

The Promotion of Sustainable Development in the EU's 'New Generation' Free Trade Agreements and its Impact on Third Countries

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Abstract

This paper aims to analyse how the so-called 'new generation' European Union trade agreements can impact sustainable development policy of third countries, verifying whether such agreements are endowed with effective instruments that guarantee the implementation of the international commitments assumed with the aim to improve environmental and labour standards. In this sense, the presence of a specific dispute resolution instrument for the chapter on "Trade and Sustainable Development", distinct from the one provided for the commercial part, on one hand highlights the relevance of the differentiated treatment granted to such issues. On the other hand, it also denotes the fragility of a system based solely on cooperation, which does not provide for the direct imposition of any type of sanction. Given this scenario, the purpose of this study is to reflect on the limitations and potential of 'new generation' trade agreements concerning the promotion of sustainable development in third countries and the possible ways to overcome the challenges inherent in building an economical sustainable society.

Keywords: Sustainable Development – Free Trade Agreement – European Union – Third Countries.

SUMMARY: 1. Introduction. 2. New Generation of Free Trade Agreements and the Promotion of Sustainable Development. 3. Trade and Sustainable Development. 4. Dispute Resolution.

1. Introduction

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The EU trade policy was significantly reshaped with the Treaty of Lisbon in 2007, guided by much broader objectives than the mere progressive abolition of the trade and investment restrictions. Although the EU has combined economic interests, political values, and other norms in its external relations, it has not indicated any priority among these objectives. The architecture of the EU's new external action creates the legal basis that enables the coordination of the Common Commercial Policy with other foreign policies, as well as pursuing non-commercial objectives through trade¹.

The Lisbon Treaty clarifies the division of powers amongst the EU and the Union Member States and the Art. 3 (e) of the Treaty on the Functioning of the European Union (TFEU) provides the exclusive competence of the EU to legislate over the Common Commercial Policy. It means that it is the EU, and not the Member States, that legislates over trade matters and concludes international trade agreements, except for agreements covering mixed responsibility issues, that can be concluded by the Council only after all Member States ratified it².

In the field of international trade agreements, the first issue elaborated by the European Court of Justice (ECJ) through advisory opinion procedure concerns the nature and division of EU competence. In the Opinion no. 1/94³, the CJEU favoured the Communities' possibility to sign international trade agreements annexed to the World Trade Organization (WTO) constitutive agreements. Further on, Opinion no. 2/15⁴ holds great importance as it defines the EU's exclusive competence over international trade matters, following the extended new definition provided by the 2007 Treaty of Lisbon on the common commercial policy. The issue was first raised in light of the EU-Singapore Free Trade Agreement⁵, being then submitted to analysis of the CJEU.

Indeed, the Treaty of Lisbon introduced a series of significant changes in the EU foreign policy, preserving many of the changes previously proposed by the unsuccessful Treaty that aimed to establish a European Constitution in 2004⁶. Amongst those, the Council's decision-making process reform and the enlargement of powers of the European Parliament regarding the conclusion of international trade agreements.

¹ S. Gstöhl, D. Hanf, *The EU's Post-Lisbon Free Trade Agreements: Commercial Interests in a Changing Constitutional Context*, in *European Law Journal*, Vol. 20 No. 6, 2014, p. 736.

² For encompassing matters beyond the trade of industrial goods, the "new generation" FTAs are generally defined as mixed agreements. For a more detailed analysis of this typology, see: C. Hillion, P. Koutrakos (eds.), *Mixed Agreements Revisited: The EU and Its Member States in the World*, Hart Publishing, London, 2010.

³ CJEU, Opinion No. 1/94 according to art. 228 (6) of the CE Treaty "Competence of the Community to negotiate international agreements in matters of services and intellectual property protection", 15 November 1994.

⁴ CJEU, Opinion No. 2/15, according to art. 218 (11), CJEU "European Union-Singapore Free Trade Agreement – 'new generation' Agreement negotiated after the entry into force of the EU and FEU Treaties – Competence to negotiate agreements", 16 May 2017.

⁵ T. Von Danwitz, *Les accords externes de l'Union Européenne en matière commerciale et la contribution de la Cour de Justice (Les dossiers européens: actualités)*, in *Revue du Droit de l'Union européenne*, No. 2, 2018, p. 204.

⁶ M. Cremona, *The Draft Constitution Treaty: External Relations and External Action*, in *Common Market Law Review*, Vol. 40 No. 6, 2003, pp. 1347-1366; S. Kurpas, *The Treaty of Lisbon - How much 'Constitution' is left? An Overview of the Main Changes*, in *CEPS Policy Brief*, No. 147, 2007, pp. 1-9.

The general procedure for the EU to adopt international agreements, including those of commercial nature, is provided by article 218 of the TFEU. It is one of the provisions whose physiognomy was most altered since the European Communities' creation in the 1950s. Suffice to say that in 1957, article 228 of the then TCEE comprised only two subparagraphs, whereas nowadays, it has eleven. This alteration made it possible to introduce substantial changes that, to a large extent, recognized the practice of the Community institutions and the consolidated jurisprudence of the CJEU⁷. Regarding trade agreements, the aforementioned provision approximates the procedures for concluding trade agreements to those adopted in the general procedure⁸, following the path previously proposed in the constitutional treaty.

