rights protection. Only a few human rights obligations of a negative nature are clear-cut and tailored for transposition onto corporations and for application in horizontal relations without provoking legal uncertainty. The majority of these obligations are either underpinned by *jus cogens* norms of International Human Rights Law, like the prohibition of torture or forced labour, or detailed by the International Labour Organization, like the prohibition of the worst forms of child labour». See also D. JURIC, A. ZUBOVIC, E. CULINOVIC-HERC, *Large Companies Saving People and the Planet*, *cit.*, at 7: «these international legal instruments set imprecise standards that need to be translated into binding rules for companies. The relevant standards must be determined by the CSDD, and another problem arises from their application in the process of drafting a due diligence policy and implementing it in a company». According to D. JURIC, A. ZUBOVIC, E. CULINOVIC-HERC, *Large Companies Saving People and the Planet*, *cit.*, at 36, «[d]irectors may have difficulty identifying the precise obligations of companies. The provisions of these conventions were originally directed at signatory countries, not companies. However, companies and their directors could face very harsh sanctions if they breach these very generally defined obligations. These new obligations and liabilities could cause directors to become fearful and defensive».

[54] EUROPEAN COMMISSION, *Just and sustainable economy: Commission lays down rules for companies to respect human rights and environment in global value chains*, Brussels, 23 February 2022.

[55] A. JOHNSTON, *Integrating Sustainability into Corporate Governance*, in C. BRUNER, M. MOORE (eds), *A Research Agenda for Corporate Law*, Edward Elgar, Cheltenham, 2023 (*forthcoming*), at 15-16. As noted by C. PATZ, *The EU's Draft Corporate Sustainability Due Diligence Directive: A First Assessment*, *cit.*, at 291, a by-product of the shift from soft law and best practices to hard law can be that of the delimitation of the scope of due diligence, to

2. Concluding remarks

It has been noted that the commentary to the UN Guiding Principles recognizes that states are neither required nor prohibited under international human rights law to legislate on extraterritorial activities of businesses domiciled in their jurisdiction, and that while the commentary does not go so far as to recommend states to implement laws that extend beyond their borders, it notes that there are strong policy reasons for home states to set out clearly the expectation that businesses respect human rights abroad[56].

While E.U. member states cannot stretch their sovereignty on the territories of other countries to intervene in the mitigation of abuses that take place therein[57], they can more easily devolve to their large domestic companies that operate globally the task of addressing those extra-territorial violations that, being outside of their jurisdiction[58], fall into the scope of the other country's duty to protect human rights, and thus into the dimension of states vis-à-vis citizens[59]. As also remarked in the 'Protect, Respect and Remedy' framework, host states «can find it difficult to strengthen domestic social and environmental standards, including those related to human rights, without fear of foreign investor challenge» (paragraph 34).

In conclusion, the Corporate Sustainability Due Diligence Directive is a company law legal instrument innervated by public, state-determined goals. In this sense, the incorporation of such objectives into company law is certainly a privileged field of dialogue between international and corporate law scholars, because these numerous references to international standards, agreements and conventions contained in the Directive can stimulate a prolific dialogue between the two legal fields, in view of coherently interpreting the legal instrument and incorporate such 'interpretive outputs' into the governance of large E.U. companies and business practice.

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the detriment of the internationally agreed and established concept not transformed into company law obligations.

[56] S. W. GAMBLE, *A Corporate Human Rights Due Diligence Law for California*, *cit.*, at 2458; O. DE SCHUTTER, *Towards a New Treaty on Business and Human Rights*, in *Business and Human Rights Journal* 1(1), 2016, pp. 41 ff., at 45.

[57] See K. MCCALL-SMITH, A. RÜHMKORF, *Sustainable global supply chains: From transparency to due diligence*, *cit.*; M. MONNHEIMER, *Due Diligence Obligations in International Human Rights Law*, Cambridge University Press, Cambridge, 2021, at 307 notes that «where human rights situations are worsened by the insufficient capacities of host states, regulatory efforts on behalf of the home state could help ensure effective protection».

[58] See T. ACKERMANN, *Extraterritorial protection of human rights in value chains*, in *Common Market Law Review* 59, 2022, pp. 143 ff., at 150-151.

[59] See R. C. BIRD, V. SOUNDARARAJAN, *From Suspicion to Sustainability in Global Supply Chains*, in *Texas A&M Law Review* 7(2), 2020, pp. 383 ff., at 392-393. With regard to the French Duty of Vigilance Law, M. MONNHEIMER, *Due Diligence Obligations in International Human Rights Law*, Cambridge University Press, Cambridge, 2021, at 311 argues that «[t]he bill establishes an independent duty of care on behalf of parent companies, which is mainly of a procedural character. Even though the parent company might not be involved in an actual human rights violation, it can still be held responsible if it failed to take adequate steps of prevention, to monitor the activities of its subsidiaries or suppliers, or to establish adequate warning and complaint mechanisms. By merely regulating French parent companies, France refrained from directly regulating foreign corporate nationals – such as subsidiaries or suppliers – thereby avoiding an undue interference with the internal affairs of other states».

PROGRESS AND SETBACKS IN EDUCATION IN SPAIN: SEEKING TO MEET THE SUSTAINABLE DEVELOPMENT GOALS AND CONVERGECE WITH EU COUNTRIES

IGNACIO DANVILA DEL VALLE

TABLE OF CONTENTS: 1. Introduction. – 2. EU trade policy and sustainability. – 3. The Sustainable Development Goals. – 4. Education in the countries of the European Union. – 5. Education in Spain. – 6. Conclusions.

ABSTRACT**:** *The EU's trade policy influences world trade, as its scope of action is not limited to a specific geographical region. Today, this trade policy promotes sustainable development, aligning itself with the United Nations Sustainable Development Goals and identifying with the goals of the 2030 Agenda. The Sustainable Development Goals aim for development that protects nature and improves the well-being of all people. Our research focuses on Goal 4, which aims for inclusive, equitable and quality education for all. Education is today the main tool for people's progress. Our work has analysed the strengths and weaknesses of education in the EU and Spain. The data show that in recent years there have been significant improvements and advances, but many actions are still needed to improve, especially to help certain disadvantaged groups. Moreover, the confinement caused by COVID-19 increased inequalities.*

KEYWORDS**:** sustainability, EU trade policy, education, sustainable development goals, 2030 Agenda.

1. Introduction

The European Union's trade policy determines the EU's objectives related to international trade. Its measures contribute to job creation and economic growth, make it easier for companies to export and import, attract foreign investment and aim to protect citizens' health, safety and labour rights as well as the environment[1].

In the current context of economic uncertainty and geopolitical instability, the EU is committed to a new, more sustainable growth model, as described in the European Green Pact and the European Digital Strategy. These two documents promote a new trade policy, which promotes greater

[1] EUROPEAN COMMISSION, *The Trade Policy of the European Union*, Vol I, Brussels, 2022, p. 3 ss. Available at: https://ec.europa.eu/trade Date of access: March 30, 2023

sustainability and fulfils the commitment made to implement the United Nations Sustainable Development Goals[2].

EU trade policies must, therefore, be aligned with the Sustainable Development Goals (SDGs). The European Union, when signing trade agreements, should seek an open, sustainable and strong trade policy that contributes to quality education, protection of human rights, poverty reduction, gender equality, respect for the environment and economic growth. All these aspects are clearly stated in the UN SDGs.

The 17 Sustainable Development Goals (SDGs) are at the heart of the 2030 Agenda. Based on these goals, strategies have been designed to reduce poverty, end hunger, ensure healthy lives, promote well-being, develop quality education, achieve gender equality, ensure water availability for all, achieve affordable and sustainable energy, improve employment, promote economic growth, foster innovation, reduce inequalities, respect the environment in production and consumption, combat climate change, and promote peace and justice.

The EU, through its trade policy, is working to achieve these goals. Given the impossibility of analysing all 17 SDGs in depth, our research will focus on Goal 4, which is formulated as follows: "Ensure inclusive and equitable quality education and promote lifelong learning opportunities for all"[3].

We believe that the fulfilment of this objective reduces poverty, improves employment, reduces inequalities, facilitates people's well-being and promotes economic development. Education is nowadays considered the main tool for the development and progress of people, the foundation on which a society that desires greater well-being rests.

In our research, we will initially study the main education data for the European Union countries, and then we will focus on the data for Spain.

The structure of this paper is as follows. First, we describe EU trade policy, focusing on measures that promote sustainability. Secondly, we present the United Nations Sustainable Development Goals, focusing on goal 4, which aims at a quality education. Subsequently, we will examine the evolution of the main education indicators in EU countries and Spain. Finally, we present a set of conclusions and possible actions for improvement.

2. EU trade policy and sustainability

EU governments set the broad outlines of EU trade policy. The European Commission then implements the agreed guidelines by negotiating trade agreements for the EU with countries outside the bloc. These trade agreements aim to enable companies from EU countries to export and import on favorable terms and to attract investment from other countries[4].

More than 100 countries have already signed trade agreements with the EU and more than 50 are currently negotiating. Signing these agreements leads to economic growth and the creation of thousands of jobs. Today, the

[2] EUROPEAN COMMISSION, *Trade Policy Review - An open, sustainable and robust trade policy*, Brussels, 2021.
[3] UNITED NATIONS, available at*:* *https://www.un.org/sustainabledevelopment*, 2021. Date of access: April 3, 2023.
[4] EUROPEAN COMMISSION, *The Trade Policy of the European Union, cit.*

livelihoods of more than 30 million people in the EU depend on exports to other countries. In addition, tens of thousands of EU SMEs benefit from these trade agreements to export goods, components and services[5].

EU trade policy, therefore, helps companies to purchase raw materials and components from all over the world, thus giving them access to inputs from third countries at competitive prices.

The emergence of new internal and external challenges, including the COVID pandemic and the war in Ukraine, has led to a review of EU trade policy. Current strategies pursue sustainable growth, in line with the UN Sustainable Development Goals.

In other words, a new trade policy is designed to take account of recent political, economic, technological, environmental and social changes and the global trends resulting from them[6].

Globalisation and technological development have improved the living standards of millions of people, but at the same time have increased inequalities between the educated and the uneducated. The gap seems to have widened in recent years, with the crisis affecting low-skilled individuals and groups more negatively. Many groups have been disadvantaged and propose reversing globalisation and implementing national isolationist or protectionist policies. The level of education seems to be the differentiating element that makes some progress and others stagnate.

The European Green Pact shapes a new EU trade policy, focused on responding better to today's challenges. Its overall objective is a profound transformation of our economies, underpinned by digital transformation and seeking sustainable development compatible with social equity[7]. The COVID-19 pandemic has accelerated the urgency to develop these changes.

EU trade policy must therefore take account of these global challenges and trends to reflect the political ambition of "A Stronger Europe in the World"[8]. There is a need to work together in different areas, building on strengths and using all trade instruments to support the delivery of Sustainable Development Goals. Today, it is imperative to enhance cooperation with existing EU partners and to reach agreements with new allies operating in various economic sectors.

In these agreements, the EU must show its partners that it is committed to upholding and protecting human rights, compliance with labour law and social protection, gender equality and the fight against climate change.

At the same time, the EU must be aware that its trade policy is often conducted amidst high tensions that create an unstable and sometimes hostile environment.

Different works consider that EU trade policy should focus on three essential objectives[9]:

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[5] EUROPEAN COMMISSION, *The Trade Policy of the European Union*, *cit.*

[6] EUROPEAN COMMISSION, *Trade Policy Review - An open, sustainable and robust trade policy*, Brussels, 2021, p.7 ss.

[7] EUROPEAN COMMISSION, *Promoting Decent Work Worldwide*, in *Commission Services Working Document*, SWD 235, Brussels, 2020.

[8] EUROPEAN COMMISSION, *Political guidelines for the next European Commission 2019-2024*, Vol. II, Brussels, 2021, p.23 ss.

[9] EUROPEAN COMMISSION, *Trade Policy Review - An open, sustainable and robust trade policy*, *cit*.

Firstly, to encourage the transformation of the economy in line with its green and digital goals. Measures must be beneficial for citizens (especially the most vulnerable), workers and businesses. Only sustainable development will increase people's prosperity. Secondly, to pass international laws for a more sustainable and fairer globalisation. Some of the rules currently governing world trade have become obsolete. For this reason, an update seems necessary to meet today's challenges. Legislation is needed to update different areas, including: artificial intelligence, biodiversity, climate change, the circular economy, pollution, digital trade, clean energy technologies, renewable energy, energy efficiency and the transition to sustainable food systems. It is a priority for the EU to actively lead the reforms needed to improve the governance of international trade. These reforms must strengthen stability, global cooperation, sustainability and fair competition. Thirdly, to improve the defence of member countries' interests, as well as to assert their legitimate rights when necessary. This means ensuring the implementation and enforcement of social, labour and environmental regulations aimed at sustainable development.

EU trade agreements and the Generalised System of Preferences have also played an important role in promoting respect for the basic human and labour rights enshrined in the core conventions of the International Labour Organisation (ILO).EU trade policy needs to pay more attention to the digitisation processes of companies and to trade in intangibles. Digital technologies lead to efficiency gains, which are often necessary in order not to lose competitiveness.

In recent years, the European Commission has reaffirmed its commitment to developing a sustainable, transparent and inclusive trade policy[10]. Surveys have shown that EU citizens value highly the European Commission's increased dialogue with civil society and social partners[11]. In other words, citizens are more aware of what the EU is doing. This means greater transparency on the part of international organisations.

EU trade policy must therefore be adapted to citizens' expectations, defend sustainable development and protect the interests of workers and businesses in the European Union. It should be borne in mind that international trade currently accounts for more than 60% of the world's GDP, generating millions of jobs and contributing to economic development in every country on the planet. International trade has also helped many developing countries to integrate into the world economy, lifting hundreds of millions of people out of poverty and reducing inequalities between countries[12].

The new challenges currently facing international trade could be solved, at least in part, by meeting the UN Sustainable Development Goals (SDGs), to which the vast majority of countries agree. EU trade policy, as noted above, should promote sustainability and the achievement of the SDGs. This will contribute to social development, protect workers' rights (especially for the

[10] EUROPEAN COMMISSION, *Trade for all: Towards a more responsible trade and investment policy*, COM 497, Brussels, 2015.
[11] EUROPEAN COMMISSION, *Trade Policy Review - An open, sustainable and robust trade policy*, *cit*.
[12] WORLD TRADE ORGANIZATION, *World Bank and World Trade Organization: The role of trade in eliminating poverty*, Geneva, 2015.

most vulnerable groups), respect the environment, people's health and gender equality.

3. The Sustainable Development Goals

On 25 September 2015, world leaders adopted a set of global goals to eradicate poverty, protect the planet and ensure prosperity for all people. Each goal has specific targets to be achieved by 2030[13]. The participation of governments, private companies, civil society and individuals is necessary to achieve these goals.

The 17 Sustainable Development Goals (SDGs) were adopted and accepted by all United Nations Member States as part of the 2030 Agenda for Sustainable Development.

The 2030 Agenda, since its inception in 2015, calls for a sustainable model that enables all people to live on a healthy planet. In recent years, extreme poverty has declined significantly, the under-five mortality rate was halved between 2000 and 2020. Immunisations have saved millions of lives and the vast majority of the world's population now has access to electricity. 186 countries have ratified the Paris Agreement on climate change, 150 nations have developed national regulations to address rapid urbanisation, and 71 countries and the European Union have regulations and instruments that support sustainable consumption and production. In addition, international organisations, businesses, local authorities, the scientific community and civil society are working towards the SDGs.

Despite these optimistic developments, other aspects have worsened in recent years. The environment has seriously deteriorated, sea levels are rising, average temperatures are increasing annually, a million species of plants and animals are threatened with extinction and soils continue to degrade. In addition, half of the world's population lacks essential health services. More than half of the world's children do not meet minimum standards in reading and mathematics, and in many places, women continue to be discriminated against.

Therefore, despite progress in some areas, much remains to be done to achieve sustainable and inclusive economies and institutions that leave no one behind.

The area requiring the most urgent action is climate change. If we do not reduce greenhouse gas emissions, global warming will reach 1.5 degrees Celsius in the coming decades. As a result of this warming, coastal erosion is increasing, extreme weather conditions are multiplying, natural disasters are becoming more frequent and severe, soils are degrading rapidly and species are disappearing. These effects threaten food production, which may eventually lead to widespread food shortages.

Another major problem of our time is rising inequality. People living in vulnerable states are twice as likely to lack basic sanitation and the number of people in these countries without safe drinking water is four times higher than those living without water in non-vulnerable states. Also, in these vulnerable countries, large numbers of women and girls are engaged in unpaid domestic work and lack autonomy in decision-making.

[13] UNITED NATIONS, available at: *https://www.un.org/sustainabledevelopment*, 2021. Date of access: April 7, 2023.

In this situation, measures that would improve the lives of the most vulnerable, such as the introduction of clean energy, reforestation of forests, promotion of responsible and sustainable agriculture, access to drinking water for all, and improvement of schooling so that children can improve their mathematical and reading skills, can no longer be delayed. All this can only be achieved if international cooperation is intensified and existing synergies are exploited.

Here are some facts that show how much remains to be done and that action is urgently needed. More than 700 million people live in extreme poverty (of which 400 million live in sub-Saharan Africa). 75% of poverty is concentrated in rural areas. More than 800 million people are undernourished (500 million of whom live in sub-Saharan Africa or South Asia). Deaths of children under 5 years of age are as high as 5 million (although this has been halved in the last 20 years, thanks to vaccines).

More than 700 million adults are illiterate (2/3 of whom are women). More than 50% of schools in sub-Saharan Africa do not have computers or internet access. 18% of women and girls have experienced gender-based violence. More than 750 million people do not have access to safe drinking water. More than 90% of the population has access to electricity, yet 3 billion people lack access to clean fuels and energy. The average hourly wage for men is 12% higher than for women. Most countries have regulations in place to facilitate safe and orderly migration, but much remains to be done to protect the rights and socio-economic well-being of migrants. Ninety per cent of urban dwellers breathe polluted air. Land degradation affects one-fifth of the earth's land surface and affects one billion people[14].

All these data show, as we have pointed out above, that despite evident improvements in some areas, many actions still need to be taken to ensure that vulnerable groups are no longer vulnerable.

As we indicated in the introduction to this paper, it would be impossible to study the problems and propose improvements to the 17 SDGs. Therefore, our work will focus on goal 4, which aims to achieve inclusive, equitable and quality education for all.

Over the past decade, access to education and enrolment rates in schools - at all levels and especially for girls - have expanded dramatically. Despite this, more than 250 million children were out of school in 2019 - almost one-fifth of the world's out-of-school population. In addition, more than half of the world's children and adolescents are not meeting minimum standards of proficiency in reading and mathematics. One third of these children and adolescents are not attending school. Girls are more likely to learn to read than boys. Globally, for every 100 boys achieving a minimum level of proficiency in reading, 105 girls reached this level[15].

The analysis of these data must be complemented by measures to ensure quality education that is accessible to all. Education is a key instrument for escaping poverty and moving up the social ladder. The least educated are more likely to fail to find decent jobs.

Numerous studies point out that a good early childhood education is one of the best investments a society can make for its children, as it builds a solid foundation for learning in later years.

[14] UNITED NATIONS, *cit*.
[15] UNITED NATIONS, *cit*.

As of March 2020, the terrible pandemic caused by COVID-19 substantially altered the way we live and interact with each other. Most countries announced temporary school closures, affecting more than 91% of students worldwide (nearly 1.6 billion children and young people). Many teachers (from kindergarten to university) taught their classes online, reworked the teaching programme to adapt it to the new situation, proposed alternative assessment tests so that students did not lose the academic year, were in contact with students (in the case of university teachers through digital platforms or Virtual Campuses) or with their families (in the case of schools and colleges), agreed to give voluntary extra classes and in many cases suggested delaying the academic calendar in order to be able to teach the planned syllabus; This was a clear example of professionalism and seriousness. Unfortunately, these measures could only be carried out in developed countries, in homes with technological means and access to the Internet. Millions of children and young people, without these means that were available in richer countries, saw their classes completely suspended, with no possibility of being made up in any way. The pandemic widened the gap between those with resources and those without.

The United Nations in order to "ensure inclusive and equitable quality education and promote lifelong learning opportunities for all" (Goal 4) set the following targets for the year 2030[16]:

1. Ensure that all children complete primary and secondary education, which should be free, equitable and of good quality.
2. Ensure that all children have access to quality early childhood care and development and preschool education so that they are ready to start primary school.
3. Ensure equal access for men and women to quality technical, vocational and higher education, including university education.
4. Increase the number of young people and adults who have the necessary skills, in particular technical and vocational skills, to access employment, decent work and entrepreneurship.
5. Eliminate gender disparities in education and ensure equal access to all levels of education and vocational training for vulnerable people, including persons with disabilities, indigenous peoples and children in vulnerable situations.
6. Ensure that all young people and a significant proportion of adults, both men and women, are literate and numerate.
7. Ensure that all learners acquire the knowledge and skills necessary to promote sustainable development, through human rights education, gender equality, promotion of a culture of peace, global citizenship, appreciation of cultural diversity and the contribution of culture to sustainable development.
8. Build and adapt education facilities that are child-, disability- and gender-sensitive, providing safe, non-violent, inclusive and effective learning environments for all.
9. Substantially increase the number of scholarships available to developing countries, in particular least developed countries, small island developing States and African countries, to enable their students to enroll in higher education programmes, including vocational, technical, scientific,

[16] UNITED NATIONS, *cit*.

engineering and information and communications technology programmes, from developed and other developing countries.
10. Increase the supply of qualified teacher mobility, through international cooperation, in order to train teachers in developing countries, especially in the least developed countries and small island developing states.

Taking into account these targets proposed to meet SDG 4 and being aware that the Sustainable Development Goals are not legally binding (although the vast majority of countries have accepted them and are taking measures to achieve them), in the following sections we will analyse the current situation of education in the EU and Spain.

4. Education in the countries of the European Union

The education policies of the EU Member States aim to develop education and training systems in the European Education Area. In the following, we will analyse the main challenges facing the EU in the field of education today.

93% of children aged 3-6 are enrolled in early childhood education (preschool education). The EU target is to reach 96%. Five countries have already reached this target (Belgium, Denmark, France, Ireland and Spain). In 2022, the European Commission proposed a package of measures to ensure education for children in vulnerable situations or from disadvantaged backgrounds.

In addition, the Recovery and Resilience Fund supports the creation of more than 7,000 childcare places for children under 3 and the renovation of more than 300 facilities by 2025.

Compulsory education in most EU countries ends at the age of 15 or 16. The school enrolment rate up to this age is 97.2%.

9.7% of 18–24-year-old dropped out of compulsory education before completion (just over three million young people). Of these, only 42.3% are in employment. The target set for 2030 is for the drop-out rate to be less than 9%; 16 EU countries are already meeting this target. 85% of young people aged 20-24 have already passed the minimum compulsory education (upper secondary education).

At the age of 18, young people in the EU reach the end of their compulsory school age. At this age, 82.1% are still participating in education and training. However, at the age of 24, only 29.2% are still enrolled in formal education. Young people whose parents have a low level of education are nine times more likely to drop out of school than young people whose parents have a high level of education. Specifically, 26.1% of young people with low-educated parents drop out of school before completing compulsory education, while for students with highly educated parents, the dropout rate is 2.9%. The difference is tremendous between the two groups. Moreover, this socio-economic gap exists, albeit to varying degrees, in all EU countries.

Youth unemployment (15–29-years-old) is 13.0% in the EU in 2021. This percentage rises to 22.4 % for young people who have not completed the minimum compulsory education. Young people have been most affected by job losses due to the economic impact of the COVID-19 crisis, especially

those with low levels of education or from disadvantaged socio-economic backgrounds.

Therefore, the first conclusion is that underachievement is related to the parents' level of education. This reinforces the idea that education is a key tool for professional and social advancement. Governments need to take action to make it easier for children from disadvantaged families to succeed in school.

The right to education is enshrined in the Universal Declaration of Human Rights and contributes to a just society with equal opportunities. Efforts to improve equity and inclusion in education are a strategic priority for the EU and complement the equality strategies pursued in recent years.

Studies on the effects of the pandemic on education show that the physical closures of schools widened educational inequalities. Learning losses were higher in households where parents had not completed higher education. Parental educational attainment, therefore, influenced the extent of learning loss, as parents with lower educational attainment found it more difficult to provide their children with adequate learning support. Learning loss was more pronounced among children from families with low family income, lack of access to educational tools, inability to access the internet or lack of parental support for learning (due to low levels of knowledge).

The most vulnerable groups were migrant and displaced children, refugee and asylum-seeking children, children living in remote rural areas with limited internet access, and children from certain ethnic minority backgrounds[17].

Students from low socio-economic backgrounds are 5.6 times more likely to be low achievers than students from high socio-economic backgrounds. Thus, there is a large gap in educational outcomes, depending on family socio-economic status. This is true in all EU countries (although the gap is much smaller in Finland and Estonia) and European authorities must take action to reduce the existing inequality.

Although education and training systems across the EU try to eliminate negative effects arising from the individual circumstances of learners, low socio-economic status is the most important explanatory factor preventing equal opportunities for many different disadvantaged groups[18].

Young people whose parents have a low level of education are nine times more likely to leave school early than young people whose parents have a high level of education.

On the other hand, females perform better than males at all ages. Specifically, underachievement is 3% lower in girls than in boys. In addition, boys drop out of school before completing compulsory education, 3% more than girls. 11.1% more females than males enter tertiary education.

Therefore, we can state that another educational inequality is gender-based. The measures taken by the EU so far are aimed at achieving a better gender balance in certain fields of study and the development of equality plans, particularly in higher education institutions.

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[17] EUROPEAN COMMISSION, *Review of Employment and Social Development in Europe (ESDE)*, available at: https://op.europa.eu/webpub/eac/education-and-training-monitor-2022/en/comparative-report/comparative-report.html, 2022.. Date of access: April 6, 2023.

[18] EUROPEAN COMMISSION, *Education and Training Monitor 2022*, *Comparative report*, 2022.

A third inequality occurs according to the country of birth of the students. Thus, young immigrants who drop out of school before completing compulsory education are 12% higher than those born in EU countries. While the percentage of immigrants obtaining a higher education degree is 7.1% lower than the EU average. In addition, a different mother tongue further increases inequalities.

To prevent this inequality, the EU must work to ensure that young people with special educational needs, school-age refugees and racial and ethnic minorities are not marginalised or discriminated against. European authorities must legislate for the inclusion and equity of these groups.

Another significant fact is that 3% of 15 year olds are not enrolled in the national education system. This figure is misleading, as there is a wide disparity between countries, with Romania at 16.8% and Bulgaria at 14.5%.

Equity and inclusion in education are, therefore, a challenge in all EU countries, although the extent and severity of the problem vary from country to country. In any case, all countries need to provide financial support for those with fewer resources, at all stages of their studies.

48.7% of students in upper secondary education in the EU (8.7 million students) are enrolled in vocational education and training (VET). In 2020, the European Commission set three targets for 2025 for students studying vocational education and training programmes[19]:

a) At least 60 % of recent graduates are required to undertake work placements during their studies.

b) At least 8 % of students must study abroad.

c) At least 82 % of graduates must be employed.

Work-based learning is very beneficial for vocational students as it equips them with the technical skills and knowledge necessary for the development of their profession. In this way, it facilitates their employability and professional development.

In addition, 40% of vocational training students who did an internship in a company during their studies were paid for this work. Experts are currently recommending regulations to standardise the duration of traineeships and their remuneration, as the differences between EU member states in this field are very large.

Regarding student mobility, it should be noted that COVID-19 discontinued practical training in most sectors and transnational mobility. Before the epidemic, the average stay of vocational students abroad was 31 days.

In 2021, the percentage of vocational graduates in employment is 76.4%. This rate is 15 points higher than that of intermediate general education graduates and 8.5 points lower than that of university graduates[20].

With regard to higher education, it should be noted that 84.9% of university graduates are employed. Currently, 41.2% of people aged 25-34 who start university studies graduate (complete their studies). The EU target for 2030 is to reach a rate of 45%, thirteen member countries have already reached this target. It should be underlined that there is a notable difference between men and women, with 46.8% of women completing higher

[19] EUROPEAN COMMISION, *cit*.
[20] EUROPEAN COMMISION, *cit*.

education, compared to only 35.7% of men. This gender gap needs to be reduced in order to meet the 2030 target.

A second very large gap is the success rate depending on the parents' education. Specifically, 70.8% of students whose parents have a university education successfully graduate from university. This percentage is only 22.2% for students with parents who have a low level of education. This is another huge gap that urgently needs to be narrowed by providing the means for students in the latter group.

Finally, children of immigrant parents have similar success rates to the rest, only first-generation migrants have a lower percentage[21].

Despite campaigns in recent years, gender stereotypes persist in the choice of studies. Thus, women overwhelmingly choose to study education, health and wellbeing, arts and humanities and social sciences, journalism and information. While men are in the majority in STEM disciplines (science, technology, engineering and mathematics)[22].

It would be desirable to promote measures to reduce these differences and above all to allow young people to choose their studies with complete freedom, without gender stereotypes limiting their possibilities.

The opportunity for university students to go abroad for their studies, as well as increased international cooperation, are drivers for improving the quality of educational institutions. Mobility is essential for lifelong learning and personal development, employability and adaptability.

In 2020, more than 4.1 million students completed their university studies in the European Union. Of these, 13.5% completed part or all of their studies abroad (approximately 550 000 students). Most EU Member States receive more students than they send abroad. In analysing these data, it should be borne in mind that COVID had not yet been fully overcome and there were partial restrictions affecting mobility.

European authorities should stimulate mobility to attract and retain valuable student, academic and research talent.

The COVID-19 pandemic has made clear the need for basic digital skills for study, work and daily life. Today, many European companies want to recruit workers with technological skills and cannot find them. For this reason, the EU has established a digital education action plan with two objectives: to foster the development of a high-performing digital education ecosystem and to improve digital skills and competencies for digital transformation.

In addition, the EU has set a target of 60% of adults aged 25-64 participating in apprenticeships by 2030. Studies show that adult learning is very low among people with low educational attainment and those living in rural areas. Therefore, socio-economic status has a decisive influence on the participation of adults in apprenticeships. Moreover, most non-formal learning is work-related and decreases with age[23].

