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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

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ABSTRACT

Since the dawn of the era inaugurated by the 2006 Global Europe communication, the European Union (E.U.) has emerged as a key international actor in the negotiation and conclusion of ambitious New Generation Free Trade Agreements (N.G.F.T.A.s), striking to counterbalance commercial liberalization also with the enhancement of environmental safeguard. Interestingly, the latter represents for the Union not merely a policy goal, but a core normative target embedded in the founding treaties. A rationale which has thus been transposed to N.G.F.T.A.s by means of ad hoc Trade and Sustainable Development (T.S.D.) Chapters - including given green clauses dedicated to a vast array of eco-related domains. Nonetheless, ambiguities continue to subsist with regard to the enforcement phase of the present Chapters, having been at the center of an intense debate. Against the illustrated backdrop, this article is to focus on the major deficiencies characterizing green clauses' enforceability both from an upstream and a downstream perspective. First, the identified pillar environmental provisions will be assessed in their semantic formulation. Secondly, attention will be paid to the specialis, non-confrontational, approach to dispute settlement provided for by T.S.D. Chapters, disregarding reliance on countermeasures in the case of non-compliance. In order to introduce innovative inputs to the research, relevance is to be conferred to the E.U. political guidelines for T.S.D. Chapters announced by the June 2022 Power of Trade Partnerships communication. Whereas it will be ultimately demonstrated that the latter document has managed to open the door to a novel season for N.G.F.T.A.s' environmental enforcement. It is believed that further room for normative clarification seems to be appropriate.

KEYWORDS

E.U. Free Trade Agreements; Common Commercial Policy; Environmental Protection; Dispute Settlement Mechanisms; European Green Deal.

EDITORIAL NOTE

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INTRODUCTION

The debate on the interlinks between the promotion of international trade and environmental protection is no novelty in the doctrinal discussion - including the works of several scholars.[1] Such an intricate relation presents both bright and bleak sides. Whilst, on the one hand, commercial intercourses at a global level might effectively contribute to increase domestic incomes, hence allowing States to assign more economic

[1] For an overview on the relationship between international trade and environmental protection see Steve Charnovitz, *Free Trade, Fair Trade, Green Trade: Defogging the Debate*, 27 Cornell Int'l L. J. 459 (1994); Edith Brown Weiss et al., Reconciling Environment and Trade (Brill, 2th ed. 2008); Brian R. Copeland & M. Scott Taylor, Trade and the Environment: Theory and Evidence (Princeton University Press, 2005); Barbara Cooreman, Global Environmental Protection through Trade: A Systemic Approach to Extraterritoriality (Edward Elgar Publishing, 2017); Elena Cima, From Exception to Promotion: Re-Thinking the Relationship between International Trade and Environmental Law (Brill, 2021).

resources abstractly to environmental protection. On the other hand, extensive liberalization in international commercial exchanges might well lead to higher consumption and pollution, also quickening the overuse of natural capitals.

In light of the presented background, various normative instruments have, over the past decades, been put forward to address the trade-and-environment nexus, both at international and European Union [hereinafter E.U.] level. With regard to the former, sustainability concerns connected to commercial patterns started to affirm in the late 1980s. In particular, the 1987 Brundtland Report, advancing a definition of sustainable development as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs",[2] further emphasized the exigence to consider "the ecological dimension of policy at the same time as the economic, trade, energy, agricultural and other dimensions".[3] Subsequently, the 1992 Rio Declaration on Environment and Development demanded States both to reduce or eliminate unsustainable patterns of production and consumption,[4] and to cooperate as to uphold an environmentally sound international economic system.[5] Ten years later, in the bosom of the 2002 Johannesburg Summit on Sustainable Development, the tripartite structure of sustainable development was affirmed with environmental protection constituting one of its operational pillars.[6] Additionally, the Johannesburg Plan of Implementation urged the international Community to "play an active role"[7] in the eradication of unsustainable patterns of production and consumption, also by "delinking economic growth and environmental degradation".[8]

Coming to present days, the United Nations Agenda 2030 envisages international trade as an "engine for inclusive economic growth",[9] capable of contributing to the

[2] Rep. of the W.C.E.D.: Our Common Future, U.N. Doc. A/42/427, at Chapter 2, ¶ 4 (Aug. 4, 1987).
[3] *Id.* ¶ 38.
[4] U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, Principle 8, U.N. Doc. A/CONF.151/26 (Vol. I), annex I (Aug. 12, 1992).
[5] *Id.* at Principle 12.
[6] According to the Johannesburg plan of implementation, environmental protection was regarded as a specific component of sustainable development, along with economic and social development. *See* World Summit on Sustainable Development (W.S.S.D.), Johannesburg Summit, *U.N., Johannesburg Plan of Implementation*, Doc. A/CONF.199/L.7 (Aug. 24 - Sept. 4, 2002) [hereinafter Johannesburg Plan of Implementation], ¶ 2. The tripartite structure of sustainable development was later confirmed at the 2012 Rio+20 Conference. *See* Rio +20 U.N. Conference on Sustainable Development, *The Future We Want: Outcome document of the United Nations Conference on Sustainable Development*, ¶ 3, U.N. Doc. A/CONF.216/L.1 (June 20-22, 2012). For a detailed comment on the principle of sustainable development in international law, see Nico J. Schrijver, The Evolution of Sustainable Development in International Law: Inception, Meaning and Status (Cambridge University Press, 2008); Virginie Barral, *Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm*, 23 Eur. J. Int'l L. 377 (2012); Malgosia Fitzmaurice et al., Environmental Protection and Sustainable Development from Rio to Rio+20: Protection de l'environnement et developpement durable de Rio a Rio+20 (Cambridge University Press, 2014).
[7] Johannesburg Plan of Implementation, *supra* note 6, ¶ 14.
[8] *Id.*
[9] G.A. Res. 70/1, ¶ 68 (Oct. 21, 2015).

promotion of sustainable development. The document further stresses the need to continue promoting an equitable multilateral trade system, under the aegis of the World Trade Organization [hereinafter W.T.O.].[10]

As a matter of fact, the 1994 Marrakesh Agreement used the notion of sustainable development in its Preamble, acknowledging that the Parties' trade and economic endeavor shall be conducted by duly taking into consideration the "optimal use of the world's resources in accordance with the objective of sustainable development",[11] to preserve and safeguard the environment. Under this viewpoint, the W.T.O. Agreement innovates in comparison with the 1947 General Agreement on Tariffs and Trade [hereinafter G.A.T.T.], in which environmental contemplations were incorporated limitingly by means of a general exception clause.[12]

Widespread integration of environmental considerations in normative documents, notwithstanding stalemates in international trade negotiations at the heart of the W.T.O. Doha round, marked a dead-end in the global promotion of trade-and-environment issues as components of a large scale commerce agenda,[13] thus leading key players - including the E.U. - to turn from multilateral to bilateral regulatory trade tools in dealing with green issues related to business patterns.[14]

[10] *Id.*

[11] Marrakesh Agreement Establishing the World Trade Agreement, Apr. 15, 1994, 1867 U.N.T.S. 154.

[12] *See* General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194. Relevant to the present analysis are, in particular, letter b (measures necessary to protection human, animal or plant life or health) and letter g (measures relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption) of Article XX, G.A.T.T. 1947. It proves essential to remember that, under the profile of environmental integration, the G.A.T.T. 1947 mirrored the spirit of its time, in which ecological concerns were not of particular relevance to the international Community. For an overview on the emergence and evolution of the trade-and-environment nexus in international trade law see Hyo Won Lee & Johann Park, *Free Trade and the Environment under the GATT/WTO: Negative or Compatible Relationship?*, 28 J. Int'l & Area Stud. 119 (2021).

[13] Interestingly, by means of the Doha Ministerial Declaration of 2001, the Parties still underlined the necessity to enhance the mutual supportiveness of trade and environment, agreeing to negotiations on selected issues. *See* World Trade Organization, Ministerial Declaration of 14 November 2001, WTO Doc. WT/MIN(01)/DEC/1, 41 ILM 746 (2002), ¶ 31.

[14] *See* Edward D. Mansfield & Eric Reinhardt, *Multilateral Determinants of Regionalism: The Effects of GATT/WTO on the Formation of Preferential Trading Arrangements*, 57 Int'l Org. 829 (2003); Surya P. Subedi, *The Road from Doha: The Issues for the Development round of the W.T.O. and the Future of International Trade*, 52 Int'l & Compara. L. Q. 425 (2003); Richard Tarasofsky & Alice Palmer, *The WTO in Crisis: Lessons Learned from the Doha Negotiations on the Environment*, in 82 Int'l Aff. 899 (2006); Richard Baldwin, *The World Trade Organization and the Future of Multilateralism*, 30 J. Econ. Persp. 95 (2016).

With the pendulum swinging from multilateralism to bilateralism in the normativization of the trade-and-environment nexus and settling on the latter, the E.U. 2006 Global Europe Communication[15] [hereinafter G.E.C.] officially inaugurated the season of New Generation Free Trade Agreements [hereinafter N.G.F.T.A.s][16] providing for a proper external dimension to the previously adopted Lisbon Strategy.[17] By acknowledging the need to "equip Europeans for globalization",[18] the former document resulted in bilateral trade agreements as normative vehicles capable of tackling issues - including environmental ones - not ready for proper discussion at the multilateral trade forum. In the Commission's words, N.G.F.T.A.s might thus represent stepping stones, instead of stumbling blocks,[19] for international trade liberalization, as long as they were: "comprehensive in scope, provide for liberalisation of substantially all trade and go beyond W.T.O. disciplines".[20]

Along with setting the trajectory for a broadened and deepened regulatory content, the Global Europe communication further managed to identify criteria for selecting novel Free Trade Agreements [hereinafter F.T.A.s] partners, first and foremost by taking into consideration their market potential - conceptualized as economic size and growth, as well as the presence of tariff and non-tariff barriers. Eventually, the need to work to reinforce sustainable development through bilateral trade relations had been recognized, mostly by means of the merger of *ad hoc* cooperative provisions.[21]

Under this regard, the G.E.C. transposed an integrated approach to sustainable development, thus conferring relevance to its three distinct but entwined structural

[15] *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, Global Europe: Competing in The World: A Contribution to the EU's Growth and Jobs Strategy,* COM (2006) 567 final (Oct. 4, 2006).

[16] According to the definition provided by the Court of Justice, New Generation Free Trade Agreements entail agreements which contain: "[I]n addition to the classical provisions on the reduction of customs duties and of non-tariff barriers to trade in goods and services, provisions on various matters related to trade, such as intellectual property protection, investment, public procurement, competition and sustainable development". Opinion 2/15, ECLI:EU:C:2017:376 [hereinafter Opinion 2/15], ¶ 17 (May 16, 2017).

[17] *Communication from the Commission to The Spring European Council: Working together for growth and jobs: A new start for the Lisbon Strategy,* COM (2005) 24 final (Feb. 2, 2005).

[18] Communication from the Commission, *supra* note 15. Parallelly to the adoption of the Global Europe Strategy, in the same year the renewed E.U. strategy for Sustainable Development was adopted, in which the importance for both the Commission and Member States to step up efforts as to render global trade a tool for achieving sustainable development was stressed, also by means of cooperation with international trading partners. *See* Council Review of the EU Sustainable Development Strategy (EU SDS) - Renewed Strategy, Doc. N.10117/06, at 21 (June 9, 2006).

[19] For an overview of the doctrinal debate regarding the picturing of F.T.A.s as either stumbling blocks or stepping stones of the international trading systems, see Richard Senti, *Regional Trade Agreements: 'Stepping Stones' Or 'Stumbling Blocks' of the WTO?*, in Reflections on the Constitutionalisation of International Economic Law: Liber Amicorum for Ernst-Ulrich Petersmann 441 (Marise Cremona, Nikolaos Lavranos & Peter Hilpold eds., 2013).

[20] Communication from the Commission, *supra* note 15, at 8.

[21] *Id.* at 9.

pillars.[22] Whereas the Global Europe Communication did not, *per se*, epitomize a stark innovation in the assimilation of green variables into the Union's external trade policy tools,[23] it did, however, configure an improvement in providing guidance to systematically address given sustainability concerns, while also laying down the foundations for more recent policy documents specifically contemplating the trade-and-environment nexus. Amongst the most relevant and worth mentioning are the 2015 Trade for All communication;[24] restating the necessity for the E.U. trade policy going hand in hand with respect for environmental standards, along with the 2021 Trade Policy Review,[25] envisaging bilateral trade agreements as vehicles for the attainment of the specific European Green Deal[26] objectives, *inter alia* combating climate change and environmental degradation.[27]

Starting with the F.T.A. signed with the Republic of Korea in October 2010,[28] several N.G.F.T.A.s with key trading partners were thus negotiated or concluded. As part of a deep trade agenda,[29] environmental provisions were consequently enshrined into a vast array of trade deals, overcoming the original approach based on an exception-based model in favor of a promotional archetypal, still with varying degrees of normative approximation.[30] The so-called Deep and Comprehensive Free Trade Agreements

[22] For an overview regarding the principle of sustainable development in E.U. law, see Sander R.W. van Hees, *Sustainable Development in the EU: Redefining and Operationalizing the Concept*, 10 Utrecht L. Rev. 60 (2014); András Jakab, *Sustainability in European Constitutional Law*, *in* Intergenerational Justice in Sustainable Development Treaty Implementation: Advancing Future Generations Rights through National Institutions 166 (Alexandra R. Harrington, Marcel Szabó & Marie-Claire Cordonier Segger eds., 2021).