The prominent role of trade agreements lies precisely in the fact that it is through them that the EU manages its trade relations with third countries, being then designed to create better trade opportunities and overcome related barriers. Free Trade Agreements (FTAs) are often used as an indispensable economic tool by the EU in the internal market and are essential to its external policy. Yet, these are not the only instruments the European integration process disposes of in international trade⁹. There are also Association Agreements¹⁰, Partnership and Cooperation Agreements¹¹, Economic Partnership Agreements that support the development of trade partners in African, Caribbean, and Pacific States¹², as well as other bilateral instruments¹³ that vary according to its content.

The impact of these agreements to its signatories is verified through significant numbers extracted from the already existing commercial relations and their effects in other affected areas, such as the generation of jobs. According to the latest Commission Report on Implementation of Free Trade Agreements for 2018¹⁴, 39% of the EU trade in goods with third countries is covered by preferential trade agreements, including those with Japan, Singapore, and Vietnam. If the EU-Mercosur¹⁵ political agreement, announced on June 28, 2019, was also considered, this figure would increase to 41%. The EU trading partners make proper use of the preferences, reaching an average usage rate of 87%. Besides, a study¹⁶ found that 36 million jobs in the EU rely on exports to third

⁷ M. Cienfuegos Mateo, *Los procedimientos de celebración de acuerdos Internacionales por la Unión Europea tras el Tratado de Lisboa*, JM Bosch editor, Barcelona, 2017, p. 35.

⁸ *Idem*, p. 149.

⁹ A. Van Waeyenbergh, P. Pecho, *Free Trade Agreements after the Treaty of Lisbon in the Light of the Case Law of the Court of Justice of the European Union*, in *European Law Journal*, Vol. 20 No. 6, 2014, p. 750.

¹⁰ Agreements with Greece in 1961 and with Turkey in 1963.

¹¹ Agreement with Russia in 1994. Besides Russia, the EU concluded seven other agreements of Partnership and Cooperation or agreements of an enhanced partnership with non-EU member States: Armenia, Azerbaijan, Kazakhstan, Kirgizstan, Uzbekistan, and Turkmenistan. For an updated list of the Agreements with Russia, Transcaucasia, and Central Asia, see: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:r17002>.

¹² The Yaoundré Convention of 1963, providing cooperation with 18 African States.

¹³ Agreement with Switzerland in 1999 for the free movement of people.

¹⁴ *Report of the Commission to the European Parliament, the Council, the Economic and Social Committee and the Regions Committee on the application of free trade agreements*, 1st of January 2018 – 31st of December 2018 [SWD (2019) 370 final], published on 14 October 2019, p. 4 and p. 7.

¹⁵ On the impact of commercial relationships of the EU and Mercosur, and specially for Brazil, see: A.B. de Moura, *O impacto do Acordo Mercosul-União Europeia para o Brasil*, in *Revista Consultor Jurídico*, julho-2019, available at: <https://www.conjur.com.br/2019-jul-03/aline-moura-impacto-acordo-mercossul-ue-brasil>.

¹⁶ EU Exports to the world and its effects on labor. Available at:

countries and that jobs related to this type of export increased by 66% between 2000 and 2017.

Considering this data, it appears that there is a high rate of preferential trade agreements use by exporters, a fact that has a major impact on the EU economy, and this application stems from the Common Commercial Policy adopted with the Lisbon Treaty, which redefined several of its parameters. To better understand the legal and political effects of ‘new generation’ free trade agreements on relations with third countries and its objective of promoting the EU non-economic values, this paper will then present an in-depth analysis of this issue.

2. New Generation of Free Trade Agreements and the Promotion of Sustainable Development

The so-called ‘new generation’ agreements are regional agreements established by numerous States, which are not necessarily neighbouring countries in the geographical meaning but have some similarities regarding economic policies¹⁷. The will of the European Union to bolster such initiative was officially presented in the statement “Global Europe: Competing in the world”¹⁸ in 2006. On its basis, one of the main objectives of the Commission was to surmount the stagnated multilateral negotiations amongst WTO countries and focus on the defence and competitiveness of their own enterprises¹⁹.

The commercial strategy “Global Europe” ended the 1999 “Lamy Doctrine”, which had levied a moratorium over new free trade bilateral agreements, favouring the multilateral commercial round. The new strategy aimed at enduring the EU competitiveness by opening its market to emerging ones, signing free trade agreements, assuring that «the fundamental economic criteria for the new FTA must be their market potential (size and economic growth) and the level of protection against EU interest in exporting matters (custom law and technical barriers) ». Amongst potential partners, the Commission indicated the Association of Southeast Asian Nations (ASEAN)²⁰, Southern Common Market (Mercosur)²¹, Gulf Cooperation Council (GCC)²², South Korea, India, Russia, and China²³.

http://trade.ec.europa.eu/doclib/docs/2018/november/tradoc_157516.pdf.

¹⁷ M.R. Calamita, *La clausola ISDS negli accordi commerciali di ultima generazione dell’Unione europea*, in *Diritto pubblico comparato ed europeo*, No. 2, 2017, p. 311.

¹⁸ *Communication from the Commission of 6 December 2006 “Global Europe: Europe’s trade defense instruments in a changing global economy - A Green Paper for public consultation”*, COM (2006) 763 final.

¹⁹ M.R. Calamita, *La clausola*, cit., p. 312.

²⁰ ASEAN was created on August 8th, 1967. It is a regional integration organization aimed at promoting economic development and political stability in the region. Currently, its members are Brunei Darussalam, Cambodia, Singapore, Philippines, Indonesia, Laos, Malaysia, Myanmar (Burma), Thailand, and Vietnam.