Most adult learning takes the form of non-formal short courses and is led by highly educated under 55s.The European Commission recommends that lifelong learning should focus on the following competencies: literacy,

[21] EUROPEAN COMMISION, *cit*.
[22] EUROPEAN COMMISSION, *Education and Training Monitor 2022*, *Comparative report*, 2022.
[23] EUROPEAN COMMISION, *cit*.

multilingualism, numeracy, digital skills; sociability, citizenship, entrepreneurship and cultural expression[24].

Underachievement rates in reading, mathematics and science are far from the 2030 target. Countries that spend more hours per year on these subjects perform better.

78.7% of young adults (25-34 years old) said they spoke one foreign language, and only 36.8% reported speaking two or more. 86.1% of pupils in primary education study a foreign language. 59.2 % of students in secondary education learn more than one foreign language. Likewise, 60 % of upper-secondary students learn at least two foreign languages. While only 35.1% of vocational students study at least two languages.

Young people with higher levels of education attach greater importance to the protection of human rights and democracy, freedom of expression and gender equality; while those with lower levels of education point to unemployment as their main concern.

In recent years, the European Commission has initiated actions aimed at raising awareness among young people about sustainability and misinformation (or the transmission of false news).

Finally, the European Commission points out that education is essential to achieve a sustainable, circular and climate-neutral planet. One of the key objectives of the Recovery and Resilience Plans is to support the green transition.

The May 2022 Eurobarometer shows that young people's top priorities include sustainability, poverty and inequality[25] . Green transition and sustainable development must be present in new curricula, programmes and learning environments.

The data analysed in this section on the state of education in the EU show that, although there have been very positive developments, there is still much room for improvement.

5. Education in Spain

In this section we will study the situation of education in Spain, analysing the similarities and differences between Spain and the other countries of the European Union.

97.2% of children over the age of three are enrolled in early childhood education. Only two EU countries have a higher percentage than Spain, and this rate exceeds the EU target (96%).

The rate of enrolment of children under the age of three is 55.3%, well above the EU average (36.6%) and also above the target set by the European authorities (33%).[26] The percentage of children enrolled in primary education in Spain is a clear strength of the country.

In the academic year 2021-2022, 435,000 children under the age of three were enrolled in pre-primary education. This academic year Spain had

[24] EUROPEAN COMMISION, *cit*.
[25] EUROPEAN COMMISION, *cit*.
[26] EUROSTAT, *https://elpais.com/educacion/2022-05-09/subirats-deja-la-espinosa-reforma-de-las-universidades-en-manos-de-los-claustros.html.*, Eurostat, educ_uoe_enrs05, 2022. Date of access: April 11, 2023.

36,500 early childhood education centres, of which 53% were public, 30% private and the rest subsidised (private centres financed by public funds)[27].

660 million, the Recovery and Resilience Fund finances the creation of 60,000 free public places for children under the age of three[28].

Regarding compulsory school education (6-16 years), a reform of the primary and secondary curricula is currently underway in Spain[29]. These new curricula have been designed following the recommendations of the European Commission regarding key competencies for lifelong learning.

The primary education curriculum is based on eight key competencies. The secondary education curriculum pays special attention to academic guidance and educational inclusion, seeking to prevent early school leaving and facilitating learning for all students. The second stage of secondary education establishes four separate pathways for students to choose from: science and technology, humanities and social sciences, arts and general.

13.3% of students dropped out of compulsory education before completion. This drop-out rate is well above the EU average (9.7%) and far from the European target set for 2030 (9%).

Specifically, 30% of students do not complete the first stage of general secondary education and more than 50% drop out of vocational education, which is the alternative pathway[30].

78.8% of young people aged 20-24 have already passed the minimum compulsory education (upper secondary education). The percentage in Europe is 85%.

Therefore, the Spanish education system must work to reduce early school leaving (3.6 points above the EU average) and to increase the number of students who complete the minimum compulsory education. Grade repetition is the main reason why students decide to drop out of school.

The EU has funded, with €285 million, a training scheme for digital educational skills. Around 700,000 teachers will benefit from this scheme. In addition, these funds will also equip more than 22,000 schools with digital devices.

More than 28,000 Ukrainian children displaced since the beginning of the war have been enrolled in schools in Spain. Of these, 22% have been enrolled in early childhood education, 46% in primary education and 32% in secondary education. The Ministry of Education and Vocational Training developed a comprehensive contingency plan for the educational care of these students, which includes the creation of school materials in both Spanish and

[27] MINISTERIO DE EDUCACIÓN DEL GOBIERNO DE ESPAÑA, available at: *https://www.educacionyfp.gob.es/dam/jcr:38b733ce-a07a-4b83-a911-dde297965023/notaresumen2021-22.pdf*, 2022. Date of access: April 11, 2023.

[28] MINISTERIO DE EDUCACIÓN DEL GOBIERNO DE ESPAÑA, *cit*. Date of access: April 11, 2023

[29] BOLETÍN OFICIAL DEL ESTADO DE ESPAÑA*, The Royal Decrees that approve these new study plans were published between February and April 2022*, available at: *https://www.boe.es/boe/dias/2022/04/06/pdfs/BOE-A-2022-5521.pdf* . Date of access: April 9, 2023.

[30] J. MORENTIN-ENCINA, B. BALLESTEROS VELÁZQUEZ, *ISCED3 objective: Analysis of educational success and dropout. Implications for guidance*, in *Revista Española de Orientación y Psicopedagogía*, Editoriale dell'Associazione Spagnola di Orientamento e Psicopedagogía, Madrid, 2021, 32, pp. 7-26.

Ukrainian and the admission of Ukrainian teachers to provide educational support in schools[31].

36.6 % of pupils in upper secondary education are enrolled in vocational education and training. This percentage is 12 points below the EU average (48.7%). In 2021, the percentage of vocational graduates in employment is 67.1%, which is 9.3 points below the EU average of 76.4%[32].

The Organic Law on the Organisation and Integration of Vocational Training, which came into force in April 2022, focuses on collaboration between training centres and companies and establishes a new model for the accreditation of professional competencies.

As far as higher education is concerned, it should be noted that in 2022 a law on university coexistence was passed, obliging all universities to have rules of coexistence that incorporate mediation mechanisms to resolve conflicts and measures to prevent and respond to violence, discrimination or harassment.

Also, in March 2023, the new law on universities (Ley Orgánica del Sistema Universitario) is approved, which aims to reduce temporary employment of teaching and research staff from 40% to 8%.

48.7% of people who start university studies graduate. This percentage is 7.5 points higher than the EU average and also meets the target set by Europe for the year 2030 (45%). The highest drop-out rates from university studies occur during the first year and are due to the socio-economic characteristics of families. In addition, one in five students drop out of undergraduate studies in the first year and another 8 % change their field of study[33].

56% of university students are women, although, as in other EU countries, they are in the minority in science, technology, engineering and mathematics (STEM) degrees.

64% of adults claim to have at least basic digital skills, above the EU average of 54%, while 38% have higher skills (12 points higher than the EU average). In January 2021, Spain approved the National Digital Skills Plan intending to promote the development of digital skills among the population.

In order to facilitate the labour market integration of adults over the age of forty-five, the 45+ *Programme* has been developed to provide direct support to unemployed people between the ages of forty-five and sixty, with tailor-made training activities aimed at improving employability.

Finally, the Organic Law on Education (LOMLOE) that came into force in 2021 considers that environmental sustainability should be included in the curricula in a cross-cutting manner and the subject of civic and ethical values.

The data analysed in this section summarise the strengths and weaknesses of the Spanish education system. The Spanish authorities should make an effort to improve those points where Spain is below the EU average or has not reached the targets set for 2030 by the EU.

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[31] EUROPEAN COMMISSION

[32] EUROSTAT, *https://elpais.com/educacion/2022-05-09/subirats-deja-la-espinosa-reforma-de-las-universidades-en-manos-de-los-claustros.html*., Eurostat, educ_uoe_enrs05, 2022. Date of access: April 11, 2023.

[33] MINISTERIO DE UNIVERSIDADES, GOBIERNO DE ESPAÑA, *cit.*

6. Conclusions

The EU's trade policy affects the trade of all countries, as it is not limited to a specific geographical area. It seeks the welfare of its citizens and promotes the universal values on which the European Union has been based since its foundation[34], including sustainable development.

The European Union is fully aligned with the goals of the 2030 Agenda. Thus, the "Trade for All" trade strategy, adopted in 2015, envisages trade that promotes sustainable development, human rights and good governance, underlining the importance of the contribution of trade policy to sustainable development as expressed in the 2030 Agenda[35].

The 2030 Agenda through the formulation of the so-called Sustainable Development Goals aims to take measures to ensure that actions taken today do not harm the well-being of future generations.

Sustainable development has been addressed at various international meetings: the United Nations Conference on Environment and Development in 1992, the Millennium Declaration in 2000, the Johannesburg Summit on Sustainable Development in 2002, the New Delhi Declaration on "Principles for International Development relating to Sustainable Development" in 2002 and the United Nations Conference on Sustainable Development in 2012[36]. At the latter meeting, the 2030 Agenda was formulated to make sustainable development an objective for all states and all public and private actors, including the European Union. The Sustainable Development Goals thus become part of the European Union's trade policy. These objectives are supported both by the European authorities and by all member states.

Our work has focused on objective 4, which calls for quality education for all. For this reason, we have analysed the situation of education in the EU and Spain. Education is key to the development and progress of people, the foundation on which a society that desires greater well-being rests. This was pointed out by Gaspar Melchor de Jovellanos "in his Memoir on Public Education", published in 1802, when he stated that education is the first source of social prosperity.

Education has become the best way to find employment and to improve socially and culturally. Fulfilling this objective reduces inequalities, improves people's well-being and fosters innovation.

The EU education survey reveals that both early school leaving and underachievement are more prevalent among students from low socio-economic backgrounds and with parents who have a low level of education.

Moreover, confinement during the pandemic increased existing inequalities, as learning losses were higher for students from poorer families and/or lower socio-educational status.

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[34] C. MÄLSTROM, *Foreword to a Handbook for trade sustainability impact assessment*. European Commission, Brussels, 2016.

[35] EUROPEAN COMMISSION, *Trade for all. Towards a more trade and investment policy responsive*, 2015.

[36] A. MANERO SALVADOR, *The European Union's common commercial policy and sustainable development* in *European Community Law Review*, Brussels, 2020, 66, pp. 603-627.

Governments must therefore take measures to ensure that students from low-income or poorly educated families successfully complete their studies, and do so with academic qualifications on a par with others.

A second existing inequality is based on gender. Women perform better than men at all ages, in some cases, such as in university studies, the difference is large.

A third inequality stems from the phenomenon of immigration. Students who are first-generation immigrants perform less well in school and drop out of compulsory minimum education at a higher rate than other students. The European Union must take action to reduce and close this gap.

A final point to note is that COVID-19 impeded the transnational mobility of students and led to an increase in youth unemployment, especially among young people with low educational attainment.

The study on Spanish education shows the strengths and weaknesses of the country in terms of education. Among the strengths are: the high rate of enrolment of children under three and in early childhood education, the creation of numerous free public places for children under three and the strong development of lifelong learning.

Among the weaknesses of the Spanish education system, we should mention: the rate of students who drop out before completing the minimum compulsory education, the low percentage of vocational training graduates who are employed, the percentage of students who drop out of university studies and the high rate of youth unemployment (the second highest among EU countries).

Finally, it should be noted that COVID-19 interrupted face-to-face activity in schools, universities and training centres. For this reason, the data for the last three years have been strongly altered and are not comparable to those of previous years. It would be highly advisable to repeat the studies once the effects of the pandemic have been fully overcome.

SUSTAINABLE DEVELOPMENT IN EU (TRADE AND) INVESTMENT AGREEMENTS: AN OVERVIEW OF RECENT TREATY PRACTICE

DOMENICO PAUCIULO

TABLE OF CONTENTS: 1. Introduction: the difficult relationship between sustainable development and investment agreements. – 2. The EU conventional practice on sustainable development: general issues. – 3. Preambulatory references to sustainable development in EU agreements. – 4. Substantive obligations: clauses on non-lowering of standards. – 5. Substantive provisions: provisions ensuring high levels of protection. – 6. Concluding remarks.

ABSTRACT: *Modern investment treaty-making has begun to combine investment liberalization and protection with international cooperation for the advancement of the UN Sustainable Development Goals: several international organizations and States have indeed promoted a reform of the IIAs system towards a more "sustainable" models of investment treaties. Most agreements therefore now contain references to sustainable development of various kinds, such as: perambulatory clauses; clauses of not lowering levels of protection of social and environmental policies; obligations for the progressive improvement of sustainable development policies. Specifically, in the European framework, since the conclusion of the Agreement with South Korea in 2009, such provisions are generally included in an ad hoc chapter of the agreement, often named «Trade and Sustainable Development» (TSD chapters), where the Parties specify their commitments in this matter and enter into mutual cooperation obligations. To date, TSD chapters have become a typical component of the new generation agreements of the European Union with both industrialized and developing countries: they also have the merit of being practically among the few examples of agreements which include provisions in the field of combating climate change. This study will focus on the substantive provisions and the preamble in EU agreements aimed at affirming the objective of sustainable development, in order to evaluate their ability to solve the problems of fragmentation and asymmetry of the investment law system that have given rise to the modernization processes of investment agreements. The answer seems negative, at least if we consider these clauses per se: in fact, the references to sustainable development have a programmatic content and, in some cases, they cannot even be invoked before the arbitral tribunals because they are subject to dispute resolution procedures. conciliatory type. This severely limits the possibility of implementing these provisions and, consequently, due to the*

type of clauses developed, the arbitrators could be influenced in a limited way. However, the EU is developing other provisions (i.e. right to regulate; corporate social responsibility clauses) that seem to ensure greater effectiveness and can better contribute to achieving the goal of sustainable development.
KEYWORDS: *sustainable development, Investment Law, investment treaties, ISDS, SDGs.*

1. Introduction: the difficult relationship between sustainable development and investment agreements

Sustainable development was famously defined in the *Brundtland Report* as the «development that meets the needs of the present without compromising the ability of future generations to meet their own needs»[1]. This concept consists of three dimensions: economic growth, social inclusion and environmental protection, which today are elaborated in 17 different *Sustainable Development Goals* (SDGs) and 169 targets in the *2030 Agenda*[2]. These goals now inspire the policies and programmes of all States, as well as the actions of intergovernmental organisations and various stakeholders. The SDGs can therefore be seen as the latest attempt to achieve sustainable development and as the paradigm that inspires global economic governance: to achieve these objectives, States must therefore adopt a proper normative framework at national, regional and international levels.

This includes, of course, the regulation of foreign investment. Indeed, increasing the flow of foreign investment is a fundamental element of national development strategies: foreign capital benefits economies by creating a competitive market and fostering trade integration. It also increases employment and supports the diffusion of new technologies and the training of human capital, with positive long-term social consequences. Foreign investment therefore supports the human dimension of development, as expressed by the *1986 Declaration on the Right to Development*, which states that «[development] is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals»[3]. This relationship has been recognised on several occasions by the United Nations, which is committed to mobilising private resources to finance development: references to private capital and foreign investment are indeed present in the *2030 Agenda*, which clearly states that foreign investment and sustainable development should be seen as mutually reinforcing «allies»[4].

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[1] WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, *Our common future*, UNGA Doc A/42/427, 1987, par. 2.

[2] UN GENERAL ASSEMBLY, Transforming our world. The 2030 Agenda for Sustainable Development, A/RES/70/1, 21 October 2015, par. 9 (hereinafter, Agenda 2030).

[3] UN GENERAL ASSEMBLY, *UN Declaration on the Right to Development*, A/RES/41/128, 4 December 1986, art. I.

[4] *Agenda 2030*, par. 9. See also *Report of the International Conference on Financing for Development*, Monterrey, Mexico, 18-22 March 2002 (A/CONF.198/11), par. 20-25, recognizing that «[p]rivate international capital flows, particularly foreign direct investment, along with international financial stability, are vital complements to national and international development efforts. Foreign direct investment contributes toward financing

In particular, the sustainability dimension of development requires foreign investors not to focus exclusively on profits, but also to take into account the environmental dimension and the social impact of their investments. Indeed, if not properly managed and monitored, investments can be detrimental to the well-being of local populations, for example generating massive pollution or favouring corruption, serious human rights violations or the reckless exploitation of natural resources. For these reasons, States, International Organisations and civil society are very concerned about the international regulation of foreign investment, because of the perception that large-scale operations can undermine other important values and objectives[5].

Nevertheless, it can be argued that the current international legal framework on foreign investment does not generally and explicitly recognise the urgency of ensuring respect for general values and concerns. Investment treaties have traditionally been limited in their objectives and provisions to the protection of private interests against abusive or discriminatory behaviour on the part of States: these instruments are consequently perceived as asymmetrical, since they outline obligations for States *vis-à-vis* foreign investors without imposing corresponding obligations on them. Also, the typical content of these agreements and the absence of norms on social and environmental values have led to an arbitral jurisprudence that is not very sympathetic to States' measures aimed at protecting public interests: indeed, arbitrators have often found violations of investors' rights even when the host State's actions were based on considerations of general nature[6].

This explains the recent regulatory strategy adopted by a large majority of States to cope with the imbalance typical of the international investment protection system. States have therefore proposed and concluded new international agreements, which express a model that intends to more closely combine the issues of sustainable development and the protection of non-economic concerns with the protection and promotion of investments. These

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sustained economic growth over the long term. It is especially important for its potential to transfer knowledge and technology, create jobs, boost overall productivity, enhance competitiveness and entrepreneurship, and ultimately eradicate poverty through economic growth and development. A central challenge, therefore, is to create the necessary domestic and international conditions to facilitate direct investment flows, conducive to achieving national development priorities, to developing countries, particularly Africa, least developed countries, small island developing States, and land- locked developing countries, and also to countries with economies in transition». See also *Addis Ababa Action Agenda of the Third International Conference on Financing for Development*, 13-16 July 2015, par. 45.

[5] This reference concerns values of a general and public nature, protected by the international obligations of States (both customary and conventional) or by obligations deriving from national law, which constitute (or should constitute) priorities for the policies of States as an expression of the various components of sustainable development. These include: civil, political, social, cultural and economic rights and fundamental freedoms; the protection of the rights of indigenous peoples; the protection of core labour standards developed by the International Labour Organisation (ILO); the protection of the natural environment and biodiversity; the prohibition of international crimes, corruption and serious violations of fundamental rights; and the protection of health.

[6] The application of conventional investment protection standards, in particular the rules on expropriation and fair and equitable treatment (FET), may require host states to compensate foreign investors for the negative effects of national measures on individual economic transactions, see D. COLLINS, *An Introduction to International Investment Law*, Cambridge University Press, Cambridge, 2017, pp. 124-136; S. DI BENEDETTO, *International Investment Law and the Environment*, Edward Elgar, Chelthenham, 2013, pp. 3-82.

new agreements are characterised by a greater focus on sovereign rights and by the attempt to reconcile the promotion and protection of investments with the advancement of sustainable development. This principle, in particular, can be seen as the cornerstone and objective of the new investment promotion strategy developed by States, aimed at directing economic cooperation towards social and environmental values. Such rule, as it has evolved in the international practice of States and in the work of International Organisations, is now the main paradigm of international cooperation and, as such, the main objective that States have included in *International Investment Agreements* (IIAs).

The positive impact of investment agreements on sustainable development may therefore depend on these regulatory progresses, which can ensure a link between sustainable development and investment operations. This strategy was endorsed also by the United Nations Commission on Trade and Development (UNCTAD) in its *Investment Policy Framework for Sustainable Development*[7] and by the G20, which adopted the *Guiding Principles for Global Investment Policymaking* in 2016, aimed at «(i) fostering an open, transparent and conducive global policy environment for investment, (ii) promoting coherence in national and international investment policymaking, and (iii) promoting inclusive economic growth and sustainable development»[8].

Such new investment agreements therefore attempt to perform this «balancing exercise» by making various references, both in the preambles and in specific substantive provisions. Particularly noteworthy is the practice of the European Union, which is characterised by the adoption of specific chapters in its trade and investment agreements, where the EU has begun to gradually recognise and include substantive references and provisions relating to sustainable development. This study is therefore aimed at analysing the EU conventional practice regarding sustainable development, first deepening the general framework on the matter (par. 2) and then the main examples of provisions related to sustainable development (paras. 3, 4 and 5). However, since clauses on sustainable development and related commitments are very limited in EU investment agreements, such analysis will encompass also corresponding provisions in Free Trade Agreements (FTAs) concluded by the EU: these rules, while referring to trade, should be understood in a broad sense, including investment as part of the common commercial policy. However, it must also be stressed that the proposed texts for investment agreements to be concluded with India and China are today more oriented to

[7] UNCTAD, *Investment Policy Framework for Sustainable Development*, UNCTAD/DIAE/PCB/2015/5, New York, 2015, available at www.unctad.org. This document contains 10 principles to guide decision-making and investment policy processes towards sustainable development and inclusive growth, namely «1. Policy consistency; 2. Public governance and institutions; 3. Dynamic policymaking; 4. Balanced rights and obligations; 5. Right to regulate; 6. Openness to investment; 7. Investment protection and treatment; 8. Investment promotion and facilitation; 9. Corporate Governance; 10. International cooperation». In practice, these principles envisage that policies – internal and international – regarding investments must be rooted in the global development strategy of each country and elaborated with the contribution of the various stakeholders.

[8] *Guiding Principles for Global Investment Policymaking*, annex to the statement adopted by the Trade Ministers of the G20 countries at the Shanghai summit of 9-10 July 2016, available at www.oecd.org.

promote sustainable development, including specific "Sustainable development chapters".

Therefore, the most recent conventional practice shows that these provisions are nowadays very common: it remains to be seen whether these references alone can enable arbitrators to strike a better balance between public needs and the protection of private interests[9].

2. The EU conventional practice on sustainable development: general issues

In the European legal framework, the promotion of sustainable development has been consolidated in the *Lisbon Treaty* as a commitment to be maintained also outside the territory of the Union, in particular with regard to trade policy[10]. Such understanding was confirmed also by the European Court of Justice in its *Opinion 2/15* regarding the investment agreement between the EU and Singapore, according to which «the common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action»: it follows that «the objective of sustainable development henceforth forms an integral part of the common commercial policy»[11].

The EU, since the conclusion of the agreement with the Republic of Korea in 2011, has started to include provisions related to sustainability in *ad hoc* chapters of its international agreements, often titled «Trade and Sustainable Development» (TSD chapters), where the Parties specify their obligations in this regard and commit themselves to mutual cooperation[12]. To date, TSD chapters have become a typical feature of the new generation of EU agreements with both industrialised and developing countries: they also have the merit of being among the few examples of agreements that include provisions to fight climate change[13]. The rules contained in these chapters are of a general nature and have a mainly interpretative function, as they aim to define the general context of the agreement and, in particular, the scope of the

[9] In some cases, the same rules cannot even be invoked before arbitration tribunals because they are subject to conciliatory dispute resolution procedures. On this matter, see the study by Susanna Villani in this book.

[10] See art. 3.5 and art. 21.2(d) and (f) of the Treaty on the European Union and art. 207.1 of the Treaty on the Functioning of the European Union.

[11] EUROPEAN COURT OF JUSTICE, *Opinion 2/15*, 16 May 2017, paras. 142-143, 147.

[12] The idea promoted by the European Commission is that IIAs and FTAs are instruments to facilitate the transition towards a *greener* development model, see the *Agreement in principle between the EU and Mercosur*, 28 June 2019, not into force (*EU-Mercosur*), according to which the aim of TSD chapter is «to enhance the integration of sustainable development in the Parties' trade and investment relationship, notably by establishing principles and actions concerning labour and environmental aspects of sustainable development of specific relevance in a trade and investment context». See also S. SCHACHERER, *Sustainable Development in EU Foreign Investment Law*, Brill, Leiden, pp. 258-261; W. ALSCHNER, E. TUERK, *The Role of International Investment Agreements in Fostering Sustainable Development*, in F. BAETENS (ed.), *Investment Law within International Law: Integrationist Perspectives*, Cambridge University Press, Cambridge, 2013, pp. 217-231.

[13] EU treaties normally provides for clauses that affirm the urgent need to combat climate change, see art. 24 of the *EU-Korea Free Trade Agreement*, 14 May 2011, and also clauses that reaffirm and implement existing international obligations, see, *ex pluribus*, art. X.5(2)(c) TSD chapter of the *Agreement proposed by the EU to Australia* in 2019 (*EU-Australia*).

substantive provisions contained in IIAs or FTAs. The purpose of including these rules is therefore to ensure that trade and investment flows can expand and develop in a manner that contributes to the objective of sustainable development.

Looking at their structure, TSD chapters are generally divided into sections, the first of which deals with the objectives and content of sustainable development provisions: in general, this part often contains references to certain international legal instruments that list specific obligations and objectives in relation to sustainable development[14]. This section is complemented by an article on the Parties' «right to regulate» with regard to their own development policies and priorities[15]; this provision is generally supplemented by the rule to maintain (and improve) the level of environmental protection and labour rights[16]. These clauses, as conceived in the EU practice, on the one hand, protect the policy and regulatory space of the contracting parties and, on the other hand, limit the exercise of this power to the compliance with internationally recognised standards or agreements in force. Thus, the amendment of laws and regulations and the adoption of new provisions are only permitted if they are consistent with international social and environmental obligations: in practical terms, these provisions not only impose a minimum level of obligations to promote sustainable development, but also have the effect of ensuring the effective implementation of international obligations in this area.

These initial provisions are followed by thematic sections: the investment agreement with China, for example, contains only two sections, one on labour policy and the other dealing with the protection of environment[17]. Other agreements, however, contain provisions that also cover other matters, such as combating climate change, the protection of biodiversity, energy policy, the protection of forests and sustainable fisheries, gender equality and corporate social responsibility[18]. In addition to

[14] For example, Article 1.1. of the *Comprehensive Agreement on Investment* between EU and China (*CAI*), 30 December 2020, not into force, recalls «Agenda 21 on Environment and Development of 1992, the Johannesburg Plan of Implementation on Sustainable Development of 2002, the Ministerial Declaration of the UN Economic and Social Council on Full Employment and Decent Work of 2006, the International Labour Organisation (ILO) Declaration on Social Justice for a Fair Globalisation of 2008 and the Outcome Document of the UN Conference on Sustainable Development of 2012 entitled 'The Future We Want', the UN 2030 Agenda for Sustainable Development and its Sustainable Development Goals, and the 2019 ILO Centenary Declaration for the Future of Work».

[15] On the right to regulate, see D. Pauciulo, *La promozione dello sviluppo sostenibile negli accordi internazionali sugli investimenti esteri*, Edizioni Scientifiche Italiane, Napoli, 2022, pp. 178-215.

[16] See, art. 2, TSD Chapter, of the *Agreement (in principle) between EU and Mexico*, 21 April 2018, not yet into force (*EU-Mexico*); and art. X.2, TSD Chapter, of the *Trade Agreement between EU and New Zealand*, 30 June 2022, not yet into force (*EU-New Zealand*); or artt. 23.2, 23.4, 24.3 and 24.5 of the *Comprehensive Economic Trade Agreement between the EU, its Member States and Canada* (CETA), 30 October 2016.

[17] See M.R. MAURO, *The EU-China Comprehensive Agreement on Investment: New Perspectives in the World of IIAs*, in E. BARONCINI, I. ESPA, M.L. MARCEDDU, L. MULAS, S. SALUZZO (a cura di), *Enforcement & Law-Making of the EU Trade Policy*, AMS Acta, Bologna, p. 139.

[18] See *EU-New Zealand*, chapter 19. Other agreements, on the other hand, have a different scope: for example, the EU-Mercosur agreement does not contain a section on gender

obligations of cooperation, exchange of information, non-regression of safeguards, the thematic sections often incorporate multilateral obligations of the parties, specifying the individual agreements to which they intend to refer or making a general reference to an entire category of agreements[19]. Finally, the EU practice is characterised by the creation of a specific institutional framework and by a dedicated dispute settlement mechanism[20].

In any case, TSD chapters endorse very specific provisions dealing with sustainable development. Such substantive obligations take mainly two forms: non-lowering of standards clauses and clauses on high levels of protection. Additionally, references to sustainable development are present also in the preambles of IIAs and FTAs concluded by the EU, that will be analyzed in the following section.

3. Preambulatory references to sustainable development in EU agreements

Most of the textual references to sustainable development in international agreements on foreign investment are contained in the preambles[21]. In the classical model of bilateral investment treaties, the objectives of the treaty were limited to the promotion of cooperation between the contracting parties, the stimulation of individual economic initiative and the flow of private capital. Since the adoption of the so-called *NAFTA*[22], there has been a general inclusion and acceptance of the objective of sustainable development among the objectives to be achieved through the conclusion of

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equality, while the *Trade and Cooperation Agreement between the EU and the United Kingdom,* 30 December 2020 (TCA), has a specific section on sustainable energy. In literature, see G. ADINOLFI, *Alla ricerca di un equilibrio tra interessi economici e tutela dell'ambiente nella politica commerciale dell'Unione europea*, in *Eurojus.it rivista*, 14 maggio 2017, available at www.rivista.eurojus.it.

[19] With regard to environmental protection, normally TSD Chapters of EU Agreements establish a generic obligation to implement *Multilateral Enviromental* Agreements, their Protocols and Annex into force for the contracting parties, see *CAI*, art. 4, section *Investment and Sustainable Development*: «Each Party is committed to effectively implement the multilateral environmental agreements to which it is a party. The Parties shall regularly exchange information on their respective situation and developments as regards ratifications and implementation of Multilateral Environmental Agreements or amendments to such agreements in a manner complementary to the exchanges under the multilateral mechanisms». The only exception is represented by *Agreement between the EU, its Member States and Colombia and Peru*, 21 December 2012 (*EU-COPE*), whose art. 270 contains a specific list of relevant environmental agreements. Recently, the reference to environmental protection standards has also been integrated by the affirmation of the importance of the decisions adopted by the UN Environmental Assembly, see *EU-Mexico, TSD Chapter*, Article 5.2.

[20] Investment agreements and TSD chapters create specific bodies (named *Committee on Trade and Development*) to monitor the implementation of sustainable development obligations: these are intergovernmental bodies with the task of guiding the Parties in the implementation of the agreement. Also, the parties have reporting obligations to such committees. In addition to this joint body, each party is also obliged to have internal consultative mechanisms (*National Consultative Groups*) and bilateral consultative mechanisms (such as the Civil Society Forum) in order to have a regular dialogue with all the stakeholders, see G. MARÍN DURÁN, *Sustainable Development Chapters in EU Free Trade Agreements*, in *Common Market Law Review*, 2020, pp. 1040-1043.