[23] *See* Rok Žvelc, *Environmental Integration in EU Trade Policy: The Generalised System of Preferences, Trade Sustainability Impact Assessments and Free Trade Agreements*, in The External Environmental Policy of the European Union: EU and International Law Perspectives 174 (Elisa Morgera ed., 2012).

[24] *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 (Oct. 14, 2015).

[25] *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 (Feb. 18, 2021).

[26] *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 (Dec. 11, 2019). The European Green Deal was launched by the European Commission in December 2019, setting the Union's commitment to tackle climate and environmental challenges. In particular, the Green Deal aims at transforming the E.U. into a society characterized by a resource-efficient economy, capable of attaining the objective of zero net emissions of greenhouse gases by 2050. *See* Micaela Falcone, *Il Green Deal europeo per un continente a impatto climatico zero: la nuova strategia europea per la crescita tra sfide, responsabilità e opportunità*, 2 Studi sull'integrazione europea 379 (2020) (It.); Marco Onida, *Il Green Deal Europeo*, *in* Unione Europea 2020 - I dodici mesi che hanno segnato l'integrazione europea 257 (CEDAM ed., 2021) (It.); Dario Bevilacqua, *La normativa europea sul clima e il Green New Deal. Una regolazione strategica di indirizzo*, 2 Rivista trimestrale di diritto pubblico 297 (2022) (It.); Susanna Paleari, *The Impact of the European Green Deal on EU Environmental Policy*, 31 J. Env't & Dev. 196 (2022).

[27] Communication from the Commission, *supra* note 26, at 12.

[28] Free trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, E.U.-Korea, Oct. 6, 2011, O.J. L 127/7 [hereinafter E.U.-Korea F.T.A.].

[29] *See* Billy A. Melo Araujo, The E.U. Deep Trade Agenda: Law and Policy (Oxford University Press, 2016).

[30] *See* Gracia Marín Durán & Elisa Morgera, Environmental Integration in the E.U.'s External Relations: Beyond multilateral dimensions (Hart, 2012).

[hereinafter D.C.F.T.A.s] concluded with Ukraine,[31] Moldova,[32] and Georgia,[33] in fact, aim at gradually integrating the mentioned States in the Union's internal market, through the establishment of free trade areas and normative approximation. Differently, N.G.F.T.A.s, signed with "distant" commercial partners - including South Korea, Central America,[34] Andean Community,[35] Canada,[36] Japan,[37] Singapore,[38] Vietnam,[39] Mexico,[40] Mercosur,[41] and New Zealand,[42] mostly rely on cooperation in addressing ecological concerns related to boosted trade liberalization. In this spectrum and on the basis of homogeneity in content, the E.U.-U.K. T.C.A.[43] also deserves reference.

Yet, despite the Union's pioneering role[44] in including green variables in trade agreements by means of *ad hoc* sustainability clauses, two considerations are necessary.

First, the new generation free trade agreements do not denote an absolute innovation in the process of incorporating environmental variables into external normative instruments. In fact, the European Union had long advocated the necessity of

[31] Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, opened for signature, E.U. - Ukraine, Mar. 21, 2014, O.J. (L 161) 1 [hereinafter E.U. - Ukraine A.A.].

[32] 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, E.U.-Moldova, June 27, 2014, O.J. (L 260) 4 [hereinafter E.U.-Moldova A.A.].

[33] 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, E.U.-Georgia, June 27, 2014, O.J. (L 261) 4 [hereinafter E.U.-Georgia A.A.].

[34] Agreement establishing an Association between the European Union and its Member States, on the one hand, and Central America on the other, E.U.-Central America, June 29, 2012, O.J. (L 346) 3 [hereinafter E.U.-Central America A.A.].

[35] Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part, E.U.-Andean Community, Dec. 21, 2012, O.J. (L 354) [hereinafter E.U.-Andean Community F.T.A.]. Agreement amended following the accession of Ecuador. *See* 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, Dec. 11, 2016, O.J. (L 356) 3.

[36] Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part, E.U.-Canada, Jan. 14, 2017 O.J. (L 11) 23 [hereinafter C.E.T.A.].

[37] Agreement between the European Union and Japan for an Economic Partnership, E.U.-Japan, July 17, 2018, O.J. (L 330) 1 [hereinafter E.U.-Japan F.T.A.].

[38] Free Trade Agreement between the European Union and the Republic of Singapore, E.U.-Singapore,Oct. 19, 2018, O.J. (L 294) 3 [hereinafter E.U.-Singapore F.T.A.].

[39] Free Trade Agreement between the European Union and the Socialist Republic of Viet Nam, E.U.-Vietnam, June 30, 2019, O.J. (L 186) 3 [hereinafter E.U.-Vietnam F.T.A.].

[40] E.U.-Mexico Agreement in principle for an F.T.A., E.U.-Mex., Apr. 21, 2018.

[41] E.U.-Mercosur Agreement in principle for an F.T.A., E.U.-Mercosur, Jun. 28, 2019.

[42] E.U.-New Zealand concluded negotiations for an F.T.A. on 30 June 2022 [hereinafter E.U.-New Zealand F.T.A.]. Text published for information purpose, https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/new-zealand/eu-new-zealand-agreement_en (last visited Nov. 22, 2022).

[43] 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, Dec. 30, 2020, O.J. (L 149) [hereinafter E.U.-U.K. T.C.A.].

[44] *See* Jean-Frédéric Morin, Nicolas Michaud, Corentin Bialais, *Trade negotiations and climate governance: the EU as a pioneer, but not (yet) a leader* (Sept. 10, 2016), https://www.chaire-epi.ulaval.ca/sites/chaire-epi.ulaval.ca/files/publications/trade_and_climate.pdf.

integrating non-trade issues in its international agreements, originally of a development-driven nature.[45] A necessity relevantly emerging in the 1989 Lomé IV Convention,[46] concluded between the Union and the African, Caribbean and Pacific [hereinafter A.C.P.] countries and incorporating an *ad hoc* human rights clause, later transposed as an essential element in given cooperation and association agreements.[47]

Secondly, the integration of ecological variables into free trade agreements is no novelty in the international legal framework. In particular, since the adoption of the 1994 North American Free Trade Agreement [N.A.F.T.A.][48] and its side agreement on Environmental Cooperation,[49] concluded amongst the United States, Canada and Mexico, the United States [hereinafter U.S.] have stood out as a central player in addressing environmental reflections through trade tools, emerging as a regulatory model largely explored by commentators in comparison to the Union's one.[50]

[45] *See generally* Andrew Mold, EU Development Policy in a Changing World: Challenges for the 21st Century (Amsterdam University Press, 2007).

[46] Fourth A.C.P.-E.E.C. Convention, Dec. 15, 1989, O.J. (L 229). In particular, art. 33 states:

> in the framework of this Convention, the protection and the enhancement of the environment and natural resources, the halting of the deterioration of land and forests, the restoration of ecological balances, the preservation of natural resources and their rational exploitation are basic objectives that the A.C.P. States concerned shall strive to achieve with Community support with a view to bringing an immediate improvement in the living conditions of their populations and to safeguarding those of future generations.

[47] *See* Žvelc, *supra* note 23; *see also* T. Takács, A. Ott and A. Dimopoulos, *Linking trade and non-commercial interests: the EU as a global role model?* (CLEER, Working Paper No. 2013/4, 2013), https://www.asser.nl/media/1639/cleer_13-4_web.pdf; Laura Beke, David D'Hollander, Nicolas Hachez, Beatriz Pérez de las Heras, *Report on the integration of human rights in EU development and trade policies* (Frame, Work Package No. 9, Deliverable No. 1, 2014), https://www.europarl.europa.eu/cmsdata/86030/FP7%20report.pdf; Billy Melo Araujo, *Regulating through Trade: re-calibration of EU Deep and Comprehensive F.T.A.s*, 31 Pace Int'l L. Rev. 377 (2019).

[48] North American Free Trade Agreement between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America, Can.-U.S.-Mex., Dec. 8, 1993.

[49] North American Agreement on Environmental Cooperation between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America, Can.-U.S.-Mex., Dec. 17, 1992.

[50] *See generally* Sikina Jinnah & Elisa Morgera, *Environmental Provisions in American and E.U. Free Trade Agreements: A Preliminary Comparison and Research Agenda*, 22 Rev. Eur. Compara. & Int'l Env't L. 324 (2013); Marco Bronckers & Giovanni Gruni, *Retooling the Sustainability Standards in E.U. Free Trade Agreements*, 24 J. Int'l Econ. L. 25 (2021); J. B. Velut et al., *Comparative Analysis of Trade and Sustainable Development Provisions in Free Trade Agreements,* european commision (Feb., 2022), https://trade.ec.europa.eu/doclib/docs/2022/february/tradoc_160043.pdf.

Against this backdrop, the present article aims at detecting if, and to what extent, environmental interests have been included into the new generation free trade agreements negotiated or concluded by the European Union with a key focus on their suitability for enforcement. Under this viewpoint, the research is to contribute to the existing doctrinal debate on the topic.[51] Yet, original inputs will be offered by underscoring the significance generated by the advent of the European Green Deal also on the E.U. external trade agenda. Consequently, it is to be ultimately demonstrated that further guidance and clarification reveals necessary. This is in spite of the inherent potential for the predisposed Power of Trade Partnerships communication[52] to turn the spotlight on a more assertive application of the ecological clauses enshrined in N.G.F.T.A.s., as demonstrated by the reformed sustainability blueprint adopted for the newborn EU-New Zealand F.T.A.

Following an introductory Section focusing on the normative rationales behind the inclusion of environmental clauses in external trade tools (Paragraph 1), the first part of the article is designed to identify and compare environmental provisions as enshrined in N.G.F.T.A.s' Trade and Sustainable Development [hereinafter T.S.D.] Chapters, with the primary aim of assessing their enforcement both from an upstream (Paragraph 2) and downstream (Paragraph 3) perspective. The work then elaborates on contemporary trajectories in the normativization of the trade-and-environment nexus, first and foremost in light of the June 2022 Commission's communication on the final revision of the fifteen-point action plan on trade and sustainable development[53] and E.U.-New Zealand F.T.A. (Paragraph 4). Eventually, concluding remarks are reported (Conclusion).

[51] *See generally* Wybe Th. Douma, *The Promotion of Sustainable Development through EU Trade Instruments*, 28 EUR. BUS. L. REV. 197 (2017); Giovanna Adinolfi, *A Cross-cutting Legal Analysis of the European Union Preferential Trade Agreement's Chapters on Sustainable Development: Further Steps towards the Attainment of the Sustainable Development Goals?*, *in* INTERNATIONAL TRADE, INVESTMENT, AND SUSTAINABLE DEVELOPMENT GOALS: WORLD TRADE FORUM 15-49 (Cosimo Beverelli, Jurgen Kurtz & Damian Raess eds., 2020); Gracia Marín Durán, *Sustainable Development Chapters in E.U. Free Trade Agreements: Emerging Compliance Issues*, 57 COMMON MKT. L. REV. 1031 (2020).

[52] *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, The power of trade partnerships: together for green and just economic growth,* COM (2022) 409 final (Jun. 22, 2022).

[53] *Id.*

1. PROMOTING ENVIRONMENTAL INTERESTS THROUGH EXTERNAL TRADE TOOLS: A PRIMARY LAW OBLIGATION

In spite of a recurrent emphasis on the need to include environmental requirements in external trade instruments being made by E.U. policy documents, it proves necessary to underscore that, at Union level, environmental integration is not merely urged by soft-law sources. To the contrary, it is also prescribed by binding norms, entailing primary law provisions. Particularly, the Single European Act, inaugurating an *ad hoc* title on the environment, formulated for the first time the horizontal clause on environmental integration, recognizing that "environmental protection requirements shall be a component of the Community's other policies".[54]

Progressively strengthened,[55] the Principle was finally transposed into Article 11 of the Treaty on the Functioning of the European Union [hereinafter T.F.E.U.] following the Lisbon amendments. This confirmed the policy rationale that advancements in environmental protection may be more effectively attained in the absence of definition and implementation of E.U. policies and activities disregarding eco-friendly contemplations.[56] As a consequence, the principles proper of the Union's environmental policy, as enshrined in Article 191 T.F.E.U., were brought out of their niche, and made applicable to a vast array of Union's policies.[57] It shall be additionally borne in mind that the principle of environmental integration has found additional lymph by virtue of its enclosure in Article 37 of the E.U. Charter of Fundamental Rights which, with the entry into force of the Lisbon Treaty, was attributed primary law relevance.[58]

[54] Single European Act, art. 130r, ¶ 2, Jun. 29, 1987, O.J. (L 169).

[55] In particular, the principle of environmental integration was valorized by the Amsterdam Treaty, which managed to place it among the general principles of E.U. law, while also introducing an express mention to the notion of sustainable development.

[56] Consolidated Version of the Treaty on the Functioning of the European Union, art. 11, May 9, 2008, 2008 O.J. (C 115) 47 reads: "Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development". *See generally* Massimiliano Montini, *The principle of integration*, *in* Principles of Environmental Law 139 (Ludwig Krämer & Emanuela Orlando eds., 2018).

[57] This shall be, in particular, the case of the principle of prevention, which has been referred to by the Court of Justice in order to review an export ban adopted under the Common Agricultural Policy. *See* Case C-157/96, The Queen v Ministry Agric. & Others, 1998, E.C.R. I-02211. *See generally* Richard Macrory et al., Principles of European Environmental Law (4th ed. 2004).