²¹ It is a regional integration organization created on March 26th, 1991, and it comprises Brazil, Argentine, Uruguay, and Paraguay.

²² Founded on May 25th, 1981, the GCC is an economic integration organization that unites the Gulf States like Oman, United Arab Emirates, Saudi Arabia, Qatar, Bahrain, and Kuwait.

²³ European Commission, *Communication from the Commission to the Council, the European Parliament, the European Social and Economic Committee and the Committee of the Regions, Global Europe:*

The multilateral agenda based on WTO works/projects was indeed the focus of European trade policy from 1999 to the middle 2000s. However, the evolution of the international economy, the positioning of some of its main rivals, the emergence of new commercial powers from emerging markets, and the disappointment with the Doha Round situation triggered political shifting in some EU preferential trade agreements²⁴.

The EU free trade agreement policies and its objectives established in “Global Europe” 2006 were later confirmed by the “Trade, Growth and World Affairs” Communiqué in 2010²⁵. This document prescribes a significant liberalization of goods and services, including investments, and rolls out numerous rules envisaging a better application of norms and international standards, such as those from WTO²⁶. The Commission presents significant changes in its positioning, mainly because it conceives a noteworthy place for regional and bilateral trade agreements, fostering a focus shifting that was before traditionally exclusive for multilateral agreements²⁷.

In addition to that, with an eye on one of the EU goals of achieving a role consistent with its economic power to lead foreign affairs and global governance, the Commission also emphasizes that it is necessary to foster specific commercial arrangements and promote human rights, environmental protection, and labour rights, as well as good governance, including fiscal matters²⁸.

In 2017, the European Commission published a slew of proposals, recommendations, and political documents to announce the debut of a new era for the EU trade policies. The Commission carries out an account of the Commercial and Investment Strategy entitled “Commerce for all”²⁹ from 2015. It strengthens the EU position in the ‘global value chain’, responds to the CJEU Advisory decision No. 02/2015 on Free Trade Agreement with Singapore, as well as regulates the imbalance between the values and interests that the EU must espouse and bolster in its commercial relations with the world³⁰.

The EU Common Trade Policy’s lynchpin lingers exactly on the promotion of non-economic values, which one can encounter in the ‘new generation’ agreements. The mention of the EU foreign affairs in article 3 (5) of the Treaty on EU (TEU) contains a special reference to commerce and sustainable development. Putting aside some commitments such as peace promotion, security, human rights protection, solidarity, and

Competing in the World: A Contribution to the EU’s Growth and Jobs Strategy, COM (2006) 567 final, p. 10.

²⁴ S. Woolcock, *EU Policy on Preferential Trade Agreements in the 2000s: A Reorientation towards Commercial Aims*, in *European Law Journal*, Vol. 20 No. 6, 2014, pp. 720-722.

²⁵ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 9 November 2010 “Trade, Growth and World Affairs – Trade Policy as a core component of the EU’s 2020 strategy” COM (2010) 612 final.

²⁶ S. Woolcock, *EU Policy on Preferential Trade Agreements in the 2000s*, cit., p. 723.

²⁷ A. Antimiani, L. Salvatici, *Regionalism versus Multilateralism: the case of the European Union Trade Policy*, in *Journal of World Trade*, Vol. 49 No. 2, 2015, p. 256.

²⁸ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 9 November 2010 “Trade, Growth and World Affairs - Trade Policy as a core component of the EU’s 2020 strategy”, COM (2010) 612 final, pp. 17-18.

²⁹ G. Adinolfi, *Alla ricerca di un equilibrio tra interessi economici e tutela dell’ambiente nella politica commerciale dell’Unione europea*, in *Rivista Eurojus*, May 2017. Available at: <http://rivista.eurojus.it/alla-ricerca-di-un-equilibrio-tra-interessi-economici-e-tutela-dellambiente-nella-politica-commerciale-dellunione-europea/>.

³⁰ *Editorial Comments*, in *Common Market Law Review*, Vol. 55, 2018, p. 373.

mutual respect amongst peoples, it is possible to see the emergence of the objectives of fostering «free and equitable trade» and the «development of a sustainable planet», which become «a component piece in the common trade policy» according to the CJEU³¹.

This rule is similar to article 21 of the Treaty on EU, which includes sustainable development to the goals of the EU foreign affairs, and to its paragraph (2), letters *d*, *e*, and *f*, that makes express reference to the promotion of sustainable development in economic, social and environmental plans of developing countries. These rules also refer to underpinning integration of all countries to the world economy by progressively eliminating obstacles to international commerce; and to the contribution for the development of international measures in order to preserve and enhance the quality of the environment and sustainable management of natural resources in global scale, with the purpose to ensure sustainable development. In ties with that are articles 9 and 11 TEU, which require social and environmental protection in all policies and activities of the EU «with the purpose to foster sustainable development».

According to the EU Parliament in its observation on the authorization of trade negotiations with Singapore, the goal is by all odds the promotion of ‘new generation’ agreements. That means an agreement that comprises beyond the classical elements of this kind of agreement, such as reducing tariff and non-tariff obstacles to the trade of goods and services, «other relevant aspects, even essential ones, to trade»³².