[21] K. NOWROT, *How to Include Environmental Protection, Human Rights and Sustainability in International Investment Law?*, in *Journal of World Investment and Trade*, 2014, pp. 612-644.

[22] *North American Free Trade Agreement*, 17 December 1992, preamble.

IIAs, as well as the stimulation and growth of foreign investment and consequent economic development.

As far as EU practice is concerned, FTAs dating to the 2000s generally included "the need to promote economic and social progress for their peoples, taking into account the principle of sustainable development [...]"[23]. Today, such clauses take into account, in particular, the three dimensions of sustainable development as well as the desire to promote economic growth, job creation and the improvement of general welfare levels[24].

As a matter of fact, references to sustainable development or to its elements in preambles can play an important interpretive role: the purpose of these provisions is to establish a general regime for the parties and to explain the reasons that led to the conclusion of the treaty[25]. Preambles thus help to identify the subject-matter and the purpose of an agreement and form part of its overall context. They can therefore be taken into account when interpreting the substantive provisions of the treaty[26].

Although this approach expands the purpose of the treaty from the mere promotion of economic welfare to include the promotion of sustainable development, it still leaves arbitral tribunals with a wide margin of discretion as to how to take sustainable development into account when interpreting the substantive provisions of the treaty: the outcomes of arbitral proceedings may therefore be influenced to a limited extent by such provisions.

4. *Substantive obligations: clauses on non-lowering of standards*

In addition to preambular references, recent EU treaty practice has adopted a standard provision aimed at preventing the parties from lowering the level of protection of non-economical values (so-called *non-lowering of standards* clause)[27]. These provisions are used to prevent States from gaining competitive advantages by resorting to the so-called "race to the bottom":

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[23] *Association Agreement between the EU, its Member States and Chile*, 30 December 2002, preamble.

[24] See the preamble of the *Free Trade Agreements between the EU and Vietnam* (*EU-Vietnam*), 30 June 2019, where the parties reaffirm their desire to a «strengthen their economic, trade and investment relationship in accordance with the objective of sustainable development, in its economic, social and environmental dimensions, and to promote trade and investment under this Agreement in a manner mindful of high levels of environmental and labour protection and relevant internationally recognised standards and agreements».

[25] Caselaw demonstrates that arbitrators can use the preamble to establish the general regime of substantive obligations, see Cfr. *Daimler Financial Services AG v. Argentina*, ICSID Case No. ARB/05/1, Award, 22 August 2012, par. 255-259; *SGS Société Générale de Surveillance S.A. v. The Philippines,* ICSID Case No. ARB/02/6, Decisions on the objections to jurisdiction, 29 January 2004, par. 116.

[26] Article 31 of the *Vienna Convention on the Law of the Treaties*, indeed, stipulates that «A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes [...]».

[27] The origin of such rule can be found in art.1114.2 NAFTA, according to which «The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor [...] ».

their proliferation became more frequent as non-economic considerations - especially environmental and social rights issues - began to be included among the issues regulated by IIAs[28]. Main differences surround the scope of application of the non-lowering provisions in EU treaty practice: some agreements, indeed, prohibit derogations "in order to promote trade or investment" as to include a subjective condition relating to the intention behind the measure[29]; other agreements refer to derogations "in such a way as to affect trade and investment between the Parties", making a reference to an objective fact, namely the effect of the measure on trade and investment between the parties[30].

These provisions normally include three distinct and interrelated obligations: the recognition of the inadequacy of lowering the levels of environmental and social protection for the promotion of investment; the obligation to maintain the level of legal and regulatory standards as in force at the time of the conclusion of the investment agreement, and to prohibit derogations from those standards for the sole purpose of attracting and/or retaining foreign investment; and the obligation to ensure the effective implementation of national provisions on sustainable development[31].

In any case, whatever their formulation, such clauses on non-lowering of standards set a (minimum) limit to the host State's freedom to exercise its regulatory powers. The positive aspect is that this minimum level is often seen in conjunction with international obligations related to the objective of sustainable development, incumbent upon the State by virtue of international treaties or general international law. This is of course a encouraging development, since in this way these clauses promote the implementation of international standards. It should be stressed, however, that these clauses are generally excluded from the jurisdiction of arbitration courts or dispute settlement mechanisms: in fact, a general recourse to consultations is prescribed in the event that one of the Parties perceives a breach of such obligation.

5. Substantive provisions: provisions ensuring high levels of protection

Certain IIAS contain also positive obligations aimed at ensuring the highest possible level of protection of environmental and social interests in domestic laws and policies. These provisions were first used in the two NAFTA-related agreements (the *North American Agreement on Environmental Cooperation* - NAAEC and the *North American Agreement on Labour Cooperation* - NAALC), which provide that the parties «shall

[28] See S. SCHACHERER, *Sustainable Development in EU Foreign Investment Law*, Brill, Leiden, 2021 pp. 230-231.
[29] See *EU-Mexico*, art. 2(3) TSD Chapter; also, artt. 23.4 and 24.5 CETA.
[30] See *EU-Singapore Free Trade Agreement*, 8 November 2019 (*EU-Singapore*), TSD Chapter, art. 12.12.
[31] See, for example, the provision developed by Canada in its *model BIT*, published on 12 May 2021, whose art. 4 establishes: «The Parties recognize that it is not appropriate to encourage investment by relaxing domestic measures relating to health, safety, the environment, other regulatory objectives, or the rights of Indigenous peoples. Accordingly, no Party shall relax, waive or otherwise derogate from, or offer to relax, waive or otherwise derogate from, such measures in order to encourage the establishment, acquisition, expansion or management of the investment of an investor in its territory».

ensure that their laws and regulations provide for a high level of [environmental/labour] protection and shall endeavour to continue to improve it»[32]. These provisions seem to be present nowadays only in the agreements concluded by the EU, where it is stipulated that the parties «shall continuously endeavour to improve such laws and regulations»[33]. For example, the EU-Vietnam agreement stipulates that if the parties wish to adopt new rules on sustainable development or amend existing ones, they must do so «in a manner consistent with internationally recognized standards and existing international agreements»[34]: such reference must be intended as to environmental and social agreements in force between the Parties.

These provisions are therefore intended to guide the development of national legislation in line with existing international standards: these rules, clearly, must be read in conjunction with the other provisions relating to sustainable development, both those relating to the maintenance of levels of protection and, above all, those reaffirming international commitments in areas related to sustainable development[35]. The purpose of these clauses is thus to promote and strengthen sustainable development by increasing the level of protection in the national law of the Parties. Although the language appears to be exhortative and programmatic, expressing a sort of *best efforts* obligation, these clauses certainly have the value of linking the promotion of sustainable development to national laws[36].

6. Concluding remarks

As said, one of the most recurrent criticisms of conventional foreign investment regimes is the lack of attention they pay to the issue of sustainable development. Sustainable development is in fact the main point of synthesis between the economic dimension and non-economic values: in its current configuration, this concept is considered to encompass the protection of the planet, the fight against inequalities within and between States, the eradication of extreme poverty, the promotion of social inclusion and the creation of continuous, inclusive and sustainable economic growth, all of which are interdependent.

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[32] See art. 3 NAAEC and art. 2 NAALC.

[33] See art. 16.2(1), of the EU-Japan Economic Partnership Agreement, 17 July 2018 (*EU-Japan*), according to which: «each Party shall strive to ensure that its laws, regulations and related policies provide high levels of environmental and labour protection and shall strive to continue to improve those laws and regulations and their underlying levels of protection». See also *EU-Vietnam*, art. 13.2(2) and *EU-Singapore*, art. 12.2(2).

[34] *EU-Vietnam*, art. 13.2(1)(c).

[35] Some agreements reaffirm international obligations in force for the parties with the aim of identifying the minimum level of commitments to be ensured in social and environmental matters and, also, ensuring the implementation of international standards in the context of investment operations and international trade, see EU-Vietnam. art. 13.5(2): "Each Party reaffirms its commitment to effectively implement in its domestic law and in practice the multilateral environmental agreements to which it is a party".

[36] Additionally, these provisions take into account the economic and social situation of the Contracting Parties when determining the appropriate level of protection, thus justifying different levels of protection on the basis of national specificities: therefore, the meaning of "high levels" is variable and depends on national development priorities.

And, as a matter of fact, foreign investments are made in socially and environmentally sensitive production sectors, ranging from the provision of essential public services to the creation of primary infrastructure and the telecommunications sector, from public procurement to the exploitation of natural resources and mining. The need to better manage foreign investment and to ensure their contribution to sustainable development, a new conventional practice, particularly thanks to the EU, was born: modern investment treaties have begun to link liberalisation and investment protection with international cooperation to promote sustainable development goals through various references in preambles and in substantive provisions.

These types of provisions are very widespread today: however, their ability to solve the problems of the system that have given rise to the modernization process of investment agreements is doubtful. Indeed, if we consider these clauses *per se*, the references to sustainable development have a programmatic content and, in some cases, they cannot even be invoked before the arbitral tribunals because they are subject to different dispute resolution procedures[37]. This severely limits the possibility of implementing these provisions and, consequently, due to the type of clauses developed, adjudicators could be influenced in a limited way.

In order to overcome such shortcomings in its conventional practice, the EU has already started to develop an evolution of its model of investment agreements, called *Sustainable Investment Facilitation Agreement* (SIFA), which aims to make it easier to attract and expand investments by enhancing transparency and predictability of investment-related measures. The agreement also includes provisions that aim at promoting sustainable development, for instance, by including commitments to effectively implement international labour and environmental instruments, such as the *Paris Agreement* or the *UN Guiding Principles on Business and Human Rights*. In June 2023, the European Commission opened the proceedings for signature and ratification of the very first SIFA, which was negotiated with Angola[38]: it is likely that this model will further the EU strategy on promoting sustainable development in investment operations.

[37] Dispute resolution mechanisms of the TSD chapters are mainly based on consultations between the Parties at governmental level, which can be simple negotiations, or one can resort to the Committee created by the treaty. These procedures, therefore, do not provide for sanctions in cases of violation of such provisions, but focus more on cooperation between the Parties and in raising awareness of sustainable development implications. Several provisions, moreover, stipulate that the procedures of the TSD chapters are exclusive and therefore it is not possible to resort to investor-State arbitration for disputes concerning investment and sustainable development, see *EU-Vietnam*, art. 13.16(1); CETA, art. 23.11(1) and 24.16(1).

[38] *Sustainable Investment Facilitation Agreement between the EU and Angola*, 18 November 2022, not yet into force.

ENVIRONMENTAL AND SOCIAL IMPACT ASSESSMENTS IN INTERNATIONAL INVESTMENT LAW: BENEFITS AND CONCERNS

MIRKO CAMANNA

TABLE OF CONTENTS: 1. Concept of impact assessment. - 2. Types of impact assessment. - 3. Main functions of ESIAs. - 4. The dual preventive role of ESIAs. - 5. Potential concerns. - 5. The problem of the sources. - 6. Proposals.

ABSTRACT: *This contribution examines the potential and the limits of the use of environmental and social impact assessments in International Investment Law, in the light of the most recent investment arbitrations. Impact assessments ensure better-planned international investment activities and a better study of potential concerns of investment projects. On the one hand, this use of impact assessments can be positive and preventive. First, they can prevent potential environmental damage, human rights violations, and social conflicts. Moreover, impact assessment can avoid the recourse to Investor-State dispute settlements (ISDS) systems, justifying Host State's decisions, preventing tensions between the Host State and the investors, and breaching investors' legitimate expectations. They can also be a useful piece of evidence in investment arbitrations. On the other hand, impact assessments can have opposite and negative effects. Inadequate, specious, or delayed use of impact assessments can contribute to damage to the environment and human rights or increase the recourse to ISDS.*

KEYWORDS: *International Investment Law, impact assessment, prevention, investment arbitration, public participation, environment, SDGs.*

1. Concept of impact assessments.

Environmental and social impact assessments (ESIAs) are procedures that identify the likely environmental or social impacts of projects before their approval[1]. They help public authorities to decide whether and how to approve a proposed investment project[2].

More generally, ESIAs are instruments of *environmental*

[1] Convention on Environmental Impact Assessment in a Transboundary Context, 1991, art. 1; V. VADI, *Environmental impact assessment in investment disputes: Method, governance and jurisprudence*, in *Polish yearbook of international law*, 2010, 30, p. 171; C. WOOD, *Environmental impact assessment: a comparative review*, Routledge, Oxford, 2013, p. 1 ss.; L. COTULA, *Foreign investment, law and sustainable development: a handbook on agriculture and extractive industries*, International Institute for Environment and Development, London 2016, p. 75.

[2] INTERGOVERNMENTAL FORUM ON MINING, MINERALS, METALS AND SUSTAINABLE DEVELOPMENT (IGF), *The Importance of Consultation and Engagement in Environmental and Social Impact Assessments*, edited by J. HILL, 2023, p.2, https://www.iisd.org/system/files/2023-01/igf-case-study-environmental-social-impact-assessments.pdf.

governance that integrate environmental and social concerns into development and decision-making and lead to better-informed decisions[3].

Usually, suggestions arising from ESIAs do not directly bind public authorities. Nevertheless, they can influence the final decision significantly[4]. In this respect, ESIAs are part of a political process whose primary purpose is to ensure that the impacts of projects are fully known and understood[5].

The results of impact assessment can be positive and negative. Even if authorities identify potential impacts, but they are not too severe or irreversible, the outcome of ESIAs may be positive. In such cases, the authorities may identify alternatives, preventive or mitigating measures[6]. Whatever, a positive assessment is often accompanied by a social and environmental management plan covering the whole life of the project and how the potential risks identified will be addressed[7]. Reviews are possible or, sometimes, mandatory[8].

However, the functions and benefits of using ESIAs in international investment activities are manifold. First of all, ESIAs can be used to implement the Sustainable Development Goals (SDGs) and the 2030 Agenda, as highlighted by the Minsk Declaration in 2017[9], although today the SDGs are usually mentioned without any further role[10]. Moreover, SDGs could also help to define the criteria for ESIAs[11].

A further function of ESIAs has also been highlighted by arbitral

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[3] K.R. GRAY, *International Environmental Impact Assessment-Potential for a Multilateral Environmental Agreement*, in *Colo. J. Int'l Envtl. L. & Pol'y*, vol. 11, 2000, p. 88; V. VADI, *Environmental impact assessment in investment disputes: Method, governance and jurisprudence*, cit.; C. WOOD, *Environmental impact assessment*, cit., p. 1 ss.; P. SANDS, J. PEEL, A. FABRA AGUILAR, R. MACKENZIE, *Principles of international environmental law*, Cambridge/New York, 2018[4], p. 657. They refer to the environmental dimension, but this consideration can be extended also to social dimension.

[4] D. A. COLLINS, *Public Participation in Environmental Impact Assessments for Foreign Investment Projects: A Canadian Perspective*, in *Public Participation and Foreign Investment Law*, edited by E. DE BRABANDERE, T. GAZZINI, A. KENT, Brill Nijhoff, Leiden, 2021, p. 231.

[5] C. WOOD, *Environmental impact assessment*, cit., p.3.

[6] L. COTULA, *Foreign investment, law and sustainable development*, cit., p. 75.

[7] *Ibid.*, p. 75; G. MAYEDA, *Integrating Environmental Impact Assessments into International Investment Agreements: Global Administrative Law and Transnational Cooperation*, in *The Journal of World Investment & Trade*, vol. 18, 2017, n.1, pp. 135 ss.

[8] G. MAYEDA, *Integrating Environmental Impact Assessments into International Investment Agreements*, cit., pp. 135 ss.

For an example see United Nations Human Rights Council, Report of the Special Rapporteur on the right to food, Olivier De Schutter, *Guiding principles on human rights impact assessments of trade and investment agreements*, 2011, A/HRC/19/59/Add.5, p.8: «*all the impacts of the entry into force of a trade or investment agreement can be anticipated. Therefore, ex ante human rights impact assessments should be complemented by human rights impact assessments performed ex post, once the impacts are measurable. A human rights impact assessment should be conceived of as an iterative process, taking place on a regular basis, for instance, every three or five years*».

[9] Meetings of the Parties (MoP) to the UNECE Convention on Environmental Impact Assessment (EIA) in a Transboundary Context (Espoo Convention) and its Protocol on Strategic Environmental Assessment (SEA), Minsk Declaration, 2017; M. NILSSON, Å. PERSSON, *Policy note: Lessons from environmental policy integration for the implementation of the 2030 Agenda*, in *Environmental Science & Policy*, vol. 78, 2017, pp. 36–39.

[10] E. RAVN BOESS, L. KØRNØV, I. LYHNE, M. R. PARTIDÁRIO, *Integrating SDGs in environmental assessment: Unfolding SDG functions in emerging practices*, in *Environmental Impact Assessment Review*, 2021, 90.

[11] M. NILSSON, Å. PERSSON, *Policy note*, cit.

tribunals[12] and international human rights case law[13]: the promotion of transparency and participation of local communities and indigenous peoples in public decision-making processes. Thus, ESIAs not only have practical and pragmatic functions related to economic activities but are also significant for the protection and promotion of human rights.

Moreover, ESIAs are also relevant from an *ex-post* perspective, using them as evidence in national court cases and investment arbitration[14], as discussed below.

2. Types of impact assessments.

The category of impact assessments encompasses several types of instruments, which differ in terms of their object, methodology, and purpose.

This paper focuses on impact assessment regarding investment projects[15]. The best-known tool in this context is the Environmental Impact Assessment (EIA), which integrates environmental concerns into socio-economic development and public decision-making[16]. The main purpose of EIA is to identify potential risks to the environment from economic activities, particularly in the areas closest to the project site[17]. Today, however, EIAs usually consider not only environmental but also social and human rights concerns, requiring the involvement of local communities and indigenous peoples, and introducing instruments such as the social license to operate or

[12] V. VADI, *Environmental impact assessment in investment disputes: Method, governance and jurisprudence*, cit., p. 202.

[13] The Social and Economic Rights Action Center and the Center for Economic, and Social Rights v Nigeria, 27 May 2002, communication n. 155/96; European Court of Human Rights, 30 March 2005, Taşkin e others v. Turkey, application n. 46117/99; Inter-American Court of Human Rights, 28 November 2007, Saramaka People y Suriname, application n. 12338/2000; European Court of Human Rights, 27 January 2009, Tatar v. Romania, application n. 67021/01;. BUTZIER, STEVENSON, *Indigenous Peoples' Rights to Sacred Sites and Traditional Cultural Properties and the Role of Consultation and Free, Prior and Informed Consent*, *Journal of Energy & Natural Resources Law*, vol. 32, 2014, n. 3, pp. 318 ss. See also the International Covenant on Civil and Political Rights (art. 25 (a)).

[14] R. PAVONI, *Environmental Rights, Sustainable Development, and Investor-State Case Law*, cit., p. 546; J. PEEL, *The use of science in environment-related investor-state arbitration*, in *Research Handbook on Environment and Investment Law*, edited by K. MILES, Edward Elgar Publishing, Cheltenham/Northampton, 2019, pp. 244–263.

[15] Even impact assessments on economic agreements are possible but are not considered in present work. See for example M. G. PLUMMER, D. CHEONG, S. HAMANAKA, *Methodology for Impact Assessment of Free Trade Agreements*, Asian Development Bank, 2011.

[16] E. MORGERA, *Human Rights Dimensions of Corporate Environmental Accountability*, in *Human Rights in International Investment Law and Arbitration*, edited by P.-M. DUPUY, E.-U. PETERSMANN, F. FRANCIONI, Oxford University, Oxford, 2009[1], p. 518; P. SANDS, J. PEEL, A. FABRA AGUILAR, R. MACKENZIE, *Principles of international environmental law*, cit., p. 657; Secretariat of the Convention on Biological Diversity, *Akwé: Kon voluntary guidelines for the conduct of cultural, environmental and social impact assessment regarding developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities*, 2004, p.7. The Akwè Guidelines define social impact assessment as «*a process of evaluating the likely impacts, both beneficial and adverse, of a proposed development that may affect the rights, which have an economic, social, cultural, civic and political dimension, as well as the well-being, vitality and viability, of an affected community*».

[17] E. MORGERA, *Human Rights Dimensions of Corporate Environmental Accountability*, cit., p.519.

the free prior informed consent (FPIC)[18].

Two distinct types of impact assessment are social impact assessment and human rights impact assessment. The former focuses on identifying and assessing undesirable and desirable social outcomes and concerns[19], while the latter focuses on international human rights standards that may be violated by investors' activities[20].

A third typology of impact assessment for investment projects is the more recent Sustainability Impact Assessment (SIA)[21], which takes a broader approach and analyses the investment project in terms of all the different pillars of sustainable development (environmental, social, and economic)[22].

Given the intersections between the different types of impact assessment, the distinction outlined here should not be overstated, and an integrated approach that considers the social, environmental, and economic dimensions together is preferable.

In addition to the above, there are other types of impact assessment related to investment activities and International Investment Law (IIL). The first is the impact assessment of international agreements, which usually takes the form of a sustainability impact assessment or human rights impact assessment. It is conducted before the conclusion of international economic agreements to avoid and prevent potential conflicts between States' environmental and human rights obligations and those arising from trade and investment agreements[23]. The second is regulatory impact assessment, which

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[18] J. A. VANDUZER, P. SIMONS, G. MAYEDA, *Integrating sustainable development into international investment agreements: a guide for developing country negotiators*, Commonwealth Secretariat, 2013; M. PAPILLON, T. RODON, *Proponent-Indigenous agreements and the implementation of the right to free, prior, and informed consent in Canada*, in *Environmental Impact Assessment Review*, vol. 62, 2017, pp. 216–224; J. HILL, *The Importance of Consultation and Engagement in Environmental and Social Impact Assessments*, cit.
See for example the Performance Standard 1: Assessment and Management of Environmental and Social Risks and Impacts in the IFC, *Performance Standards on Environmental and Social Sustainability*, (2012) or the above mentioned Akwè Guidelines.

[19] Secretariat of the Convention on Biological Diversity, *Akwé: Kon voluntary guidelines for the conduct of cultural, environmental and social impact assessment regarding developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities*, 2004, cit., p.7; J. HARRISON, *Human rights measurement: reflections on the current practice and future potential of human rights impact assessment*, in *Journal of Human Rights Practice*, vol. 3, 2011, n. 2, pp. 162–167.

[20] J. HARRISON, *Human rights measurement: reflections on the current practice and future potential of human rights impact assessment*, *Journal of Human Rights Practice*, vol. 3, 2011, n. 2, pp. 162–167; S. DEVA, *International Investment Agreements and Human Rights: Assessing the Role of the UN's Business and Human Rights Regulatory Initiatives*, in *Handbook of International Investment Law and Policy*, edited by J. CHAISSE, L. CHOUKROUNE, S. JUSOH, Springer Singapore, Singapore, 2022, p.1751.

[21] See the proposal of European Commission, Directorate General for Trade, *Handbook for trade sustainability impact assessment*, 2016.

[22] *Ibid.*; S. SCHACHERER, R.T. HOFFMANN, *International investment law and sustainable development*, in *Research Handbook on Foreign Direct Investment*, edited by M. KRAJEWSKI, R.T. HOFFMANN, Edward Elgar Publishing, Cheltenham/Northampton, 2019, pp. 587 – 588.

[23] O. DE SCHUTTER, *Guiding principles on human rights impact assessments of trade and investment agreements*, cit.; EUROPEAN COMMISSION, DIRECTORATE GENERAL FOR TRADE, *Handbook for trade sustainability impact assessment.*, cit.; M. GEHRING, S. STEPHENSON, M.-C. C. SEGGER, *Sustainability Impact Assessments as Inputs and as Interpretative Aids in*

is a systematic approach to critically evaluating the positive and negative impacts (e.g. on environment) of proposed and existing regulations and alternatives[24]. Regulatory impact assessment is also helpful for investors, as it should help clarify what kind of legislation is most appropriate to promote investment and provide guidance on specific host States' obligations and requirements[25].

A similar tool is a human rights audit, which would examine a Host State's human rights obligations and allow the investor to anticipate and take into account future changes in this legislation, thereby avoiding the creation of legitimate expectations and better defining the landscape of foreign investors' legitimate expectations in a way that does not leave excessive *ex-post* discretion to arbitrators[26].

3. The problem of the sources.

The evaluation of the space given to ESIAs in international sources can be positive and negative.

Looking at general International Law, ESIAs have been mentioned since the 1970s. Today, the obligation to conduct EIAs seems to be an important environmental principle and a well-established tool, both in case law and in international sources (although many of these sources are soft law in this respect)[27]. Even national legislations usually provide for ESIAs, in particular environmental impact assessment, although these laws may have criticisms, as will be explained below.

Looking at IIL, the situation is quite different. In the specific context of IIL, there is a lack of references to ESIAs in International Investment

International Investment Law, in *The Journal of World Investment & Trade*, 18/1, 2017, pp. 163–199. Several National Action Plans on Business and Human rights require conducting impact assessment during agreements' negotiations, see for example Finnish National Plan, art.1.3.

[24] OECD (ed.), *Regulatory impact assessment*, OECD Publishing, Paris 2020.

[25] EUROPEAN COMMISSION, HIGH-LEVEL EXPERT GROUP ON SUSTAINABLE FINANCE, *Financing a sustainable european economy*, 2018, https://finance.ec.europa.eu/system/files/2018-01/180131-sustainable-finance-final-report_en.pdf.

[26] B. SIMMA, *foreign investment arbitration: a place for human rights?*, in I*nternational and Comparative Law Quarterly*, vol. 60, 2011, n.3, pp. 573–596.

[27] D. SHELTON, *International Environmental Law: 3rd Edition*, Brill | Nijhoff, Leiden, 2021, pp. 236 – 244; R. PAVONI, *Environmental Rights, Sustainable Development, and Investor-State Case Law*, cit., p. 546.

See Art. I, Kuwait Regional Convention (1978); Art. 13, West and Central African Marine Environment Convention (1981); Art. 10, South-East Pacific Marine Environment Convention (1981); 14(1) (a), Biological Diversity Convention (1982); Principle 11 of the World Charter for Nature (1982); Art. 206, UNCLOS (1982); Art. 14, ASEAN Agreement (1985); Artt. 6, 15, Tribal Peoples Convention 169 (ILO 169) (1989), Convention on Environmental Impact Assessment in a Transboundary Context, Espoo, (1991); art. 14, Convention on Biological Diversity; See also Principle 17 of the Rio Declaration (1992); Art. 4(1) (f), Climate Change Convention (1992); Preamble, Amendments to the Protocol for the Protection of the Mediterranean Sea against Pollution from Land-Based Sources, (1996); art. 6, Aarhus Convention, (1998); UN Guiding Principles on Principles on Business and Human Rights (2011).

Agreements (IIAs)[28]: analysing the more than 3,000 IIAs and the more than 400 TIPS that have been adopted to date, only 44 IIAs contain references to impact assessment[29]. Among these 44 IIAs, 39 of them mention environmental impact assessment, and only 3 IIAs mention social impact assessment[30].

The first reaction to this data is discouraging, and it seems that IIAs have basically no interest in dealing with ESIAs. It should be noted that, according to some authors, the ESIAs provisions - or proposals - in IIAs go far beyond what could reasonably be expected from an IIA[31].

On the other hand, it is interesting to note that a significant number of the 44 treaties that mention impact assessments are recent treaties, well known for their focus on the environment and human rights[32]. Therefore this may be the beginning of a changing trend. Otherwise, ESIAs may also become indirectly relevant in investment arbitration, where provisions in IIAs require arbitrators to decide on the basis of national or international law[33], and these sources regulate ESIAs.

Considering the European Union as a case study, there is a difference between the internal and the external perspective. Concerning internal policies, the EU has a relevant regulation on impact assessment[34]. But looking at the external policies, specifically the economic agreements concluded by the EU, there are some references to impact assessment, but these references are mainly contained in trade agreements or trade chapters and not in investment chapters[35]. Moreover, these references are mostly to the regulatory

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[28] J. A. VANDUZER, P. SIMONS, G. MAYEDA, *Integrating sustainable development into international investment agreements: a guide for developing country negotiators*, cit., p. 268.

[29] UNCTAD Investment Policy Hub, https://investmentpolicy.unctad.org/international-investment-agreements, last access 24.07.2023.

[30] UNCTAD Investment Policy Hub, https://investmentpolicy.unctad.org/international-investment-agreements last access 24.07.2023.

[31] P. MUCHLINSKI, *Negotiating New Generation International Investment Agreements*, in *Shifting Paradigms in International Investment Law*, edited by S. HINDELANG, M. KRAJEWSKI, Oxford University Press, Oxford, 2016, pp. 41–64.

[32] E.g. IISD Model International Agreement on Investment for Sustainable Development; PAIC SADC Model Bilateral Investment Treaty 2012, art. 13; Morocco Nigeria BIT, art.14; 2019 Dutch Model BIT.

[33] See the partial dissenting opinion of Professor Philippe Sands in case Bear Creek Mining Corporation v. Republic of Peru, ICSID Case No. ARB/14/21, award 30 November 2017, par. 11: «*The same considerations apply in the present case in relation to the requirements of ILO Convention 169, and in particular its Article 15 on consultation requirements. Article 837 of the Canada Peru FTA, on Governing Law, provides that this Tribunal "shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law". ILO Convention 169 is a rule of international law applicable to the territory of Peru. This Tribunal is entitled to take the Convention into account in determining whether the Claimant carried out its obligation to give effect to the aspirations of the Aymara peoples in an appropriate manner, having regard to all relevant legal requirements, including the implementing Peruvian legislation*».

[34] See in particular Directive 2001/42/EC, Directive 2011/92/EU, and Directive 2014/52/EU.

[35] Although there are interesting provision related to economic activities in other EU's agreements. See for example the recent EU – New Zealand FTA, art. 13.8, that introduce an assessment of environmental impact: *Each Party shall ensure that its laws and regulations require an environmental impact assessment for activities related to production of energy goods or raw materials, where such activities may have a significant impact on the environment*. See also EU - United Kingdom Trade and Cooperation Agreement affirms at

or agreements' impact assessment[36], and not to investment activities impact assessments. Even the recent EU-Angola Sustainable Investment Facilitation Agreement contains an impact assessment, but this is a regulatory impact assessment[37].

4. The dual preventive role of ESIAs: ESIAs as preventive tools.

The first section outlined the main functions and benefits of using ESIAs for international investment projects. This section focuses on the role of ESIAs as preventive tools: as will be explained, this preventive function is one of the main benefits of ESIAs.