[58] Art. 37, affirming: "A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development". *See* Charter of Fundamental Rights of the European Union, Dec. 12, 2007, O.J. (C 326). For a comment in the literature, see Elisa Morgera & Gracia Marin-Duran, *Commentary to Article 37 - Environmental Protection of the EU Charter of Fundamental Rights*, *in* Commentary on the EU Charter of Fundamental Rights 983 (Peers et al. eds., 2d ed. 2021).

Notwithstanding its prescriptive formulation,[59] the enforceability of the environmental integration principle remains questionable, with the European Union Court of Justice [hereinafter E.C.J.] accentuating the broad discretionary powers in the hands of the Union's legislator to evaluate concretely to what extent ecological requirements ought to be integrated into the E.U. 's other policies and actions.[60]

Along with reaffirming the principle of environmental integration, the Treaty of Lisbon further contributed to confer significance to the chase of non-trade objectives by means of the common commercial policy [hereinafter C.C.P.]. Article 207 T.F.E.U. now compels the C.C.P. to be based on uniform principles, along with being conducted "in the context of the principles and objectives of the Union's external action",[61] as also overarchingly demanded by Article 205 T.F.E.U.[62]

For the purpose of the present examination, the *renvoi* operated by the aforementioned norms leads to the identification of precise aims. Notably, Article 21 of the Treaty on European Union [hereinafter T.E.U.], requiring the Union to define and pursue its external policies to "foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty"[63] and "help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development".[64] Eventually, mention has to be made to Article 3(5), T.E.U., highlighting the necessity for the Union to "uphold

[59] The conception of the integration of environmental considerations as an obligation for the Union legislator has also been acknowledged by the E.C.J. *See* Cases T-429/13 and T-451/13, Bayer CropScience AG & Others v Comm'n, ECLI:EU:T:2018:280, ¶ 106 (May 17, 2018).

[60] *See, e.g.*, Case C-733/19, Kingdom of the Neth. v Council & Parliament, ECLI:EU:C:2021:272, ¶ ¶ 49-50 (May 15, 2021). For a comment in the literature, see Francesco Munari & Lorenzo Schiano di Pepe, La Tutela Transnazionale dell'Ambiente (2012); Jan H. Jans, *Stop the Integration Principle?*, 33 Fordham Int'l L. J. 1533 (2011), https://ir.lawnet.fordham.edu/ilj/vol33/iss5/8.

[61] T.F.E.U., *supra* note 56, at art. 207. For a comment regarding the effects of the Lisbon Treaty on the common commercial policy, see Angelos Dimopoulos, *The Effects of the Lisbon Treaty on the Principles and Objectives of the Common Commercial Policy*, 15 Eur. Foreign Aff. Rev. 153 (Feb. 15, 2010), https://hdl.handle.net/1814/17320; Joris Larik, *Entrenching Global Governance: The EU's Constitutional Objectives Caught Between a Sanguine World View and a Daunting Reality*, *in* The EU's Role in Global Governance: The Legal Dimension 7 (Bart Van Vooren, Jan Wouters & Steven Blockmans eds., 2013). The broadening of the field of application of the C.C.P., and the consequent evolution of the latter as embedded in Article 207 T.F.E.U., in comparison with art. 133 of the Treaty establishing the European Community, has also been acknowledged by the E.C.J. *See, e.g.*, Case C-414/11, Daiichi Sankyo Co. Ltd, Sanofi-Aventis Deutschland GmbH v. DEMO Anonimos Viomikhaniki kai Emporiki Etairia Farmakon, ECLI:EU:C:2013:520, ¶ ¶ 45-46 (July 13, 2013).

[62] T.F.E.U., *supra* note 56, at art. 205, stating: "The Union's action on the international scene, pursuant to this Part, shall be guided by the principles, pursue the objectives and be conducted in accordance with the general provisions laid down in Chapter 1 of Title V of the Treaty on European Union".

[63] Consolidated Version of the Treaty on European Union, art. 21, ¶ 2 (d), Oct. 26, 2012, 2012 O.J. (C326).

[64] *Id.* at art. 21, ¶ 2 (f).

and promote its values and interests"[65] in its relations with the wider world, to contribute to the sustainable development of the Earth, along with free and fair trade.

The era inaugurated by the Lisbon Treaty thus appears to attribute emphasis to an approach to foreign policy which has been epitomized as managed globalization, attempting at accommodating free trade imperatives with the prerequisite to uphold non-trade benefits in international commercial intercourses, including the promotion of sustainable development.[66]

A requirement which, in the aftermath of the landmark Opinion 2/15,[67] materializes as strengthened. The Court was, as a matter of fact, requested to determine whether the Union had the requisite competence to sign and conclude alone the F.T.A. with Singapore and, specifically, which provisions of the agreements fell within the E.U.'s exclusive and shared competences, as well as within the exclusive competence of the Member States.[68]

With particular regard to the commitments concerning sustainable development, the Opinion emphasizes that the obligation on the European Union to integrate the objectives and principles of the Union's external action into the conduct of the C.C.P. is "apparent from the second sentence of Article 207(1) T.F.E.U. read in conjunction with Article 21(3) T.E.U. and Article 205 T.F.E.U.".[69] Therefore, the Court underscores that account must be taken of Article 11 T.F.E.U.[70] and that the "objective of sustainable development forms an integral part of the common commercial policy".[71] An interpretation which departs from the reading provided by the Advocate General

[65] *Id.* at art. 3, ¶ 5.

[66] Rawi Abdelal & Sophie Meunier, *Managed Globalization: Doctrine, Practice and Promise*, 17 J. Eur. Pub. Pol'y 350 (2010).

[67] Opinion 2/15, *supra* note 16. Opinion 2/15 was delivered by the Full Court in May 2017, upon a request made by the European Commission ex T.F.E.U. art. 218, ¶ 11. It represents a landmark ruling for the common commercial policy in general and F.T.A.s' trade and sustainable development Chapters in particular, elaborating on the correct allocation of competences between the E.U. and its Member States. *See, e.g.*, David Kleimann, *Reading Opinion 2/15: Standards of Analysis, the Court's Discretion, and the Legal View of the Advocate General* (EUI RSCAS 2017/23 Global Governance Programme-264, Working Paper No. 23, 2017), https://cadmus.eui.eu/bitstream/handle/1814/46104/RSCAS_2017_23REVISED.pdf?sequence=4&isAllowed=y; Marise Cremona, *Shaping EU Trade Policy post-Lisbon: Opinion 2/15 of 16 May 2017*, 14 Eur. Cont. L. Rev. 231 (2018); Reinhard Quick & Attila Gerhäuser, EU *Trade Policy after Opinion 2/15: Internal and External Threats to Broad and Comprehensive Free Trade Agreements*, *in* Law and Practice of the Common Commercial Policy: The First 10 years after the Treaty of Lisbon 486 (Guillaume Van der Loo & Michael Hahn eds., 2021); Charlotte Beaucillon, *Opinion 2/15: Sustainable Is the New Trade. Rethinking Coherence for the New Common Commercial Policy,* 2 Eur. Papers 819 (2017).

[68] Kleimann, *supra* note 67, ¶ 1. It is important to remember that, by relying on settled case-law, the Court affirmed that an E.U. act is to fall within the common commercial policy if it: "relates specifically to such trade in that it is essentially intended to promote, facilitate or govern such trade and has direct and immediate effects on it". Concordantly, the fact that an E.U. act is merely liable to have implications for trade is not enough for it to be classified as a C.C.P. measure. *See* Kleimann *supra* note 67, ¶ 36.

[69] *Id.* ¶ 143.

[70] *Id.* ¶ 146.

[71] *Id.* ¶ 147.

[hereinafter A.G.], according to whom Article 11 T.F.E.U. could not "affect the scope of the common commercial policy laid down in Article 207 T.F.E.U."[72] or "modify the scope of the European Union's competence".[73]

The E.C.J. has thus offered an extensively broad reading of the Union's post-Lisbon competences in external trade policy,[74] unambiguously embracing also commitments concerning sustainable development as embedded in N.G.F.T.A.s.[75]

The Court of Justice has only narrowly advanced a fully-fledged scrutiny of Articles 21 and 3(5), T.E.U. Whereas, on the one hand, the obligation for the E.U. to integrate the objectives and principles of the Union's external action into the C.C.P. has been, as shown, declared.[76] On the other hand, the E.U. institutions' wide-ranging margin of appreciation in the field of external economic relations seems to have been confirmed.[77]

[72] Opinion of Advocate General Sharpston, ECLI:EU:C:2016:992, ¶ 495, (Dec. 21, 2016).
[73] *Id.*
[74] The Court, in fact, determined that all provisions of the E.U.-Singapore F.T.A. fell within the Union's exclusive competence, with the only exception of clauses relating to non-direct investment and on Investor-State dispute settlement.
[75] An extensive analysis concerning the implications of Opinion 2/15 on trade and sustainable development goes beyond the scope of the present analysis. *See, e.g.*, Charlotte Beaucillon, *Opinion 2/15: Sustainable Is the New Trade. Rethinking Coherence for the New Common Commercial Policy,* 2 Eur. Papers 819 (2017); Laurens Ankersmit, *Opinion 2/15: Adding some spice to the trade & environment debate*, Eur. L. Blog (Jun. 15, 2017) https://europeanlawblog.eu/2017/06/15/opinion-215-adding-some-spice-to-the-trade-environment-debate.
[76] Opinion 2/15, *supra* note 16, ¶ 143.
[77] *See* Case T-512/12, Front populaire pour la libération de la saguia-el-hamra et du rio de oro (Front Polisario) v. Council, 2015 ECLI:EU:T:2015:953, ¶ 164. *See also* Alessandra Asteriti, *Article 21 TEU and the EU's Common Commercial Policy: A Test of Coherence*, *in* 2017 European Yearbook of International Economic Law 111 (Marc Bungenberg et al. eds., 2017).

2. UPSTREAM ENFORCEMENT: CONTENT AND RATIO OF ENVIRONMENTAL PROVISIONS IN NEW GENERATION F.T.A.S

Granted that an introductory analysis on the primary law requirements legitimizing the Union to include environmental contemplations into its N.G.F.T.A.s has been provided, the present Section turns to inspect the content of the specific provisions approaching green concerns, with the aim of assessing their potential for enforcement.

Since the E.U.-Korea F.T.A., environmental clauses have been mainly[78] included into a specific chapter which is rubricated as Trade and Sustainable Development. A relevant exception is to be found in C.E.T.A., where - granted a *chapeau* T.S.D. Chapter - sustainability clauses have been split into two *ad hoc* Sections, respectively coping with labor issues[79] and environmental considerations.[80] The C.E.T.A. model has been also reproduced in the E.U.-U.K. T.C.A., in which labor and environmental issues are pondered separately.[81] Besides, green provisions as embedded in T.S.D. Chapters do not come as general exceptions formulated on the blueprint of Article XX G.A.T.T. Instead, they rely on bilateral cooperation to foster environmental protection.[82]

Yet, a point remains firm: M.E.A.s clauses as embedded in N.G.F.T.A.s do not radically innovate with respect to the environmental obligations contracted by the Signatories at international level, they have consequently been baptized as a mere: "reaffirmation of obligations already binding on the Parties under those agreements".[83] But they are not meaningless in scope. Actually, the incorporation of obligations deriving from M.E.A.s into T.S.D. Chapters generates a double layer of protection since, by absorbing multilateral environmental agreements into N.G.F.T.A.s, the Parties have committed to respect those obligations also on the basis of the bilateral Agreement, as by analogy, rightly pointed out by the Panel of Experts in the Korea-E.U. dispute.[84]

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[78] The choice of the adverb "mainly" is not causal. T.S.D. Chapters aside, N.G.F.T.A.s contain provisions related, albeit in an indirect way, to the environment also by means of exception clauses modelled upon art. XX G.A.T.T. granted uniformity in content, by way of example, see E.U.-Korea F.T.A, *supra* note 28, at art. 2.15.

[79] C.E.T.A., *supra* note 36, at chapter 23.

[80] *Id.* at chapter 24.

[81] Namely: E.U.-U.K. T.C.A., *supra* note 43, at title XI, Chapter 6 (Labour and Social Standards); Chapter 7 (Environment and Climate Change) and Chapter 8 (Other instruments for Trade and Sustainable Development).

[82] *See, e.g.*, Adinolfi, *supra* note 51; Azzurra Muccione, *Il rapporto dei capitoli su "Commercio e Sviluppo Sostenibile" con la Disciplina in Materia Commerciale*, *in* Gli Accordi Preferenziali di Nuova Generazione dell'Unione Europea 235 (Giovanna Adinolfi ed., 2021) (It.).

[83] Lorand Bartels, *Human Rights and Sustainable Development Obligations in E.U. Free Trade Agreements*, 40 Legal Issues Econ. Integration 297 (2013).