Certainly, the EU common trade policy and the ‘new generation’ free trade agreements nowadays are inserted in a critical conjecture. Pursuing issues, such as ‘mundialization’, the challenge of *Brexit*, and the US new trade strategy, the CJEU has also contributed to clarifying some matters. It always guides itself by acknowledging the importance of such treaties to the EU to achieve economic growth and prosperity and allow a crucial regulation of various economic, social, and political interests existing in the EU through legal instruments³³.

Indeed, the CJEU’s decisions point out some non-commercial matters that can be discussed in an international agreement. Fundamental rights can also be foreseen in trade and investment agreements, as stated in the CJEU Advisory Opinion No. 01/17³⁴ by demand of Belgium on the Comprehensive Economic and Trade Agreement (CETA) with Canada, concerning the EU Charter of Fundamental Rights and freedom of enterprise, property rights, and social rights³⁵.

Regarding the Sustainable Development Goals, the already mentioned CJEU Advisory Opinion No. 02/15 ruled that the social protection of labour and environmental protection are part of the EU Common Trade Policies³⁶. Therefore, beyond the classical elements of trade agreements, such as reducing tariffs and non-tariff barriers levied upon goods and services, the ‘new generation’ agreements include rules deemed relevant under other aspects, which are essential for commercial exchange³⁷.

³¹ CJEU, *Advisory Opinion* No. 02/15, para. 147.

³² CJEU, *Advisory Opinion* No. 02/15, para. 140.

³³ T. Von Danwitz, *Les accords externes de l’Union Européenne*, cit., p. 203.

³⁴ CJEU, *Advisory Opinion* from Oct. 13th, 2017.

³⁵ T. Von Danwitz, *Les accords externes de l’Union Européenne*, cit., p. 203.

³⁶ CJEU, *Advisory Opinion* No. 02/15, para. 147.

³⁷ T. Von Danwitz, *Les accords externes de l’Union Européenne*, cit., p. 204.

Regarding that, the EU makes use of FTA's in order to emphasize international standards in areas of deeper integration, with the aim to warrant that the rules developed in the main markets of its partners be consistent with EU standards. Hence, these agreements have two particular aspects that merit attention. On the one hand, they envisage to a certain extent the 'export' of EU fundamental values to EU's partners, thus enhancing the constitutional rights of non-EU citizens. On the other hand, they provoke internal impacts, for protecting their own citizens by establishing criteria as a precondition to more ambitious trade liberalization³⁸.

The adoption of this new EU trade policy reflects on third countries and can spur positive and negative impacts. Although it may sound positive that the EU stimulates its partners to ratify the UN or the International Labour Organization (ILO) conventions and engage in domestic civil society organizations, it also imposes a commercial agenda, especially on economically and politically weaker countries, which interferes in many domestic issues. Therefore, EU trade policy generally became more responsible, yet not necessarily more liberal³⁹.

In this path, it is relevant to those willing to export and sell within the EU territory to observe European regulations' strictness on labour and environmental protection. Even for those that belong/come from third countries, products must be in accordance with the EU rules, such as Directive (EU) No. 2019/904 on the reduction of the impact of certain plastic products on the environment, which will enter into force in July 2021 and impose stiff conditions for the movement of goods, including those imported from third countries. The legal basis for these obligations can be found in the "Trade and Sustainable Development" (TSD) Chapter, featured in all EU trade agreements of the 'new generation', which will be discussed further.

3. Trade and Sustainable Development

The "Trade and Sustainable Development" (TSD) chapters in EU trade agreements, which are typical for the 'new generation' ones, represent an endeavour to integrate social and environmental aspects to the trade policy goals. This chapter has its own characteristics and encompasses three matters: i) commitments to implement key ILO conventions and multilateral environmental agreements; ii) commitments to not reduce labour and environmental standards, in order to improve trade and attract investments (non-regression clause); and iii) obligations on sustainable management of natural resources, suppression of illegal commerce (e.g. threatened species) and cooperation by means of social responsibility of enterprises and ethical trading initiatives⁴⁰.

When implementing labour and environmental protection, the EU trade policy indicates a global approach of trade factors and sustainable development, which until then were conceived separately. Thus, economic, and social growth, as well as environmental protection, are understood as interdependent concepts and become part of sustainable

³⁸ S. Gstöhl, D. Hanf, *The EU's Post-Lisbon Free Trade Agreements*, cit., p. 735.

³⁹ *idem*, p. 748.

⁴⁰ *Editorial Comments*, cit., p. 384.

development, which support each other and contribute to the establishment of a welfare state for present and future generations⁴¹.

Hence, the TSD Chapter is not independent of the trade policy, meaning that it creates new and separate obligations; it is, in fact, a part of it, ensuring that «trade [between parties] occurs in respect to obligations from international conventions on matters like social and environmental protection, to which they are parties»⁴². Considering this trade policy, the CJEU binds fair trade to sustainable development, and the latter is defined based on specific multilateral conventions on the main labour rights and environmental protection.

The CJEU Advisory Opinion No. 02/2015 analysed the TSD Chapter, from the point of view of competence distribution and its legal fundamentals, clarifying the material concept of the EU trade policy. As presented by the Advocate-General⁴³, the CJEU could have declared that the obligations of this Chapter are merely accessories and punctual to the main relevant goals of the agreement or that they represent sufficiently independent obligations to demand a separate legal base. Instead, the Court chose to redefine the scope and objectives of the EU trade policy pursuant to general goals that guide all external action and to article 207(1) of the EUFT, meaning that the common trade policy is conducted «accordingly to» the principles and objectives of the Unions' external actions⁴⁴.