The preventive function of ESIAs is closely linked to their outcomes and timing. As explained above, ESIAs intervene before investment activities are approved and initiated. Considering the ESIAs' findings, public authorities could decide to suspend or require modifications to the investment project if they identify likely adverse impacts and concerns.

In light of these considerations, ESIAs could have a twofold preventive function: first, from and environmental and human rights perspective; second, from an International Investment Law and investor-State dispute settlement (ISDS) perspective.

Concerning the first dimension, ESIAs could prevent environmental, social, and human rights abuses and concerns.

From an environmental perspective, ESIAs can prevent potential damage and pollution from investment activities, because if ESIAs identify potential negative impacts, the project would not be approved or would be modified to avoid such problems. Even arbitral tribunals have recognised this preventive role of ESIAs, for example in the leading case *Maffezini v. Spain*: « *(…) the Environmental Impact Assessment procedure is basic for the adequate protection of the environment and the application of appropriate preventive measures. This is true, not only under Spanish and EEC law, but also increasingly so under international law*»[38]. This preventive role of ESIAs for environmental concerns is particularly true in the case of high-impact activities, such as extractive industries[39].

This role of ESIAs as preventive tools is crucial: it would certainly be better to prevent environmental damage from occurring than to ensure that

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Article 7.4 par. 2: *The Parties reaffirm their respective commitments to procedures for evaluating the likely impact of a proposed activity on the environment, and where specified projects, plans and programmes are likely to have significant environmental, including health, effects, this includes an environmental impact assessment or a strategic environmental assessment, as appropriate*.

[36] See for example EU – New Zealand FTA, art. 22.8; EU - United Kingdom Trade and Cooperation Agreement, artt. TBT.4, GRP.8

[37] See art. 25 of EU-Angola Sustainable Investment Facilitation Agreement.

[38] Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7, Award 13 November 2000, par. 67.

[39] L. JOHNSON, *FDI, international investment agreements and the sustainable development goals*, in *Research Handbook on Foreign Direct Investment* edited by M. KRAJEWSKI, R.T. HOFFMANN, Edward Elgar Publishing, Cheltenham/Northampton, 2019, p. 147.

investors who cause damage are held fully responsible[40].

Even if investment project with potentially harmful effects are approved, ESIAs at least make authorities and local communities aware of the potential harmful externalities of investment activities[41].

The preventive role of ESIAs also addresses social tensions, human rights abuses, and cultural heritage concerns[42]. As explained above, ESIAs include tools such as local community engagement, transparency, FPIC, and social licence to operate: these instruments may prevent potential tensions with local communities, ensure full disclosure of investment projects and benefits, and help to find a compromise between local communities and investors. The problem arises in particular when local communities do not want investment activities in their territories, especially if they are highly impactful, but also in cases where investment activities would not be particularly harmful, but the population may still perceive them as such[43].

Conversely, denying local communities the right to participate in public decision-making, especially where environmental or social concerns are foreseeable, could provoke their reactions, which could be legal[44] but also violent and unlawful[45].

This problem is clearly illustrated in two cases.

The first is the Ecuadorian saga of oil exploration projects in the Ecuadorian Amazon[46]. In this case, Ecuador approved an investment project without the mandatory involvement of local communities and indigenous. The epilogue of this saga was highly problematic: first, local communities violently protested for their exclusion from the public procedure, and Ecuador was even condemned by the Inter-American Court of Human Rights[47]. Second, there were relevant problems of pollution and oil spills, so Ecuador

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[40] A.K. BJORKLUND, *Sustainable development and international investment law*, in *Research Handbook on Environment and Investment Law*, edited by K. MILES, Edward Elgar Publishing, Cheltenham/Northampton, 2019, p. 67.

[41] C. WOOD, *Environmental impact assessment*, cit., pp. 3 – 4.

[42] F. FRANCIONI, *Diritto internazionale degli investimenti e tutela dei diritti umani: convergenza o conflitto?*, in *La tutela dei diritti umani e il diritto internazionale : XVI Convegno, Catania, 23- 24 giugno 2011* (*SIDI, Società Italiana di Diritto Internazionale*), edited by A. DI STEFANO, R. SAPIENZA, Editoriale Scientifica, Napoli, 2012, pp. 432 – 433.

[43] Compliance Advisor/Ombudsman, 7 September 2005, Assessment Report of a complaint in relation to the Marlin Mining Project in Guatemala; R. PAVONI, *Environmental Rights, Sustainable Development, and Investor-State Case Law*, cit., p. 522.

[44] Such as going to court or appealing international human rights bodies. E.g. The Social and Economic Rights Action Center and the Center for Economic, and Social Rights v Nigeria; 27 May 2002, communication n. 155/96; Inter-American Court of Human Rights, 28 November 2007, *Saramaka People y Suriname*, application n. 12338/2000; European Court of Human Rights, 27 January 2009, *Tatar v. Romania*, application n. 67021/01.
See also Bilcon v Canada, UNCITRAL, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015, where the project was denied because the Canadian appellate body affirmed that the project presented significant and adverse environmental effect on the 'community core values'.

[45] Copper Mesa Mining Corp. v Ecuador, PCA Case No. 2012-2, Award 15 March 2016, see for more details Court of Appeal for Ontario, ONCA 191, Piedra v. Copper Mesa Mining Corporation, 11 March 2011; Bear Creek Mining Corporation v. Republic of Peru, ICSID Case No. ARB/14/21, award 30 November 2017;

[46] C. BINDER, J. HOFBAUER, *Case Study: Burlington Resources Inc. v Ecuador/Kichwa Indigenous People of Sarayaku v Ecuador*, 2016.

[47] Inter-American Court of Human Rights, 27 June 2012, Kichwa indigenous people of Sarayaku v. Ecuador, application n. 12465/2003.

revoked the authorization to the foreign company, but this latter requested an arbitration[48]. In the end, the arbitration ended favourably for Ecuador and is also one of the few cases with a counterclaim upheld on environmental grounds[49]. This is a clear example of the interactions between investment activities, environmental damage, and human rights abuses. This case is also significant because there has been a concurrence of claims before both human rights tribunals and ISDS.

The second case is *Metalclad v. Mexico*[50], where pressure from local communities on the government persuaded - or forced - the authorities to revoke the investor's permit, even though the project was well advanced. Significantly, in this case, the local communities were initially excluded from the preliminary stages of the investment project. As a result of the revocation, the investor filed an ISDS claim for unfair conduct of Mexican authorities and breach of the investor's legitimate expectations.

The second dimension of the preventive role of ESIAs relates to International Investment Law and arbitrations. In this sense, ESIAs can be a tool to prevent the recourse to arbitration[51], to safeguard public decisions and even to protect investors' interests.

First, this preventive role in IIL is related to the preventive function for environmental and social concerns. Environmental or human rights abuses caused by investors' activities may provoke a reaction from the host State and the local population, causing social problems or environmental damage and convincing the host State to revoke project permits. As a result, the investor may react to protect its investment, even proposing arbitration. ESIAs could therefore prevent these violations and tensions between the host State, investors, and population, and thus prevent potential ISDS.

In this context, ESIAs primarily benefit the host State. Decisions by public authorities that affect investors' interests may not appear arbitrary or unjustified if they depend on the results of ESIAs, and this could prevent potential claims by investors. Alternatively, host States could condition project approvals on the results of ESIAs, thereby preventing the emergence of legitimate investor expectations. ESIAs can therefore protect and justify public policies and decisions.

However, the sole existence of ESIAs legislation in the host State is insufficient to prevent arbitration and safeguard the choices of public authorities. What is needed is clear and complete legislation that is applied fairly and correctly.

Nevertheless, if investors were to file a claim, the host State would use

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[48] Burlington Resources Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, award on liability 14 December 2012.

[49] Burlington Resources Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, decision on counterclaim 7 February 2017.

[50] Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB(AF)/97/1, award 30 August 2000; A. TAMAYO, *The New Federalism in Mexico and Foreign Economic Policy: An Alternative Two-Level Game Analysis of the Metalclad Case*, in *Latin American Politics and Society*, vol. 43, 2001, n. 4, pp. 67–90; F. EL-HOSSENY, *Civil Society in Investment Treaty Arbitration: Status and Prospects*, Brill, Leiden, 2018, pp. 77 – 80.

[51] F. FRANCIONI, *Dispute Avoidance in International Environmental Law*, in *Economic Globalization and Compliance with International Environmental Agreements,* edited by D. SHELTON, A. KISS, Wolters Kluwer, The Hague, 2003, p. 235; V. VADI, *Environmental impact assessment in investment disputes: Method, governance and jurisprudence*, cit.

the ESIAs as a defence to justify its decision and discourage ISDS claims[52].

ESIAs benefit investors as well as States. They can prevent the creation of legitimate false expectations and avoid the commencement of investments in States where negative assessments have been made (with potential denial of permits or subsequent revocation), thus avoiding wasted time and resources. In this sense, even the cost of an impact assessment is lower and preferable than the costs of a failed investment and a hypothetical ISDS[53].

5. Potential concerns.

Despite the benefits, ESIAs are not a *panacea*[54], and using impact assessments can also have negative effects, both from a substantial and ISDS dimension.

From a substantial dimension, the first problem is the uncertainty about sources[55]. Even today, ESIAs procedures are mainly regulated at the national level [56], but this legislation may be absent, uncertain, constantly changing, or inadequate to deal with complex investment projects.

The main problem, however, is whether ESIAs legislation exists but is ineffective, not applied, or misapplied. The reasons for these inefficiencies can be manifold, such as the inadequacy of the authorities responsible for carrying out ESIAs, the lack of capacity to analyse complex projects, pressure from governments and investors, or corruption[57].

Poorly or inadequately conducted ESIAs could have the opposite effect of what they are supposed to prevent because they fail to assess the likely or potential negative impacts of investment projects. This could lead to the approval of projects that are deemed safe, but which later turn out to be unsafe and produce 'foreseeable but unforeseen' negative externalities for the environment, local communities, and human rights[58]. In these cases, the

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[52] In Glamis Gold, Ltd. v. The United States of America, UNCITRAL for example the EIA's outcomes against the open-mine project was a strong argument in favour of USA.

[53] F. FRANCIONI, *Diritto internazionale degli investimenti e tutela dei diritti umani: convergenza o conflitto?*, cit., p. 433.

[54] In the same term but regarding *ex ante* regulatory impact assessment RENDA, *Impact assessment in the EU: the state of the art and the art of the state*, Brussel, 2006, pp. 41 - 44, 79, 88, 135.

[55] S. ROBERT-CUENDET, *Protection of the environment and international investment law*, in *Research Handbook on Foreign Direct Investment*, edited by M. KRAJEWSKI, R.T. HOFFMANN, Edward Elgar Publishing, Cheltenham/Northampton, 2019, p. 606.

[56] A.K. BJORKLUND, *Sustainable development and international investment law*, cit., pp. 52 – 53.

[57] L. COTULA, *Foreign investment, law and sustainable development*, cit. See in particular p. 79: «*Recurring problems include: inadequate company systems and expertise; lack of institutional capacity in the government agencies that scrutinise impact studies and subsequently monitor compliance with management plans; lack of institutional independence between the project proponent and the party (often a consultant) carrying out the assessment; and weak negotiating power of environmental agencies with other ministries when it comes to investment decision making*.

[58] Compliance Advisor/Ombudsman, November 2003, Assessment Report on the complaint regarding the Zambia Konkola Copper Mine Project; Assessment Report of a complaint in relation to the Marlin Mining Project in Guatemala, cit.; G.W. FERNANDES ET AL, *Deep into the mud: ecological and socio-economic impacts of the dam breach in Mariana, Brazil*, in *Natureza & Conservação*, vol.14, 2016, n. 2, pp. 35–45; R.M. TÓFOLI ET AL, *Gold at what cost? Another megaproject threatens biodiversity in the Amazon*, in *Perspectives in Ecology*

authorities may be unprepared to react because the project was approved and considered safe.

Moreover, even in cases where ESIAs are well done, the possibility of exceptional and unforeseen events remains[59].

Substantial problems are also reflected in the IIL and ISDS dimensions.

ESIAs do not preclude the recourse to arbitration, and investors could challenge both the fact that ESIAs have been enforced and how they have been enforced[60].

Indeed, from an investor's perspective, ESIAs can be positive, but they can also hinder or slow down investment activities. Thus, ESIAs can be a «*pervasive form of interference with investment activities*» and affect the profitability of investments[61].

Nevertheless, investors are much more likely to challenge how ESIAs are carried out than the reasons to require them[62]. Looking at the case law, ESIAs have been challenged in particular for: the methodologies applied[63]; inefficiencies and misinformation[64]; the timing to conduct them, especially if requested after project approval (when the investor has already started its activities, or there is already a legitimate expectation)[65]; the use of ESIAs by Host States as a pretext to revoke investment approvals no longer desired[66].

Moreover, even a positive impact assessment and project approval do not provide investors with a full guarantee. Events such as political changes or new legislation could lead to reconsider the project approval, but this change would be contrary to investors' expectations and would breach investors' rights under the IIAs[67].

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and Conservation, vol. 15, 2017, n. 2, pp. 129–131 for the concerns about Volta Grande project in Brasil.

[59] S. SCHACHERER, R.T. HOFFMANN, *International investment law and sustainable development*, cit., p. 488.

[60] G. MAYEDA, *Integrating Environmental Impact Assessments into International Investment Agreements*, cit., p. 138. Ascent Resources Plc and Ascent Slovenia Ltd v. Republic of Slovenia, Notice of Intent 23 July 2020.

[61] R. PAVONI, *Environmental Rights, Sustainable Development, and Investor-State Case Law*, cit., p. 476; V. VADI, *Environmental impact assessment in investment disputes: Method, governance and jurisprudence*, cit., p. 190; G. MAYEDA, *Integrating Environmental Impact Assessments into International Investment Agreements*, cit. pp. 132, 138. The Renco Group, Inc. v. Republic of Peru [I], ICSID Case No. UNCT/13/1.

[62] V. VADI, *Environmental impact assessment in investment disputes: Method, governance and jurisprudence*, cit., p. 190; L. COTULA, *Foreign investment, law and sustainable development*, cit., p. 80 ss.

[63] Methanex Corporation v. United States of America, UNCITRAL, Final Award 3 August 2005.

[64] COUNCIL OF EUROPE, COMMITTEE ON LEGAL AFFAIRS AND HUMAN RIGHTS, *Human rights compatibility of investor–State arbitration in international investment protection agreements*, p. 14.

[65] Glamis Gold, Ltd. v. The United States of America, UNCITRAL, Award 8 June 2009; MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7**,** Award 25 May 2004**.**

[66] Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7, Award 13 November 2000; Chemtura Corporation v. Government of Canada, UNCITRAL, Award 2 August 2010, (para. 35 and 41); Bilcon v Canada, UNCITRAL, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015

[67] Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB(AF)/97/1, award 30 August 2000; Copper Mesa Mining Corp. v Ecuador, PCA Case No. 2012-2, award 15

Another key issue is the *chilling effect*[68] that could result from the fear of arbitration due to ESIAs. First, the chilling effect could hinder the introduction or strengthening of ESIAs legislation (*regulatory chill*). Second, the threat of ISDS could influence the administrative authorities responsible for ESIAs, which might hesitate to enforce or implement stringent EIA procedures or be induced to make more investor-friendly assessments, even for ESIAs concerning local companies[69].

Finally, in International Law the obligation to conduct impact assessments is often imposed only on States, not on investors[70]. Therefore, the investor is usually not internationally responsible for not conducting ESIAs.

Concluding and summarizing, this is the paradox: ESIAs are supposed to be a preventive tool, but they risk causing the same negative impacts they are supposed to prevent.

6. Conclusion and proposals.

As explained above, ESIAs for international investment activities have positive and negative aspects. On the one hand, they are a tool for preventing human rights and environmental abuses and for ISDS. On the other hand, they can contribute to and cause both human rights and environmental abuses and ISDS claims.

Some proposals are therefore suggested to strengthen the preventive and positive role of ESIAs without increasing the negative externalities.

1. Reform IIAs. In particular, introduce ESIAs[71] and integrate them with other IIAs provisions. Integrating social and environmental concerns into IIL is a significant challenge for modern IIAs, and ESIAs could prevent the occurrence of potential human rights or environmental violations and the recourse to ISDS. The introduction and integration of ESIAs into IIAs could also provide greater certainty about the mutual obligations of host States and investors, clarify ESIAs procedures, and define the interaction between

March 2016; Pac Rim Cayman LLC v. Republic of El Salvador, ICSID Case No. ARB/09/12, award 14 October 2016; Infinito Gold Ltd. v. Costa Rica, ICSID Case No. ARB/14/5, Award 3 June 2021.

[68] K. TIENHAARA, *Regulatory chill and the threat of arbitration: A view from political science*, in *Evolution in Investment Treaty Law and Arbitration*, edited by C. BROWN, K. MILES, Cambridge University Press, Cambridge, 17/11/2011[1], pp. 606–628.

[69] G. MAYEDA, *Integrating Environmental Impact Assessments into International Investment Agreements*, cit., pp. 144 ss. See also dissenting opinion *Bilcon v Canada*, UNCITRAL, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015 by Professor Mc Rae.

[70] Pulp Mills on the River Uruguay (Argentina v. Uruguay), I.C.J. Reports, 2010, (I), Exhibit CL-127, par. 101; Construction of a Road in Costa Rica Along the San Juan River (Nicaragua v. Costa Rica), I.C.J. judgement, 2015, par. 101, 104; Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic, ICSID Case No. ARB/14/3, Final Award 27 December 2016 par. 275-6.

[71] R. PAVONI, *Environmental Rights, Sustainable Development, and Investor-State Case Law*, cit.; V. VADI, *Environmental impact assessment in investment disputes: Method, governance and jurisprudence*, cit.; J. A. VANDUZER, P. SIMONS, G. MAYEDA, *Integrating sustainable development into international investment agreements: a guide for developing country negotiators*, cit.; G. MAYEDA, *Integrating Environmental Impact Assessments into International Investment Agreements*, cit.; L. JOHNSON, *FDI, international investment agreements and the sustainable development goals*, cit.; S. DEVA, *International Investment Agreements and Human Rights*, cit., p. 1751.

ESIAs and investors' legitimate expectations.

2. Effective implementation of ESIAs. As explained above, the main problem with ESIAs in investment arbitration seems how they are conducted. It is crucial to clarify their scope, methodology, and application. Furthermore, Host States and investors should strive to implement ESIAs as best as possible. Poor ESIAs lead to higher risks and a higher likelihood of ISDS claims.

3. Adopt an SDGs approach. As investment activities have an impact on all dimensions of sustainable development (environmental, social, and economic), ESIAs must be designed with the SDGs in mind. In this sense, ESIAs could allow States to respect and fulfil national and international sustainable development obligations. In this context, the SDGs could also define the evaluation criteria in ESIAs[72]. As the case law demonstrates, carrying out impact assessments is certainly time-consuming and costly, but failing to carry out impact assessments or carrying them out inadequately has far more negative consequences.

[72] M. NILSSON, Å. PERSSON, *Policy note*, cit.

CLEAN INVESTMENTS, SDGs AND THE LOCAL COMMUNITIES IN THE ARCTIC

REETTA TOIVANEN, MAIJA LASSILA AND TUIJA VON DER PÜTTEN

TABLE OF CONTENTS: 1. Introduction. - 1.1 Research question, background and main methods. - 1.2 Arctic region and the SDGs. - 2. What are clean investments in the Arctic. - 3. Case study: *Sakatti* mine project and reindeer herding in *Sodankylä*. - 4. Case study: Wind energy and Indigenous and local peoples. - 4.1 *Rástigáisá* case. - 5. Conclusions.

ABSTRACT: *In 2015, the United Nations General Assembly introduced a transformative agenda through the Sustainable Development Goals (SDGs), constituting a global commitment to address critical economic, environmental, and social challenges. The primary objective of the SDGs is to harmonize economic growth, environmental preservation, and social inclusion. The SDGs, taking an all-encompassing and interdisciplinary approach, straddle the spheres of economics, environment, and socio-political affairs, with a particular emphasis on the unique challenges faced by developing nations. Yet, amid their noble intentions and global scope, the SDGs have encountered criticism for their top-down approach, which heavily relies on governments and international organizations. This approach has proven to be a significant obstacle to effective local-level implementation. This article explores the specific challenges encountered during the transition towards sustainable and climate-neutral economy, with a focus on clean investments in the Nordic Arctic region. This region, with its distinctive biocultural environment, presents a unique context for examining the intricacies of the SDGs. The study presents two case studies, a multimetal mine project in Arctic Finland and wind energy project on Sámi Indigenous home region in the Nordic Countries, examining the effects of these projects on Indigenous peoples and local peoples' traditional livelihoods. The article also considers the "more-than-human" stakeholders, acknowledging the interconnectedness of human and environmental elements. Critically analysing the SDGs, the article highlights the necessity of addressing the complex biocultural environment in the pursuit of these goals. In the context of clean energy investments, the concepts of energy justice and the rights of Indigenous and local communities emerge as central components. A comprehensive evaluation of what constitutes a genuinely "clean" investment necessitates a deep understanding of who benefits from these initiatives and who might bear the burdens.*

KEYWORDS: *Arctic, clean investments, SDGs, indigenous peoples, mining, wind power.*

1. Introduction

In 2015, the United Nations General Assembly introduced a set of 17 new global objectives known as the Sustainable Development Goals (SDGs),

part of the UN Resolution Agenda 2030. These goals were built upon the earlier Millennium Development Goals (MDGs)[1]. The primary aim of the SDGs is to merge economic growth, environmental preservation, and social inclusion. These 17 SDGs encompass 169 specific targets, which include 43 targets focused on implementing the goals and 232 distinct indicators. These indicators serve as practical tools designed to assist countries in both executing and monitoring their progress towards achieving these SDGs. Essentially, they act as scorecards, tracking how far each target has been accomplished[2].

The SDGs adopt a comprehensive and interdisciplinary approach, bridging the realms of economic, environmental, and socio-political matters, with a specific emphasis on addressing the needs of developing nations. However, the SDGs have faced criticism for their top-down approach, heavily reliant on governments and international organisations, making it challenging to implement these goals effectively at the local level[3]. Developments in sustainability science increasingly emphasise new collaborative ways of knowledge production and practices, such as participatory action, citizen science as well as co-creative and transformational research[4].

It is also widely acknowledged within the academic discourse that the realisation of human rights plays a pivotal role in the attainment of sustainable development objectives. This correlation is substantiated by the seminal document titled "Transforming our world: The 2030 Agenda for Sustainable Development," which was formally adopted by the United Nations General Assembly on 21 October, 2015[5]. Central to the overarching framework of this agenda is the fundamental principle that all policies and processes devised for the effective implementation of the Sustainable Development Goals (SDGs) must be firmly anchored in the realm of universal human rights. Thus, the Agenda is explicitly anchored in international human rights standards and affirms realising human rights for all as its goal, meaning that minority and Indigenous concerns also need to be addressed at a similar level to that of the majority's[6].

The Arctic region presents a special challenge to the implementation of the SDGs. The Arctic is a polar region consisting of the northern parts of

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[1] SACHS*, From Millennium Development Goals to Sustainable Development Goals. The Lancet*, 2012, pp. 2206–2211, https://doi.org/10.1016/S0140-6736(12)60685-0.

[2] HANSSON ET AL., *Governance for sustainable urban development: The double function of SDG indicators. Area Development and Policy*, 2019, pp. 217–235, https://doi.org/10.1080/23792949.2019.1585192.

[3] HAJER ET AL., *Beyond Cockpit-ism: Four Insights to Enhance the Transformative Potential of the Sustainable Development Goals. Sustainability*, 2015, pp. 1651–1660, https://doi.org/10.3390/su7021651; TOIVANEN & CAMBOU, *Human Rights*. In KRIEG & TOIVANEN (eds.), *Situating Sustainability: A Handbook of Concepts and Contexts*, Helsinki University Press, 2021, https://doi.org/10.33134/HUP-14-4.

[4] NORSTRÖN ET AL., *Principles for knowledge co-production in sustainability research. Nature Sustainability*, 2020, pp. 182–190, https://doi.org/10.1038/s41893-019-0448-2; SOININEN ET AL., *Bridge over troubled water: managing compatibility and conflict among thought collectives in sustainability science. Sustainability Science*, 2022, pp. 27–44, https://doi.org/10.1007/s11625-021-01068-w.

[5] United Nations General Assembly Resolution A/RES/70/1.

[6] TOIVANEN & CAMBOU, *Human Rights*. In KRIEG AND TOIVANEN (eds.), *Situating Sustainability: A Handbook of Concepts and Contexts*, Helsinki University Press, 2021, https://doi.org/10.33134/HUP-14-4.

Canada, the USA, Russia, Greenland, Finland, Norway and Sweden, and is deeply affected by climate change as well as the costs of the sustainable transition of resource-intensive industry sectors[7]. Arctic is warming four times faster than the rest of the world[8] and this creates more risks for industries and uncertainty to subsistence-based livelihoods such as reindeer husbandry[9]. There are fewer options for adapting land-based livelihood to changes as climate change is making seasons unpredictable. The warming climate and the competing land use by industries diminishes the space for nature-dependent livelihoods such as reindeer herding[10].

The Nordic Arctic region is a sparsely populated area inhabited also by ca 10% of Indigenous peoples engaged in traditional livelihoods, such as reindeer husbandry and 90% of other professions such as tourism, forestry and services. Despite being known for its harsh climate and remoteness, the Arctic region has become the 'new frontier of economic growth' providing opportunities for economic activity, especially in the areas of renewable energy and production of raw materials for the green transition[11]. The EU has recognised this and sees the region's potential for clean energy production as well as becoming a significant supplier of critical raw materials[12]. To achieve sustainable development and climate mitigation goals, all Arctic countries are currently engaged in small- or large-scale renewable energy production projects in their northern areas ranging from solar and wind parks to mineral production. The region does provide new opportunities for wind, hydro, tidal, geothermal, solar, and biomass energy production, and to the extractives industry, but at the same time renewable energy and extractive industry projects cause conflict with Indigenous and local people's rights and their livelihoods.

1.1 Research question, background and main methods

The main question for this article is what the specific challenges are in the process of so-called green or clean transition, and investment in this transition, when looking at the Nordic Arctic region, meaning the Arctic areas of Finland, Norway, and Sweden, and its inhabitants and more-than-human

[7] TERÄS ET AL., *Sustainable development and Sustainable Development Goals in Smart Specialisation strategies in the European Arctic regions*, Publications Office of the European Union, 2023, https://doi.org/10.2760/671740.
[8] RANTANEN ET AL., *The Arctic has warmed nearly four times faster than the globe since 1979. Communications Earth & Environment*, 2022, pp. 1-10.
[9] MUSTONEN & LEHTINEN, *Arctic Earthviews: Cyclic Passing of Knowledge among the Indigenous Communities of the Eurasian North, Sibirica: Journal of Siberian Studies*; 2013, DOI:10.3167/sib.2013.120102.
[10] NYSTEN-HAARALA ET AL., *Wind energy projects and reindeer herders' rights in Finnish Lapland: A legal framework. Elementa*, 2021, available at: https://www.proquest.com/scholarly-journals/wind-energy-projects-reindeer-herders-rights/docview/2738663835/se-2 (accessed September 11, 2023).
[11] Guggenheim, *Financing Sustainable Development in the Arctic Responsible Investment Solutions for the Future*, 2019, available at: https://www.guggenheiminvestments.com/cmspages/getfile.aspx?guid=02cd94e0-3d73-423c-a4ac-24141d3a0950.
[12] European Commission, *Joint Communication: A stronger EU engagement for a peaceful, sustainable and prosperous Arctic*. JOIN (2021) Final 27, available at: https://www.eeas.europa.eu/sites/default/files/2_en_act_part1_v7.pd.

stakeholders. The paper takes a critical approach to the SDGs pointing out that in implementing them, the complex biocultural environment needs to be addressed. In investing in clean energy, energy justice and Indigenous and local peoples' rights are central to a comprehensive analysis of what makes an investment "clean" and to whom.

We used mixed methods in researching this article, from legal and policy analysis to study the frameworks in which clean investments take place, to ethnographic methods for the case studies. The article consists of an introduction followed by a section setting the scene by presenting the Nordic Arctic region and its special environmental and political position. The third section focuses on giving an overview of clean investments in the Nordic Arctic in the context of EU directives and regulations, followed by two case studies. The fourth section discusses the case of Sakatti mine in the municipality of Sodankylä in North Finland, and the fifth section presents a case study of the Sámi Indigenous home region in the Nordic countries facing the challenge of clean energy investment in a form of wind parks. The focus of this article is on the challenges of sustainable development goals and clean investments in the Nordic Arctic areas (Arctic Finland, Arctic Norway, and Arctic Sweden). At the end, we will conclude that the discussion on the failures and successes of the investment in green and clean energy has just started and further research is acutely needed.

1.2 Arctic region and the SDGs

The Arctic region stands as a remarkable locus of considerable environmental and sociocultural diversity, characterised by unique challenges, including the alarming pace of temperature rise, shifting demographic patterns, and geopolitical complexities[13]. Despite being geographically encompassed within the territories of eight different nation-states, the Arctic assumes a distinctive international character, notably exemplified by the establishment of the Arctic Council in 1996[14]. Consequently, it is imperative to explore global strategies from an Arctic-centric perspective to enhance comprehension of the region's distinctive environmental and sociocultural dynamics.

The adoption of the 17 Sustainable Development Goals (SDGs) along with their accompanying 232 indicators, although commendable on a global scale, has been critiqued for their inadequacy in capturing the economic and cultural intricacies intrinsic to sustainable development in the Arctic context[15]. This insufficiency underscores the imperative of tailoring international sustainability initiatives to better suit the unique challenges and opportunities presented by the Arctic region.

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[13] NILSSON & LARSEN, *Making Regional Sense of Global Sustainable Development Indicators for the Arctic. Sustainability*, 2020, https://doi.org/10.3390/su12031027.

[14] KESKITALO, *International Region-Building: Development of the Arctic as an International Region. Cooperation and Conflict*, 2007, pp. 187–205, https://doi.org/10.1177/0010836707076689.

[15] SKÖLD ET AL., *The SDGs and the Arctic: The need for polar indicators. 9.* Paper presented at Arctic Observing Summit 2018, Davos, Switzerland; NILSSON AND LARSEN, *Making Regional Sense of Global Sustainable Development Indicators for the Arctic. Sustainability*, 2020, p. 1027, https://doi.org/10.3390/su12031027.