[84] Panel Report, *Panel of Experts proceeding constituted under Article 13.15 of the E.U.-Korea Free Trade Agreement*, ¶ 107 (Jan. 20, 2021) [hereinafter E.U.-Korea Panel Report],

At the outset, it shall be underscored that mention to the *generalis* notion of sustainable development and the *specialis* concept of environmental protection[85] are to be found already in the preambles of several N.G.F.T.A.s, in which the Parties either reaffirmed or recognized their commitment to promote sustainable development in their economic intercourses,[86] or determined to strengthen their international trade relations in accordance with the objectives of sustainable development, along with endorsing exchanges respectful of high levels of environmental protection.[87] As pointed out by Adinolfi, despite lacking prescriptive force, environmental and sustainability references as embraced by N.G.F.T.A.s' Preambles may assume relevance under Article 31 of the 1969 Vienna Convention on the Law of Treaties, thus chiefly serving as interpretative criteria.[88]

Coming to their scope, T.S.D. Chapters do not, by and large, aim at reaching harmonization between the laws and standards of the Parties. Instead, they attempt to bolster cooperation on sustainability issues, conducting commercial exchanges which convict a "race to the bottom" generated by domestic deregulation favoring competitive market conditions. Green clauses contained into T.S.D. Chapters can be concordantly categorized into three main categories: clauses referring to ratification or implementation of Multilateral Environmental Agreements [hereinafter M.E.A.s]; right to regulate and levels of protection clauses; and upholding level of protection clauses (*infra* Annex Table).

Alongside, satellite provisions dealing with particular environmental concerns, including sustainable forest management and trade in forest products, as well as provisions on trade and biodiversity, trade and climate change and trade and sustainable

https://trade.ec.europa.eu/doclib/docs/2021/january/tradoc_159358.pdf. *See also* Opinion of Advocate General Sharpston, *supra* note 72, ¶ 498.

[85] It proves essential to remember that, while constituting a specific pillar of sustainable development, the concept of "environment" represents an extremely broad and multifaceted notion. *See* Michelle Ben-David, *Defining International Environmental Law,* 38 ECOLOGY L. Q. 553 (2011).

[86] *See for example*, C.E.T.A., *supra* note 36, at preamble, in which the Parties reaffirmed: "Their commitment to promote sustainable development and the development of international trade in such a way as to contribute to sustainable development in its economic, social and environmental dimensions". *See also*, E.U.-Korea F.T.A., *supra* note 28, at preamble; E.U.-Andean Community F.T.A., *supra* note 35, at preamble; E.U.-Japan F.T.A., *supra* note 37, at preamble.

[87] *See for example*, E.U.-Singapore F.T.A., *supra* note 38, at preamble, in which the Parties determined to:

> strengthen their economic, trade, and investment relations in accordance with the objective of sustainable development, in its economic, social and environmental dimensions, and to promote trade and investment in a manner mindful of high levels of environmental and labour protection and relevant internationally-recognised standards and agreements to which they are party.

See also, E.U.-Vietnam F.T.A., *supra* note 39, at preamble; E.U.-New Zealand F.T.A., *supra* note 42, at preamble.

[88] Giovanna Adinolfi, *Alla ricerca di un equilibrio tra interessi economici e tutela dell'ambiente nella politica commerciale dell'Unione europea*, EUROJUS (May 14, 2017), http://rivista.eurojus.it/alla-ricerca-di-un-equilibrio-tra-interessi-economici-e-tutela-dellambiente-nella-politica-commerciale-dellunione-europea/ (It.).

management of fisheries and aquaculture are to be detected. With an eye evaluating their potential for enforcement, the analysis will now turn to the three pillar provisions constituting the basis of N.G.F.T.A.s' environmental regulation.

2.1.ACLAUSES REFERRING TO RATIFICATION OR IMPLEMENTATION OF MULTILATERAL ENVIRONMENTAL AGREEMENTS

M.E.A.s clauses, representing the first pillar of environmental provisions as enshrined in T.S.D. Chapters display several common features. To begin with, they generally comprise a *chapeau* paragraph, according to which the Parties recognize the importance of international environmental governance and agreements as a response of the international community to global ecological problems. Alongside that, they highlight the necessity to advance bilateral supportiveness between trade and environmental policies and measures,[89] also at the core of the United Nations Environmental Assembly.[90]

In this context, new generation free trade agreements deliberately provide for the Parties to consult and cooperate, as appropriate, with regard to environmental issues of mutual interest related to trade.[91]

[89] *See e.g.*, E.U.-Korea F.T.A., *supra* note 28, at art. 13.5, ¶ 1; E.U.-Andean Community F.T.A., *supra* note 35, at art. 270, ¶ 1; C.E.T.A., *supra* note 36, at art. 24.4, ¶ 1; E.U.-Japan F.T.A., *supra* note 37, at art. 16.4, ¶ 1; E.U.-Singapore F.T.A., *supra* note 38, at art. 12.6, ¶ 1; E.U.-Vietnam F.T.A., *supra* note 39, at art. 13.5, ¶ 1; E.U.-U.K. T.C.A., *supra* note 43, at art. 400, ¶ 1. As for association agreements, see E.U.-Central America A.A., *supra* note 34, at art. 287, ¶ 1; E.U.-Ukraine A.A., *supra* note 31, at art. 292, ¶ 1; E.U.-Moldova A.A., *supra* note 32, at art. 366, ¶ 1; E.U.-Georgia A.A., *supra* note 33, at art. 230, ¶ 1. With regard to agreements in principle reached by the Union and agreements whose negotiations have been recently concluded, see E.U.-Mexico Agreement in Principle, *supra* note 40, at art. 4, ¶ 1; E.U.-Mercosur Agreement in Principle, *supra* note 41, at art. 5, ¶ 2; E.U.-New Zealand F.T.A., *supra* note 42, at art. X.5, ¶ 1.

[90] *See* E.U.-U.K. T.C.A., *supra* note 43, at art. 400, ¶ 1; E.U.-Mexico Agreement in Principle, *supra* note 40, at art. 4, ¶ 1; E.U.-Mercosur Agreement in Principle, *supra* note 41, at art. 5, ¶ 2; E.U.-New Zealand F.T.A., *supra* note 42, at art. X.5, ¶ 1.

[91] *See, e.g.*, E.U.-Korea F.T.A., *supra* note 28, at art. 13.5, ¶ 1; E.U.-Andean Community F.T.A., *supra* note 35, at art. 270, ¶ 1; C.E.T.A., *supra* note 36, at art. 24.4, ¶¶ 1, 3; E.U.-Japan F.T.A., *supra* note 37, at art. 16.4, ¶ 1; E.U.-Singapore F.T.A., *supra* note 38, at art. 12.6, ¶ 1; E.U.-Vietnam F.T.A., *supra* note 39, at art. 13.5, ¶ 1; E.U.-U.K. T.C.A., *supra* note 43, at art. 400, ¶ 5; E.U.-Central America A.A., *supra* note 34, at art. 287, ¶ 1; E.U.-Ukraine A.A., *supra* note 31, at art. 292, ¶ 5; E.U.-Moldova A.A., *supra* note 32, at art. 366, ¶ 1; E.U.-Georgia A.A., *supra* note 33, at art. 230, ¶ 1; E.U.-Mexico Agreement in Principle, *supra* note 40, at art. 4, ¶¶ 1, 4; E.U.-Mercosur Agreement in Principle, *supra* note 41, at art. 5, ¶¶ 2, 5; E.U.-New Zealand F.T.A., *supra* note 42, at art. X.5, ¶¶ 1, 5.

Secondly and most remarkably, the Parties reaffirm their commitment to implement, effectively, into their laws and practices, the multilateral environmental agreements to which there are parties. Yet the provision, despite limited exceptions,[92] does not insert a detailed list of the ratified M.E.A.s, distancing E.U. practice from the one proper of the United States.[93] Apropos ratification of multilateral environmental agreements, the vast majority of N.G.F.T.A.s are silent on the topic, with only limited agreements[94] providing for the commitment to exchange information regularly on the progress on ratification of M.E.A.s, including their protocols and amendments. This practice comes in contrast with T.S.D. Chapters' labor-related provisions, mandating for the commitment to make continued and sustained efforts towards ratification of the fundamental International Labour Organization [hereinafter I.L.O.] Conventions, as well as other conventions classified by I.L.O. as up-to-date. A commitment which, still, is often articulated as a 'mere best effort' obligation.[95]

As highlighted by Bronckers and Gruni, the choice not to include compulsory ratification of M.E.A.s might find a justification in the fact that, to date, the majority of multilateral environmental agreements bearing a relevance for trade according to the W.T.O. has been extensively ratified.[96] Nevertheless, whilst this might be the case for several environmental agreements, different N.G.F.T.A.s partners have still not managed to ratify particular M.E.A.s, thus opening the door to uncertainties regarding the *ratio* for this neat exclusion.[97]

[92] It is notably the case of the E.U.-Andean Community F.T.A. and the E.U.-Central America A.A., in which ratified M.E.A.s are explicitly listed. *See* E.U.-Central America A.A, *supra* note 34, at art. 287, ¶ 2; E.U.-Andean Community F.T.A., *supra* note 35, at art. 270, ¶ 2.

[93] *See e.g.*, Agreement between the United States of America, the United Mexican States, and Canada, art. 24.8, ¶ 4, Nov. 30, 2008 [hereinafter U.S.M.C.A.]. Where not explicitly listed in a given agreement's provision, M.E.A.s may still be found listed in specific Annexes. *See, e.g.*, Free Trade Agreement between the United States of America and the Republic of Korea, Annex 20-A, U.S.-S. Kor., Jun. 30, 2007 [hereinafter U.S.-Korea F.T.A.]. For an analysis and comparison in the literature, see Jinnah & Morgera, *supra* note 50; Sikina Jinnah & Julia Kennedy, *A New Era of Trade-Environment Politics: Learning from US Leadership and its Consequences Abroad,* 12 Whitehead J. Dipl. & Int'l Rel. 95 (2011).

[94] *See* E.U.-Japan FTA, *supra* note 37, at art. 16.4, ¶ 3; E.U.-Vietnam FTA, *supra* note 39, at art. 13.5, ¶ 3; E.U.-U.K. T.C.A., *supra* note 43, at art. 400, ¶ 3; E.U.-Central America A.A., *supra* note 34, at art. 287, ¶ ¶ 3, 4; E.U.-Moldova A.A., *supra* note 32, at art. 366, ¶ 3; E.U.-Mexico Agreement in principle, *supra* note 40, at art. 4, ¶ 3; E.U.-Mercosur Agreement in principle, *supra* note 41, at art. 5, ¶ 4; E.U.-New Zealand F.T.A., *supra* note 42, at art. X.5, ¶ 3. An interesting exception is represented by E.U.-Central America A.A., *supra* note 34, at art. 287, whose Paragraph 3 contains the obligation for the Parties to undertake to ensure ratification of the amendment to Article XXI of Washington Convention (C.I.T.E.S.) by the entry into force of the Agreement. Paragraph 4 continues by underling the commitment to ratify, to the extent that the Parties have not yet done so, the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, at the latest by the entry into force of the Agreement.

[95] *See* Bronckers & Gruni, *supra* note 50; James Harrison et al., *Governing Labour Standards through Free Trade Agreements: Limits of the European Union's Trade and Sustainable Development Chapters*, 57 J. Common Mkt. Stud. 260 (2019); James Harrison, *The Labour Rights Agenda in Free Trade Agreements*, 20 J. World Inv. & Trade 705 (2019).

[96] Bronckers & Gruni, *supra* note 50.

[97] *Id.*

Yet, a point remains firm: M.E.A.s clauses as embedded in N.G.F.T.A.s do not radically innovate with respect to the environmental obligations contracted by the Signatories at international level, they have consequently been baptized as a mere: "reaffirmation of obligations already binding on the Parties under those agreements".[98] But they are not meaningless in scope. Actually, the incorporation of obligations deriving from M.E.A.s into T.S.D. Chapters generates a double layer of protection since, by absorbing multilateral environmental agreements into N.G.F.T.A.s, the Parties have committed to respect those obligations also on the basis of the bilateral Agreement, as by analogy, rightly pointed out by the Panel of Experts in the Korea-E.U. dispute.[99]

Additionally and with an eye to enforcement, the assimilation of M.E.A.s obligations in the text of T.S.D. Chapters would confer the Parties the power to refer the dispute, in case of violation of the relevant clauses, to a specific adjudicatory procedure, as provided for by the F.T.A. itself.

Against this backdrop, further features of the present clauses remain opaque having been at the center of a vivid debate.

In primis, commitments related to M.E.A.s mostly come with hortatory or best endeavor formulations, which may suggest a lack of prescriptive force. Problematics might also arise regarding the commitment on implementation which, despite an apparent binding formulation, does not contain benchmarks for concretely actualizing pledges. The latter point deserves attention in the aftermath of the E.U.-Korea dispute - where the Panel embraced a broad understanding of the obligation to make continued and sustained efforts towards ratification of the core I.L.O. Conventions. As a matter of fact, the Panel emphasized that, in the absence of "specific forms or contents of efforts being required",[100] the Agreement's text would confer to the Parties a "certain level of leeway in selecting specific ways of making such required efforts",[101] which may ultimately come at the expense of effective implementation and enforcement.

Eventually, a point worth recalling relates to the presence, in M.E.A.s clauses, of a direct and immediate link between multilateral environmental agreements and trade and investment - a characteristic already detected by A.G. Sharpston in her delivered Opinion.[102] In particular, clauses relating to multilateral environmental agreements

[98] Lorand Bartels, *Human Rights and Sustainable Development Obligations in E.U. Free Trade Agreements*, 40 Legal Issues Econ. Integration 297 (2013).