In this sense, the EU free trade agreements' content reveals their immediate trade objectives and includes strategic trade interests, which seek to entice rules from trade and international investment systems to guarantee that the EU set of rules be consistent with international tendencies⁴⁵.

Pursuant to the 'new generation' agreements, trade must foster sustainable development. Thus all involved countries must endeavour to bolster trade and economic influxes while ensuring dignifying labour and environmental protection, especially in order to stimulate: i) the development and use of voluntary regimes related to the sustainable production of goods and services, as well as enhanced voluntary activities on social issues by enterprises, some of which can be found in the Organization for Economic Cooperation and Development (OECD) guidelines for multinational corporations; ii) integration of sustainable issues in decisions related to consuming in public and private sectors; and iii) creation, establishment, maintenance or improvement of goals and rules of environmental performance⁴⁶.

According to what has been established by the UN Human Rights Charter, observance to democratic principles and human rights must guide the parties' domestic and international policies and is an essential element in the EU trade agreements; moreover, when they are not preceded by political and cooperation dialogue⁴⁷.

⁴¹ Art. 22.1 (1) from Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada from 2016.

⁴² CJEU, *Advisory Opinion* No. 02/15, para. 152.

⁴³ Conclusions of the General-Advocate Eleanor Sharpston, presented on 21 Dec. 2016.

⁴⁴ *Editorial Comments*, cit., p. 384

⁴⁵ S. Woolcock, *EU Policy on Preferential Trade Agreements in the 2000s*, cit., p. 724.

⁴⁶ Art. 22.3 (2), CETA.

⁴⁷ S. Woolcock, *EU Policy on Preferential Trade Agreements in the 2000s*, cit., p. 730. That was the case of the Agreement with Colombia and Peru, where art. 1 prescribes human rights without any Agreement

The way rights and obligations related to sustainable development appear and how they are inserted in those agreements are unique. In general, these commitments are connected to the parties' obligations to effectively apply certain multilateral treaties that have been negotiated by other international organizations, regarding labour rights and environmental protection, which create new obligations directly emerging from the trade agreement.

Therefore, either the agreements are generally related to other international commitments⁴⁸ or they mention specific international instrument⁴⁹, which may be thoroughly enumerated and also include the duty to ratify and apply environmental treaties that have already been signed by the parties⁵⁰.

By comparing the provisions on sustainable development in the EU 'new generation' agreements signed with its trade partners, one can see similarities and particular remarks, depending on the analyzed country.

The EU trade agreement with Colombia and Peru from 2012⁵¹, which Ecuador later joined in 2016⁵², establishes several particular provisions to the parties, in order to respect labour and environmental norms⁵³, including some items dedicated to «biological diversity», «trade in forest products», «trade in products» and «climate change»⁵⁴. Interestingly, it is the only agreement that mentions labour migration in the TSD Chapter. Under article 276, entitled «migrant workers», countries may seek «equality of treatment in respect of working conditions, to eliminate any discrimination in respect thereof to any workers, including migrant workers legally employed in their territories».

Further reference to migration in the 'new generation' agreement is only found in the FTA signed with Central America in 2012, with the following States: Costa Rica, Salvador, Guatemala, Honduras, Nicaragua, and Panama. Although it is not allocated in the TSD chapter, migration issues are encompassed in a broader sense in the «Institutional framework» and «Social Development and Social Cohesion»⁵⁵. These chapters regulate the idea of migration by the movement of workers and the protection of refugees. Besides, it establishes the obligation to the parties to effectively implement eight ILO conventions and other eight treaties on environmental matters, that the Agreement thoroughly lists⁵⁶.

on Political Dialogue and Cooperation. In this case, there is no monitoring mechanism, thus the problem is addressed by the general trade committee.

⁴⁸ Art. 22.1 (3, c), CETA.

⁴⁹ Art. 13.5 (3) of the EU-Korea Agreement. It expressively mentions the UNFCCC, the Kyoto Protocol, and the Bali Plan of Action; arts. 267 (2, b), 269, and 270 of the EU-Colombia, Peru and Ecuador Agreement from 2012; arts. 285.1, 286, and 287 from the Agreement with Central America 2012; arts. 12.2, 12.3 and 12.6 of the EU-Singapore agreement 2019; arts. 16.3 (2) and 16.4 (4) of the EU-Japan agreement 2019; arts. 13.2, 13.4 and 13.5 of the EU-Vietnam agreement 2016.

⁵⁰ S. Gstöhl; D. Hanf, *The EU's Post-Lisbon Free Trade Agreements*, cit., p. 743.

⁵¹ Free Trade Agreement between EU and Colombia and Peru (JO L 354 de 21.12.2012).

⁵² Protocol of Accession of Ecuador to the EU-Colombia and Peru agreement (JO L 356 de 24.12.2016, pp. 3-1456).

⁵³ The art. 269 (3) of the EU-Colombia, Peru and Ecuador agreement prescribes that the main conventions of the ILO must be ratified and effectively implemented.

⁵⁴ Arts. 272-275 of the EU-Colombia, Peru and Ecuador agreement.

⁵⁵ Arts. 19-49 of the EU-Central America Agreement.

⁵⁶ Art. 286.2 prescribes the respect to the ILO Conventions No. 138, 182, 105, 29, 100, 111, 87, and 98.