Notably, the indigenous populations, comprising approximately 10% of the Arctic's inhabitants, confront particularly acute consequences stemming from the adverse impacts of climate change on Arctic marine and freshwater ecosystems. These environmental shifts pose severe threats to the traditional livelihoods and subsistence practices of these indigenous communities[16]. Consequently, a nuanced understanding of the interplay between global sustainability objectives and the distinctive circumstance of the Arctic is indispensable in addressing the pressing challenges faced by its inhabitants.

1. What are clean investments in the Arctic?

The Arctic region has long been a source of fossil fuel extraction, and such activities still count for a significant part of economic output in many countries in the region. Norway, Alaska and Russia have well-established oil and gas industries operating in the region producing a large portion of these states' annual revenues. Beyond the region's massive fossil fuel reserves, the Arctic is also seen as having an immense potential for clean investments[17]. Clean (or green) investments are investments in renewable energy production, sustainable building and infrastructure, clean technology and innovation, and sustainable agriculture and forestry[18]. Clean energy investments, both public and private, have especially become the key to reaching sustainable development goals, improving energy security, greenhouse gas reduction and climate neutrality targets set by the SDGs and the Paris Agreement.

The Arctic region is expected to provide an alternative for supplying many of the vital materials for the global green transition as well as a key to supplying green energy to facilitate the transition. Because of the need to become climate-neutral by 2050, in line with the European Green Deal and the Paris Agreement, and the abundance of renewable energy potential in the Arctic, massive investments are already being made into wind energy, hydrogen generation stations, solar parks, mining explorations and battery manufacturing in many areas of the Arctic[19]. Indeed, as the global investment in clean energy is about USD 1.7 trillion annually (IEA, 2023)[20], many companies are looking for new investment opportunities in the Arctic region.

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[16] NUTTALL, *Arctic Environments and Peoples*. In CALLAN (ed.), *The International Encyclopedia of Anthropology*, Wiley Online, 2018, https://doi.org/10.1002/9781118924396.wbiea1480.

[17] KOIVUROVA & NATCHER, *Introduction: Renewable economies in the Arctic*. In NATCHER & KOIVUROVA (eds.), *Renewable Economies in the Arctic*, Routledge, Routledge Research in Polar Regions, 2022, https://doi.org/10.4324/9781003172406-1; European Commission, *Joint Communication: A stronger EU engagement for a peaceful, sustainable and prosperous Arctic*. JOIN (2021) Final 27, available at: https://www.eeas.europa.eu/sites/default/files/2_en_act_part1_v7.pd.

[18] GOLUB ET AL., *Defining and Measuring Green FDI: An Exploratory Review of Existing Work and Evidence*. OECD Working Papers on International Investment, 2011/02, OECD Publishing, available at: http://dx.doi.org/10.1787/5kg58j1cvcvk-en (Accessed 5 Oct 2023); International Energy Agency (IEA), *World Energy Investment 2023.* IEA Publication*, 2023.*

[19] MIDDLETON ET AL., *Innovative Business in the Arctic: Many Ways to Success, Business Index North*, February 2020; Arctic Economic Council, *Sustainable Investment Opportunities in the Arctic,* 2022, available at: https://arcticeconomiccouncil.com/wp-content/uploads/2022/10/sustainable-investment-opportunities-october-2022-low-res-3.pdf (Accessed 5 Oct 2023).

[20] International Energy Agency (IEA), World Energy Investment 2023. IEA Publication, 2023.

The Arctic contains vast quantities of mineral resources, which have attracted metal mining and exploration by domestic and international investors[21]. The region has been the site for mining for centuries, currently for example generating a turnover of EUR 460 million in Finnish Lapland and producing roughly 20% of GDP in Canada's Northwest Territories[22]. However, mining companies are now looking for key raw materials from the region needed to build clean technologies. Clean energy technologies – from solar panels and wind turbines to battery storage – require many critical minerals that are found in the Arctic region. According to a World Bank Group Report, the production of minerals, such as lithium, cobalt and graphite, could increase by 500% by 2050 just to meet the demand for the shift to a low-carbon economy[23]. Many of these energy transition minerals and metals are located on or near Indigenous people's lands[24]. Since the current supply of key raw materials is highly centralised concentrating on China,[25] the USA, the EU, and Canada aim to diversify their supplies through minerals found in the Arctic and have already made legislative proposals to make it easier for investors to invest in these projects[26]. For the EU, diversification and a secure supply of rare minerals, such as cobalt and platinum, has become a top priority since there is a risk of shortage in the coming years. Currently, a big part of the EU's domestic mineral supply comes from the Nordic countries. The EU aims to create favourable conditions for mining in the European north and hopes for developing rare earth minerals and raw materials further in the Nordic Arctic to increase domestic mineral production[27]. In March 2023, the EU published a proposal for Critical Raw Materials Act,[28] which aims to ensure that the EU has access to secure and sustainable supply of critical raw materials. The Act aims to streamline permitting procedures for accessing critical raw materials so that strategically important mining projects could be approved in expedited permitting processes. Similarly, the Biden administration in the USA adopted the new Inflation Reduction Act,[29] which includes large tax breaks for mining companies that produce required critical raw materials.

In the efforts to transition away from fossil fuel energy production, wind energy holds tremendous potential, making it one of the more prominent sources of energy generation in the world's efforts to combat climate

[21] DALE ET AL., *The Will to Drill – Mining in Arctic Communities*. Cham, Springer, 2018.
[22] Arctic Economic Council, *Sustainable Investment Opportunities in the Arctic,* 2022, available at: https://arcticeconomiccouncil.com/wp-content/uploads/2022/10/sustainable-investment-opportunities-october-2022-low-res-3.pdf (Accessed 5 Oct 2023).
[23] HUND ET AL., *Minerals for Climate Action: The Mineral Intensity of the Clean Energy Transition*. World Bank Group Report, 2020.
[24] OWEN ET AL., *Energy transition minerals and their intersection with land-connected peoples*. *Nature Sustainability*, 2023, pp. 203-211.
[25] China produces 95% of the world's current supply of rare earth minerals. See PUI-KWAN TSE, *China's Rare-Earth Industry*. U.S. Geological Survey, Reston, Virginia, 2011.
[26] JONSSON ET AL., *Critical metals and minerals in the Nordic countries of Europe: diversity of mineralization and green energy potential*. *Geological Society*, 2023, pp. 95-152.
[27] ARNARSSON ET AL., *Strategic Assessment of Development of the Arctic: Assessment conducted for the European Union*. European Union, 2014.
[28] 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 materials and amending Regulations (EU) 168/2013, (EU) 2018/858, 2018/1724 and (EU) 2019/102.
[29] An Act To provide for reconciliation pursuant to title II of S. Con. Res. 14.

change[30]. The open landscapes and remoteness of the Arctic region provide an ideal place for onshore wind farms and large-scale wind energy projects have already been developed or are being developed in Alaska, north Canada, Russia and in Nordic Arctic areas. For example, Norway's biggest land-based wind park located in the Fosen Peninsula in Lapland has the capacity to supply energy to more than 170,000 households. Sweden and Finland also have several ongoing wind park projects in Lapland, which have raised a lot of controversy[31]. As the EU has set legally binding targets requiring 42.5% of EU energy to be renewable by 2030 (Renewable Energy Directive, EU RED III), it means that the Nordic Arctic will see many more wind farm projects in the future.

The increasing economic activity and clean investments in the region have positive as well as negative impacts on sustainable development of the Arctic. Clean energy projects create jobs and provide economic development, but they also have negative effects on the environment and Indigenous peoples' and local peoples' livelihoods. The rights of Indigenous people and the local people's right to a livelihood is often in conflict with the objectives of large companies operating in the area. Renewable energy projects often face opposition from local communities and Indigenous groups and are sometimes referred to as 'green colonialism' or 'green sacrifice zones'[32]. The decisions on the locations of these projects and concerns over their environmental and social impacts have generated protests and court cases in the Nordic Arctic[33]. As businesses are intensifying their operations in the Arctic to access valuable raw materials or to build renewables power installations that are needed for the green transition, they might overlook local peoples' perspectives and knowledge.

Local people's concerns, environmental and social impacts of investment projects in the Arctic as well as global calls for more responsible business behaviour have triggered demands for purveyors of renewables projects to engage meaningfully with the local communities as well as to learn from traditional knowledge[34]. Clean investment projects should not repeat the

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[30] According to the International Energy Agency, wind energy is the leading non-hydro renewable technology, generating over 2 100 TWh in 2022 (IEA, World Energy Outlook 2022). Global investments in wind energy technologies are annually around 160 billion Euros, Europe investing annually about 17 billion Euros (See BRIDLAY, *Financing and investment trends: The European wind industry in 2022*. Wind Europe, March 2023).

[31] For example, Nuolivaara wind farm in Finland and Lehtirova wind farm in Sweden.

[32] ZOGRAFOS, *The contradictions of Green New Deals: green sacrifice and colonialism*. *Soundings*, 2022, pp. 37-50; NORMANN, *Green colonialism in the Nordic context: Exploring Southern Saami representations of wind energy development*. *Journal of Community Psychology*, 2021.

[33] See for example BUHMANN et al., *Towards Socially Sustainable Renewable Energy Projects Through Involvement of Local Communities: Normative Aspects and Practices on the Ground*. In NATCHER & KOIVUROVA (eds.), *Renewable Economies in the Arctic. Routledge*. Routledge Research in Polar, 2021, https://doi.org/10.4324/9781003172406-1; CAMBOU ET AL., *Reindeer husbandry vs. wind energy: Analysis of the Pauträsk and Norrbäck court decisions in Sweden*. In TENNBERG ET AL. (eds), *Indigenous Peoples, Natural Resources and Governance: Agencies and Interactions*. Routledge Research in Polar Regions, Routledge, Abingdon, 2021, pp. 39-58.

[34] The renewable energy sector struggles not only in the Arctic regions but also globally with allegations of serious human rights violations. See for example Renewable Energy & Human Rights Resource Centre, *Renewable Energy & Human Rights Benchmark. Key Findings from*

mistakes made by the fossil fuel industry. Companies operating on Indigenous people's lands should obtain free, prior and informed consent (FPIC) from the local community as recognised in the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) before any official approval of the project[35]. Industry-led soft-law instruments have also been developed recently to create more responsible corporate behaviour. A new regulatory instrument, the Arctic Investment Protocol drafted by the World Economic Forum (WEF), for example promotes traditional knowledge as a key principle for sustainable investing (Principle 5, Arctic Investment Protocol). Additionally, the Arctic Economic Council has developed its own Code of Ethics. Although these regulatory instruments are soft law and therefore non-binding, they should be endorsed by all multinational companies and industry groups operating in the Arctic and influence the behaviour of businesses and investors in the region.

2. Case study: Sakatti mine project and reindeer herding in Sodankylä

Arctic Finland is becoming a hotspot for both mining and wind energy investment, as shown in the previous subsection, with heterogenous local responses to the transformations. An aspect that drives the current industrial expansion in Lapland and creates a favourable mining policy today for transnational investors and companies is the historical view of the North as a resource periphery[36]. After the Second World War Lapland was viewed by politicians as being open to extraction. Extensive hydro energy production, forestry and mineral exploration in Lapland contributed to the modernisation and reconstruction of society while local subsistence ways of life and Indigenous Sámi territorial relations were ignored[37]. The current societal and political discourse on the transition follows a line, where Lapland's resources are viewed as indispensable for society and providing solutions to climate change. Within the EU's clean energy and raw materials self- sufficiency policies, the state's goal is to expand mining in Finland[38]. The situation is such that all forms of mining are increasingly being legitimated as providing a solution to climate change despite growing environmental concerns and accumulating impacts. Finland's system is based on claims. Whoever finds

the Wind&Solar Sectors (2021 edition), available at: https://media.business-humanrights.org/media/documents/2021_Renewable_Energy_Benchmark_v5.pdf (Accessed 5 Oct 2023); and H. Agrawal,L. El-Katiri, K. Muiruri, and S. Szoke-Burke, *Enabling a Just Transition: Protecting Human Rights in Renewable Energy Projects: A Briefing For Policymakers* (April 2023), available at: https://ssrn.com/abstract=4438576 (Accessed 5 Oct 2023).

[35] BUHMANN et al., *Towards Socially Sustainable Renewable Energy Projects Through Involvement of Local Communities: Normative Aspects and Practices on the Ground*. In NATCHER & KOIVUROVA (eds.), *Renewable Economies in the Arctic. Routledge*. Routledge Research in Polar, 2021, https://doi.org/10.4324/9781003172406-1.

[36] TOIVANEN & FABRITIUS, *Arctic Youth Transcending Notions of 'Culture' and 'Nature'. Emancipative Discourses of place for cultural sustainability*. *Current Opinion in Environmental Sustainability*, 2020, pp. 58–64.

[37] See MUSTONEN & MUSTONEN in cooperation with Aikio, A. and Aikio, P., *Drowning reindeer drowning homes: Indigenous Sámi and hydroenergy development in Sompio, Finland*. Snowchange Cooperative, 2010.

[38] Finnish Government, *Valtioneuvoston kirjelmä*. TEM/2023/80, 2023, available at: https://valtioneuvosto.fi/paatokset/paatos?decisionId=0900908f8082a702 (Accessed 5 Oct 2023).

the minerals can claim them and make a reservation that gives them the preliminary right to apply for a mineral exploration permit[39]. Therefore, vast land areas are under private companies' reservations or mineral exploration activities, creating uncertainty for local communities. The state supports mining through infrastructure, financing, and low taxes. Having had no mining tax before, in 2023 Finland decided to begin implementing a mining tax beginning from 2025, although the tax level, based on a royalty model, has been criticised for being exceptionally low compared to other countries with a similar model[40]. Local movements that resist mining, researchers, and some politicians are increasingly questioning whether Finland is giving up its minerals for too low a price, with too few local benefits and too many negative impacts. The yearly "Maamme rikkaudet" ("Our underground riches") forum in Savonlinna, is an example of this.

The Anglo American mining company's Sakatti mine project has raised controversy in the municipality of Sodankylä, where much of the mineral exploration in Finland has now concentrated. Approximately 20 companies conduct exploration in the municipality which is in the mineral potential "greenstone belt" of Central Lapland. The Sakatti ore body which the company discovered in 2009, stands out as particularly promising with high concentrations of minerals such as copper, nickel, cobalt, and platinum group minerals[41]. The ore body is located under the Viiankiaapa mire, an exceptionally biodiverse environment and protected in the EU's Natura 2000 network of protected habitats and species as well as in the national peatland protection programme.

Finnish speaking reindeer herders in the Oraniemi and Sattasniemi co-ops of the municipality, living just to the south of Sápmi, the Sámi homeland, are in a particularly vulnerable position as impacts from mining, state forestry and hydropower over time have already diminished much of their vast natural pasture lands that reindeer need for nutrition[42]. Most of their traditional, collectively used territories have now been reserved for mineral exploration. An exception to this is the Lappi co-op in the north of the municipality which still largely avoided by companies as it is located in Sápmi, but it is seeing increased pressure for mineral exploration[43].

Mining makes large land areas unhabitable for generations to come and creates slowly but steadily accumulating environmental impacts such as water contamination and dust fallouts, in addition to continuous noise and light

[39] Tukes, *Malminetsintä*, 2023, available at: https://tukes.fi/teollisuus/kaivos-malminetsinta-ja-kullanhuuhdonta/malminetsinta (Accessed 5 Oct 2023).

[40] Finnwatch, *Kaivosvero etenee, verotaso kuitenkin matala*, available at: https://finnwatch.org/fi/blogi/989-kaivosvero-etenee-%E2%80%93-verotaso-kuitenkin-matala (Accessed 5 Oct 2023).

[41] Anglo American, *About Sakatti*, available at: https://finland.angloamerican.com/en/about-sakatti (Accessed 5 Oct 2023).

[42] LASSILA, *The Abundant Arctic land: Past and present-day dispossessions of reindeer herders' life worlds in the current expansion of 'green' mining in Sodankylä, Finland*. Forthcoming.

[43] JÄÄSKELÄINEN, *The Sámi Reindeer herders' perceptions of sustainability in the permitting of mineral extraction – contradictions related to sustainability criteria*. *Current Opinion in Environmental Sustainability*, 2020, pp. 49–57, https://doi.org/10.1016/j.cosust.2020.02.002.

pollution[44]. These impacts have already been detected in relation to the municipality's Kevitsa Boliden mine, Finland's second largest mine, which now has been operating for over ten years[45]. It is not only environmental impacts or the economic basis of the livelihood which are of concern, but also the continuity of reindeer herding as an intergenerational way of life. The reindeer herders have a collective social relation to the land, seen for example during reindeer round ups in the fall or reindeer calf marking in the spring[46].

Reindeer herders from both co-ops are against the Sakatti mine but their experience was that they were ignored in the company's environmental impact assessment process during which both the herders and the company representatives acknowledged that it is difficult to estimate the exact impacts to reindeer herding[47]. While the ore deposit is underground, the aboveground factory area, including a planned tailings dust storage field, will be outside the Viiankiaapa mire, potentially affecting reindeer herding[48]. In the exact area of the factory, a herder from Oraniemi tends his herd of approximately 600 animals. The herd's pasture rotation, situated partly in Viiankiaapa and partly on its adjacent lands with the mine factory area, will be directly disturbed by the mine which would mean an end to the herd, in addition to still largely unknown impacts on other herds in the Sattasniemi and Oraniemi co-ops.

The Sakatti case is an example of the complex situation in the country where mining companies begin to influence the state based on climate change and critical minerals, creating pressure to change legislation according to private companies' interests, as the company is planning to push the Finnish government for a change in legislation to dismantle the protection in the Viiankiaapa mire[49]. This push will come after Lapland's regional environmental authority considered the Anglo American environmental impact assessment to be insufficient. There is an elevated risk that the protected mire will dry out from the construction of an underground mine as

[44] HANACEK ET AL., *On Thin Ice – The Arctic Commodity Extraction Frontier and Environmental Conflicts. Environmental Economics*, 2022, https://doi.org/10.1016/j.ecolecon.2021.107247; MANWAR ET AL., *Environmental Propagation of Noise in Mines and Nearby Villages: A Study Through Noise Mapping. Noise Health*, 2016, pp. 185–193, DOI: 10.4103/1463-1741.189246.

[45] LEISTI, *Kevitsan suurkaivoksen jäteallas vuotaa metalleja pohjavesiin–viranomaisia huolettaa nyt myös pintavesien saastuminen*. YLE 13 September 2023, https://yle.fi/a/74-20048867 (Accessed 5 October 2023).

[46] HELLE, *Porolaidunten yhteiskäytön ongelmia: Kokemuksia Sompiosta*. In PYHÄJÄRVI (ed.), *Lokka muutosten näyttämönä*. Acta Lapponica Fenniae, 23. Rovaniemi: Lapin tutkimusseura. 2011, pp. 82–95.

[47] LASSILA, *An Irreplaceable place: Onto epistemological contestation in the environmental impact assessment process of the green Anglo American Sakatti mine*. *Society & Natural Resources*, 2023. https://doi.org/10.1080/08941920.2023.2166182.

[48] Finnish Consulting Group (FCG), *Sakatin monimetaaliesiintymän kaivoshanke. Ympäristövaikutusten arviointiselostus*, 2020, available at: https://www.ymparisto.fi/sites/default/files/documents/LAPPI_Arviointiselostus_Sakatti_30112020 _FINAL_pieni.pdf (Accessed 5 October 2023).

[49] PELLI, *Ely-keskus: Suojelualueen kaivos olisi lainvastainen –Yhtiö jatkaa silti*. *Helsingin Sanomat*, 2023, available at: https://www.hs.fi/talous/art-2000009793466.html (Accessed 5 October 2023).

seen in a similar case in Kaunisvaara, Sweden[50]. The current discourse in Finland and at the EU level of mining as a green solution, is creating a favourable atmosphere to socio-ecologically problematic projects such as Sakatti. More broadly, the creation of "fast tracks" to mining can be viewed as connected to a broader discursive shift in the legitimation processes of extractive industries. Industries that are harmful to the environment participate in society in moulding understandings of nature, "green" and "cleanliness" through their corporate social responsibility strategies and political power so that in certain areas, environmental suffering will become routinised over time[51]. The language of local social and economic development that the industry uses for its benefit is developed in global corporate forums, detached from local democratic processes and experiences[52]. In conclusion, the Sakatti project exemplifies the complex local dynamics of the clean investments transition in Arctic regions with rich resources and cumulating local histories of raw materials extraction or energy production. Currently, the clean investment transition as it is now pushed through corporate and private profit driven interests, is posing a risk to democratic participation and the human rights of land-dependent local groups such as reindeer herders.

3. Case study: Wind energy and Indigenous and local peoples

One important source of clean energy is wind power parks. In Fenno-Scandinavia, most of the existing parks are not (yet) located in the Arctic region but on the coasts. At the same time, the higher tundra areas in the North of Sweden and Finland are well suited due to the lack of forest and altitude[53]. These same areas are also home to the Indigenous peoples, the Sámi. In this case study, we have briefly addressed the complications and lack of equality faced by the Indigenous peoples because their livelihoods are heavily negatively impacted by the rapid climate change in the Arctic but also by the mitigation plans including wind and water energy production. Researchers have referred to the process as "green colonialism"[54].

[50] LEISTI, *Lapin ely-keskus: Suojellulle suolle suunniteltu kaivos edellyttäisi soidensuojelulain muuttamista*. YLE 17 Aug 2023, available at: https://yle.fi/a/74-20045764 (Accessed 5 Oct 2023).

[51] HEIKKINEN ET AL., *The slow violence of mining and environmental suffering in the Andean waterscapes. The Extractive Industries and Society*, 2023, https://doi.org/10.1016/j.exis.2023.101254.

[52] See PARIKKA, *Kirkkaan vihreä tulevaisuus: Fetisismi ja puhtaus Fennoscandian Exploration & Mining 2021 -konferenssissa*. Master's thesis, University of Eastern Finland, 2023; Rajak, *In Good company: An Anatomy of Corporate Social Responsibility*. Stanford University Press, 2011.

[53] NYSTEN-HAARALA ET AL., *Wind energy projects and reindeer herders' rights in Finnish Lapland: A legal framework. Elementa*, 2021, https://www.proquest.com/scholarly-journals/wind-energy-projects-reindeer-herders-rights/docview/2738663835/se-2 (accessed 11 September 2023).

[54] NORMANN, *Green colonialism in the Nordic context: Exploring Southern Saami representations of wind energy development. Journal of Community Psychology*, 2021.

The environmental impact of wind power plants, particularly on reindeer, has also been investigated in Scandinavia[55]. Increased noise pollution, human activities and the building of roads and other structures disturb the reindeer in their grazing as well as causing habitat fragmentation[56]. Wind turbines can further lead to visual disturbance which particularly affects prey animals, such as reindeer[57]. Roads and improved infrastructure as a consequence of wind power plants then promote access to remote areas for human activities unrelated to wind power plants, such as recreation, hunting, and leisure traffic, that can impact animals and lead to habitat loss[58]. Considering that it is planned to build new wind power plants in very remote areas, these landscape changes and environmental impacts can be expected to increase in future[59]. As animals can also become accustomed to new structures, the dimension of disturbance is still uncertain. The impacts of wind power plants on mammals may also depend on the amount and size of wind power turbines in an area[60]. Further research is therefore needed to fully understand how wind turbines and the construction of those impact mammals, especially reindeer, in northern Fennoscandia.

Researchers in Finland, Norway and Sweden have shown that reindeer herding, fishing and forest management have always been considered to be secondary when competing with infrastructure or industry building[61]. This also evidenced in Rástigaisa, a Norwegian case.

4.1 Rástigáisá case

The Finnish company ST1 and the Norwegian companies Vindkraft Nord AS and Ny Energi AS, jointly owned by Grenselandet AS, are planning to build a wind farm called Davvi in the Rástigáisá area. This wind farm will

[55] HELLDIN ET AL, *The impact of wind power on terrestrial mammals: A synthesis*. Swedish Environmental Protection Agency Report 6510. Stockholm, Sweden, 2012; SKARIN & ÅHMAN, *Do human activity and infrastructure disturb domesticated reindeer? The need for the reindeer's perspective. Polar biology*, 2014, pp.1041-1054; SKARIN ET AL., *Wind farm construction impacts reindeer migration and movement corridors. Landscape Ecology,* 2015, pp. 1527-1540; NYSTEN-HAARALA ET AL., *Wind energy projects and reindeer herders' rights in Finnish Lapland: A legal framework. Elementa*, 2021, https://www.proquest.com/scholarly-journals/wind-energy-projects-reindeer-herders-rights/docview/2738663835/se-2 (accessed September 11, 2023).

[56] SKARIN ET AL., *Wind farm construction impacts reindeer migration and movement corridors. Landscape Ecology,* 2015, pp. 1527-1540.

[57] SKARIN & ÅHMAN, *Do human activity and infrastructure disturb domesticated reindeer? The need for the reindeer's perspective. Polar biology*, 2014, pp.1041-1054; SKARIN ET AL., *Out of sight of wind turbines—Reindeer response to wind farms in operation*. *Ecology and Evolution*, 2018.

[58] HELLDIN ET AL, *The impact of wind power on terrestrial mammals: A synthesis*. Swedish Environmental Protection Agency Report 6510. Stockholm, Sweden, 2012.

[59] *Ibid.*; ÖSTERLIN & RAITIO, *Fragmented Landscapes and Planscapes—The Double Pressure of Increasing Natural Resource Exploitation on Indigenous Sámi Lands in Northern Sweden. Resources,* 2020, p. 104, https://doi.org/10.3390/resources9090104.

[60] HELLDIN ET AL, *The impact of wind power on terrestrial mammals: A synthesis*. Swedish Environmental Protection Agency Report 6510. Stockholm, Sweden, 2012.

[61] BRÄNNSTRÖM, *Forestry and reindeer herding on the same land: A legal study on ownership right and right for reindeer herding*. In Swedish: *Skogsbruk och renskötsel på samma mark: En rättsvetenskaplig studie av äganderätten och renskötselrätten*. Umeå University, Umeå, 2017; CAMBOU, *Uncovering injustices in the green transition: Sámi rights in the development of wind energy in Sweden. Arctic Review on Law and Politics*, 2020.

consist of 100 to 267 wind turbines, generating a total capacity of 800 megawatts (MW). The wind energy industrial area would require the space of approximately 8,000 soccer fields, equivalent to 63 square kilometres, and over a hundred kilometres of access roads.

The wind power farm, road network, and electrical connectivity would have a highly negative impact on the Rástigáisá area, both in terms of the environment, culture, and the traditional livelihoods of the Sámi people. The construction of the wind turbines, roads, and power lines would violate the International Labour Organization's Convention No. 169 on Indigenous and Tribal Peoples and Article 27 of the United Nations International Covenant on Civil and Political Rights (ICCPR).

The Sámi Council is particularly concerned about wind power projects because in 2018, the Norwegian government did not comply with the directive of the United Nations Committee on the Elimination of Racial Discrimination (CERD) to halt the construction of a wind power project in the southern Sámi reindeer herding community of Fosen-Njaarken[62].

Rástigáisá holds great spiritual significance for the Sámi people, with numerous ancient sacred sites and cultural treasures dotting its surroundings. However, experts from Siida, the Sámi Museum, have pointed out that the archaeological remnants in the mountain's upland areas have not undergone comprehensive examination, emphasising the need for further research in this regard.

Over the ages, the Rástigáisá region has served as a vital hub for reindeer herding and sustainable interactions with nature. This area plays a crucial role in supporting several Sámi reindeer herding communities, offering enduring job opportunities that help safeguard the Sámi language and heritage. The construction of wind turbines and their associated infrastructure would encroach upon and divide the areas where reindeer graze, disrupting their annual migration routes. Studies have demonstrated that wind power has adverse effects on reindeer and reindeer herding practices. The flickering lights, shadows, and noise from wind turbines startle the reindeer, prompting them to steer clear of the turbines by distances of up to ten kilometres. This, in turn, places additional burdens on reindeer herders in terms of work and expense, while also adversely affecting their mental well-being.

4. Conclusions

The Sustainable Development Goals were developed to foster economic growth that would also accommodate environmental preservation and social inclusion. The SDGs have been criticised for being distant from local realities. In the fragile Arctic region, which is warming four times faster than the rest of the world, the implementation of SDGs while acknowledging

[62] CAMBOU, *Uncovering injustices in the green transition: Sámi rights in the development of wind energy in Sweden. Arctic Review on Law and Politics*, 2020, pp. 310–333; NYSTEN-HAARALA ET AL., *Wind energy projects and reindeer herders' rights in Finnish Lapland: A legal framework. Elementa*, 2021, https://www.proquest.com/scholarly-journals/wind-energy-projects-reindeer-herders-rights/docview/2738663835/se-2 (accessed 11 September 2023), see also above footnote.

and respecting human rights in the context of the region's investment boom for renewable energies and critical and raw materials is topical.

Climate change is one of the more complex issues facing our planet and highlights the need to shift to a sustainable and carbon-neutral economy. Sustainable development goals and the Paris Agreement acknowledge the importance of clean energy investments in this transition. Accelerating the transition to clean energy has created a huge demand for public and private clean investments and made the Arctic a new frontier of renewable energy production as well as a source of critical raw materials needed in the green transition. Although the intentions of clean energy investors might be admirable, there are signs that the renewables industry and the extractive industry are making the same mistakes as the fossil fuel industry: violating Indigenous and local peoples' rights in the Arctic.

The aspiration for the green transition that the world needs should not take place through private profit-driven interests and at the cost of Indigenous people and local communities who have long standing, intergenerational and heterogenic socioecological relations with Arctic lands. On the contrary, the research and decisions which are based on new clean investments should be made collaboratively with local groups, in accordance with their historical experiences of marginality and cumulated effects of resource extraction, as well as through integrating local knowledge of climatic changes into all decision making. The discussion on the failures and successes of clean energy investments in the Arctic region has just begun and further research on how to reach a just transition for all is acutely needed.

MAPPING THE STATE OF CLIMATE LITIGATION IN EUROPE

ANDREA CEROFOLINI

TABLE OF CONTENTS: 1. Introduction. – 2. Domestic cases: the *Urgenda* impact 2.1 French domestic cases. – 2.2 German domestic cases. – 2.3 British domestic cases. – 2.4 Italian domestic cases. – 2.5 Other domestic cases. – 3. European cases. – 3.1 Court of Justice of the European Union. – 3.2 ECtHR. – 4. Concluding remarks.

