



The EU's contribution to the promotion of sustainable development and the fight against climate change by means of the inclusion of sustainable trade commitments in preferential free trade agreements: the case of the agreement with Mercosur

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SUMMARY: 1. Trade and sustainable development in the new generation of preferential free trade agreements concluded by the Union. – 2. The EU-Mercosur agreement. – 3. The commitments concerning climate change. – 4. The enforcement of the TSD commitments. – 5. Final remarks.

1. Trade and sustainable development in the new generation of preferential free trade agreements concluded by the Union

The interdependence between international trade and sustainable development is now an accepted and established fact, as evidenced, *inter alia*, by the Sustainable Development Goals approved at the 2015 UN summit and the increasingly frequent inclusion in preferential free

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trade agreements (FTAs) concluded by the EU of commitments aiming at enhancing the protection of workers and the environment.¹

Recently, the European Union has placed great emphasis on sustainability issues (both environmental and social) as part of its trade strategy.

As is well known, a profound change in international trade has been taking place for some years now. In particular, as a result of phenomena such as the globalization of supply chains and the emergence of new economic powers in constant growth and expansion, we are witnessing the appearance and spread of unprecedented dynamics to which the WTO system, which has been in serious crisis for some time now, does not seem able to provide adequate responses.²

¹ On these issues, see, *ex plurimis*, L. BARTELS, *Human Rights and Sustainable Development Obligations in EU Free Trade Agreements*, in *LIEI*, 2013, p. 297 ff.; G. ADINOLFI, *Alla ricerca di un equilibrio tra interessi economici e tutela dell'ambiente nella politica commerciale dell'Unione europea*, in *EJ*, 14 May 2017; K. HRADILOVA, O. SVOBODA, *Sustainable Development Chapters in the EU Free Trade Agreements: Searching for Effectiveness*, in *Journal of World Trade*, 2018, p. 1019 ff.; G. ADINOLFI, *A Cross-cutting Legal Analysis of the European Union Preferential Trade Agreements' Chapters on Sustainable Development*, in C. BEVERELLI ET AL. (eds.), *International Trade, Investment and the Sustainable Development Goals*, Cambridge, 2020, p. 15 ff.; G. M. DURAN, *Sustainable Development Chapters in EU Free Trade Agreements: Emerging Compliance Issues*, in *CMLR*, 2020, p. 1031 ff.; M. COLLI VIGNARELLI, *The European Commission Trade Policy Review: the Effectiveness of Sustainable Development Chapters in EU FTAs*, in *EP*, vol. 6, 2021, p. 1 ff.; A. MUCCIONE, *Il rapporto dei capitoli su "commercio e sviluppo sostenibile" con la disciplina in materia commerciale*, in G. ADINOLFI (ed.), *Gli accordi preferenziali di nuova generazione dell'Unione europea*, Torino, 2021, p. 190 ff.; C. CERETELLI, *La clausola sociale nei trattati di libero scambio di nuova generazione dell'Unione europea*, in *RDI*, 2022, p. 1013 ff.; T. NOVITZ, *Sustainable Labour Conditionality in EU Free Trade Agreements? Implications of the EU-Korea Expert Panel Report*, in *ELR*, 2022, p. 3 ff.; S. VILLANI, *I capitoli in materia di sviluppo sostenibile negli accordi commerciali dell'Unione europea: prove di rilevanza sistemica*, in *RCI*, 2022, p. 707 ff.; L. DI ANSELMO, *La promozione dello sviluppo sostenibile negli accordi commerciali dell'Unione europea: alla ricerca di strumenti di enforcement più incisivi?*, in *federalismi.it*, 2023, p. 90 ff.; C. GAMBINO, *Commercio e sviluppo sostenibile negli accordi preferenziali di nuova generazione con i partners asiatici alla prova delle competenze esterne dell'UE*, in *RGA*, 2024, p. 86 ff.; M. MONTINI, *L'azione esterna dell'Unione europea per l'attuazione dello sviluppo sostenibile*, Naples, 2025.