Art. 287 establishes that parties shall commit to the following multilateral agreements: Montreal Protocol on Substances that Deplete the Ozone Layer from 1987, Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Stockholm Convention on persistent

In addition to that, it includes two provisions related to «trade in forest products» and «trade in products»⁵⁷.

The 2012 agreement with Korea, the EU's first one with an Asian country, establishes the duty for the parties to implement ILO conventions already signed and to ratify those that have not yet been signed. On environmental matters, parties compromise to achieve the final goal of the United Nations Framework Convention of Climate Change and Kyoto Protocol, as well as to observe Bali Action Plan's guidelines⁵⁸. In this agreement, one cannot find specific provisions on certain areas of environmental protection, and there is only one generic provision on «trade favouring sustainable development»⁵⁹.

In the free trade agreement between EU and Singapore in 2019, parties commit to guarantee that trade would respect international convention obligations concerning labor and environmental protection matters, envisaging the effective implementation of the principles and rights therein⁶⁰, while referring to the ILO conventions ratified by the parties⁶¹ and to the UNFCCC goals and its Kyoto and Paris Protocols⁶². Besides, the agreement establishes specific provisions on «trade in timber and timber products» and «trade in fish products»⁶³.

Particularly, the agreement with Vietnam in 2020 makes clear that sustainable development goes on a par with economic and social development and environmental protection, and that these three aspects «constitute three interdependent issues which underpin each other»⁶⁴. In respect to international duties, the parties stress their commitment to endeavour to ratify the main ILO Conventions that they have not ratified yet. In the environmental field, the TSD chapter states its own provisions to regulate matters on «climate change», «biological diversity», «sustainable management of forests and trade in forest products», «trade and sustainable management of living marine resources and aquaculture products», «trade and investment favouring sustainable development»⁶⁵, which include a myriad of international treaties to be duly observed by the parties.

The FTA with Japan mentions duties derived from ILO⁶⁶ and from international treaties on environmental matters, while similar to the Agreement with Vietnam, are rolled out on the following items: «trade and investment favouring sustainable development», «biological diversity», «sustainable forest management and trade in forest

organic pollutants, Convention on International Trade in Endangered Species of Wild Fauna and Flora, Convention on Biological Diversity, Cartagena Protocol on Biosafety to the Convention on Biological Diversity, UNFCCC Kyoto Protocol; and ratify until the date of entry into force of the FTA with the EU the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade.

⁵⁷ Arts. 289 and 290 of the EU-Central America Agreement.

⁵⁸ Arts. 13.4 (3) and 13.4 (3) of the EU-Korea Agreement.

⁵⁹ Art. 13.6 of the EU-Korea Agreement.

⁶⁰ T. Von Danwitz, *Les accords externes de l'Union Européenne*, cit., p. 204.

⁶¹ Art. 12.3 of the EU-Singapore Agreement.

⁶² Art. 12.6 (3) of the EU-Singapore Agreement.

⁶³ Arts. 12.7 and 12.8 of the EU-Singapore Agreement.

⁶⁴ Art. 13.1.3 of the EU-Vietnam Agreement.

⁶⁵ Art. 13.6 of the EU-Vietnam Agreement.

⁶⁶ Art. 16.3 (2) of the EU-Japan Agreement.

products», «trade and sustainable management of living marine resources and aquaculture products»⁶⁷.

In a broader view, the FTA with Canada in 2017⁶⁸ states that the parties intend to endorse the application of the respective labour and environmental laws and respect international agreements on labour and environmental issues. Nonetheless, it does not impose any specific duty related to compliance with a specific international treaty as it is in the other trade agreements. Albeit apparently hasty, both issues are deeply regulated along two dedicated chapters entitled “Trade and Labour”, “Trade and Environment”, which follow the traditional chapter entitled “Trade and Sustainable Development”⁶⁹. By displacing labour and environmental provisions to specific chapters, negotiators point out a distinguished position compared to the other ‘new generation’ agreements. The TSD Chapter brings principles of sustainable development and prescribes, in a broader view, the guidelines that are better explained in the labour and trade chapters.

The FTA announced in 2019 between the EU and Mercosur, a Latin-American integration process involving Argentina, Brazil, Paraguay and Uruguay, is still being subjected to a legal and technical revision of its texts. The agreement signed with Mercosur is the most significant that the EU has ever negotiated, considering the economic point of view. Mercosur and the EU represent together 25% of the global GGP, equivalent to € 19 tri, and a market demand of 773 million people. The EU is currently the second major Mercosur’s partner, after China, and Mercosur is the 8th main extra regional partner of the EU. Pursuant to the European Commission data⁷⁰, the total amount of bi-regional trade in products and services was around € 122 bi in 2018. To make it feasible to comprehend, European enterprises will save more than € 4 bi per year in customs duties, which is four times bigger than the FTA signed with Japan in 2018⁷¹.

The Agreement with Mercosur also encompasses a TSD chapter, which prescribes commitments to international treaties on labour and environmental issues, as well as matters on «trade and climate change», «trade and biodiversity», «trade and sustainable forest management», «trade and sustainable management of living marine resources and aquaculture products», in which the Sustainable Development Goals of the UN 2030 Agenda are constantly mentioned.

The environmental issue has been a constant in critics from European governments and foreign institutions, majorly due to fires in the Amazon region and the Brazilian negligence towards the Paris Agreement⁷². A report prepared by the London School of Economics in July 2020⁷³ analysed more deeply the impact that the environmental issues

⁶⁷ Arts. 16.5-16.8 of the EU-Japan Agreement.