ABSTRACT: *This contribution aims to provide a general overview of climate litigation in Europe. It begins by examining the landmark Urgenda case, which was the first successful strategic litigation case in this context. Afterward, it briefly reviews significant cases that have emerged in other European countries, including France, Germany, and the United Kingdom. Then, the contribution proceeds to report on ongoing cases in various States, as well as recently initiated litigation. Furthermore, it analyzes the climate-related cases that are currently pending before the European Court of Human Rights, with an expectation of a decision being reached this year. The possible effects of the ECHR Court's decision will be the subject of the conclusion. Most of the information in this contribution is based on the Sabin Centre for Climate Change Law Portal of the Columbia University, School of law*[1].
KEYWORDS: *climate change, climate litigation, human rights, domestic courts, ECtHR.*

1. Introduction

For some scholarship, climate litigation could be broadly defined to includes lawsuits brought before administrative, judicial and other investigatory bodies, in domestic and international Courts and organizations, that raise issues of law or fact regarding the science of climate change and climate change mitigation and adaptation efforts[2]. However, for other authors, the notion of climate litigation can also extend to disputes in which the issue of climate change is a consequence of the lawsuit, but is not part of the judicial arguments used[3].

Usually, all of the plaintiffs' claims are based on the norms of domestic law, with an explicit reference to rights under the ECHR and international climate agreements.

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[1] SABIN CENTRE FOR CLIMATE CHANGE LAW, Columbia Law School, available at: https://climate.law.columbia.edu/.

[2] J. SETZER, C. HIGHAM, A. JACKSON, J. SOLANA, *Climate Change Litigation and Central Banks*, in *European Central Bank Legal Working Paper Series 2021/21*, 2021, Available at SSRN: https://ssrn.com/abstract=3977335 or http://dx.doi.org/10.2139/ssrn.3977335. See also: M. BURGER, J. GUNDLACH, *The Status of Climate Change Litigation: A Global Review* in *Columbia Public Law Research Paper,* 2017, Available at SSRN: https://ssrn.com/abstract=3364568.

[3] J. PEEL, JACQUELINE, H. M. OSOFSKY, *Climate change litigation*, in *Annual Review of Law and Social Science* 16, 2020, p. 23.

Frequently, claimants appeal to domestic Courts complaining about the inadequacy of their states' climate policies and requesting that their governments be ordered to: take appropriate measures to reduce greenhouse gas emissions (GHGE) to a level compatible with keeping the average temperature within 1.5°; take the necessary measures to mitigate the effects of climate change, take the necessary measures to adapt to the effects of climate change[4]. Moreover, the plaintiffs' claims are often based on the Intergovernmental Panel on Climate Change (IPCC) Reports.

2. Domestic cases: the Urgenda impact

The Netherlands has been a pioneer in climate litigation, becoming the first country in Europe to successfully bring such cases. An example of this is the *Urgenda* case (*Urgenda Foundation v. State of the Netherlands*), in which the Dutch Supreme Court in 2019 – upholding first and second instance decisions – ordered the Dutch government to revise its climate policy, in particular by ordering a 25% reduction in GHGE by 2020 compared to an estimated 17% reduction from 1990 levels[5].

The 25% emission reduction target compared to the 1990 level was based on the IPCC's 2007 AR4 Report[6], for which a 25-40% reduction in emissions by UNFCC[7] Annex I countries (industrialized and with economies in transition countries) would keep the global temperature increase within 2°C.

The Dutch example has had a significant impact, acting as a catalyst for the proliferation of climate litigation throughout Europe. Many of the cases filed in other European countries explicitly refer to the Dutch cases and draw inspiration from their legal strategies and sources.

However, it is important to note that the Dutch legal system has its own characteristics that have contributed to the success of the *Urgenda* case.

[4] For a general overview see: A, SAVARESI, J. SETZER, *Rights-based litigation in the climate emergency: mapping the landscape and new knowledge frontiers*, in *Journal of Human Rights and the Environment*, *13*(1), 2022, pp. 7-34.

[5] SUPREME COURT OF THE NETHERLANDS, *Urgenda v. the Government of the Netherlands,* Judgment 19/00135, 20 December 2019. See also A. TANZI, L. CHIUSSI CURZI, *El caso Urgenda*, in *La lucha en clave judicial frente al cambio climático*, edit by F. ZAMORA CABOT ET AL., Editorial Aranzadi, 2022; B. MAYER, *The State of the Netherlands v. Urgenda Foundation: Ruling of the Court of Appeal of The Hague (9 October 2018*, in *Transnational Environmental Law, 8(1),* 2019, pp. 167-192; B. MAYER*, The Contribution of Urgenda to the Mitigation of Climate Change*, *Journal of Environmental Law*, vol. XXXVI, Issue 2, 2023, pp. 167–184.

[6] S. GUPTA, D. A. TIRPAK ET. AL., *Policies, Instruments and Co-operative Arrangements. In Climate Change 2007: Mitigation. Contribution of Working Group III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change*, Box 13.7 of chapter 13 WG III of AR4, p. 776, in *Climate Change 2007: Mitigation. Contribution of Working Group III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change,* edit by B. METZ, O.R. DAVIDSON, P.R. BOSCH, R. DAVE, L.A. MEYER, Cambridge University Press, 2007.

[7] UN GENERAL ASSEMBLY, *United Nations Framework Convention on Climate Change: resolution / adopted by the General Assembly*, 20 January 1994, A/RES/48/189, available at: https://www.refworld.org/docid/3b00f2770.html

Specifically, Article 3:305a[8] of the Dutch Civil Code has allowed the *Urgenda* association to represent the collective interests of citizens.

Nevertheless, this did not preclude the French and German Courts from reaching similar conclusions.

2.1. French domestic cases

In fact, in *Commune de Grande-Synthe v. France*, the Council of State granted the plaintiff's request, ordering the government to 'take all necessary measures' by the end of March 2022 to bend the curve of GHGE and meet climate targets, including a 40 percent reduction by 2030[9]. The process of evaluating the implementation of measures needed to comply with the State Council's decision is currently underway.

The Court indicated that the decision would be guided by French and European law and not by the Paris Agreement. The Court motivated that the Paris Agreement must be considered in the interpretation of domestic law. In this regard, the goal of reducing GHGE by 40 percent between 1990 and 2030 set out in Article L. 100-4 of the Energy Code[10], which specifically mentions the UNFCCC and the Paris Agreement, is intended to ensure, as far as France is concerned, the effective implementation of the principles enshrined in international law[11].

A similar decision was made by the Paris Administrative Court in *Notre Affaire à Tous and Others v. France* (*Affaire du Seicle*)[12]. The Paris Administrative Court recognized the responsibility of the State for the inadequacy of mitigation measures taken by the government. Specifically, the French State had been found liable for damage caused by failure to set

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[8] DUTCH CIVIL CODE, *Article 305a par. 1* (Unofficial translation), *[Admissibility]:* A foundation or association with full legal capacity may initiate an action seeking to protect similar interests of other persons, provided that it advances those interests in accordance with its articles of association and that those interests are adequately safeguarded. Available at: Artikel 305a Burgerlijk Wetboek Boek 3. See also O. Spijkers, *Public Interest Litigation Before Domestic Courts in The Netherlands on the Basis of International Law: Article 3:305a Dutch Civil Code* in *EJIL:Talk!*, 2020, available at: https://www.ejiltalk.org/public-interest-litigation-before-domestic-courts-in-the-netherlands-on-the-basis-of-international-law-article-3305a-dutch-civil-code/

[9] FRENCH STATE COUNCIL, *Commune de Grande-Synthe v. France*, Judgment, no. 427302, 11 June 2021.

[10] CODE DE L'ENERGIE, *Article L100-4 par. 1:* I.-Pour répondre à l'urgence écologique et climatique, la politique énergétique nationale a pour objectifs : 1° De réduire les émissions de gaz à effet de serre de 40 % entre 1990 et 2030 et d'atteindre la neutralité carbone à l'horizon 2050 en divisant les émissions de gaz à effet de serre par un facteur supérieur à six entre 1990 et 2050. La trajectoire est précisée dans les budgets carbone mentionnés à l'article L. 222-1 A du code de l'environnement. Pour l'application du présent 1°, la neutralité carbone est entendue comme un équilibre, sur le territoire national, entre les émissions anthropiques par les sources et les absorptions anthropiques par les puits de gaz à effet de serre, tel que mentionné à l'article 4 de l'accord de Paris ratifié le 5 octobre 2016. La comptabilisation de ces émissions et absorptions est réalisée selon les mêmes modalités que celles applicables aux inventaires nationaux de gaz à effet de serre notifiés à la Commission européenne et dans le cadre de la convention-cadre des Nations unies sur les changements climatiques, sans tenir compte des crédits internationaux de compensation carbone.

[11] FRENCH STATE COUNCIL, *Commune de Grande-Synthe v. France*, Preliminary decision, no. 427302, 19 November 2020.

[12] PARIS ADMINISTRATIVE COURT, *Notre Affaire à Tous and Others v France*, Preliminary decision no. 1904967, 1904968, 1904972, 1904976/4-1, 3 February 2021.

intermediate targets for GHGE reductions and had been ordered to pay compensation for the moral damage caused in the nominal amount of 1 euro per claimant. Additionally, the Tribunal ordered the government to take immediate and concrete actions to meet its climate commitments to reduce GHGE, including recovering excess emissions produced between 2015 and 2018 by December 31, 2022[13].

2.2. German domestic cases

The *Neubauer et al. v. Germany* case[14] is the first recorded successful climate change litigation case in Germany. Before to this dispute, the case of *Family Farmers and Greenpeace Germany v. Germany* was registered in the country but was decided in favor of the State by the Administrative Court of Berlin[15]. The Court ruled that although the State's emission reduction target by 2020 was set at 32% instead of the European contractual requirement of 40%, the 8% gap could be considered within the government's political discretion[16]. However, the judge, in a prophetic/anticipatory role, warned the government that its climate policy is subject to judicial review and must be consistent with the government's duties to protect the fundamental rights provided by the German Constitution. And indeed, two years later, the German Constitutional Court, when examining the constitutionality of the Climate Protection Act, in the case *Neubauer et al. v. Germany*, declared it unconstitutional under Article 20A of the German Constitution, and urged the legislator to act in order to achieve a fair balance of the interests of present and future generations[17].

Following the ruling of the German Constitutional Court, the legislator intervened by amending the Climate Protection Act (Klimaschutzgesetz). However, this was not sufficient to prevent further litigation attempts against the German government. In December, the German Constitutional Court ruled on the *Individuals v. Germany case,*[18] rejecting the plaintiffs' claim. The plaintiffs argued that a violation of the climate protection principle enshrined in Article 20a of the Constitution could be inferred 'by way of example' from the fact that the legislator had not made adequate decisions in the transport sector to reduce GHGE by 2030. The Constitutional Court rejected the claim as it was not proven either that the anticipated GHGE reductions by the end of this decade must necessarily be guaranteed for constitutional reasons

[13] PARIS ADMINISTRATIVE COURT, *Notre Affaire à Tous and Others v France*, Final Judgment, no.1904967, 1904968, 1904972, 1904976/4-1, 14 October 2021.
[14] FEDERAL CONSTITUTIONAL COURT, *Neubauer et al. v Germany*, 1 BvR 2656/18, 1 BvR 96/20, 1 BvR 78/20, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20, 29 April 2021. See also L. KOTZÉ, *Neubauer et al. versus Germany: Planetary Climate Litigation for the Anthropocene?* In *German Law Journal, 22*(8), 2021 pp.1423-1444.
[15] ADMINISTRATIVE COURT OF BERLIN, *Family Farmers and Greenpeace Germany v. Germany*, Judgment no. VG 10 K 412.18, 31 October 2019.
[16] Ibid., p. 20 of the Unofficial translation of the Judgment available at http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2021/20211031_0027117R-SP_judgment-1.pdf
[17] FEDERAL CONSTITUTIONAL COURT, *Neubauer et al. v Germany*, 1 BvR 2656/18, 1 BvR 96/20, 1 BvR 78/20, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20, para 229, 29 April 2021.
[18] FEDERAL CONSTITUTIONAL COURT, *Individuals v. Germany*, Judgment no. 1 BvR 2146/22, 15 December 2022.

specifically in the transport sector, or that additional current savings must be achieved through a speed limit.

Parallel to the lawsuits filed against the German government, various claims have been brought against individual German federal States. However, the Federal Constitutional Court rejected them because the individual federal States are not subject to a 'GHGE budget,' only the legislature is subject to this duty.

2.3. British domestic cases

A more cautious approach is found in the United Kingdom where domestic courts have consistently found climate change litigation cases inadmissible. This arises from the strict interpretation and application of the principle of separation of powers carried out by domestic courts. For example, in December 2021, the High Court of Justice, in *Plan B Earth and Others v. Prime Minister and Others*[19], rejected the plaintiffs' request for review on the basis of the separation of powers principle, ruling that it cannot interfere with the competences of the government and parliament, nor does it have the jurisdiction to evaluate legislative choices made through the Climate Change Act 2008[20]. In addition, the Court stated that it did not have jurisdiction over the government for violation of an international treaty, such as the Paris Agreement[21], which was not transposed into domestic law[22].

Most recently, in the case *Friends of the Earth, ClientEarth and the Good Law Project v. Secretary of State for Business Energy and Industrial Strategy*[23], the High Court of Justice partially allowed the appeal filed by the plaintiffs, ordering the U.K. government to revise the Net-Zero Strategy plan as it was deemed inadequate in light of the Climate Change Act (CCA) of 2008. Specifically, the judges considered that the NZS did not contain a sufficient level of detail on how the UK would meet the emissions threshold set in the CCA. For these reasons, they called on the government to provide more detail on the measures the government intends to follow[24-25].

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[19] HIGH COURT OF JUSTICE, *Plan B Earth and Others v. Prime Minister and Others*, Judgment no. CO/1587/2021, 21 December 2021.

[20] Ibid para 49-51.

[21] UNFCCC, *Decision 1/CP.21, Adoption of the Paris Agreement*, UN Doc. CCC/CP/2015/10/ Add.1, 29 January 2016.

[22] Ibid para. 25.

[23] HIGH COURT OF JUSTICE, *Friends of the Earth Ltd & Ors, R (On the Application Of) v Secretary of State for Business, Energy and Industrial Strategy*, Judgment no. CO/126/2022 CO/163/2022 CO/199/2022, 18 July 2022.

[24] Ibid para 211-222 and 253-259. See also, THE GUARDIAN, *Court orders UK government to explain how net zero policies will reach targets*, 18 July 2022. Available at: https://www.theguardian.com/environment/2022/jul/18/court-orders-uk-government-to-explain-how-net-zero-policies-will-reach-targets.

[25] The UK government has announced a 'fast-track' independent review on how to achieve the UK's climate target of zero emissions by 2050 in a way that will grow the economy and not impose excessive burdens on businesses or consumers, THE INDEPENDENT, *Government set to publish net zero review in early 2023*, 02 January 2023. Available at: https://www.independent.co.uk/climate-change/news/rishi-sunak-chris-skidmore-government-michael-gove-commons-b2254465.html

2.4. Italian domestic case

The first Italian climate litigation dispute is the '*Giudizio Universale*' (doomsday) case[26]. The plaintiffs have taken legal action against the Italian government for its failure to comply with international obligations to reduce GHGE. Through their action, the plaintiffs request that the State be held responsible for the dangerous situation resulting from its inaction in addressing the climate emergency, and that it be ordered to reduce its emissions by 92% by 2030 compared to 1990 levels. This threshold has been identified by the plaintiffs based on a report by Climate Analytics and corresponds to the emissions reduction target that Italy is required to achieve in line with the long-term temperature goal of the Paris Agreement[27].

The demand for a 92% reduction in emissions by 2030, compared to 1990 levels, was based on a report commissioned by the plaintiffs themselves from the Climate Analytics Institute[28]. The analysis of the emission reduction required of Italy is based on the idea that other States also set a reduction target that, compared to their own 'fair share', corresponds to the same level of ambition as Italy's action. However, on the institute's website one can find a publication entitled 'What is Italy's pathway to limit global warming to 1.5°?' updated in October 2022, which states that Italy would have to reduce GHGE by 61-71% to the 1990 level by 20230 to be in line with the 1.5°C target[29].

The plaintiffs base their claims on multiple legal instruments, as: UNFCCC[30], Paris Agreement[31], art. 9 of the Italian Constitution[32], articles 2 and 8 of the European Convention on Human Rights (ECHR)[33]-[34], EU

[26] TRIBUNALE DI ROMA, *A Sud et al. v. Italy.*

[27] RETE LEGALITÀ PER IL CLIMA, *Atto di Citazione causa legale A Sud e altri vs Stato Italiano*, *Giudizio Universale*, 5 June 2021. Available at: http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2021/20210605_14016_petition-1.pdf.

[28] CLIMATE ANLYSTICS, *Obiettivi e politiche climatiche dell'Italia in conformità all'Accordo di Parigi e alle valutazioni di Equity globale*, March 2021. Available at: https://giudiziouniversale.eu/wp-content/uploads/2021/06/Executive-summary_-Report-Obiettivi-e-politiche-climatiche-dellItalia_IT.pdf.

[29] Available at: https://1p5ndc-pathways.climateanalytics.org/countries/italy/ambition-gap/.

[30] UN GENERAL ASSEMBLY, *supra* note 6.

[31] UN GENERAL ASSEMBLY, *United Nations Framework Convention on Climate Change: resolution / adopted by the General Assembly*, 20 January 1994, A/RES/48/189, available at: https://www.refworld.org/docid/3b00f2770.html.

[32] ITALIAN CONSTITUTION, *Article 9*: The Republic shall promote the development of culture and of scientific and technical research. It shall safeguard the natural beauties and the historical and artistic heritage of the Nation. It shall safeguard the environment, biodiversity and ecosystems, also in the interest of future generations. State law shall regulate the methods and means of safeguarding animals. Available at: https://www.quirinale.it/allegati_statici/costituzione/costituzione_inglese.pdf.

[33] COUNCIL OF EUROPE, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950.

[34] Right to life and right to private and family life.

Regulations No. 2018/842[35], 2018/1999[36], 2020/852[37], 2021/241[38], art. 2043 of the Italian Civil Code (non-contractual liability)[39].

The State's defense is based on the: inadmissibility of the claim due to excess of judicial power and lack of jurisdiction of the ordinary judge; the lack of standing to sue and; impossibility to hold the Italian State individually responsible for climate change and its consequences.

The case is still ongoing. The next hearing, for the specification of conclusions, is scheduled for September 13, 2023.

2.5. Other domestic cases

In other European countries, the plaintiffs' claims were rejected by domestic Courts. The most common grounds for rejection have been the lack of *locus standi* and the principle of separation of powers, which do not allow judges to order governments to take purely political measures. For example: the *KlimaSeniorinnen* case in Switzerland[40], the *People v Arctic Oil* case in Norway[41], and the *Fliegenschnee* case in Austria[42].

[35] Regulation (EU) 2018/842 of the European Parliament and of the Council of 30 May 2018 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement and amending Regulation (EU) No 525/2013, as published in the Official Journal of the European Union 2018 L 156/26.

[36] 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, as published in the Official Journal of the European Union 2018 L 321/1.

[37] 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, as published in the Official Journal of the European Union 2020 L 198/213.

[38] Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility, as published in the Official Journal of the European Union 2021 L 57/17.

[39] ITALIAN CIVIL CODE, *Article 2043* (Unofficial Translation): Any intentional or negligent act that causes an unjustified injury to another obliges the person who has committed the act to pay damages. Available at: http://italiantortlaw.altervista.org/civilcode.html#:~:text=2043.,fatto%20a%20risarcire%20il%20danno.

[40] *Association of Swiss Senior Women for Climate Protection v. Federal Department of the Environment Transport, Energy and Communications (DETEC) and Others* http://climatecasechart.com/non-us-case/union-of-swiss-senior-women-for-climate-protection-v-swiss-federal-parliament/.

[41] *Greenpeace Nordic Ass'n v. Ministry of Petroleum and Energy (People v Arctic Oil)* http://climatecasechart.com/non-us-case/greenpeace-nordic-assn-and-nature-youth-v-norway-ministry-of-petroleum-and-energy/.

[42] *Fliegenschnee et al. v. Federal Ministry for Digitalisation and Business Location* http://climatecasechart.com/non-us-case/fliegenschnee-et-al-v-federal-ministry-for-digitalisation-and-business-location-austria/.

The Austrian Constitutional Court has also been involved in cases of climate change litigation. In *Greenpeace et al. v. Austria*[43], the Austrian Constitutional Court rejected the case due to the lack of *locus standi* of the applicants, using an 'original' argumentation. The Court argued that in some cases, individuals who are not direct recipients of the laws can be considered as such if the legislation affects their legally protected sphere guaranteed by constitutional rights. However, in this case, there was no interference because the applicants did not use the services of airlines[44]. However Recently, the Austrian Constitutional Court also declared the case *Children of Austria v. Austria* inadmissible[45].

Strategic climate litigation has also not been successful in the Czech Republic. *In Klimatická žaloba ČR v. Czech Republic*[46] after an initial ruling in favor of the plaintiffs, the Czech Supreme Administrative Court, applying the principle of separation of power, ruled in February 2023 that the reduction of GHGE must be the subject of legislative and political negotiations, including at the European level[47].

Finally, several judgments are still pending in various European countries, including, Finland, Romania, Sweden and Spain[48].

3. European cases

Climate change litigation as a tool for implementing and reinforcing international environmental obligations, especially in the context of climate, has initially developed at the national level. However, this dimension has soon taken on a supranational character, especially in the European context. Indeed, there have been cases of climate litigation brought before European judicial bodies.

While domestic jurisdiction has played a driving role in the increasingly widespread development of climate litigation, such rulings have not yet found confirmation at the supranational level. As we will see, European judges, particularly those of the Court of Justice, by strictly applying the requirements of standing and the effectiveness and adequacy of domestic remedies, have rejected the claims of various applicants as inadmissible.

However, for the reasons that will be discussed below, the year 2023, barring delays, will represent a crucial year in defining the future of climate

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[43] AUSTRIAN CONSTITUTIONAL COURT, *Greenpeace et al. v. Austria*, Judgment no. G 144-145/2020-13, V 332/2020-13 (30 September 2020).

[44] AUSTRIAN CONSTITUTIONAL COURT, *Greenpeace et al. v. Austria*, Judgment no. G 144-145/2020-13, V 332/2020-13, par. 68 (30 September 2020).

[45] AUSTRIAN CONSTITUTIONAL COURT, *Children of Austria v. Austria,* Judgment no. G 139/2021-11 (27 June 2023).

[46] SUPREME ADMINISTRATIVE COURT OF CZECH REPUBLIC, *Klimatická žaloba ČR v. Czech Republic*, Judgment no. 9 As 116/2022 (20 February 2023).

[47] Ibid. para 334.

[48] See *Finnish Association for Nature Conservation and Greenpeace v. Finland* http://climatecasechart.com/non-us-case/finnish-association-for-nature-conservation-and-greenpeace-v-finland/; *Declic et al. v. The Romanian Government* http://climatecasechart.com/non-us-case/declic-et-al-v-the-romanian-government/; *Anton Foley and others v Sweden (Aurora Case)* http://climatecasechart.com/non-us-case/anton-foley-and-others-v-sweden-aurora-case/; *Greenpeace v. Spain I* http://climatecasechart.com/non-us-case/greenpeace-v-spain/; *Greenpeace v. Spain II* http://climatecasechart.com/non-us-case/greenpeace-v-spain-ii/.

litigation in Europe, as the European Court of Human Rights will rule on three major climate change cases.

3.1. Court of Justice of the European Union

The first climate litigation case handled by the Court of Justice of the European Union (CJEU) was *Armando Ferrão Carvalho and others v. European Parliament and Council*[49], filed in 2018 and decided in 2021. The plaintiffs, believing the European target of reducing GHGE by 40 percent by 2030 to be insufficient, brought an action before the European General Court seeking, under Article 263 TFEU, the invalidation of three EU acts: the Emissions Trading Scheme (ETS)[50], the Effort Sharing Regulation (ESR)[51], and the Land Use, Land Use Change and Forestry Regulation (LULUCF)[52]. At the same time, the plaintiffs requested an injunction against the EU Parliament and Commission under Article 340 TFEU to force the European institutions to set stricter GHGE reduction targets.

Based on the so-called *Plaumann Formula*, the General Court rejected the plaintiffs' claims on the basis that they had not shown that they were personally and directly affected by the challenged measures in their legal sphere[53].

In their appeal, the plaintiffs had tried to ask for an adaptation of the *Plaumann Formula*, but the CJEU, through a literal interpretation of Article 263 TFEU, quickly closed any further consideration of the issue, stating: 'According to settled case-law, the Courts of the European Union may not, without going beyond their jurisdiction, interpret the conditions under which an individual may institute proceedings against an act of the Union in a way which has the effect of setting aside those conditions, which are expressly laid down in the FEU Treaty, even in the light of the principle of effective judicial protection'[54].

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[49] CJEU, *Armando Ferrão Carvalho and others v. European Parliament and Council,* decisions delivered by the General Court of 8 May 2019, Case no. T-330/18.

[50] Directive (EU) 2018/410 of the European Parliament and of the Council of 14 March 2018 amending Directive 2003/87/EC to enhance cost-effective emission reductions and low-carbon investments, and Decision (EU) 2015/1814, as published in the Official Journal of the European Union 2018 L 76/3.

[51] Regulation (EU) 2023/857 of the European Parliament and of the Council of 19 April 2023 amending Regulation (EU) 2018/842 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement, and Regulation (EU) 2018/1999, as published in the Official Journal of the European Union 2023 L 111/1.

[52] Regulation (EU) 2018/841 of the European Parliament and of the Council of 30 May 2018 on the inclusion of greenhouse gas emissions and removals from land use, land use change and forestry in the 2030 climate and energy framework and amending Regulation (EU) No 525/2013 and Decision No 529/2013/EU, as published in the Official Journal of the European Union 2018 L 156/1.

[53] CJEU, *Armando Ferrão Carvalho and others v. European Parliament and Council,* decisions delivered by the General Court of 8 May 2019, Case no. T-330/18, para 49-50.

[54] CJEU, *Armando Carvalho and Others v. The European Parliament and the Council*, judgment of the Court of Justice of 25 March 2021, Case no. C-565/19 par.69. See also C. BROWN, *The Plaumann Problem: How the People's Climate Case Widened the Gap to Judicial Review of the EU's Inadequate Climate Policy*, in *Denv. J. Int'l L. & Pol'y 50*, 2021, pp. 197-208.

3.2. ECtHR

As anticipated, several cases of climate change litigation have also been brought to the attention of the European Court of Human Rights (ECtHR). Currently, there are nine pending cases before the ECtHR[55], three of which have been referred to the Grand Chamber of the Court[56]. Two cases, namely Plan B. Earth and Others v. the United Kingdom and Humane Being and Others v. the United Kingdom, were declared inadmissible in December 2022[57].

The ECtHR declared both cases inadmissible because it had not been sufficiently proven that the applicants were victims of a violation of the Convention within the meaning of Article 34 [58].

Of the nine pending cases, three - *Verein KlimaSeniorinnen Schweiz and others v. Switzerland*; *Carême v. France; Duarte Agostinho et al. v. Portugal and 32 other States* - have been referred to the Grand Chamber because 'the cases raise a serious issue concerning the interpretation of the Convention'.

In the case *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, the applicants - an association of Swiss senior women called Senior Women for Climate Protection Switzerland - turned to the European Court of Human Rights, alleging a violation of Articles 2 and 8 of the ECHR (right to life and right to private and family life), as well as Articles 6 and 13 (right to a fair trial and right to an effective remedy). They argued that the Swiss government failed to protect their right to life and private and family life by adopting inadequate legislative and administrative frameworks to prevent global temperature increase exceeding 1.5°C above pre-industrial levels, as established by international agreements. They also complained about the lack of an effective remedy and a fair trial in the country.

The case was heard before the European Court of Human Rights on March 29, 2023.

The defense of the respondent State was based on the lack of locus standi of the applicant association, arguing that the lawsuit is an *actio popularis* and therefore falls outside the jurisdiction of the European Court of Human Rights. Furthermore, the defense representatives argued the absence of a real and imminent risk of harm to the applicants, as well as the absence of a causal link between the emissions produced by the Swiss State and the

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[55] *Uricchiov v. Italy and 31 Other States* application no. 14615/21; *De Conto v. Italy and 32 Other States* application no. 14620/21; *Müllner v. Austria* application no. 18859/21; *Greenpeace Nordic and Others v. Norway* application no. 34068/21; *The Norwegian Grandparents' Climate Campaign and Others v. Norway* application no. 19026/21; *Soubeste and four other applications v. Austria and 11 Other States*, applications nos. 31925/22, 31932/22, 31938/22, 31943/22 and 31947/22; *Engels v.* Germany application no. 46906/22.

[56] *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, application no. 53600/20; *Carême v. France* application no. 7189/21; *Duarte Agostinho and Others v. Portugal and 32 Other States* application no. 39371/20.

[57] *Humane Being v. the United Kingdom*, application no. 36959/22; *Plan B. Earth and Others v. the United Kingdom*, application no. 35057/22.

[58] ECTHR, *Humane Being v. the United Kingdom*, application no. 36959/22, Decision (single judge) of 1 December 2022; ECTHR, *Plan B. Earth and Others v. the United Kingdom*, application no. 35057/22, Decision (single judge) of 1 December 2022.

harm alleged by the applicants. Finally, it was argued by the defense that Switzerland is fulfilling its obligations under the Paris Agreement.

The applicants, on the other hand, based their arguments on the work of the Climate Action Tracker (CAT)[59], the principle of dynamic interpretation of the law, and the case law of the European Court of Human Rights itself. They requested the Court to apply its own environmental case law, adapting it to climate change [60].

The *Carême v. France* case is a spin-off of the case *Commune de Grande-Synthe v. France*, in which the applicants had achieved a significant legal victory. However, in preliminary proceedings, the French Council of State had deemed admissible only the request of the municipality of Grande-Synthe, not that of its mayor, Mr. Damien Carême. According to the judges, the applicant had failed to demonstrate the standing to act. As a result, Mr. Carême approached the ECtHR, alleging the violation by the French State of its positive obligations to protect private and family life and his right to life (Articles 2 and 8 of the ECHR). The case was discussed in March 2023.