² B. RIGOD, *Global Europe: the EU's New Trade Policy in its Legal Context*, in *CJEL*, 2012, p. 278 ff.; G. SACERDOTI, *Lo stallo dell'Organizzazione Mondiale del Commercio davanti alla sfida di Trump: difficoltà passeggiare o crisi del multilateralismo?*, in *DPCE*, 2018, p. V ff.; G. SACERDOTI, *Sopravviverà l'Organizzazione Mondiale del Commercio alla sfida di Trump? Riflessioni sulla crisi*

This situation has forced a significant rethinking of the European Union's trade strategy, pivoting on the elaboration – according to the line dictated by the Commission since the *Global Europe Communication* of 2006³ – of an action plan strongly focused, as far as the external dimension is concerned, on the conclusion of preferential free trade agreements that are characterized by a 'deepened' and 'global' scope (the so-called 'new generation agreements'), as they also aim to regulate those aspects of contemporary international trade – including, as far as we are concerned, those related to the so-called sustainability, both from the environmental and the social point of view – which, at least for the moment, it would seem impossible to fully address at the multilateral level.⁴

Since the *Communication Trade for All - Towards a more responsible trade and investment policy* of 2015,⁵ the Commission emphasized, in particular, the need to ensure the coherence of the Union's trade policy with broader EU values, including those of a non-trade related nature, such as the development of poorer countries, the

del multilateralismo, un global public good da difendere, in DPCE, 2019, p. 685 ff.; A. DEL VECCHIO, *La crisi del multilateralismo e le sue conseguenze sulla soluzione delle controversie economiche internazionali*, in OIDU, 2020, p. 111 ff.; G. SACERDOTI, *La crisi dell'organizzazione mondiale del commercio – WTO: ragioni e prospettive di rilancio dopo la 12^a conferenza ministeriale di giugno 2022*, in DCI, 2022, p. 595 ff.

³ European Commission, *Global Europe - Competing in the world - A contribution to the EU's Growth and Jobs Strategy*, 4 October 2006, Communication COM (2006) 567final.

⁴ On 'new generation' trade agreements see D. KLEIMANN (ed.), *EU Preferential Trade Agreements: Commerce, Foreign Policy and Development Aspects*, Florence, 2013; C. DI TURI, *La strategia commerciale dell'Unione europea tra "regionalismo economico" e multilateralismo: quale ruolo per gli accordi di libero scambio di nuova generazione?*, in SIE, 2014, p. 81 ff.; S. GSTOL, D. HANF, *The EU's Post-Lisbon Free Trade Agreements: Commercial Interests in a Changing Constitutional Context*, in ELJ, 2014, p. 733 ff.; S. WOOLCOCK, *EU Policy on Preferential Trade Agreements in the 2000s: a Reorientation towards Commercial Aims*, in ELJ, 2014, p. 718 ff.; C. CELLERINO, *EU Common Commercial Policy in Context: Opportunities and Challenges of a Changing Landscape*, in DCI, 2015, p. 783 ff.; B. HOEKMAN, *Deep and Comprehensive Free Trade Agreements*, EUI working paper RSCAS no.2016/29, 2016; G. M. RUOTOLO, *Gli accordi commerciali di ultima generazione dell'Unione europea e i loro rapporti col sistema multilaterale degli scambi*, in SIE, 2016, p. 329 ff.

⁵ European Commission, *Trade for All - Towards a more responsible trade and investment policy*, 14 October 2015, Communication COM (2015) 497final.

promotion of high environmental and social standards and respect for human rights.⁶

Such an approach undoubtedly stems from the subjection – in the post-Lisbon regulatory context – of the Union's external action and, consequently, of its the common commercial policy as well to the general principles and objectives enshrined in Articles 3(5), 21 and 22 TEU in this regard.⁷ These provisions denote, in fact, the express recognition, within the Treaties, of the necessary connection between trade matters and more purely political considerations and of the need to put them on an equal foot, as called upon to go «hand in hand».⁸

In the light of this regulatory framework, the Commission emphasized, in the above-mentioned 2015 Communication, that «one of the aims of the EU is to ensure that economic growth goes hand in hand with social justice, respect for human rights, high labour and environmental standards, health and safety protection» and that «this applies to external as well as internal policies, and so also includes trade and investment policy».⁹

This translated, in concrete terms, into a call for free trade agreements to include commitments on sustainable development and to ensure that they are implemented and adhered to. In this regard, more

⁶ On this Communication, see A. BONFANTI, *Diritti umani e politiche dell'Unione europea in materia commerciale e di investimenti stranieri: la Comunicazione Commercio per tutti, tra regionalismo e multilateralismo economico*, in DUDI, 2016, p. 233 ff.; G. ADINOLFI, *Alla ricerca di un equilibrio tra interessi economici e tutela dell'ambiente*, cit.