⁶⁸ Art. 22.1 (3, c) of the EU-CETA.

⁶⁹ Arts. 22,23 and 24 of the EU-CETA respectively.

⁷⁰ EU and Mercosur reach agreement on trade. Available at:

https://ec.europa.eu/commission/presscorner/detail/en/ip_19_3396?fbclid=IwAR3Be_1CVRoXUpPqpq2xVdKCsC6F2B5ZBOHEF2MfZdqX7Rfryd-etNBELTg.

⁷¹ A. B. de Moura, *O impacto do Acordo Mercosul-União Europeia para o Brasil*, cit.

⁷² Three European Parliaments (Austrian, Netherland, and that from the Belgium region of Wallonia) already declared that they will not ratify the agreement.

⁷³ Sustainability Impact Assessment (SIA) in Support of the Association Agreement Negotiations between the European Union and Mercosur. Draft Final Report, London School of Economics and Political Science (LSE), July 2020. The European Commission generally resorted to private firms to have SIA’s elaborated for its trade agreements and published it on the Commission’s website.

have over the agreement. In accordance with the report, Brazil, Uruguay, and Paraguay have great weight in the sector of clean energy production⁷⁴, whereas data from 2004 and 2012 show that, while Brazil considerably reduced the rate of deforestation, there has been an increase of the agricultural production. This indicates that agriculture and meat production are not obstacles to forest protection; however, the latter hinges even more on public policies' effectiveness⁷⁵. Data also point out that there was an increase in logging in Brazil from 2012 to 2018, followed by a significant increase of +29, 5% in 2019, which has been superior to the annual rate of deforestation registered in any last decade year. Nevertheless, it rested below rates registered in any year from 1988 to 2008⁷⁶. The report limited itself to examine the macroeconomic impacts of the future trade agreement but did not raise any specific environmental problems, such as the numerous environmental initiatives announced in the communication "The European Green Deal"⁷⁷ by the Commission at the end of 2019⁷⁸.

The EU Ombudsman has presented a complaint questioning the Commission's leading of the negotiations with Mercosur⁷⁹. The main argument is that the EU announced an agreement without any adequate environmental evaluation and concluded it after analysing out-of-date info on potential social, economic, and environmental impacts of the agreement. The question still lingers uncertain, and it is necessary to wait until the following outcomes to analyse the future of the EU-Mercosur Agreement, whose negotiations commenced more than 20 years ago.

After a systematic review of the 'new generation' agreements presented above, all but that with Canada prescribe duties, so the parties adopt or change their legislation and their domestic policies, according to relevant international rules and to the agreements to which they are parties, explicitly mentioning a list of multilateral treaties on labour and environmental issues. Notwithstanding that, CETA is the only agreement with specific chapters dedicated to trading under labour and environmental perspectives. Except for the one with Korea, all the analysed agreements contain provisions of specific environmental matters, such as climate change, biological diversity, forest management, and fishery. Hence, it is observable that these agreements are flexible according to different levels of protection, in accordance with particularities and especial needs of each country to adapt to the minimum required international standards of sustainable development.

Lastly, regarding the EU-Mercosur Agreement, there is not one single common commitment to improving the protection of the environment in either the EU or in the Mercosur countries to guarantee 'sustainable development'. Furthermore, no sanctions

⁷⁴ According to the Report (p.77), in 2014, 73% of the energy production in Brazil was renewable, 91% in Uruguay and 100% in Paraguay. Argentina produced 32%, but even more than in the EU, where the rate is 29%.

⁷⁵ Sustainability Impact Assessment in Support of the Association Agreement Negotiations between the European Union and Mercosur. Draft Final Report, 2020, cit., p. 15.

⁷⁶ *Idem*, p. 78.

⁷⁷ European Commission. Communication from the Commission the European Green Deal Commission. COM (2019), Brussels, 2019.

⁷⁸ L. Kramer, *A Lost Opportunity? The Environment and the EU-Mercosur Trade Agreement*, in C. Derani; A.B. de Moura, P. G. Noschang (eds), *Regulamentação europeia sobre água, energia e alimentos para a sustentabilidade ambiental*, EMAIS, Florianópolis, 2020, p. 11.

⁷⁹ The initiative has the support of Federação Internacional de Direitos Humanos, ClientEarth, Fern, Veblen Institute and La Fondation Nicolas Hulot pour la Nature et l'Homme.

are foreseen should the international environmental agreements listed in the Agreement not be implemented. Thus, as conceived under the Agreement, the sustainable development is nothing else than «business as usual»⁸⁰ and the Parties missed the opportunity to elaborate an innovative and effective ‘new generation’ of free trade agreement.

4. *Dispute Resolution*

Considering that the TSD Chapter complements but does not replace the controlling mechanisms prescribed by the international agreement, any dispute related to the interpretation and application of this Chapter refrains from arbitral tribunals provided by trade agreements⁸¹. Thus, the Chapter enjoys a relative autonomy comparing to the other trade provisions, adopting a cooperative approach and including its own instruments⁸², as the enduring of capacities, incentive measures, monitoring and dialogue⁸³.

The TSD Chapter’s implementation is typically monitored by a specialized Committee composed of high representatives of the parties. In some cases, dialogues with civil society are established through advisory groups formed by independent organizations of civil society, which represent equally distributed environmental, labour and commercial organizations, as well as other groups of interest. This can be found in the Agreements with Korea⁸⁴ and Colombia, Peru and Ecuador⁸⁵. In addition to that, a meeting of civil society, composed by all civil society organizations, must take place from time to time, with the aim to establish a dialogue on the agreement’s sustainable development aspects.