[99] Panel Report, *Panel of Experts proceeding constituted under Article 13.15 of the E.U.-Korea Free Trade Agreement*, ¶ 107 (Jan. 20, 2021) [hereinafter E.U.-Korea Panel Report], https://trade.ec.europa.eu/doclib/docs/2021/january/tradoc_159358.pdf. *See also* Opinion of Advocate General Sharpston, *supra* note 72, ¶ 498.

[100] E.U.-Korea Panel Report, *supra* note 97, ¶ 274.

[101] *Id.*

[102] Sharpston, supra note 72, ¶ 489.

would "specifically [address] the issue of disguised restrictions on trade which may result from measures implementing multilateral environmental agreements".[103]

Still, N.G.F.T.A.s provide no guidance on how environmental measures flowing from the implementation of M.E.A.s might, concretely, affect bilateral trade. From this perspective, E.U. praxis diverges from the one proper of the U.S. F.T.A.s concluded following the 2006 Peru-U.S. Agreement,[104] in which a violation of the provisions concerning multilateral environmental agreements shall be "in a manner effecting trade or investment between the Parties".[105] Interestingly, the United States-Mexico-Canada Agreement F.T.A.[106] sets indicators for identifying under what conditions such a violation may occur; specifying that a failure is to be regarded as affecting trade or investment if it involves "a person or industry that produces a good or supplies a service traded between the Parties or has an investment in the territory of the Party that has failed to comply with this obligation"[107] or "a person or industry that produces a good or supplies a service that competes in the territory of a Party with a good or a service of another Party".[108]

[103] *Id.*
[104] Peru Trade Promotion Agreement, Peru-U.S., Jan. 6, 2006, [hereinafter U.S.-Peru T.P.A.].
[105] *Id.* at art. 18.2. *See also* U.S.-Korea F.T.A., *supra* note 91, at art. 20.2; United States-Colombia Trade Promotion Agreement, Colombia-U.S., May 15, 2012, at art. 18.2; Free Trade Agreement, Columbia-U.S., Nov. 22, 2006 [hereinafter U.S.-Colombia F.T.A.]; U.S.-Panama Trade Promotion Agreement, art. 17.2, U.S.-Pan. F.T.A. [hereinafter U.S.-Panama F.T.A.]; U.S.M.C.A., *supra* note 91 art. 24.8. For an in-depth analysis in the literature, see Jinnah & Kennedy, *supra* note 91.
[106] Agreement between the United States of America, the United Mexican States, and Canada, *supra* note 95.
[107] U.S.M.C.A., *supra* note 91, at art. 24.8.
[108] *Id.*

2.2. RIGHT TO REGULATE AND LEVELS OF PROTECTION CLAUSES

Right to regulate and levels of protection clauses[109] best mirror the overarching objective of T.S.D. Chapters, by which the Signatories do not intend to harmonize their respective environmental laws and regulations. Conversely, they recognize the sovereign right of each Party to determine its own environmental priorities; establish its levels of environmental protection; and adopt or modify domestic legislation and policies accordingly, with still due regard to both ratified multilateral environmental agreements and internationally recognized standards.

As anticipated, a limited deviation from this model is to be detected in the D.C.F.T.A.s concluded with Ukraine, Moldova and Georgia, falling under the aegis of the E.U. neighborhood policy.[110] In the mentioned Agreements, the specific right to regulate clause is accompanied by a general commitment of legislative approximation to the E.U. *acquis* in the environmental domain.[111] Yet, the choice comes as no surprise, given the twofold objective of D.C.F.T.A.s calling for both the associated Country integration in the Union's internal market by means of the setting up of a free trade area and the progressive approximation of domestic legislation to that of the Community.[112]

Furthermore, right to regulate clauses encompass references to given levels of protection, demanding the F.T.A. partners to ensure that domestic laws and policies provide for and encourage high levels of environmental safeguard, along with enshrining a commitment to strive to keep incrementing domestic legislation and policies.

An analysis of right to regulate and levels of protection clauses hence reveals the presence of two distinct components, also termed in the literature as minimum-level and high-level clauses.[113] The former, phrased in mandatory terms, establishes a straightforward connection with M.E.A.s obligations, thus granting minimum standards of protection in the Party's exclusive right to regulate. Minimum-level provisions border the power of States to autonomously determine, without normative constraints, domestic environmental legislation. Also, they innovate with regard to the traditional

[109] *See, e.g.*, E.U.-Korea F.T.A., *supra* note 28, at art. 13.3; E.U.-Andean Community F.T.A., *supra* note 35, at art. 268; C.E.T.A., *supra* note 36, at art. 24.3; E.U.-Japan F.T.A., *supra* note 37, at art. 16.2, ¶ 1; E.U.-Singapore F.T.A., *supra* note 38, at art. 12.2; E.U.-Vietnam F.T.A., *supra* note 39, at art. 13.2; E.U.-U.K. T.C.A., *supra* note 43, at art. 391, ¶ 1; E.U.-Georgia A.A., *supra* note 33, at art. 228; E.U.-Moldova A.A., *supra* note 32, at art. 364; E.U.-Mexico Agreement in Principle, *supra* note 40, at art. 2, ¶¶ 1, 2; E.U.-Mercosur Agreement in Principle, *supra* note 41, at art. 2, ¶¶ 1, 2; E.U.-New Zealand F.T.A., *supra* note 42 at art. X.2, ¶¶ 1, 2.

[110] For an overview in the literature, see Bart Van Vooren, EU External Relations Law and the European Neighbourhood Policy: A Paradigm for Coherence (Routledge ed., 2011).

[111] E.U.-Ukraine A.A., *supra* note 31, at art. 290, ¶ 2; E.U.-Moldova A.A., *supra* note 32, at art. 91, 97; E.U.-Georgia A.A., *supra* note 33, at art. 306, 312.

[112] E.U.-Ukraine A.A., *supra* note 31, at art. 1, ¶ 2 (d); E.U.-Moldova A.A., *supra* note 32, at art. 1, ¶ 2 (f); E.U.-Georgia A.A., *supra* note 33, at art. 1, ¶ 2 (h).

[113] *See* Marín Durán, *supra* note 51.

affirmation of the principle on the blueprint of the exception-based model adapted on Article XX G.A.T.T.[114]

High-level provisions, while acting as a supplementary constraint to the Parties' right to regulate, still show an aspirational character, being enunciated in constructs such as "each part shall strive to continue to improve"[115] or "shall strive to ensure"[116] that relevant law and policies provide for high levels of environmental protection. Mostly due to their hortatory formulation - even raising doubts over their effective legal significance - high level of protection clauses may open the door to interpretative uncertainties in adjudicatory procedures, leading the doctrine to observe how their current phrasing could come with difficulties in both implementation and enforcement praxis.[117]

With limited precedents of T.S.D. Panel of Experts not providing for a comprehensive view on the way in which such clauses materially operate, it remains to be seen how semantic constructs such as "high levels of environmental protection" will be interpreted as to assign consistency to the clause.

By way of example, if the Panel decided to make reference to the E.C.J. jurisprudence, the expression "high levels of environmental protection" would not be interpreted as the highest standard of protection technically possible.[118] As asserted by Krämer, high levels of environmental protection are to be determined by referring to environmental denominators as set by those Member States which display an elevated grade of environmental safeguard, along with the reliance on policy declarations, resolutions or targets.[119]

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[114] A wide-ranging assessment of the Parties' right to regulate in preferential trade agreements is outside the scope of the present Article. *See e.g.*, Elizabeth Trujillo, *Balancing Sustainability, the Right to Regulate, and the Need for Investor Protection: Lessons from the Trade Regime*, 59 B. C. L. Rev. 2735 (2018).

[115] Despite minimum differences in formulation, see C.E.T.A., *supra* note 36, at art. 24.3, ¶ 1; E.U.-Singapore F.T.A., *supra* note 38, at art. 12.2, ¶ 2; E.U.-Mexico Agreement in Principle, *supra* note 40, at art. 2, ¶ 2.

[116] Despite minimum differences in formulation, see E.U.-Korea F.T.A., *supra* note 28, at art. 13.3; E.U.-Andean Community F.T.A., *supra* note 35, at art. 268; E.U.-Japan F.T.A., *supra* note 37 , at art. 16.2, ¶ 1; C.E.T.A., *supra* note 36, at art. 24.3, ¶ 1; E.U.-Singapore F.T.A., *supra* note 38, at art. 12.2, ¶ 2; E.U.-Vietnam F.T.A., *supra* note 39, at art. 13.2, ¶ 2; E.U.-U.K. T.C.A., *supra* note 43, at art. 391, ¶ 5; E.U.-Central America A.A., *supra* note 34, at art. 285, ¶ 2; E.U.-Ukraine A.A., *supra* note 31 at art. 290, ¶ 1; E.U.-Georgia A.A., *supra* note 33, at art. 228, ¶ 2; E.U.-Moldova A.A., *supra* note 32, at art. 364, ¶ 2; E.U.-Mexico Agreement in Principle, *supra* note 40, at art. 2, ¶ 2; E.U.-Mercosur Agreement in principle, *supra* note 41, at art. 2, ¶ 2; E.U.-New Zealand F.T.A., *supra* note 42, at art. X.2, ¶ 2.

[117] *See* Marín Durán, *supra* note 51; Marco Bronckers & Giovanni Gruni, *Taking the Enforcement of Labour Standards in The EU's Free Trade Agreements Seriously*, 56 Common Mkt. L. Rev. 1591 (2019).

[118] *See* Case C-284/95, Safety Hi-Tech Srl v. S. & T. Srl., 1998, E.C.R. I-04301.

[119] *See* Nicolas de Sadeleer, *The Principle of a High Level of Environmental Protection in EU Law: Policy Principle or General Principle of Law?*, *in* Mijöẗtsliga Perspektiv Och Tankeẅndor, *VÄNBOK TILL JAN DARPÖ & GABRIEL MICHANEK* 447, 447-65 (Lena Gipperth & Charlotta Zetterbeg eds., 2013); Ludwig Kẗmer, EU Environmental Law (Sweet & Maxwell eds., 8th ed. 2016).

Eventually, it proves necessary to accentuate that, contrary to M.E.A.s clauses, no explicit and direct connection with trade and investment is set in right to regulate at the level of protection clauses. As currently framed and verbalized, the right to regulate provisions would thus seem to establish a plain environmental commitment as noted by A.G. Sharpston in her delivered Opinion.[120]

2.3. UPHOLDING LEVELS OF PROTECTION CLAUSES

Contrary to M.E.A.s and right to regulate clauses, upholding protection level clauses[121] explicitly provide for a direct link with trade and investment to subsist in the case of a Party's failure, through a sustained or recurring course of action or inaction, to effectively enforce or derogate from domestic environmental norms.

The provision, phrased in mandatory terms, comes with subtle variations in N.G.F.T.A.s[122] and a broad scope of application, pertaining to national environmental legislation in its entirety, and not purely internal regulations implementing multilateral environmental agreements. Upholding levels of protection provisions; hence, complement high- and minimum-level of protection clauses by establishing an additional constraint on the Parties' sovereign right to regulate - calling on F.T.A.s Signatories not to fail to enforce or lower ecological regulations and standards in bolstering bilateral trade intercourses. Consequently , their *ratio* is to avoid the so-called "race to the bottom", promoting economic growth through trade exchanges by sustaining environmental deregulation.

As anticipated, the peculiarity of upholding levels of protection clauses rests on their inherent trade association which, in the absence of textual clarification on how this connection - or trade test - shall be envisaged, has led commentators to turn to foreign

[120] Opinion of A.G. Sharpston, ¶ 503.

[121] *See, e.g.*, E.U.-Korea F.T.A., *supra* note 28, at art. 13.7; E.U.-Andean Community F.T.A., *supra* note 35, at art. 277; C.E.T.A., *supra* note 36, at art. 24.5; E.U.-Japan F.T.A., *supra* note 37, at art. 16.2, ¶ 2; E.U.-Singapore F.T.A., *supra* note 38, at art. 12.12; E.U.-Vietnam F.T.A., *supra* note 39, at art. 13.3; E.U.-U.K. T.C.A., *supra* note 43, at art. 391, ¶ 2; E.U.-Central America A.A., *supra* note 34, at art. 291; E.U.-Ukraine A.A., *supra* note 31, at art. 296; E.U.-Georgia A.A., *supra* note 33, at art. 235; E.U.-Moldova A.A., *supra* note 32, at art. 371; E.U.-Mexico Agreement in Principle, *supra* note 40, at Art. 2, ¶¶ 3-6; E.U.-Mercosur Agreement in Principle, *supra* note 41, at art. 2, ¶¶ 3-5; E.U.-New Zealand F.T.A., *supra* note 42, at art. X.2, ¶¶ 3-6. In the literature, upholding levels of protection clauses are also referred to as "non-regression" and "non-derogation" clauses. *See* Adinolfi, *supra* note 51.