⁷ According to Article 205 TFEU «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». In the same vein, Article 207, para. 1, TFEU underlines that «the common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action». Particularly interesting is Article 3, para. 5 TEU when clarifying that «in its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter».

⁸ M. CREMONA, *A Quiet Revolution: the Common Commercial Policy Six Years after the Treaty of Lisbon*, in *European Yearbook of International Economic Law*, 2017, p. 35.

⁹ COM (2015) 497final, cit., at 15.

specifically, the Commission emphasized that «recent EU FTAs also systematically include provisions on trade and sustainable development» and that «as FTAs enter into force, the EU will have to make sure that the provisions on trade and sustainable development are implemented and used effectively, including by offering appropriate support through development cooperation».¹⁰ Similar considerations are also made in subsequent documents, such as the *Reflection Paper on harnessing globalization*¹¹ and the *Trade Policy Review - An Open, Sustainable and Assertive Trade Policy*.¹²

Lastly, the FTA Policy Review reflected in the Communication *The power of trade partnerships: together for green and just economic growth* of 2022¹³ further emphasized the need to focus on the effective implementation of existing trade partnerships also in view of the commitments made by the Union internationally and consolidated in the European Green Deal.¹⁴

The inclusion, within the preferential agreements, of specific commitments in relation to the issues in question can therefore be considered as an effective tool to “export” abroad the EU standards and values. At the same time, it is undeniable the need to regulate the aspects in question by means of the provision of standards as common as possible in order to limit the so-called race to the bottom and the competitive advantage potentially deriving from the application, in the partner countries’ legal systems, of levels of protection significantly lower than those in force in the European Union.¹⁵

¹⁰ *Ivi*, at 17.

¹¹ Commission, *Reflection Paper on harnessing globalization*, 10 May 2017, COM (2017) 240final.

¹² Commission, *Trade Policy Review - An Open, Sustainable and Assertive Trade Policy*, 18 February 2021, Communication COM (2021) 66final. For further reading, see M. COLLI VIGNARELLI, *op. cit.*

¹³ Commission, *The power of trade partnerships: together for green and just economic growth*, 22 June 2022, Communication COM (2022) 409final.

¹⁴ Commission, *The European Green Deal*, 11 December 2019, Communication COM (2019) 640final.

¹⁵ The EU-Vietnam agreement explicitly states, at Article 13.4, para. 5, that «the Parties recognise that the violation of fundamental principles and rights at work cannot be invoked or otherwise used as a legitimate comparative advantage and that labour standards should not be used for protectionist trade purposes».

2. The EU-Mercosur agreement

The EU has identified the Americas, particularly Latin America and the Caribbean, as a key geopolitical trade partner, as well as a prospective collaborator in advancing important climate change and sustainability objectives within the context of its external action.¹⁶

On 6 December 2024, the EU and the Mercosur countries (corresponding to Argentina, Brazil, Uruguay and Paraguay) finalized the negotiations for the (debated and controversial) conclusion of a trade agreement, whose text – in an updated version of the “agreement in principle” reached in 2019 – gives to the issues regarding sustainability an unprecedented centrality.¹⁷

Concerns about the environmental impact of the deal are, indeed, among the most debated issues that have caused negotiations to take over twenty years to conclude, especially in the light of the increased destruction of the Amazon under the policies of Brazil's President

¹⁶ Commission and High Representative for CFSP, *A New Agenda for Relations between the EU and Latin America and the Caribbean*, 7 June 2023, Joint Communication JOIN (2023)17final.