Notwithstanding the possibility of sanction-based application as an alternative to bolster the TSD Chapter, the European Commission strongly objected it. The Commission argues that a sanction-based application that the USA and Canada spur protects domestic producers against unfair competition (‘social dumping’). The EU, in its turn, would rather adopt an approach that allows conditions for an equitable competition based on multilateral standards in order to combine the two key elements of fair trade⁸⁶.

Therefore, it is not feasible to apply any sanction in non-observance cases of the provisions contained in the mentioned chapter. For instance, the infringement does not allow countermeasures, except for the only case where the trade agreement refers to an

⁸⁰ L. Kramer, *A Lost Opportunity? The Environment and the EU-Mercosur Trade Agreement*, cit., p. 12.

⁸¹ G. Adinolfi, *Alla ricerca di un equilibrio tra interessi economici e tutela dell’ambiente nella politica commerciale dell’Unione europea*, cit.

⁸² A. Semertzi, *The Preclusion of Direct Effect in the Recently Concluded EU Free Trade Agreements*, in *Common Market Law Review*, Vol. 51, 2014, p. 1141.

⁸³ Arts. 23.11 and 24.16 of the EU-CETA; Arts. 13.16 and 13.17 of the EU-South Korea Agreement; Arts. 12.15-12(17) of the EU-Singapore Agreement; Art. 284 of the EU-Colombia, Peru and Ecuador Agreement; Art. 297 of the EU-Central America Agreement.

⁸⁴ Art. 13.12(5) and 13.13 of the EU-South Korea Agreement from 14 May 2011.

⁸⁵ Art. 282 of the EU-Colombia, Peru, and Ecuador Agreement.

⁸⁶ In this view, fair trade can simply mean following the rules, but these rules are no more limited to the WTO provisions. They have a broader scope and include provisions projected to guarantee equitable conditions and criteria that derive directly or indirectly from general international law and multilateral conventions on labour rights or environment. Certainly, the balance between the different dimensions of free and equitable trade will hinge on the EU’s interests and will be arranged according to its trade partners, which vary in terms of economic development and political views. See: *Editorial Comments*, 2018, pp. 385-386.

international treaty that encompasses commercial restrictions against the wrongdoer, as in the case of the Montreal Protocol on Substances that Deplete the Ozone Layer from 1987⁸⁷. Moreover, any party that may not be in accordance with it must bring out a plan of action, and the Trade and Sustainable Development Sub-Committee shall monitor its implementation⁸⁸.

The combination of broadly established standards and a weak mechanism of coercion, mainly grounded on consultative procedures, can be qualified as the most recent outcome of the 'legal inflation' in the FTA's⁸⁹. Nonetheless, in the long term, it can help monitor and progressively promoting the end of these goals through a slow though constant political process of awareness of governments, civil society, and trade community. The Commission's position goes in ties with the idea of «allowing civil society, including its social partners, to perform their role regarding the application [of the TSD Chapter]»⁹⁰.

Albeit the absence of any sanction originated directly from the TSD Chapter, the CJEU has already declared that the infringement of any provision on labour and environmental protection allows the injured party to «end the trade liberalization brought on by other provisions of the agreement or to discontinue it»⁹¹, based on the international custom law written down in article 60 (1) of the Convention on the Law of Treaties from 1969⁹², which is plainly applicable to EU relations with third countries⁹³.

In conclusion, the 'new generation' agreements are an important regulation tool when considering the globalization process, allowing the EU to face the challenges created by the different levels of social and environmental protection without resorting to multilateral treaties. The celebration of such agreements allows the prevention of the social model typical for western society against all attempt to initiate a «Race to the bottom», also known as «course *vers le bas*»⁹⁴.

⁸⁷ Art. 4 of the Montreal Protocol on Control of trade with non-Parties, which prescribes that parties shall prohibit importation of controlled substances from any country that is not party to the Protocol, as well as refrain from providing subsidies, aid, credits, guarantees or insurance programmes for the export to States not party to this Protocol of products, equipment, plants, or technology that would facilitate the production of controlled substances. G. Adinolfi, *Alla ricerca di un equilibrio tra interessi economici e tutela dell'ambiente nella politica commerciale dell'Unione europea*, cit.

⁸⁸ S. Woolcock, *EU Policy on Preferential Trade Agreements in the 2000s*, cit., pp. 729-730.

⁸⁹ S. Gstöhl, D. Hanf, *The EU's Post-Lisbon Free Trade Agreements*, cit., p. 744.

⁹⁰ *Report of the Commission to the EU Parliament, Council, Social and Economic Committee and to the Committee of regions on the application of free trade agreements*, 1 Jan. 2018-31 Dec. 2018 [SWD (2019) 370 final], p. 29.

⁹¹ CJEU, *Advisory Opinion* No. 02/15, para.161.

⁹² Vienna Convention on the Law of Treaties of 23 May 1969.

⁹³ For more details on the applicability of custom law to the Union's foreign affairs that are stated in the Vienna Convention, see CJEU, *Judgment Brita*, C-386/08 of 25 Feb. 2010; CJEU, *Judgment Council/Frente Polisário*, C 104/16 of 21 December 2016.

⁹⁴ T. Von Danwitz, *Les accords externes de l'Union européenne*, cit., p. 207.