[122] On the one hand, in some N.G.F.T.A.s, such as C.E.T.A., upholding levels of protection clauses are formulated in slightly less mandatory terms, utilizing the expression: "[T]he parties recognize that it is inappropriate to encourage trade or investment by weakening or reducing the levels of protection afforded in their environmental law". On the other, different N.G.F.T.A.s, such as the E.U.-Korea F.T.A., do incorporate a stronger wording, prescribing that: "[A] Party shall not fail to effectively enforce its environmental and labour laws".

practice for interpretative guidance.[123] Remarkably, in the landmark decision given under the Dominican Republic-Central America-United States Free Trade Agreement [hereinafter C.A.F.T.A.-D.R.],[124] the Arbitral Panel accentuated that it shall be for the plaintiff to demonstrate that alleged practices regarded as being in contrast with sustainability provisions, as enshrined in the trade agreement, have assigned a "competitive advantage on the employer or employers engaged in trade",[125] by means of "repeated behavior which displays sufficient similarity"[126] or "prolonged behavior in which there is sufficient consistency in sustained acts or omissions as to constitute a line of connected behavior".[127]

Taking as a basis the arbitral panel's ruling, it can be accordingly ascertained that, on the one hand, a sole failure to effectively enforce environmental laws is not eligible to be classified as a violation of upholding levels of protection clauses. On the other, a competitive advantage shall be detected, accruing to a relevant employer and consequently affecting its competitiveness.[128] On the basis of semantic correspondence detected in the E.U. and in the U. S. upholding level of protection clauses, a convergence in interpretation may, thus, be plausible.[129]

3. DOWNSTREAM ENFORCEMENT: A SPECIALIS DISPUTE SETTLEMENT MECHANISM AND THE LACK OF ECONOMIC SANCTIONS

By means of new generation F.T.A.s, the European Union has assumed a promotional, or managerial,[130] approach in sustaining environmental interests through trade agreements, a normative choice disregarding the utilization of countermeasures in case

[123] Bronckers & Gruni, *supra* note 50.

[124] Dominican Republic - Central America - United States Free Trade Agreement Arbitral Panel Established Pursuant to Chapter 20 in the Matter of Guatemala, Issues Relating to the Obligations Under Article 16.2.1(A) of the C.A.F.T.A.-D.R., Final Report of the Panel, Jun. 14, 2017 [hereinafter C.A.F.T.A.-D.R. Panel Report]. For a comment in the literature, see Phillip Paiement, *Leveraging Trade Agreements for Labor Law Enforcement: Drawing Lessons from the US-Guatemala CAFTA Dispute*, 49 Geo. J. Int'l L. 675, 675-92 (2018); Tequila J. Brooks, *U.S.-Guatemala Arbitration Panel Clarifies Effective Enforcement Under Labor Provisions of Free Trade Agreement,* 4 Int'l Lab. Rts. Case L. 45 (2018).

[125] C.A.F.T.A.-D.R. Panel Report, *supra* note 122, ¶ 190.

[126] *Id.* ¶ 152.

[127] *Id.*

[128] *Id.* ¶ 195.

[129] *See, e.g.*, E.U.-Korea F.T.A., *supra* note 28, at art. 13.7; U.S.-Korea F.T.A., *supra* note 91, at art. 20.3.

[130] *See* Denise Prévost & Alexovicova Iveta, *Mind the Compliance Gap: Managing Trustworthy Partnerships for Sustainable Development in the European Union's Free Trade Agreements*, 6 Int'l J. Pub. L. & Pol'y 236, 236-269 (2019).

of non-compliance. A regulatory tactic epitomizing the central deviation point from its main alternative model is the confrontational one embraced by F.T.A.s negotiated and concluded by the United States.[131]

Notably, all E.U. new generation free trade agreements include a *specialis* dispute settlement mechanism [hereinafter D.S.M.] for "any matter of mutual interest"[132] arising from the provisions contained in trade and sustainable development Chapters. This is an apparatus structured around a recurrent double layer: governmental consultations followed by the potential establishment of a Panel of Experts, or group of experts,[133] in the case of failed bilateral dialogue. The adjudicatory procedure spelt out in T.S.D. Chapters thus unfolds into precise steps.

To begin with, in the case of a disagreement over a matter arising under the considered Chapters, a Party can request consultations with the Counterpart by delivering a written request to the specific contact point, i.e., a designated office within the other Party's administration. Consultations shall thus commence punctually after the delivery of the written request. A point worth mentioning regards the eventual consideration of the activity of relevant multilateral environmental organizations as to reach a mutually satisfactory solution, along with the possibility for the Parties, by mutual accord, to seek recommendations of these organizations or bodies in order to investigate the matter.

Secondly, in the eventuality of a Party's will to further examine the object of the dispute, a specific organ constituted under the F.T.A., denominated as Trade and Sustainable Development Committee or Board on Trade and Sustainable Development, may be convened with the view of considering the matter.[134]

Yet and thirdly, should the dispute fail to be satisfactorily addressed, each Party may request, again in writing to the contact point of the Counterpart, the establishment of a Panel of Experts to analyze the matter. Panelists are to be designated among individuals with specialized knowledge or expertise in relation to the topics addressed by T.S.D. Chapters - which shall be independent and serve in their individual capacities.

[131] Jinnah & Morgera, *supra* note 50.

[132] Granted uniformity in the content of the procedures, see e.g., E.U.-Korea F.T.A, *supra* note 28, at art. 13.14, ¶ 1.

[133] *See, e.g.*, E.U.-Andean Community F.T.A. *supra* note 35, at art. 284; E.U.-Ukraine A.A., *supra* note 31, at art. 301.

[134] The procedure spelt out in N.G.F.T.A.s for governmental consultations comes with slight variations in the analyzed agreements. *See* E.U.-Korea F.T.A., *supra* note 28, at art. 13.14; E.U.-Andean Community F.T.A., *supra* note 35, at art. 283; C.E.T.A., *supra* note 36, at art. 23.9; E.U.-Japan F.T.A., *supra* note 37, at art. 16.17; E.U.-Singapore F.T.A., *supra* note 38, at art. 12.16; E.U.-Vietnam F.T.A., *supra* note 39, at art. 13.16; E.U.-U.K. T.C.A., *supra* note 43, at art. 408; E.U.-Central America A.A., *supra* note 34, at art. 296; E.U.-Georgia A.A., *supra* note 33, at art. 242; E.U.-Moldova A.A., *supra* note 32, at art. 378; E.U.-Ukraine A.A., *supra* note 31, at art. 300, ¶¶ 4-6; E.U.-Mexico Agreement in Principle, *supra* note 40, at art. 16; E.U.-Mercosur Agreement in Principle, *supra* note 41, at art. 16.

The chief task of the Panel is thus to present a final report containing recommendations to the Parties.

In so doing, the matter is to be examined in light of the relevant provisions of the T.S.D. Chapter and, if deemed relevant, information from any ulterior source may be obtained. Particularly, in matters related to respect of M.E.A.s, the Panel might be entitled to seek information from the relevant multilateral environmental agreements' bodies. Coming to the Panel's final report, this shall set out the findings of facts, the applicability of the relevant provisions and the rationale at the basis of the recommendations. The Parties, despite variations in formulation, are required to make their best efforts to accommodate the Panel's advice.[135]

Henceforth, N.G.F.T.A.s establish a two-track system of judicial protection: a *generalis* adjudicatory procedure applicable to regular trade issues of commercial liberalization, along with intellectual property protection, and a *specialis* one characterizing non-trade components as contained in T.S.D. Chapters.

Such a normative bipartition raises doubts on the overall coherence of the C.C.P., in particular, in a post-Opinion 2/15 scenario abstractly elevating non-trade issues as integral components of the common commercial policy.[136] This is a view further toughened in the aftermath of the E.U.-Korea dispute.[137] Being requested by the Union to assess the consistency of a number of Korean law measures with Chapter 13, Article 13.4.3, of the E.U.-Korea F.T.A.,[138] the Panel ultimately affirmed the binding nature of the sustainability clause at stake.[139] Whereas the dispute related to the labor pillar of

[135] For example, E.U.-Vietnam F.T.A., *supra* note 39, at art. 13.17, ¶ 9, provides for the Parties to "discuss appropriate actions or measures to be implemented taking into account the final report of the Panel of Experts and the recommendations therein". Similarly, also: E.U.-Japan F.T.A., *supra* note 37, at art. 16.18, ¶ 6; E.U.-Singapore F.T.A., *supra* note 38, at art. 12.17, ¶ 9; E.U.-U.K. T.C.A., *supra* note 43, at art. 409, ¶ 16; E.U.-Georgia A.A., *supra* note 33, at art. 243, ¶ 8; E.U.-Moldova A.A., *supra* note 32, at art. 379, ¶ 8; E.U.-Mexico Agreement in Principle, *supra* note 40, at art. 17, ¶ 9; E.U.-Mercosur Agreement in principle, *supra* note 41, at art. 17, ¶ 11. Relevant also the variation contained in C.E.T.A., *supra* note 36, at art. 24.15, ¶ 11, stating:

> [I]f the final report of the Panel of Experts determines that a Party has not conformed with its obligations under this Chapter, the Parties shall engage in discussions and shall endeavour, within three months of the delivery of the final report, to identify an appropriate measure or, if appropriate, to decide upon a mutually satisfactory action plan. In these discussions, the Parties shall take into account the final report.

See also E.U.-Central America A.A., *supra* note 34, at art. 301, ¶ 3.

[136] Sharpston, *supra* note 72, ¶ 147 reading: "[I]t follows that the objective of sustainable development henceforth forms an integral part of the common commercial policy". *See* Susanna Villani, *Settling Disputes on TDS Chapters of E.U. FTAs: Recent Trends and Future Challenge in the Light of CJEU Opinion 2/15, in* The EU and the Rule of Law in International Economic Relations, An agenda for an Enhanced Dialogue 107 (Andrea Biondi & Giorgia Sangiuolo eds., 2021).

[137] E.U.-Korea Panel Report, *supra* note 97.

[138] *Id.* ¶¶ 100-102, 259-260.

[139] *Id.* ¶¶ 127, 277.

sustainable development, the decision reveals crucial also for the interpretation of environmental provisions, on the basis of homogeneity in linguistic formulation.[140]

It is thus no coincidence that claims have been raised as to strengthen sustainability Chapters further and align the T.S.D. mechanism for settling disputes to the N.G.F.T.A.'s regular one[141] - with particular regard to the possibility for demanding countermeasures be implemented in case of non-compliance, at date excluded.

Firmly advocating the promotion of environmental interests through cooperation, the E.U. 's approach had still for a long time rejected the confrontational tactic proper of the United States, which still deserves clarification. As emphasized, F.T.A.s concluded by the United States introduce the possibility for environmental provisions to be subject to the regular dispute settlement mechanism, thus granting the prospect of applying countermeasures in case of non-compliance. Nevertheless, as pointed out by Jinnah and Morgera, the triggering of such a normative leeway remains questionable in practice.[142] A closer look at the relevant provisions[143] reveals that, prior to resorting to the *generalis* D.S.M., the Parties shall turn to *ad hoc* consultative processes, as provided for by F.T.A.s environmental Chapters. Consequently, the prospect of effectively imposing sanctions in instances of missed observance of green provisions would stand out as a mere last resort option following the exhaustion of preliminary remedies.

In addition, the European Union has not excluded, *in toto*, a more assertive approach in enforcing T.S.D. provisions, also of an environmental nature. A partial deviation from the common D.S.M. blueprint for sustainability clauses has in fact been envisaged in the E.U.-U.K. Trade and Cooperation Agreement by means of Article 410 for non-regression areas. In particular, Paragraph 3 legitimizes the complaining Party, where the respondent Party decides not to take any action to conform with the report of the Panel and with the Agreement, to refer *mutatis mutandis* to any remedy authorized under Article 749. This thus regulates temporary remedies for non-compliance with a

[140] A critical assessment of the E.U.-Korea dispute lies outside the scope of this Article. *See* Ji Sun Han, *The EU-Korea Labour Dispute: A Critical Analysis of the EU's Approach*, 26 Eur. Foreign Aff. Rev. 531 (2021); María J. García, *Sanctioning Capacity in Trade and Sustainability Chapters in EU Trade Agreements: The EU–Korea Case*, 10 Pol. & Governance 58 (2022).

[141] *See* Axel Marx et al., Dispute Settlement in the Trade and Sustainable Development Chapters of EU Trade Agreements (Leuven Centre for Global Governance Studies ed., 2017); Dutch Trade Minister & French Trade Minister, *Non-paper from the Netherlands and France on trade, social economic effects and sustainable development* (2020), https://www.tresor.economie.gouv.fr/Articles/73ce0c5c-11ab-402d-95b1-5dbb8759d699/files/6b6ff3bf-e8fb-4de2-94f8-922eddd81d08.

[142] Jinnah & Morgera, *supra* note 50.

[143] For details regarding the procedures, see U.S.-Peru T.P.A., *supra* note 102, at art. 18.12; U.S.-Colombia F.T.A., *supra* note 103, at art. 18.12; U.S.-Korea F.T.A., *supra* note 91, at art. 20.9; C.A.F.T.A.-D.R. Panel Report, *supra* note 122, at art. 17.10; U.S.-Panama F.T.A., *supra* note 103, at art. 17.11; U.S.M.C.A. F.T.A., *supra* note 91, at art. 24.32.