During the discussion of the case, the judges asked the applicant about his current place of residence, and it emerged that Mr. Damien Carême currently resides in Brussels.

The other case currently pending before the Grand Chamber, but not yet discussed, is the case of Duarte Agostinho and Others v. Portugal and 32 other States. The applicants, six young Portuguese individuals, have brought a lawsuit against 33 European States, arguing that their climate policy has been insufficient to prevent extreme events (particularly the wildfires that occurred in Portugal in 2017) that have had significant negative repercussions in their legal sphere, such as the stress resulting from heatwaves, the inability to enjoy outdoor leisure time, respiratory diseases, and associated anxiety. Therefore, the applicants claim that the 33 States have failed to fulfill their positive obligations under Articles 2 and 8 of the ECHR, read in light of the commitments made by the States themselves under the Paris Agreement. In particular, the applicants refer to the commitment, provided by Article 2 of the Agreement, to limit the increase in global average temperature well below 2 degrees Celsius above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5 degrees Celsius above pre-industrial levels, as this would significantly reduce the risks and impacts of climate change. The applicants also allege a violation of Article 14 in conjunction with Articles 2 and 8 of the Convention, arguing that global warming particularly affects their generation and, given their age, the interference with their rights is more pronounced compared to previous generations, especially considering that the

[59] That is an independent scientific analysis produced by two research organizations tracking climate action since 2009. It is produced by two research organizations: Climate Analytics and New Climate Institute. The first institute is the same as that used by the plaintiffs in the Italian 'Giudizo Universale' case.

[60] HELEN ARLING, *KlimaSeniorinnen v. Switzerland – A New Era for Climate Change Protection or Proceeding with the Status Quo?*, in *EJIL: Talk*!, 6 April 2023 available at: https://www.ejiltalk.org/klimaseniorinnen-v-switzerland-a-new-era-for-climate-change-protection-or-proceeding-with-the-status-quo/, accessed 8 June 2023. OLE W PEDERSEN, *Climate Change Hearings and the ECtHR*, in EJIL: Talk!, 4 April 2023) available at: https://www.ejiltalk.org/climate-change-hearings-and-the-ecthr/, accessed 8 June 2023.

deterioration of climatic conditions will continue over time[61]. Additionally, the ECtHR has requested, on its own motion, a comment on possible violations of Article 3 of the ECHR (prohibition of torture)[62].

The *Duarte* case presents some important peculiarities, such as the absence of exhaustion of domestic remedies before resorting to the ECtHR, the involvement of multiple States, and the lack of a connection between the applicants and almost all of the States Party. These peculiarities form the basis of the defenses of the States Party, who argue the inadmissibility of the application on the grounds that the applicants do not fall under their jurisdiction under Article 1 of the ECHR, and they have not exhausted domestic remedies as required by Article 35 of the ECHR. The case in question will be discussed before the ECtHR next September. After the discussion, it is expected that the Court will pronounce its judgments on the three applications.

As for the other cases pending before the ECtHR, it is worth noting that *Uricchiov v. Italy and 31 Other States*, *De Conto v. Italy and 32 Other States* and *Engels v. Germany* follow a structure similar to the *Duarte* case. *Greenpeace Nordic and Others v. Norway, The Norwegian Grandparents' Climate Campaign and Others v. Norway* focus on the granting of new licenses for oil and gas exploration in the Barents Sea, which, according to the applicants, will affect their rights. *Müllner v. Austria* follows a structure similar to the *KlimaSeniorinnen* case, as the applicant, who suffers from multiple sclerosis, complains of being forced to use a wheelchair when the temperature exceeds 30°C. *Soubeste and four other applications v. Austria and 11 Other States* concern the Energy Charter Treaty, which, according to the applicants, prevents the States Party from achieving the objective of the Paris Agreement.

4. Concluding remarks

It is uncertain what response the ECtHR will give in the three pending cases before the Grand Chamber. What is certain is that such rulings will influence other pending cases, as well as national appeals before domestic Courts.

Unexpectedly, a ruling in favor of the applicants could temporarily halt the driving role that climate litigation is playing in the implementation and strengthening of international obligations. This is because a favorable ruling for the applicants would likely lead to an adjustment of State policies and legislation, the effects of which may not be scrutinized in the short term. However, it is also impossible to predict how the applicants' claims might be addressed. The determination of a violation of the right to life and family and private life under Articles 2 and 8 of the ECHR would have different repercussions compared to establishing a violation of these norms together with the right to a fair trial and an effective remedy under Articles 6 and 13

[61] ECTHR, *Duarte Agostinho and Others v. Portugal and 32 Other States, Application form*, September 2020, available at: http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2020/20200902_3937120_complaint.pdf

[62] ECTHR, *Case Communication, Requête no 39371/20 Cláudia DUARTE AGOSTINHO et autres contre le Portugal et 32 autres États introduite le 7 septembre 2020,* 30 November 2020, available at: http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2020/20201130_3937120_na-2.pdf

of the ECHR. In the latter case, the possibility would arise in all national jurisdictions to overcome rigid interpretations of procedural requirements, such as standing to sue. However, this could have the opposite effect of what has just been argued, namely, it could intensify new national disputes aimed at incorporating the interpretation given by the ECtHR. Furthermore, a favorable ruling for the applicants would hardly be able to delve into the political and legislative aspects of the measures that States must adopt to reduce their GHGE, such as defining 'fair contribution'.

On the other hand, an unfavorable ruling for the applicants would not paralyze the use of climate litigation. This is because the ECtHR will undoubtedly provide its own assessment of the human rights-climate change relationship. It cannot avoid addressing this issue. The Court, in fact, has a unique and historic opportunity before it. It can be the first supranational judicial body to express itself on the issue. Indeed, the International Court of Justice, the International Tribunal for the Law of the Sea and the Interamerican Court of Human Rights will also express themselves on the obligations of States in relation to climate change following a request for an advisory opinion[63], although not before next year. Furthermore, these future statements must be contextualized with other national and international events, including the emergence of climate litigation, the recognition of the human right to a healthy and sustainable environment by the United Nations General Assembly last year, and the growing attention from civil society and public opinion on the issue.

In such a context, it is unrealistic to think that the ECtHR could limit itself to declaring the cases inadmissible without addressing at least one legal aspect, such as victim status, the causal link between State omissions and the effects of climate change, and States obligations to mitigate. Furthermore, by expediting the handling of the *Duarte*, *KlimaSeniorinnen* and *Carême* cases and rejecting France's request for annulment of priority treatment to assess admissibility requirements, the Court has shown its intention to address the merits of three cases that, despite their different characteristics, will influence decisions on other pending cases.

[63] UN GENERAL ASSEMBLY, *Request for an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change,* 4 April 2023, A/RES/77/276, available at: https://documents-dds-ny.un.org/doc/UNDOC/LTD/N23/094/52/PDF/N2309452.pdf?OpenElement; COMMISSION OF SMALL ISLAND STATES ON CLIMATE CHANGE AND INTERNATIONAL LAW*, Request for an Advisory Opinion submitted,* 12 December 2022, available at: https://www.itlos.org/fileadmin/itlos/documents/cases/31/Request_for_Advisory_Opinion_COSIS_12.12.22.pdf; Request for an advisory opinion on the Climate Emergency and Human Rights submitted to the Inter-American Court of Human Rights by the Republic of Colombia and the Republic of Chile, 9 January 2023, available at: https://www.corteidh.or.cr/docs/opiniones/soc_1_2023_en.pdf.

GENDER-BASED CLIMATE CHANGE LITIGATION: A MERE TREND OR A KEY SOLUTION TO ADDRESS THE PROBLEM?

GRAZIA ELEONORA VITA

TABLE OF CONTENTS: 1. Introduction. – 2. The relationship between Gender and Climate Change. – 3. Gender-based climate change litigation. – 4. Filling the gender equality gap. – 5. Final remarks.

***ABSTRACT**: This paper examines the emerging trend of gender-based climate change litigation, emphasizing its potential as a solution to address climate-related gender disparities. The Paris Agreement and other international instruments already recognised the relationship between gender and climate change, highlighting the disproportionate effects of the latter on women, especially in developing countries. The paper discusses significant cases, including KlimaSeniorinnen v. Switzerland and Maria Khan et al. v. Federation of Pakistan, where gender is central to their legal claims. It argues that while litigation can protect vulnerable groups, it remains accessible to a privileged few. To make climate litigation effective, equal access to justice must be provided at all levels. The paper also stresses the importance of incorporating gender-sensitive considerations in climate policies and finance. In conclusion, these gender-based climate claims are a potential catalyst for more inclusive climate litigation, contributing to gender equality and environmental protection. A judgment by the ECtHR in the KlimaSeniorinnen case could set a precedent for European countries and inspire women worldwide to challenge gender-insensitive climate policies. These cases represent a transformative force in climate litigation.*

***KEYWORDS:** climate change, gender, litigation, human rights.*

1. Introduction

Different actors across the globe are increasingly turning to international and national courts with respect to climate change. The number of climate cases keeps increasing at the European Court of Human Rights, while requests for advisory opinions have been submitted before the International Court of Justice, the International Tribunal for the Law of the Sea, the Inter-American Court of Human Rights, and the African Court on Human People's Rights.

Such applications are often the result of the initiative of vulnerable groups, be it because of age, gender, race, or country of origin. Back in 2015, the Paris Agreement's Preamble acknowledged that States should respect, promote, and consider their obligations regarding gender equality and women empowerment. Furthermore, articles 7 and 11 call for a 'gender-responsive' approach, as reiterated by the CEDAW Committee in its general recommendations focused on the gendered impact of climate change.

In parallel, several cases have been promoted by women, both from developed and developing countries, almost giving rise to a trend. Activists such as Luisa Neubauer, Cecilia la Rose, Anjali Sharma, and Greta Thunberg have taken legal action against their respective States as well as third States, while Roda Verheyen has counselled many ground-breaking cases, such as the one against RWE. Not to mention the landmark decision just handed down by the ECtHR in the case brought by an association of Swiss elderly women, the first climate case heard and decided by the ECtHR. Finally, a group of female petitioners has sued the Pakistani government.

Is litigation the right venue to tackle gender-related issues of the climate crisis? This paper aims to analyse the relationship between gender and climate change and the role of women in climate change litigation since this phenomenon affects them disproportionately. It will be argued that, while litigation represents a potentially valuable tool for enhancing the protection of vulnerable groups, it is still largely a privilege of few. To make litigation effective in addressing climate-driven inequalities, instruments have to be provided to democratise access to justice, at both domestic and international levels.

2. The relationship between Gender and Climate Change

In 2015 the Paris Agreement, in its preamble, already acknowledged that States, when taking action to address climate change, should respect, promote, and consider their respective obligations regarding gender equality and women empowerment, even suggesting a 'gender-responsive' approach under articles 7 and 11[1].

Back in 2018, the Committee on the Elimination of Discrimination against Women (CEDAW) adopted a general recommendation focusing on gender-related dimensions of disaster risk reduction in a changing climate[2]. In the same year also the Human Rights Council, by adopting Resolution No. 38/4, requested the Office of the High Commissioner for Human Rights «to conduct, from within existing resources, an analytical study on the integration of a gender-responsive approach into climate action at the local, national, regional and international levels for the full and effective enjoyment of the rights of women…»[3].

At the end of 2021, the Inter-American Commission on Human Rights adopted a resolution titled "Climate Emergency: Scope of Inter-American Human Rights Obligations", which analysed the rights of individuals and groups in situations of vulnerability or historical discrimination in environmental and climate matters[4]. More recently, the Special Rapporteur on violence against women and girls also explored the

[1] Paris Agreement (Paris, 12 December 2015, entered into force on 4 November 2016), articles 7 and 11.

[2] UN COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN (CEDAW), *General Recommendation No. 37 on Gender-Related Dimensions of Disaster Risk Reduction in the Context of Climate Change*, UN Doc. CEDAW/C/GC/37, 2018.

[3] HUMAN RIGHTS COUNCIL, *Human Rights and Climate Change*, UN Doc. A/HRC/RES/38/4, 5 July 2018.

[4] INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, *Climate Emergency: Scope of Inter-American Human Rights Obligations,* Resolution No. 3/2021, 31 December 2021.

nexus between the climate crisis, environmental degradation, and related displacement, and violence against women and girls[5].

Finally, the linkage between these two issues has been stressed and reported by the United Nations Commission on the Status of Women (CSW), which dedicated its 66th session to discussing gender equality and women empowerment in the context of climate change, environmental and disaster risk reduction policies, and programmes[6]. Alongside these resolutions, the Intergovernmental Panel on Climate Change, the United Nations body for assessing the science related to climate change, also pledged to diversify and include more the specific position of women in its work and goals[7]. Considering all these instruments and reports issued by authoritative institutions, it will be very interesting to see whether advisory opinions currently pending will take into account the gender aspect as well[8].

It will be now addressed more in detail how and to what extent climate change and gender are related. It is well known that climate change is a threat to everyone; however, it does not affect everyone equally. Indeed, extreme heat, wildfires, floods, droughts, and other unusual phenomena affect millions of people around the world, but their impacts differ greatly on women, especially among poor and vulnerable population groups who tend to be more exposed and have less resilience, to climate variability, stresses, and shocks[9]. These differences are evident in aspects such as health and education: among the examples given on the World Bank's blogs, one can mention that of the increase in hospitalisation during pregnancy as a direct consequence of rising temperatures. However, the most noticeable impact is on economic opportunities.

We could find an example in the agricultural sector. In developing countries, women work mainly in the agricultural sector. However, they do not have the same access as men to resources and decision-making processes, even at this historic moment[10]. According to United Nations data, even though a third of women's employment worldwide is in the agricultural sector,

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[5] SPECIAL RAPPORTEUR ON VIOLENCE AGAINST WOMEN AND GIRLS, ITS CAUSES AND CONSEQUENCES, *Violence against women and girls in the context of the climate crisis, including environmental degradation and related disaster risk mitigation and response,* UN Doc. A/77/136, 11 July 2022.

[6] UNITED NATIONS COMMISSION ON THE STATUS OF WOMEN (CSW), *Achieving gender equality and the empowerment of all women and girls in the context of climate change, environmental and disaster risk reduction policies and programmes,* UN Doc. E/CN.6/2022/L.7, 25 March 2022.

[7] IPCC, *IPCC Gender Policy and Implementation Plan,* 52nd Session of the IPCC in February 2020.

[8] Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law (Request for Advisory Opinion submitted to the Tribunal), Advisory Opinion, 2022; Obligations of States in respect of climate change (Request for Advisory Opinion), Press Release, 2022.

[9] H. BRIXI, J. J. SARA AND M. PORTER PESCHKA, *People and planet together: Why women and girls are at the heart of climate action*, *World Bank Blogs,* https://blogs.worldbank.org/climatechange/people-and-planet-together-why-women-and-girls-are-heart-climate-action.

[10] UNDP, *What does gender equality have to do with climate change?, Blog Posts,* https://climatepromise.undp.org/news-and-stories/what-does-gender-equality-have-do-climate-change.

women represent only 13 percent of landowners[11]. The lack of control over resources means that women receive only 10% of the total aid for agriculture, forestry, and fisheries. As a result, they suffer increased vulnerability due to poor access to information on adaptation technologies, cropping patterns, and weather events. Reducing, or rather, removing this gap would not only benefit women but help create more resilient families and communities. Furthermore, involving women in decision-making processes would allow their perspectives to be taken into account in the adoption of climate change policies, adaptation and mitigation measures, thus integrating the gender-responsive approach addressed by the Paris Agreement[12].

However, there is another aspect that should not be underestimated: women are hampered by their unpaid care responsibilities. In fact, they carry out more than 75% of these activities[13]. That can only increase when it comes to crisis situations, such as climate one, as they take it upon themselves to help their communities recover. Considering this, ensuring a just transition should mean ensuring that climate policies and, more in general, decision-making processes are informed by these gendered realities. But it also means going beyond them, using the climate transition as an opportunity to overcome inequalities, learn from the voices of women, and other vulnerable groups, and release their potential[14].

3. Gender-based climate change litigation

Despite the obstacles, many women, both from developing and developed countries, have put themselves on the front line to advocate and defend themselves against the threat posed by climate change. On the one hand, many female activists have championed cases against the inadequate environmental policies of States, among them Luisa Nebauer[15], Cecilia la Rose[16], Anjali Sharma[17], and Greta Thunberg.[18] On the other hand, we cannot fail to mention lawyer Roda Verheyen who is pursuing many important climate cases, such as the one against RWE, Germany's largest electricity producer[19].

For the purposes of this paper, however, the focus will be on an even more interesting phenomenon, namely the emergence of new cases in which

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[11] UN OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, *Analytical study on gender-responsive climate action for the full and effective enjoyment of the rights of women*, UN Doc. A/HRC/41/26, 1 May 2019.

[12] *What does gender equality have to do with climate change?,* cit.

[13] *Analytical study on gender-responsive climate action for the full and effective enjoyment of the rights of women,* cit.

[14] *What does gender equality have to do with climate change?,* cit.

[15] *Nebauer, et al. v. Germany*, Federal Constitutional Court 1 BvR 2656/18, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20, Order, 24 March 2021.

[16] *La Rose v. Her Majesty the Queen*, Canadian Federal Court of Appeal, T-1750-19, Complaint, 25 October 2019.

[17] *Sharma and others v. Minister for the Environment*, Federal Court of Australia VID 389 of 2021; [2021] FCA 560; [2021] FCA 774; [2022] FCAFC 35; [2022] FCAFC 65, Judgement, 22 April 2022.

[18] *Thunberg, et al v. Sweden*, https://www.bnnbloomberg.ca/greta-thunberg-sues-her-native-sweden-for-failing-on-climate-1.1851106.

[19] *Luciano Lliuya v. RWE AG*, Case No. 2 O 285/15 Essen Regional Court, Complaint, 23 November 2015.

plaintiffs, all women, assert the formal admissibility and substantive merits of their claim on the grounds of being women. In particular, reference will be made to the *KlimaSeniorinnen v. Switzerland* case[20] before the European Court of Human Rights (hereinafter, the ECtHR) and to the *Maria Khan et al.* case[21] before the Pakistani courts, both of them still pending.

The first lawsuit was filed in 2016 against several Swiss authorities, namely the Federal Council, the Federal Department of the Environment Transport, Energy and Communications (DETEC), the Federal Office for the Environment, and the Federal Office for Energy by the Swiss Senior Women for Climate Protection, a group of more than 2,000 senior Swiss women. These women argued that the government bodies were violating their human rights by failing to ensure Switzerland is on track to comply with the goal of the Paris Climate Agreement to keep global temperatures well below 2 degrees above pre-industrial levels. In particular, they contested the violations of Article 10 (the right to life) and Articles 73-74 (sustainability principle and environmental protection) of the Swiss Constitution; and Articles 2 and 8 of the European Convention on Human Rights.

The country's Federal Administrative Court first rejected the case in 2018, stating that women could not be identified as victims because they were not particularly affected by climate change. Indeed, the court argued that all humans, animals, and plants, were affected in some way since the impact of climate change is of a general nature. Therefore, «it cannot be said from the perspective of the administration of justice, […], that the proximity of the appellants to the matter in dispute – climate protection on the part of the Confederation – was particular, compared with the general public»[22]. An appeal was then rejected by the Swiss Federal Supreme Court in 2020, which argued that the climate crisis was not affecting the women's right to life and health with sufficient intensity, adding that the group of women should have advanced this kind of requests by political means rather than legal action[23].

Therefore, on November 26, 2020, having exhausted all available legal remedies in Switzerland, these female claimants filed an application to the ECtHR, which represents the first climate case ever heard by the court itself along with the *Carême v. France* case[24] last March 29. As mentioned above, the uniqueness of this case lies in the centrality attributed to the gender of the plaintiffs, who use this aspect to ground the admissibility of their own claim. Indeed, according to Swiss law (Art. 25 of the Administrative Procedure Act, VwVG) and Art. 34 of the ECHR, a case is admissible when the contested violation is at least conceivable. In doing so, the Swiss women's group emphasises how their

[20] ECTHR, *KlimaSeniorinnen v Switzerland*, Application No. 53600/20, 26 November 2020.
[21] *Maria Khan et al. v. Federation of Pakistan et al*., Application No. 8960 of 2019, 14 February 2019.
[22] *Verein KlimaSeniorinnen Schweiz et al. v. Federal Department of the Environment, Transport, Energy and Communications (DETEC),* Federal Administrative Court of Switzerland, Section 1 Judgment A-2992/2017, 27 November 2018, para 7.4.3.
[23] *Verein KlimaSeniorinnen Schweiz et al. v. Federal Department of the Environment, Transport, Energy and Communications (DETEC),* Federal Supreme Court of Switzerland, Public Law Division I, Judgment 1C_37/2019, 5 May 2020, para 5.5.
[24] ECTHR, *Carême v. France*, Application No. 7189/21, 28 January 2021.

status as aged women profoundly affects them to the extent that they are a real vulnerable group in need of protection. The plaintiffs want the court to recognise the close link between health, age, gender, and the climate crisis. In light of this, they argue that they fall within the concept of a victim as defined by the Convention. Moreover, identifying themselves as a vulnerable group, they count on strengthening their claims on the basis of the Court's case law on this very issue[25]. On the merits, for the sake of completeness, the Swiss group argues that Switzerland is violating their right to life and health under Articles 2 and 8 of the ECHR and that, by rejecting their case it also violated their right to a fair trial under Article 6; finally, since the Swiss authorities and courts did not deal with the merits of their complaints, they are also violating their right to an effective remedy in Article 13.

The origins of this intersectional approach to human rights date back 30 years. The American legal scholar Kimberlé Crenshaw introduced the term intersectionality[26], arguing how the law had «conceptual limitations of ... single-issue analyses»[27]. For instance, Crenshaw analysed the case *De Graffenreid v. General Motors*[28], where the hiring and firing system of the company was discriminatory both on a gender and race basis, as a result, those who needed legal protection the most – Black women – did not receive it. The company had never hired black women before 1964. Due to the recession, layoffs were necessary for the company, however, the latter were based on seniority criteria. As a result, all black women hired after 1964 were fired. This law was therefore not limited to gender or race discrimination but to both, creating a so-called intersection. Indeed, such law seemed to forget that black women were both black and female, and thus subject to discrimination on the basis of both race, gender, and often, a combination of the two. Comparable to Crenshaw's analysis of how US anti-discrimination law was not written for Black women, the group of senior Swiss women ultimately argues that Swiss climate law was not written for them, namely a group of female and senior individuals. KlimaSeniorinnen asked the court to pay due attention to the unique vulnerability that arises at the intersection of age and gender, as the Court could really contribute to the important work that many international human rights bodies are currently carrying out by implementing intersectionality considerations in human rights law.

It did not take long for the Court to react. On 9 April 2024, the ECtHR made history by delivering its first ever judgment on climate change: of all the cases brought before the Court, the Swiss case was the only one declared

[25] P. SUßNER, *Intersectionality in Climate Litigation*, *Verfassungsblog on matters constitutional*, https://verfassungsblog.de/intersectionality-in-climate-litigation/#commentform; HERI (edited by), *Responsive Human Rights: Vulnerability, Ill-treatment and the ECtHR*, Hart Publishing, 2021.

[26] K. CRENSHAW, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics,* in *University of Chicago Legal Forum*, Vol. 1989, 1989, p. 139 ff.

[27] J. COASTON, *The intersectionality wars*, *Vox*, https://www.vox.com/the-highlight/2019/5/20/18542843/intersectionality-conservatism-law-race-gender-discrimination.

[28] *De Graffenreid v. General Motors*, U.S. District Court for the Eastern District of Missouri - 413 F. Supp. 142 (E.D. Mo. 1976), 4 May 1976.

admissible[29]. The Grand Chamber declared that Switzerland had violated its human rights obligations, in particular Article 8, by failing to take the necessary steps to combat climate change, both by failing to meet national greenhouse gas reduction targets and by failing to put in place adequate plans and legislation to mitigate and address the problem. For the first time, the Court explicitly stated that States must «adopt, and to effectively apply in practice, regulations and measures capable of mitigating the existing and potentially irreversible, future effects of climate change»[30] and it even identified five types of mitigation measures that States should implement[31]. Furthermore, while the Court recognised that it is the role of the legislature and the executive to take action, it emphasised that it is the role of the judiciary to monitor and supervise compliance with the rule of law[32]. The Court also found a violation of Article 6 because the domestic courts dismissed the cases and never heard the applicants' complaints on the merits. In this regard, the Court reiterated that national authorities, including courts, must be the first ones to uphold and apply ECHR obligations[33].

Finally, and most importantly for the purposes of this paper, is the issue of standing. Although the Court did not make a clear statement on the relationship between climate change and gender, it did acknowledge that there is scientific evidence that climate change «… contributed to an increase in morbidity and mortality, *especially among certain more vulnerable groups*…»[34]. Indeed, the Court found it necessary to highlight many factual elements from the material that was made available to it. It referred to the Paris Agreement, the Glasgow Climate Pact, the Sharm el-Sheikh Implementation Plan, the CEDAW General Recommendations and many other instruments, all of which recognise women's vulnerability to climate change.

The Court also made an important innovation. NGOs that meet certain requirements will have standing even if their members individually do not meet the requirements for victim status[35], while individuals will have standing in climate change mitigation cases only if there is «(a) high intensity of exposure of the applicant to the adverse effects of climate change; and (b) a pressing need to ensure the applicant's individual protection»[36]. Needless to say, this decision represents a milestone in the ECtHR jurisprudence that will affect pending cases and pave the way for many more on the same subject.

The second case, *Maria Khan et al. v. Federation of Pakistan*, involves a coalition of female petitioners who sued the Pakistani government in 2019, also on behalf of future generations. Applicants argue that the federal

[29] The *Carême* and the *Duarte* cases were both declared inadmissible. See https://www.echr.coe.int/w/grand-chamber-rulings-in-the-climate-change-cases.
[30] ECtHR, *KlimaSeniorinnen v Switzerland*, Decision, 9 April 2024, para 545.
[31] Ibid, para 550.
[32] Ibid, para 412.
[33] Ibid, paras 575 – 640.
[34] Ibid, para 478 [emphasis added].
[35] M. MILANOVIC, *A Quick Take on the European Court's Climate Change Judgments, EJIL Talk! Blog of the European Journal of International Law, https://www.ejiltalk.org/a-quick-take-on-the-european-courts-climate-change-judgments/.*
[36] ECtHR, *KlimaSeniorinnen v Switzerland*, Decision, 9 April 2024, paras 478-488.

government's inaction on climate change violated their fundamental rights including the right to a clean and healthy environment and a climate capable of sustaining human life[37]. Furthermore, they also point out that the consequences of global warming will have a greater impact on women due to social constraints that offer them fewer opportunities than men. In a developing country like Pakistan, what has been analysed in the paper regarding the importance of guaranteeing the same economic opportunities finds its concrete application in this case. Therefore, according to these female petitioners, given the disproportionate impact of the climate crisis on women, government inaction on climate violates the rights of plaintiffs to equal protection under the Pakistani Sex Non-Discrimination Act.

The applicants reiterated that women tend to own fewer assets than men and that are more dependent on natural resources for their livelihoods. In times of disaster, women are more likely to suffer because of their limited access to financial, natural, institutional, or social resources and often because of the social and cultural context in which they live. This is even more true in Pakistan, which is already experiencing a lot of problems with extreme weather, floods, and high heat, which affect women and their lifestyle[38]. Applicants relied on the publications of the United Nations Development Programme, the UNFCCC Secretariat and the other related agencies, which comprehensively conclude that climate change severely disadvantages women more than men[39]. The case is only at an early stage, but it will be really interesting to find out what happens next and to see whether the Pakistani court will take into consideration the ECtHR's decision.

4. Filling the gender equality gap

All recent developments in the climate change litigation field show that civil society has managed to make its way, however, litigation will necessarily have to evolve and take more into consideration the peculiarities and differences of the applicants and interests at stake to be concretely effective[40]. In the end, what is clear is that litigation can become a useful tool only if equal access is provided. That goal can be reached only if the conditions change. The following are four suggestions advanced, among others, by the World Bank to fill the gender equality gap.

Firstly: boost people's resilience and adaptive capacity in gender-sensitive ways and draft legislation addressing gender considerations; secondly: support women to thrive in greener economies (both in terms of education and formation); thirdly: ensure that women's voices and leadership are incorporated into climate governance at the local and national levels; and

[37] The right to a clean and healthy environment was previously recognized in another case *Asghar Leghari v. Federation of Pakistan* 2018 CLD 424.

[38] Justice Ayesha Malik of Pakistan's Supreme Court, who was asked about the women's climate cases at the Sabin Center conference, said the nation's climate jurisprudence is just beginning.

[39] *Maria Khan et al. v. Federation of Pakistan et al*., Application No. 8960 of 2019, 14 February 2019, para 25.

[40] ATAPATTU (edited by), *Human Rights Approaches to Climate Change Challenges and Opportunities,* Routledge, 2016.

lastly: integrate gender equality into climate investments across sectors and expand gender-sensitive climate finance[41].

One final suggestion concerns the National Determined Contributions mechanism (hereinafter NDCs) introduced by the Paris Agreement[42]. In the first round of NDCs, starting in 2015, gender equality was only vaguely addressed, without specific actions and policies being put forward by most countries. The lack of gender-disaggregated data and information during the development of the NDCs themselves certainly contributed to this issue. Indeed, States Parties did not have sufficient evidence to understand the different impacts of climate change on women compared to men. Furthermore, the limited participation of women's groups and other civil society organisations in climate change policy processes, as already pointed out, has resulted in climate action planning not always being gender responsive. Therefore, there is an urgent need to support States in integrating gender considerations into their climate policies and action plans and, consequently, in developing their NDCs in this direction. Undoubtedly, there is a stronger awareness of the issue that has led to a significant improvement in the quality of NDCs from 2015 to 2020-2021; however, one must always keep in mind that, despite these small steps forward, progress on gender equality is always at risk due to changes in political, economic, and social contexts.