¹⁷ For further reading, see M. BALTENSPERGER, U. DADUSH, *The European Union – Mercosur Free Trade Agreement: Prospects and Risks*, in *Bruegel Policy Contribution*, n. 11, 2019; F. COLLI, *The EU-Mercosur Agreement: towards Integrated Climate Policy?*, in *European Policy Brief*, n. 57, November 2019; J. HARRISON, S. PAULINI, *The Trade and Sustainable Development Chapter in the EU-Mercosur Association Agreement – Is it Fit for Purpose?*, Client Earth, 2020; F. DE ANDRADE CORREA, A. LEHMEN, *Trade, Sustainable Development and Climate Change: How Can Free Trade Agreements be Leveraged for Increased Climate Action? Perspectives on the EU-Mercosur Agreement*, in *LIEI*, 2023, p. 287 ff.; I. ESPA, M. TOKAS, *Interrelation between Paris Agreement and EU Free Trade Agreements' Commitments: in Search of a Sustainable Path*, in *European Foreign Affairs Review*, 2024, p. 7 ff.; L. GOVAERT, *Neocolonialism in Disguise? The European Commission's Trade and Sustainable Development Discourse*, *ivi*, p. 331 ff.; R. PALMIERI ET AL., *Beyond the Finish Line: Sustainability Hurdles in the EU-Mercosur Free Trade Agreement*, in *Social Sciences*, 2024, p. 362; C. ECKES, P. KRAJEWSKI, *How Sustainable is the EU-Mercosur Agreement?*, Report for Climate Action Network Europe, 2025; I. ESPA, M. TOKAS, M. SEGGER, M. GEHRING, *Climate Change and Sustainability Advances in EU Trade Agreements: Policy and Legal Innovations, Interlinkages and Implementation*, in *European Foreign Affairs Review*, 2025, p. 1 ff.; J. HARRISON, S. PAULINI, *Reinventing Trade, Environment and Development Interlinkages: Lessons from the EU-Mercosur Association Agreement*, in *Journal of International Economic Law*, 2025, p. 723 ff.; A. LEHMEN, G. VIDIGAL, *Trade and Environment in EU-Mercosur Relations: Negotiating in the Shadow of Unilateralism*, in *European Foreign Affairs Review*, 2025, p. 87 ff.

Bolsonaro. Hence, the declared objective of the EU-Mercosur Joint Instrument released in 2023 was precisely to strengthen the sustainability commitments contained in the said agreement in principle, with specific reference to their enforcement.¹⁸

On 3 September 2025, the Commission has put forward its proposal to the Council for the signature and conclusion of the EU-Mercosur Partnership Agreement (EMPA), which will subsequently need ratification by all Member States. The Commission's proposal also includes an Interim Trade Agreement (ITA) which – covering only those commitments falling within the exclusive competence of the EU – is subject to the EU-only ratification process and whose effects will cease right after the entry into force of the EMPA.

Most of the provisions contained in the TSD Chapter are in line with other trade agreements previously signed by the EU. The TSD Chapter is not limited, though, to reaffirming existing international obligations, dealing with the so-called right to regulate and imposing the maintenance of current levels of protection: it also contains specific provisions on climate change, deforestation, fishing and aquaculture, as well as responsible management of supply chains. The agreement also consists of a special annex that further specifies the commitments undertaken by the parties in relation to these issues.

Particularly interesting, for the purposes of this work, are those provisions (addressed in the following paragraphs) dealing with climate change and the implementation of the Paris Agreement, as well as the specific enforcement mechanisms displayed for their violation.

3. *The commitments concerning climate change*

The relationship between trade agreements and climate change is quite controversial.¹⁹ On the one hand, trade – and, all the more so, its increase as a consequence of the liberation effect stemming from FTAs

¹⁸ EU-Mercosur Joint Instrument DRAFT - SENSITIVE Version of February 2023. In 2023, the EU and Mercosur engaged in negotiations for a “Joint Instrument” as a supplementary agreement to address concerns about the EU-Mercosur trade deal's impact on sustainability.

¹⁹ For further reading, see J. MORIN, S. JINNAH, *The Untapped Potential of Preferential Trade Agreements for Climate Governance*, in *EP*, 2018, p. 541 ff.