Panel's ruling in the forms of compensation or suspension of obligations. Furthermore, Article 411, termed as "rebalancing", while recognizing each Party's sovereign right in determining its future policies and priorities in relation to environmental and climate protection,[144] underscores how the Partners acknowledge that "significant divergences in these areas can be capable of impacting trade"[145] between them, in a manner which "changes the circumstances that have formed the basis for the conclusion of this Agreement".[146] Henceforth, in case of material impacts on trade between the Parties, arising as a result of significant divergences in environmental and climate protection, each Party may take appropriate rebalancing measures to address the situation. Nevertheless, despite the norm containing procedural guidance on how these measures shall be applied,[147] interpretation is needed to determine what might constitute a "significant divergence" or a "material impact" on trade, with the article merely stating that "a Party's assessment of those impacts shall be based on reliable evidence and not merely on conjecture or remote possibility".[148]

Besides the peculiarities proper of the E.U.-U.K. T.C.A., it is interesting to notice that the possibility for suspension of commercial preferences has also been endorsed by the E.U. through the insertion in trade and cooperation agreements of human rights essential element clauses which, mostly coming into standard wording,[149] have been enclosed in external normative instruments since the 1990s prevalently as tools for triggering the suspension mechanism, are provided for by Article 60 of the Vienna Convention on the Law of Treaties.[150]

[144] E.U.-U.K. T.C.A., *supra* note 43, at art. 411, ¶ 1.Yet, the same Paragraph expressly underlines that the right of each Party to determine its future policy and priorities with regard to environmental or climate protection shall be consistent with each Party's international commitments, including those flowing from the Agreement itself.

[145] *Id.*

[146] E.U.-U.K. T.C.A., *supra* note 43, at art. 411, ¶ 1.

[147] *Id.* ¶¶ 2-3.

[148] *Id.* ¶ 2. The procedure contained in Article 411 is extremely detailed and subject to *ad hoc* procedural requirements. *See generally*, Azzurra Muccione, *La Tutela dell'Ambiente e del Clima*, *in* L'Accordo sugli Scambi Commerciali e la Cooperazione tra l'Unione Europea e il Regno Unito 149 (Alberto Leone Malatesta ed., 2022) (It.).

[149] Generally, essential element clauses concerning human rights present a fixed formula, as by way of exemplification illustrated by the Partnership agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, Jun. 23, 2000, O.J. (L 317) (Cotonou Agreement). In particular, see art. 9, ¶ 2: "[R]espect for human rights, democratic principles and the rule of law, which underpin the [A.C.P.-E.U.] Partnership, shall underpin the domestic and international policies of the Parties and constitute the essential elements of this Agreement".

[150] *See* Nicolas Hachez, *"Essential Elements" Clauses in EU Trade Agreements Making Trade Work in a Way that helps Human Rights?* (KU Leuven Working Paper, Paper No. 158, 2015); Bartels, *supra* note 96.

Nevertheless, standard essential element clauses are rarely reproduced in N.G.F.T.A.s,[151] with the limited exception of the E.U.-Andean Community F.T.A.[152] A remarkable exception to this trend can still be detected in the E.U.-U.K. T.C.A., which explicitly stipulates that Article 764(1) on climate change constitutes an essential element of the Agreement.[153]

The latter also elaborates on the fulfillment of the obligations stemming from the clauses marked as essential elements. It introduces the possibility for a Party - when considering that a serious and substantial failure has occurred and after having requested the intervention of the Partnership Council as to reach a mutually agreed solution - to terminate or suspend the operation of the Agreement, or any supplementing agreement, in whole or in part.[154]

Yet, the measures adopted ought to respect international law fully and be proportionate, with priority being conferred to those which "least disturb the functioning"[155] of the Agreement and of any supplementing agreement.[156] The provision concludes by attempting to confer interpretative guidance to the norm, underscoring that for a particular situation to constitute a serious and substantial failure to fulfill the obligations of Article 771, its gravity and nature would be of an "exceptional sort that threatens peace and security or that has international repercussions". [157]

The high threshold for assessing non-compliance with essential element clauses would thus lead to alimenting existing doubts[158] over the effective potential of these provisions in concretely contributing to the protection of human rights and respect for democratic principles abroad.[159] As underlined by Hachez: "essential elements have sparsely been invoked, they have not always led to sanctions proper but rather to consultations, and the sanctions when applied did not involve the lifting of trade

[151] Still, it shall be underscored that, as pointed out by the European Commission, in cases where N.G.F.T.A.s do not incorporate essential elements clauses, the latter is to be found in *ad hoc* framework agreements negotiated with the partner country and legally linked to the trade Agreement. *See Commission Non paper: Using EU Trade Policy to promote fundamental human rights, Current policies and practices* (2012), https://trade.ec.europa.eu/doclib/docs/2012/february/tradoc_149064.pdf.

[152] E.U.-Andean Community F.T.A., *supra* note 35, at art. 1, 2.

[153] E.U.-U.K. T.C.A., *supra* note 43, at art. 771.

[154] *Id.* at art. 772, ¶¶ 1-2.

[155] E.U.-U.K. T.C.A., *supra* note 43, at art. 772, ¶ 3.

[156] *Id.*

[157] *Id.* at art. 772, ¶ 4. For greater clarity, the same provision also underlines that: "[A]n act or omission which materially defeats the object and purpose of the Paris Agreement shall always be considered as a serious and substantial failure for the purposes of this Article".

[158] *See* Lorand Bartels, A Model Human Rights Clause for the EU's International Trade Agreements (German Institute for Human Rights and Misereor, 2014).

[159] *See* Hachez, *supra* note 148. For an overview also regarding essential element clauses in the E.U.-U.K. T.C.A., see Steve Peers, *So Close, Yet So Far: The EU/UK Trade and Cooperation Agreement*, 59 Common Mkt. L. Rev. 49 (2022).

preferences but rather suspension of meetings and technical co-operation programmes".[160]

Against this backdrop, it is still significant that, for the very first time, the E.U.-U.K. T.C.A. introduced an essential element clause explicitly dedicated to the fight against climate change - a factor which may be explained by the Parties' willingness to confer priority to environmental protection in its most pressing dimension.[161] Yet, it should be borne in mind that the peculiarities proper to the Trade and Cooperation Agreement signed with the U.K. might remain a normative *unicum* on the basis of the latter's status of former E.U. Member State.

4. THE ROAD FORWARD: NOVELTIES AHEAD IN THE ERA OF THE EUROPEAN GREEN DEAL

The criticalities characterizing both the upstream and downstream enforcement phases of trade and sustainable development Chapters have not gone unnoticed. Shortly after T.S.D. Chapters entered the scene of free trade agreements, claims have been raised for a more assertive enforcement of sustainability commitments, including environmental provisions as enshrined in new generation commercial agreements. In response to criticism addressing the alleged weak nature of T.S.D. commitments to endorse environmental considerations effectively, in 2017 the European Commission launched a debate[162] on how to improve trade and sustainable development Chapters enshrined in N.G.F.T.A.s.

[160] Hachez, *supra* note 148, at 19. *Contra* Lorand Bartels, *The Application of Human Rights Conditionality in the EU's Bilateral Trade Agreements and Other Trade Arrangements with Third Countries*, European Parliament (2008), https://www.europarl.europa.eu/RegData/etudes/etudes/join/2008/406991/EXPO-INTA_ET(2008)406991_EN.pdf.

[161] *See* Muccione, *supra* note 146; *but see* Giulia C. Leonelli, *From Extra-Territorial Leverage and Transnational Environmental Protection to Distortions of Competition: The Level Playing Field in the EU–UK Trade and Cooperation Agreement*, 33 J. Env't L. 611 (2021). Recently and following the conclusion of negotiations for the E.U.-New Zealand F.T.A., the Commission announced that, also for the aforesaid Agreement, respect of the Paris Agreement shall constitute an essential element. *See* European Commission Press Release IP/22/4158, EU - New Zealand Trade Agreement: Unlocking Sustainable Economic Growth (Jun. 30, 2022).

[162] *Non-paper of the Commission Services, Trade and Sustainable Development (TSD) Chapters in E.U. Free Trade Agreements (FTAs)* (Jul. 11, 2017), https://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155686.pdf.

One year later, the Commission published the non-paper on "Feedback and way forward on improving the implementation and enforcement of Trade and Sustainable Development Chapters in E.U. Free Trade Agreements".[163] It was reiterating its aversion to the deployment of economic sanctions in order to grant compliance with environmental clauses included in T.S.D. Chapters. Yet, the non-paper managed to advance an action plan in fifteen points aiming at stepping up implementation of T.S.D. Chapters which, with an eye to enforcement, put forward a combination of deeds to be pursued, including enhanced action in the monitoring phase, enabling the civil society to take effective part in the proper functioning of T.S.D. Chapters and ensuring the proper implementation of the Panels' reports.

Nevertheless, the plan did not succeed in halting discussion,[164] which led the Commission to announce a new reflection on T.S.D. Chapters in line with the objectives proper of the European Green Deal. The latter, depicting the E.U. environmental path for the attainment of climate neutrality by 2050, addresses the necessity for the Union to develop a specific "green deal diplomacy"[165] centered on the necessity of "convincing and supporting others to take on their share of promoting more sustainable development".[166]

In order to reach this objective, trade policy is identified as a specific area of cooperation for the advancement of the Union's ecological transition, both at the fore of relevant international fora and through bilateral cooperation with partner countries. In particular, the Green Deal makes it clear how commercial intercourses can favor engagement with trading partners on climate and environmental action, with the E.U. aiming at utilizing its "expertise in green regulation"[167] for acting as an exporter of environmental standards at global level.

The assertion is not causal. Instead, it well mirrors both the first (a European Green Deal) and the fifth (a stronger Europe in the world) headline ambitions set by the Commission's President Ursula von der Leyen for the period 2019-2024.[168] The necessity

[163] *Non paper of the Commission services, Feedback and way forward on improving the implementation and enforcement of Trade and Sustainable Development chapters in E.U. Free Trade Agreements* (Feb. 26, 2018), https://trade.ec.europa.eu/doclib/docs/2018/february/tradoc_156618.pdf.

[164] *See* Non-paper from the Netherlands and France on trade, social economic effects and sustainable development, *supra* note 139; Resolution on the trade-related aspects and implications of COVID-19, Eur. Parl. Doc. P9_TA(2021)0328 (2021); ClientEarth, *A New Blueprint for Environmental Provisions in EU Trade Agreements: ClientEarth Contribution to DG Trade Review of Trade and Sustainable Development Chapters*, CLIENTEARTH (Dec., 2021), https://www.clientearth.org/media/0ytbtiaq/blueprint-for-environmental-provisions-in-eu-ftas-final-071221.pdf.

[165] Communication from the Commission, *supra* note 26, at 20.

[166] *Id.*

[167] *Id.* at 21.

[168] *Political Guidelines for the Next European Commission 2019-2024, A Union that Strives for More, My Agenda for Europe, by Candidate of the European Commission Ursula von der Leyen*, https://ec.europa.eu/info/sites/default/files/political-guidelines-next-commission_en_0.pdf (last visited Nov. 22, 2022).

for the Union's trade agreements to present the highest standards of climate and environmental protection results was stressed, with a view for the E.U. to "uphold and update the rules-based global order".[169] It thus comes to mind how, in this context, the Union would aim at acting as a "normative power"[170] on the global scene, attempting at extending its standards into the international system.[171]

The reflection on the alignment of the proper objectives of the European Green Deal to the Union's external trade agenda, announced in February 2021,[172] ultimately led to the publication of the June 2022 Power of Trade Partnerships communication.[173]

Based on inputs and recommendations,[174] six policy priorities for trade agreements to contribute to sustainability have been identified, specifically: (i) proactive cooperation with partners; (ii) bolstering a country-specific approach; (iii) including sustainability commitments also in other Chapters of the F.T.A.s; (iv) incrementing monitoring and implementation of T.S.D. commitments; (v) strengthening the role of civil society; and (vi) stepping up enforcement through trade sanctions as *extrema ratio* options.[175]

Among them, one point deserves attention for present purposes. Notably, the "enhancement of enforcement by means of trade sanctions as a measure of last resort"[176] - mirroring a change in paradigm from previous policy documents. A reflection hence proves necessary in relation to two variables: on the one hand, the asserted alignment of the *specialis* and *generalis* D.S.M.s as embedded in N.G.F.T.A.s, and on the other, the inclusion of the Paris Agreement [hereinafter P.A.] as an essential element clause of new generation arrangements.

[169] *Id.* at 17.
[170] Ian Manners, *Normative Power Europe: A contradiction in Terms?*, 40 J. Common Mkt. Stud. 235 (2002).
[171] For a detailed examination regarding the global reach of E.U. law see Joanne Scott, *Extraterritoriality and Territorial Extension in EU Law*, 62 Am. J. Compar. L. 87 (2014).
[172] Communication from the Commission, *supra* note 25.
[173] *Id.*
[174] Velut et al., *supra* note 50.
[175] Communication from the Commission, *supra* note 52, at 4.
[176] *Id.*

First, the Communication suggests a focus on the particular enforcement phase concerning the implementation of the Panel's report which, until now, has not included given rules of monitoring. The compliance stage proper to the arbitral procedure under the *generalis* D.S.M. would consequently be extended to disputes arising from T.S.D. Chapters, with the Party found in violation having to communicate how the Panel's report is to be implemented within a specified timeframe.[177] This model, remarkably, has already been realized in the E.U.-New Zealand F.T.A., whose negotiations were concluded on 30 June 2022.[178]

Whereas the published version of the Agreement might still undergo amendments, an examination of the disclosed provisions reveals that: "[T]he Party complained against shall 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".[179]

Moreover, no later than thirty days following the delivery of the Panel's report, the Party complained against shall notify the complaining Party of the measures taken or to be taken to comply with the ruling.[180] In cases of disputes arising under trade and sustainable development Chapters, Article X.13(3) mandatorily demands the Party complained against to make the other aware of the measures to be adopted in its domestic civil society mechanism as established under the Agreement, along with the contact point of the Counterpart. Eventually, an asserted "body"[181] is to monitor the implementation of the compliance measures when T.S.D. commitments come into play, whereas the civil society mechanism is entitled to submit observations in this regard.[182]

[177] In particular, according to the Commission's communication this will entail that, were a Party found in violation of its commitments deriving from T.S.D. Chapters, they will have to "promptly inform how they will implement the panel report, and carry this out within a certain period of time". Also, the procedure is to be subject to Panel review, along with contemplating the possibility for the civil society to submit observations at this stage. *See* Communication from the Commission, *supra* note 52, at 11.