5. Final remarks

The two cases presented in this paper are the first gender-based climate claims, which offer interesting starting points both for the field of human rights and environmental law. Even if the ECtHR judgment in the *KlimaSeniorinnen* case is binding only on Switzerland, it sets a precedent for the other members of the Council of Europe and beyond. Furthermore, many women will potentially have new and strong arguments to challenge policies designed without any gender-sensitive consideration, which is not uncommon. Nonetheless, as already mentioned when speaking of intersectionality, inequalities may come into play also within the same category, in this case, women. It is undeniable that in the case of *KlimaSeniorinnen*, the applicants are rather privileged than vulnerable. One may argue that, after all, they are Swiss women, living in a well-developed and wealthy country. However, it should not be underestimated the impact that such a case will have as a starting point from which other women, from all over the world, with any background and living condition, could benefit. As long as the system changes starting from the roots, cases like the two lawsuits examined in this paper, especially the *KlimaSeniorinnen* one, could

[41] *People and planet together: Why women and girls are at the heart of climate action*, *World Bank Blogs*, op. cit.

[42] UNFCCC, «*Nationally determined contributions (NDCs) are at the heart of the Paris Agreement and the achievement of its long-term goals. NDCs embody efforts by each country to reduce national emissions and adapt to the impacts of climate change. The Paris Agreement (Article 4, paragraph 2) requires each Party to prepare, communicate and maintain successive nationally determined contributions (NDCs) that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions*.».

become real shapers of a new avenue for climate litigation and not remain only a trend.

HOW SOVEREIGN WEALTH FUNDS ADDRESS CLIMATE CHANGE CONSIDERATIONS

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***ABSTRACT**: Sovereign Wealth Funds (SWFs) are investment vehicles established by their home states to invest public resources (like oil royalties or foreign exchange surpluses) in the financial market with a long-term sovereign purpose, such as market stabilisation or intergenerational equity. The study examines how these investors are addressing climate change from three distinct and interrelated perspectives. First, in terms of how the investment activities of SWFs can have an impact on climate change (and environmental issues more generally), it should be noted that these entities can play an important role with regard to the sustainability of their investments. Indeed, their long-term horizon (when compared to that of other sovereign investment instruments), which typically focuses on future generations and intergenerational equity, can lead to climate change considerations playing an important role in the definition of their investment strategies. Yet, criticisms have been made that SWFs' approach to the environmental transition may be more business-oriented than philanthropic. Second, international practice has witnessed the establishment of a number of networks of sovereign investment vehicles focused on environmental implications, such as the One Planet Sovereign Wealth Funds initiative launched by six major SWFs in 2017. Third, from a regulatory perspective, a proposal has been made to address the issue by amending the Santiago Principles, a non-binding guidance instrument for SWFs. Within this framework, it has been proposed to add a new principle requiring that investments take into account sustainable development, with a particular focus on environmental protection.*

Against this backdrop, it is argued that the implementation of these strategies would only generate social and political pressure, as there is still a lack of instruments that bind SWFs to take climate change considerations into account in their investment policies.

***KEYWORDS**: sovereign wealth funds, International Investment Law, climate change, sustainable development, state immunity.*

1. Introductory Remarks

In his Hague lectures, Professor Treves emphasised the emergence of 'sovereign wealth funds' (SWFs) as «a means for States to participate in international financial markets»[1] within the broader process of the expansion of entities different from states in the international scenario.

[1] T. TREVES, *The Expansion of International Law*, in *Recueil des cours*, 2019, vol. 398, p. 73.

SWFs are Janus-faced investment vehicles established by their states of nationality (*parent* states)[2] to invest public resources (such as oil royalties[3] or foreign-exchange surpluses)[4] in financial markets, with a long-term sovereign purpose, like market stabilisation or intergenerational equity[5].

Furthermore, SWFs can be established through different legal structures, either private or public, with or without a legal personality separate from their parent states[6]. The different legal models that states can choose to

[2] The expression '*parent* states' has been first used, in respect to states' constituent subdivisions and agencies, by C.H. SCHREUER *et al.*, *The ICSID Convention: A Commentary*, Cambridge University Press, Cambridge, 2009[2], p. 1101. With special regard to SWFs, see G. ADINOLFI, *Sovereign Wealth Funds and State Immunity: Overcoming the Contradiction*, in *Rivista di diritto internazionale privato e processuale*, 2014, 4, p. 896; V.J. TEJERA, *The U.S. Law Regime of Sovereign Immunity and the Sovereign Wealth Funds*, in *University of Miami Business Law Review*, 2016, 1, p. 16; S. SHANG, W. SHEN, *When the State Sovereign Immunity Rule Meets Sovereign Wealth Funds in the Post Financial Crisis Era Is There Still a Black Hole in International Law*, in *Leiden Journal of International Law*, 2018, 4, p. 937. Other expressions to identify SWFs' states of nationality are '*home* states/countries' (F. BASSAN, *Una regolazione per i fondi sovrani*, in *Mercato concorrenza regole*, 2009, 1, p. 97; ID., *Host States and Sovereign Wealth Funds, between National Security and International Law*, in *European Business Law Review*, 2010, 2, p. 166; ID., *The Law of Sovereign Wealth Funds*, Edward Elgar, Cheltenham/Northampton, 2011; ID., *Introduction*, in *Research Handbook on Sovereign Wealth Funds and International Investment Law*, edited by F. BASSAN, Edward Elgar, Cheltenham/Northampton, 2015; ID., *Legal Options and Models in the Design of a Sovereign Wealth Fund, and Their Implications for Human Rights Protection*, in *International Law and the Protection of Humanity: Essays in Honor of Flavia Lattanzi*, edited by P. ACCONCI *et al.*, Brill/Nijhoff, Leiden, 2016, p. 48; D. CUMMING *et al.*, *Introducing Sovereign Wealth Funds*, in *The Oxford Handbook of Sovereign Wealth Funds*, edited by D. CUMMING *et al*., Oxford University Press, Oxford, 2017, p. 6) or '*sponsoring* states' (B. NALBANDIAN, *The Relevance of the Green Swan Risk: Accounting for Climate Change in the Legal Framework of Sovereign Investors*, in *State Capitalism and International Investment Law*, edited by P. DELIMATSIS, G. DIMITROPOULOS, A. GOURGOURINIS, Hart, Oxford, 2023, p. 305 (n. 9)).

[3] SWFs funded through raw materials, such as oil and gas, known as 'commodity funds', which are established in order to «replac[e] a real asset *in the ground* with a financial asset *in an account*» (C. LOWERY, *Sovereign Wealth Funds and the International Financial System. Remarks by Acting Under Secretary for International Affairs*, at *www.treasury.gov/press-center/press-releases/Pages/hp471.aspx* (emphasis added)).

[4] This kind of funds, which have mostly been created by Asian countries, are established «through transfers of assets from official foreign exchange reserves» (*ibid.*). On the distinction between commodity and non-commodity SWFs, see also R.M. KIMMITT, *Public Footprints in Private Markets: Sovereign Wealth Funds and the World Economy*, in *Foreign Affairs*, 2008, 1, p. 120 ff.; D. SINISCALCO, *Governi alle porte. Crisi del credito e fondi sovrani*, in *Mercato concorrenza regole*, 2008, 1, p. 81; J.-M. PUEL, *Les fonds souverains: instruments financiers ou armes politiques?*, Autrement, Paris, 2009, p. 21; F. BASSAN, *The Law*, cit., p. 20.

[5] For a comprehensive classification of the different long-term purposes that can be pursued by a SWFs, see D. CUMMING *et al.*, *op. cit.*, p. 5 ff., distinguishing between SWFs used as (*i*) parent states' diplomatic and political tools; (*ii*) instruments aimed at fostering the domestic or regional development; (*iii*) financial stabilisation tools; and (*iv*) intergenerational saving mechanisms.

[6] Three main SWF models can be identified: (*i*) pools of assets; (*ii*) public entities; (*iii*) private entities, in the form of state-owned enterprises. See C. HAMMER, P. KUNZEL, I. PETROVA, *Sovereign Wealth Funds: Current Institutional and Operational Practices (IMF Working Paper)*, at *https://www.imf.org/external/pubs/ft/wp/2008/ wp08254.pdf*; F. BASSAN, *The Law*, cit., p. 33; ID., S*overeign Wealth Funds: A Definition and Classification*, in *Research Handbook on Sovereign Wealth Funds and International Investment Law*, edited by F. BASSAN, Edward Elgar, Cheltenham/Northampton, 2015, p. 48; ID., *Legal Option*, cit., p. 47;

establish SWFs have resulted in the absence of a shared definition of these players[7]. One of those that mainly reflects the current scenario of SWFs is the definition elaborated by Bassan. According to the latter, SWFs are «funds established, owned and operated by local or central governments, which investment strategies include the acquisition of equity interest in companies listed in international markets operating in sectors considered strategic by their countries of incorporation»[8].

SWFs hold globally more than 11.5 trillion US dollars of assets under management[9]. The size of their investments and their long-term purposes witness the relevance of climate change considerations for these entities. As highlighted by some commentators, «[t]he intergenerational nature of SWF's business places them in a better position to assess the materiality of long-term risks, such as climate change, to their portfolios»[10]. SWFs' action or inaction with respect to climate-related finance is thus critical to reaching the Paris Agreement's goals.

However, it is only in recent years that SWFs and their parent states have begun to consider sustainable development in relation to SWF investments. This contribution aims to shed light on some tools that have been or could be adopted in this regard, highlighting some best practices undertaken by SWFs from different regions. Should an SWF be sued before a foreign civil court over a climate-related issue, the rule of state immunity – both from adjudication and execution – may come into play, depending on the specific characteristics of the fund.

This analysis is structured into four parts. Paragraph 2 dwells on how climate change considerations may influence SWFs' investment choices. The following paragraphs shed light on the main global networks established by SWFs to deal with the ecological transition (paragraph 3), as well as on some proposals for integrating the latter into SWF regulation (paragraph 4). Paragraph 5 addresses the scope of the rule of state immunity when an SWF is sued before a foreign civil court for climate-related issues.

R. BISMUTH, *Les fonds souverains face au droit international – Panorama des problèmes juridiques posés par des investisseurs peu ordinaires*, in *Annuaire français de droit international*, 2010, p. 573; A. AL-HASSAN *et al*., *Sovereign Wealth Funds: Aspects of Governance Structures and Investment Management (IMF Working Paper)*, p. 9, at *https://www.imf.org/en/Publications/WP/Issues/2016/12/31/Sovereign-Wealth-Funds-Aspects-of-Governance-Structures-and-Investment-Management-41046*; H. HAERI *et al.*, '*Sovereign Wealth Funds: Transnational Regulation and Dispute Resolution*', British Institute of International and Comparative Law, Withers LLP, p. 17, at *https://www.biicl.org/documents/144_sovereign-wealth-funds-regulation-dispute-resolution-.pdf*.

[7] An overview of the main SWF definitions provided by both scholars and international institutions has been drawn by F. BASSAN, *The Law*, cit., p. 3 ff.

[8] F. BASSAN, *The Law*, cit., p. 32. See also ID., *Sovereign Wealth Funds*, cit., p. 44.

[9] W.L. MEGGINSON, A.I. MALIK, X.Y. ZHOU, *Sovereign Wealth Funds in the Post-Pandemic Era*, in *Journal of International Business Policy*, 2023, at *https://link.springer.com/article/10.1057/s42214-023-00155-2*.

[10] B. BORTOLOTTI, G. LOSS, R.W. VAN ZWIETEN, *The Times Are They A-Changin'? Tracking Sovereign Wealth Funds' Sustainable Investing*, in *Journal of International Business Policy*, 2023, at *https://link.springer.com/article/10.1057/ s42214-023-00161-4*.

2. SWFs and Investment Activities

In the last decade, SWFs have started to take environmental considerations into account when deciding how to invest. Unlike other investment vehicles (such as state-owned enterprises), SWFs usually engage in portfolio investments rather than foreign direct investments (FDI)[11]. Therefore, SWFs can play a significant role with regard to the sustainability of their investments, especially when compared to other cognate entities[12].

Indeed, on the one hand, FDI are usually aimed at achieving short-run profits. In this perspective, the production of income can often be confused with capital consumption, such as deforestation or intensive agriculture. On the other hand, the scenario is slightly different when it comes to SWFs. Their long-term investment horizon, which usually focuses on future generations, results in climate change considerations playing a critical role in the definition of the funds' investment strategies[13]. Furthermore, SWFs' diversified portfolio exposes these entities significantly to climate change risks, as no economic sector or state can isolate itself from these hazards.

In this regard, it is worth noting that almost 60% of SWFs are commodity funds, i.e., funds capitalised through revenues from raw materials, in particular oil and gas[14]. The relevance of climate change for this type of funds is even more evident due to the potential decline in demand for fossil fuels in the medium to long term[15].

It bears highlighting that the way SWFs deal with climate change has evolved in recent years. In particular, there has been a shift from rather aggressive divestment strategies to forms of persuasion and inclusive practices, such as the promotion of codes of conduct and ethical guidelines for investors[16].

A survey conducted by the International Forum on Sovereign Wealth Funds (IFSWF) and One Planet SWF Network (OPSWF)[17] revealed a growing awareness of the issue of ecological transition among SWFs. In 2022, in response to the question «Do you believe that addressing the effects of climate change is consistent with your investment mandate? », 91% of

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[11] See L.C. BACKER, *Sovereign Investing in Times of Crisis: Global Regulation of Sovereign Wealth Funds, State Owned Enterprises and the Chinese Experience*, in *Transnational Law & Contemporary Problems*, 2010, 3, p. 13; A. CUERVO-CAZURA, A. GROSMAN, W.L. MEGGINSON, *A Review of the Internationalization of State-Owned Firms and Sovereign Wealth Funds: Governments' Nonbusiness Objectives and Discreet Power*, in *Journal of International Business Studies*, 2023, 1, p. 80.

[12] See B. BORTOLOTTI, G. LOSS, R.W. VAN ZWIETEN, *op. cit*.

[13] See OECD, *The Role of Sovereign and Strategic Investment Funds in the Low-Carbon Transition*, at *https://www.oecd-ilibrary.org/sites/ddfd6a9f-en/index.html?itemId=/content/publication/ddfd6a9f-en*; B. BORTOLOTTI, G. LOSS, R.W. VAN ZWIETEN, *op. cit*.

[14] However, a number of African states have established commodity funds capitalized through the commercialization of raw materials different from oil and gas, such as diamond, gold or other minerals; see T. TRIKI, I. FAYE, *Africa's Quest for Development: Can Sovereign Wealth Funds Help? (African Development Bank Group, Working Paper No. 142)*, 2011, p. 23, at *https://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/WPS%20No%20142%20Africas%20Quest%20for%20Development%20%20Can%20Sovereign%20Wealth%20Funds%20help%20AS.pdf*.

[15] B. NALBANDIAN, *op. cit.*, p. 311.

[16] *Ibid*., p. 313.

[17] The two institutions will be analysed in the following sections.

funds answered in the affirmative[18]. The previous year, only 9% had responded positively to a similar question[19].

The international practice shows that the sensibility of the different funds for environmental matters reflects that of their parent states. In this regard, it is worth noting that the funds of Norway and New Zealand have played as pioneers in taking climate change considerations into account when deciding how to allocate their investments[20].

In particular, the SWF of Norway – the Government Pension Fund Global (GPFG), managed by the Central Bank of Norway – first addressed environmental issues in 2001. In that year, a separate environmental fund was created in the framework of the GPFG portfolio. The new fund was dismissed a few years later, but the principle behind this decision has remained valid. Indeed, the initial idea to undertake specific investments in the environmental sector gave way to a more general approach of considering the implications of climate change in the activities of the fund, based on ethical guidelines and a comprehensive responsible investment strategy[21].

3. Strategies: Global Networks

The way SWFs (and, behind them, their parent states) address climate change considerations has followed two main directions. On the one hand, the creation of global networks of state investment vehicles. On the other, the development of a number of proposals to address climate change through instruments regulating the investment activities of these funds.

From the first perspective, the most relevant network established with the aim of dealing with the ecological transition is the aforementioned OPSWF, launched in 2017 under the auspices of French President Macron in the wake of the Paris Agreement by six SWFs, including five of the ten largest ones in terms of assets under management (such as those of Norway[22], Saudi Arabia[23], Abu Dhabi[24], Qatar[25], and Kuwait[26])[27].

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[18] IFSWF, ONE PLANET SWF NETWORK, *Newton's Second Law: Sovereign Wealth Funds' Progress on Climate Change*, p. 7, at *https://www.ifswf.org/sites/default/files/IFSWF_Newtons_Second_Law.pdf*.

[19] «Is addressing the effects of climate change part of your investment mandate?» (IFSWF, ONE PLANET SWF NETWORK, *In Full Flow: Sovereign Wealth Funds Mainstream Climate Change*, p. 8, at *https://www.ifswf.org/sites/default/files/IFSWF _InFullFlow.pdf*).

[20] See B. BORTOLOTTI, G. LOSS, R.W. VAN ZWIETEN, *op. cit*.

[21] On GPFG's strategies towards the sustainability of its investments, see L. CHIUSSI, *Corporate Human Rights Compliance and Disinvestment. Lessons from the Norwegian Sovereign Wealth Fund*, in *Business and Human Rights in Europe: International Law Challenges*, edited by A. BONFANTI, Routledge, New York, p. 145 ff.

[22] Government Pension Fund Global.

[23] Public Investment Fund.

[24] Abu Dhabi Investment Authority.

[25] Qatar Investment Authority.

[26] Kuwait Investment Authority.

[27] As stated in the OPSWF Framework, «the One Planet Sovereign Wealth Funds (OPSWF) initiative was launched at the One Planet Summit in December 2017 in Paris to accelerate the integration of climate change analysis into the management of large, long-term, and diversified asset pools with the goals of the Paris Agreement» (ONE PLANET SWF NETWORK, *Framework Companion Document 2022*, p. 4, at *https://oneplanetswfs.org/wp-content/pdfjs/web/viewer.html?file=/download/155/ 6oct2022/1959/companion-document_2022.pdf*.).

Each year, the network's founding members publish a voluntary framework outlining the principle of incorporating climate change considerations into their investment agenda and supporting global climate action.

OPSWF follows three main guiding principles. First, to promote climate change concerns in investors' decision-making processes. Second, to leverage the ownership rights of SWFs to encourage targeted companies to address climate change in their governance, strategies, risk assessment and reporting. Third, to enhance the resilience of long-term investment portfolios by integrating climate change opportunities and risks into their decision-making process[28].

A few examples shed light on best practices adopted by OPSWF network members:

- South Korean SWF played an active role in issuing the Korean government's green bonds. The fund was entrusted with the proceeds of the bonds in order to invest in sustainable projects.
- New Zealand SWF has significantly reduced carbon emissions and fossil fuel reserves in its portfolio, shifting around the 40% of its investments to Paris-aligned ones.
- The Kuwait Investment Authority used its shareholder rights to make target companies commit to their climate pledges.
- The SWF of Gabon has measured the carbon footprint of the emissions of its portfolio companies. It also defined a decarbonisation strategy that includes short-, medium- and long-term actions[29].

However, there are no, or not yet, binding instruments requiring SWFs to consider the environmental implications of their investments. Therefore, the decision to 'green' SWF portfolios is still left to the will of each fund and its parent state.

4. Regulation

A proposal has been made to address the matter under consideration by amending the most important instrument of self-regulation of SWFs, i.e. the Generally Accepted Principles and Practices (GAPPs), also known as the 'Santiago Principles'[30].

These twenty-four guiding principles, constituting the first attempt to regulate SWFs internationally, have been adopted by the International Working Group on SWFs (IWG). The IWG was established in 2008 by the International Monetary Fund (IMF). It then evolved into the current IFSWF in 2009. The main mandate of the IWG, composed of both IMF senior staff members and representatives of some SWFs, was to draft a code of conduct for SWFs under the aegis of the IMF, which resulted in the adoption of the Santiago Principles.

The Principles do not explicitly reference the ecological transition, climate change or sustainable development. Nonetheless, the official

[28] *Ibid.*, p. 6.
[29] Several more examples, grouped into the three directions mentioned above, can be found *ibid.*, p. 18 ff.
[30] IWG, *Sovereign Wealth Funds Generally Accepted Principles and Practices - "Santiago Principles"*, 2008, at *https://www.ifswf.org/sites/default/files/santiagoprinciples _0_0.pdf*.

commentary on Principles No. 19 states that «some SWFs may exclude certain investments for various reasons, including social or ethical reasons», and that, «[m]ore broadly, some SWFs may address social, environmental, or other factors in their investment policy», provided that such policy is publicly disclosed[31].

Some commentators have advocated adding a new principle, stating that investments must take sustainable development into consideration, with special regard to the protection of the environment[32]. Should a significant number of members of the IFSWF demand the implementation of this proposal, which is far from easy, such a new principle would also create strong pressure on other members. Indeed, while the GAPPs are a soft law instrument, more akin to a code of conduct, the decision of a fund to withdraw from the Forum would be particularly disadvantageous to itself[33].

5. SWF Entitlement to Enjoy State Immunity

SWFs can be entitled, at certain conditions, to enjoy state immunity in domestic litigation, both from adjudication and execution. Nevertheless, their hybrid nature poses several challenges to the application of the said rule. The latter may come into play particularly in the case of a climate-related claim directly against a fund, e.g. because its investment scheme contributed to climate change, thus breaching its duty of care[34].

When discussing state immunity, a preliminary clarification is needed. Indeed, at this stage, there is no agreement between states on how to

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[31] IWG, *op. cit.*, p. 22. See S. WURSTER, S.J. SCHLOSSER, *Sovereign Wealth Funds as Sustainability Instruments? Disclosure of Sustainability Criteria in Worldwide Comparison*, in *Sustainability*, 2021, 10, p. 8, who also pointed out that, «[s]ince the Santiago Principles are intended to increase the legitimacy of the SWF and can, therefore, be expected to be positively associated with a high level of disclosure of the SWF leadership and governance, it is expected that funds, which have signed the Santiago Principles, are also likely to regard sustainability criteria in their investing to further increase their legitimacy».

[32] A.M. HALVORSSEN, *The Norwegian Sovereign Wealth Fund Addresses the Interrelated Challenges of Climate Change and Sustainable Development – A Model for Regulating Other Sovereign Wealth Funds (SWF)*, 2009, p. 29 ff., at *https://www.astrid-online.it/static/upload/protected/3-1_/3-1_Halvorssen.pdf*.

[33] See S. WURSTER, S.J. SCHLOSSER, *op. cit.*, p. 28; B. NALBANDIAN, *op. cit.*, p. 322.

[34] For an overview of the different kinds of litigation cases that can arise from SWFs' investment activities, see A.-C. HAHN, *State Immunity and Veil Piercing in the Age of Sovereign Wealth Funds*, in *Revue suisse de droit des affaires et du marché financier*, 2012, 2, p. 103 ff.; A. VAN AAKEN, *Blurring Boundaries between Sovereign Acts and Commercial Activities: A Functional View on Regulatory Immunity and Immunity from Execution*, in *Immunities in the Age of Global Constitutionalism*, edited by A. PETERS *et al.*, Brill/Nijhoff, Leiden, 2014, p. 133. It bears noting that immunity from execution is also relevant with respect to the possibility for a creditor of the SWF's parent state to attach the assets of the SWF (the so-called 'piercing the corporate veil' issue). Indeed, as highlighted by A.-C. HAHN, *op. cit.*, p. 105, «SWFs may, due to the significant wealth held by them and due to the international scope of their activities, be attracting the attention of creditors trying to enforce claims against the states controlling them».[34] It must be emphasised that, in cases where investment arbitration awards are issued in favour of the investor, piercing the corporate veil existing between the state and an SWF (or, more generally, a state-owned enterprise) could be the only way in which the creditor can actually enforce the award (see E. GAILLARD, *Effectiveness of Arbitral Awards, State Immunity from Execution and Autonomy of State Entities: Three Incompatible Principles*, in *State Entities in International Arbitration (IAI Seminar)*, edited by E. GAILLARD, J. YOUNAN, Juris Publishing, Huntington, p. 189; A.-C. HAHN, *op. cit.*, p. 108).

implement the restrictive doctrine of state immunity at the domestic level[35]. Therefore, the matter is still governed by the *lex fori*. Although a comprehensive analysis of the application of the state immunity rule would require a more profound study[36], some general remarks can be drawn, distinguishing between adjudicative immunity and immunity from enforcement[37].

On the one side, immunity from adjudication is often granted based on the 'nature' of the conduct giving rise to the dispute. Consequently, it can be argued – in very general terms – that, since investments in financial markets (e.g., by purchasing foreign companies' shares) are acts of private nature, the commercial exception to immunity would apply. Accordingly, SWFs can generally be sued before a foreign civil court[38]. On the other side, the greatest protection for SWFs concerns their entitlement to enjoy immunity from execution, which is usually based on the 'purpose' test, focusing on the purposes of the assets intended to be attached (which, in the case of these funds, are often sovereign)[39].

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[35] On the one hand, the United Nations Convention on Jurisdictional Immunities of States and Their Property (adopted in New York on 2 December 2004; not yet in force), representing the first universal convention on state immunity, is not yet in force. On the other hand, the European Convention on State Immunity (ECSI) (adopted in Basel on 16 May 1972; entered into force on 11 June 1976) only regulates the relations between its member states, i.e. Austria, Belgium, Cyprus, Germany, Luxembourg, Netherlands, Switzerland and the UK (see ECSI, Preamble: «[d]esiring to establish *in their mutual relations* common rules relating to the scope of the immunity of one State from the jurisdiction of the courts of another State, and designed to ensure compliance with judgments given against another State» (emphasis added); see also International Court of Justice, *Jurisdictional Immunities of the State (Germany v Italy) (Judgment) (Dissenting opinion of Judge ad hoc Gaja)*, in *I.C.J. Rep.*, 2012, p. 310). On the lack of a customary rule on state immunity, see I. SINCLAIR, *The European Convention on State Immunity*, in *The International and Comparative Law Quarterly*, 1973, 2, p. 267; A. ORAKHELASHVILI, *State Immunity from Jurisdiction between Law, Comity and Ideology*, in *Research Handbook on Jurisdiction and Immunities in International Law*, edited by A. ORAKHELASHVILI, Edward Elgar, Cheltenham/Northampton, 2015, p. 164 ff.

[36] On SWFs and state immunity, see R. BISMUTH, *op. cit.*; F. BASSAN, *The Law*, cit., p. 89 ff.; A.-C. HAHN, *op. cit.*; G. ADINOLFI, *op. cit.*; D. GAUKRODGER, *Les fonds souverains et le pays d'accueil : quelques observations sur la question de l'immunité*, in *Les fonds souverains : entre affirmation et dilution de l' État face à la mondialisation*, edited by P. BODEAU-LIVINEC, Pedone, Paris, 2014; A. VAN AAKEN, *op. cit.*; V.J. TEJERA, *op. cit.*; S. SHANG, W. SHEN, *op. cit*. See also M. ARGENTINI, *The new Patrimonio Rilancio and the Italian approach to Sovereign Wealth Funds*, in *QIL, Zoom-out*, 2021, 81, p. 61 ff.

[37] Whereas adjudicative immunity is linked to the claims arising from SWF investment activities, immunity from execution is also relevant with respect to the possibility for a creditor of the SWF parent state to attach the assets of the fund by piercing its corporate veil; see E. GAILLARD, *op. cit.*, p. 189; A.-C. HAHN, *op. cit.*, p. 108.

[38] See G. ADINOLFI, *op. cit.*, p. 929.

[39] *Ibid*. See also X. YANG, *State Immunity in International Law*, Cambridge University Press, Cambridge, 2012, p. 362 ff. Nonetheless, it bears noting that SWF investments are characterised by two concurrent goals: one short-term and one long-term, respectively. The former pursues the maximisation of investment profit; the latter the achievement of the public (usually macroeconomic) purpose that led to the establishment of each fund. This scenario is clearly described by F. BASSAN, *The Law*, cit., p. 114; according to the Author, «two levels of purpose may be assumed: an immediate one and an indirect one. The immediate purpose is economic: to make greater profits. And it cannot be any different, because it is the only allowed for SWF investments according to the Santiago principles […]. However, the immediate profit is in turn functional to the end purpose of the fund».

However, the actual implementation of the immunity rule to an SWF deeply depends on the features of the fund, such as its legal nature – with or without an autonomous legal personality – and the entity managing it, which can be the central bank, the ministry of economic affairs, or a private company[40].

6. Concluding remarks

Most recent surveys have witnessed an increasing awareness by SWFs and their parent states of climate change considerations, even when compared to the results of a year or two ago. Two main strategies could be pursued for SWFs to address the ecological transition: (*i*) the creation of global networks; and (*ii*) an international regulation of SWF investment activities that takes climate change into account. As for the former, the OPSWF, established in the aftermath of the Paris Agreement by some of the most influential SFWs, offers a clear and fruitful example. Regarding the latter, a proposal has been made to amend the Santiago Principles, adding an explicit reference to sustainable development.

However, the implementation of these options would only create social and political pressure, as there is still a lack of instruments binding SWFs to integrate climate change considerations into their investment strategies. Moreover, any civil claims against SWFs (e.g. for breach of their sustainable development obligations) would likely be unsuccessful, especially at the enforcement stage, falling within the scope of the state immunity rule. This is particularly true if the fund was established as a pool of assets managed by the central bank of its parent state[41].

Finally, from the perspective of SWFs, it can be argued that the funds' focus is more on safeguarding their investments or their reputation from climate change rather than on fighting it through their investments. In other words, the approach may be more business-oriented than philanthropic.

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[40] See G. ADINOLFI, *op. cit.*, p. 929; with specific regard to SWF entitlement to enjoy immunity from execution, the Author pointed out that «the public features of the SWF may help to sustain and affirm the claim that their assets qualify for protection, largely when they have been place under the management of the central bank or of another monetary authority of the parent State, and to a lesser degree when the funds have been established as independent legal persons or their administration has been bestowed upon an organ of the home State other than the monetary authority». See also V.J. TEJERA, *op. cit.*, p. 73 ff.

[41] However, recent practice shows an emerging trend (still at an early stage) to deny immunity to SWFs; see Brussels Court of appeal (Belgium), *Republic of Kazakhstan v Stati and Others*, 2018/AR/1209, 2021; Högsta domstolen (Sweden), *Ascom Group and Others v Republic of Kazakhstan and National Bank of Kazakhstan*, Ö 3828-20, 2021. See also M. FOGDESTAM-AGIUS, G. AHREL, *Swedish Supreme Court Weighs in on Immunity of Sovereign Wealth Fund Assets Under Central Bank Management*, in *Kluwer Arbitration Blog*, 7 March 2022, at *http://arbitrationblog.kluwerarbitration. com/2022/03/07/swedish-supreme-court-weighs-in-on-immunity-of-sovereign-wealth-fund-assets-under-central-bank-management/*.

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