[178] European Commission Press release IP/22/4158, *supra* note 159. *See also* Giulia D'Agnone, *Sviluppo Sostenibile: una Condizionalità Ambientale...Soft? Alcune Brevi Osservazioni sull'Accordo Commerciale Negoziato tra l'Unione Europea e la Nuova Zelanda*, Blogdue (Sept. 11, 2022), https://www.aisdue.eu/giulia-dagnone-sviluppo-sostenibile-una-condizionalita-ambientale-soft-alcune-brevi-osservazioni-sullaccordo-commerciale-negoziato-tra-lunione-europea-e-la-nuova-zeland/ (It.).

[179] E.U.-New Zealand F.T.A., *supra* note 42, at Chapter 26, art. X.13.

[180] *Id.* ¶ 2.

[181] *Id.* ¶ 3 (b). Yet, the reading of E.U.-New Zealand F.T.A., supra note 42, at Chapter 19, art. X.15, reveals that the generic term "body" actually refers, in the context of T.S.D. Chapters, to the Committee on Trade and Sustainable Development, specifically established under the F.T.A.'s Chapter XX.

[182] *Id.* at art. X.13, ¶ 3.

Secondly, the eventual imposition of countermeasures in the case of non-compliance, in the form of suspension of trade concessions or compensation, has been put forward, with the possibility of being explicitly limited, in the environmental domain, to "instances of serious violations"[183] of the P.A. on climate change.[184] In detail, this has been envisaged as a "failure to comply with obligations that materially defeat the object and purpose of the agreement".[185] Consequently, respect for the P.A. is rendered an essential element of trade agreements.[186]

Yet, some criticalities shall be underscored. Firstly, it is not clear from the analyzed policy document what declination the asserted sanctions shall assume, since the Commission's communication merely states that these may take the form of suspension of trade concessions.[187] Still, as reported by commentators,[188] the plethora of economic remedies in the hands of the Union is far broader, also comprising financial penalties and targeted sanctions.

Notwithstanding, partial clarification deriving from Article X.16 of the E.U.-New Zealand F.T.A. explicates that trade "sanctions" would actually comprise suspension of obligations or compensation, which shall be temporary and apply only in given circumstances.[189]

Furthermore, and perhaps most importantly, uncertainty remains as to the framing of a material breach of the object and purpose of the Paris Agreement. While the understanding of the former might be drawn from Article 60(3) of the Vienna Convention on the Law of Treaties,[190] the identification of a violation concerning the "object and purpose" of the P.A. reveals more complicated in practice. Particularly, Signatories of the Paris Agreement would chiefly be legally bound to undertake and communicate "ambitious efforts", termed Nationally Determined Contributions [hereinafter N.D.C.s], with the view of achieving the objective of the Agreement as

[183] Communication from the Commission, *supra* note 52, at 11.
[184] Paris Agreement, Oct. 10, 2016, O.J. L 282/4.
[185] Communication from the Commission, *supra* note 52 (emphasis added).
[186] *Id.*
[187] *Id.*
[188] Bronckers & Gruni, *supra* note 50.
[189] In particular, Chapter 26, art. X.16, ¶ 7, excludes suspension of obligations or compensation after: (a) the Parties have reached a mutually agreed solution pursuant to Article X.32; (b) the Parties have agreed that the measure taken to comply brings the Party complained against into conformity with the covered provisions or; (c) any measure taken to comply which the Panel has found to be inconsistent with the covered provisions has been withdrawn or amended so as to bring the Party complained against into conformity with those provisions.
[190] Vienna Convention on the Law of Treaties art. 60, ¶ 3, May 23, 1969, 331 U.N.T.S. 1155 states: "[A] material breach of a treaty, for the purposes of this article, consists in: (a) a repudiation of the treaty not sanctioned by the present Convention; or (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty".

enshrined in Article 2. The latter, strikingly, does not prescribe national-level emissions' reduction targets, instead resorting to both a global temperature limit and elements proper to the long-term climate pathway.[191]

While the affirmed obligation to communicate N.D.C.s is granted,[192] it is to be considered whether the Paris Agreement effectively put in place an individual obligation on State parties, actually, to fulfill the content of such contributions. This is a hypothesis which may be disregarded in the lack of a clear substantive duty on the point.[193]

Yet, the P.A. opens the door for State parties to engage in a virtuous circle since, when communicating novel N.D.C.s, the latter shall: "represent a progression beyond the Party's then current nationally determined contribution and reflect its highest possible ambition".[194] With an eye on the present analysis, it might be asserted that, whilst the actual unfulfilling of the content of N.D.C.s may not be eligible for triggering the suspension mechanism provided for by essential element clauses in N.G.F.T.A.s, along with the possible imposition of countermeasures, a Party's failure in actually improving its N.D.C.s or retrograding from it may, abstractly, be.

Notwithstanding, as underscored by Leonelli, insufficiently ambitious future targets, which still bring about (limited) ameliorations, would hardly be regarded as defeating the objective and purpose of the P.A., *de jure* not being in contrast with the text of the Agreement.[195] The E.U.-New Zealand F.T.A. does not provide major guidance on the point. Whilst Article X.16 on temporary remedies in cases of non-compliance straightforwardly refers, in the environmental domain, to violations pertaining to Article X.6 of the Agreement, i.e., trade and climate change. The latter, tautologically, restates the commitment to implement the Paris Agreement as an obligation to "refrain from any action or omission which materially defeats the object and purpose of the Paris Agreement".[196]

[191] *See generally* Ralph Bodle et al., *The Paris Agreement: Analysis, Assessment and Outlook*, 10 Carbon & Climate L. Rev. 5 (2016).
[192] Paris Agreement art. 4, ¶ 2.
[193] In particular, Bodle et al., *supra* note 189, at 7, underline that: «The [P.A.] does not oblige parties to actually fulfil these [N.D.C.s], hence their content is not as such legally binding. Parties are only required to pursue measures «with the aim of achieving» the objectives of such contributions». *See also* Daniel Bodansky, *The Legal Character of the Paris Agreement*, 25 Rev. Eur. Compar. & Int'l Env't L. 142 (2016).
[194] Paris Agreement, *supra* note 182, at art. 4, ¶ 3.
[195] Leonelli, *supra* note 159.
[196] E.U.-New Zealand F.T.A., *supra* note 42, at Chapter 19, art. X.6, ¶ 3.

CONCLUSION

The present article has attempted at providing an overview of environmental commitments, specifically enshrined in currently concluded and negotiated E.U. new generation free trade agreements, by emphasizing the normative profiles connected to enforceability.

As illustrated, the integration of environmental considerations into the Union's C.C.P. would respond to given primary law requirements, specifically enshrined in the E.U. founding Treaties. Yet, N.G.F.T.A.s have not, until now, proceeded to a complete equalization of trade and non-trade variables, with trade and sustainable development Chapters traveling on a separate track, being conferred a widely promotional role. This neat bipartition distinctly manifests itself in both the upstream and downstream enforcement capacities of green clauses.

As for the former, the scrutinized pillar provisions proper to environmental cooperation chiefly show a hortatory or best-endeavor formulation - as was demonstrated by the textual analysis of M.E.A.s clauses and high-level of protection provisions. On a similar footing, despite presenting stronger wording, minimum and upholding level protection clauses, the clauses do not come with specific criteria for implementation, which comes at the expense of effective enforcement. On the basis of the presented considerations, one might wonder whether T.S.D. provisions might still be deployed as valid exceptions to be invoked in cases of restrictions to bilateral trade exchanges.

Yet, a unanimous and negative response can be derived from the ruling of the Arbitral Panel constituted under the E.U.-Ukraine A.A.[197] specifying that the provisions contained in the trade and sustainable development Chapter do not integrate "self-standing or unqualified exceptions",[198] which may be relied upon for justifying measures which constitute, *per se*, a breach of titles dedicated to trade and trade-related matters.[199] The Panel further went on in unveiling the alleged normative scope of T.S.D.

[197] *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* (Dec. 11, 2020), https://trade.ec.europa.eu/doclib/docs/2020/december/tradoc_159181.pdf [hereinafter E.U.-Ukraine Panel Report]. *See also* Anzhela Makhinova & Mariia Shulha, *The Arbitration Panel Ruling on Ukraine's Certain Wood Restrictions under the EU-UA Association Agreement*, 16 Glob. Trade & Customs J. 355 (2021); Geraldo Vidigal, *Regional Trade Adjudication and the Rise of Sustainability Disputes: Korea - Labor Commitments and Ukraine - Wood Export Bans*, 116 Am. J. Int'l L. 567 (2022); Susanna Villani, *I Capitali in Materia di Sviluppo Sostenibile Negli Accordi Commerciali dell'Unione europea: Prove di Rilevanza Sistemica*, 3 Diritto del Commercio Internazionale (2022).

[198] E.U.-Ukraine Panel Report, *supra* note 195, ¶ 251.

[199] *Id.*

provisions, which would supposedly serve as "relevant context"[200] for the interpretation of provisions contained in "other parts" of the Agreement,[201] on the basis of Article 31 of the Vienna Convention of the Law of Treaties.

With regard to downstream enforcement, the *specialis*, non-confrontational dispute settlement mechanism applicable in cases of breach of sustainability commitments stands out. While a more assertive route towards enforceability has been recently suggested, this article has highlighted how relevant praxis does not seem to confirm its suitability in better addressing sustainability concerns - as illustrated by the U.S.-Guatemala case. Yet, the framing of the respect for the Paris Agreement as an essential element of N.G.F.T.A.s, as indicated by the Commission's communication, may represent a partial U-turn in the Union's conciliatory paradigm, opening the door to a stronger enforcement of T.S.D. obligations.

Notwithstanding, it has been suggested that it would prove particularly arduous to determine, concretely, the parameters for ascertaining an instance of serious violation of the objective and purpose of the Paris Agreements, on the basis of the latter framing of the Parties' commitments through obligations of means not mandating for the compulsory attainment of the content of specified N.D.C.s. Moreover, as the outcome of the 2022 T.S.D. review is to be proposed for ongoing and future F.T.A.s negotiations only, a comprehensive assessment reveals premature.

Detected criticalities notwithstanding, it is undeniable that the European Green Deal is turning the spotlight onto environmental components to be effectively integrated into the Union's external trade policy. A commitment which, remarkably, is also going beyond the deployment of bilateral instruments[202] - shedding light on the Union's potential to carry on a commercial agenda enhancing trade-related environmental interests.

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[200] *Id.*

[201] *Id.* reading:

> in light of the foregoing, the Arbitration Panel finds that the provisions of Chapter 13 are not self-standing or unqualified exceptions that could justify measures that are per se in breach of Article 35 of the [A.A.]. The Arbitration Panel is nonetheless persuaded that the provisions of Chapter 13 serve as relevant "context" for the interpretation of other provisions of Title IV, which allow the Parties to introduce or maintain measures in derogation to Article 35 of the [A.A.], including for environmental reasons based on Article 36 of the [A.A.] in conjunction with Article XX of the [G.A.T.T.] 1994.

See also Muccione, *supra* note 82.

[202] *See e.g.*, *Proposal for a Regulation of the European Parliament and of the Council for a Carbon Border Adjustment Mechanism,* COM (2021) 564 final (July 14, 2021)*; Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937,* COM (2022) 71 final (Feb. 23, 2022); *Proposal for a Regulation of the European Parliament and of the Council on the Making Available on the Union Market as well as Export from the Union of Certain Commodities and Products Associated with Deforestation and Forest Degradation and Repealing Regulation (EU) No 995/2010*, COM (2021) 706 final (Nov. 17, 2021).

ANNEX I

Agreement	MEA clause	Right to regulate and levels of protection clause	Upholding levels of protection clause
E.U.-Korea F.T.A.	Art. 13.5	Art. 13.3	Art. 13.7
E.U.-Andean Community F.T.A.	Art. 270	Art. 268	Art. 277
E.U.-Central America A.A.	Art. 287	Art. 285	Art. 291
E.U.-Ukraine A.A.	Art. 292	Art. 290	Art. 296
E.U.-Georgia A.A.	Art. 230	Art. 228	Art. 235
E.U.-Moldova A.A.	Art. 366	Art. 364	Art. 371
E.U.-Canada C.E.T.A.	Art. 24.4	Art. 24.3	Art. 24.5
E.U.-Japan E.P.A.	Art. 16.4	Art. 16.2	Art. 16.2
E.U.-Singapore F.T.A.	Art. 12.6	Art. 12.2	Art. 12.12
E.U.-Vietnam F.T.A.	Art. 13.5	Art. 13.2	Art. 13.3
E.U.-U.K. T.C.A.	Art. 400	Art. 391	Art. 391
E.U.-Mexico Agreement in Principle	Art. 4	Art. 2	Art. 2
E.U.-MERCOSUR Agreement in Principle	Art. 5	Art. 2	Art. 2
E.U.-New Zealand F.T.A.	Art. X.5	Art. X.2	Art. X.2