– is one of the major sources of greenhouse emissions. On the other hand, trade agreements can provide an opportunity for the negotiation of specific provisions aimed at protecting the environment and forests, as well as at greening exports of developing countries.²⁰

As already mentioned, the agreement at stake includes specific provisions dealing with climate change, corresponding to *i*) Article 18.6 of the Chapter concerning “*Trade and Sustainable Development*”, as well as – after the updating of the 2019 version of the deal – *ii*) two additional articles, entitled “*climate change*” (Article 7.7) and “*fulfilment of obligations*” (Article 30.4), and *iii*) a dedicated Annex to the said chapter (Annex 18-A).

More in detail, according to Article 18.2, para. 2, «each Party shall: *a*) effectively implement the UNFCCC and the Paris Agreement»; *b*) «consistent with article 2 of the Paris Agreement, promote the positive contribution of trade to a pathway towards low greenhouse gas emission and climate-resilient development and to increasing the ability to adapt to the adverse impacts of climate change in a manner that does not threaten food production».

In the same vein, under Article 7.7, para. 1, «the Parties reiterate their commitment to the implementation of the Paris agreement».

Such commitments are not declined, though, in specific objectives. The agreement does not clarify what «effective implementation» of the Paris Agreement exactly means, nor in what ways the parties are required to «promote» the positive contribution to the reduction of greenhouse gas emissions consistently with the goal to hold the increase in global average temperature envisaged in Article 2 of the Paris Agreement. As such, the provisions at stake can be qualified as open-ended clauses, whose potential of giving rise to binding and enforceable obligations is, consequently, quite uncertain, with significant implications, as will subsequently be pointed out, as regards their enforcement.²¹

²⁰ The Commission in its Communication COM (2022) 409final cit., p. 2, states that «as instruments of privileged partnership, trade agreements provide a platform for policy dialogue and cooperation on sustainability with partner countries. This is vital because only global cooperation can address global challenges».

²¹ It is noteworthy that, conversely, the draft Joint Instrument proposed by the EU in 2023 included – as regards climate change – a number of specific commitments, such as *a*) the «timely communication and implementation of successive and progressive

It is noteworthy that, for instance, the EU-UK agreement precisely declines the obligations stemming from the recognition of the importance of taking urgent action to fight climate change and its impacts in line with the multilateral instruments in force. Besides *a)* committing to «effectively implementing» the UNFCCC and the Paris Agreement, Article 401, para. 2 of such latter agreement, requires the Parties *b)* to promote the mutual supportiveness of trade and climate policies by contributing to the transition to a low greenhouse gas emission and resource-efficient economy, as well as to a climate-resilient development and *c)* to facilitate the removal of obstacles to trade and investment in goods and services of particular relevance for the issues at stake, such as renewable energy and energy efficient products and services, naming, by way of example, the addressing of tariff and non-tariff barriers and the adoption of policy frameworks conducive to the deployment of the best available solutions.

Similarly, the EU-New Zealand²² agreement specifies that the pledge to «effectively implement» the UNFCCC and the Paris Agreement includes «commitments with regard to nationally determined contributions» and the obligation «to refrain from any action or omission that materially defeats the object and purpose of the Paris Agreement».²³ Furthermore, among the actions which the Parties shall carry out under this clause, the agreement mentions – in addition to the ones listed within the EU-UK deal – the promotion of emission trading as an effective policy tool for reducing greenhouse gas

Nationally Determined Contributions (NDCs) reflecting the highest possible ambition, in accordance with Arts. 4.2 and 4.3 of the Paris Agreement»; *b)* «no reduction in the level of ambition of each Party's NDC, including with respect to deforestation targets». The document also mentioned «legislative, regulatory and policy action aiming at making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development, in accordance with Article 2.1.c. of the Paris Agreement». The lack of precise guidance has led the EU Commission, in its Communication COM (2022) 409final, cit., to highlight the need for specifying targets, deadlines and goals in sustainable development chapters of FTAs.

²² For further reading, see G. D'AGNONE, *Sviluppo sostenibile: una condizionalità ambientale... soft? Alcune brevi osservazioni sull'accordo commerciale negoziato tra l'Unione europea e la Nuova Zelanda*, in this *Journal*, 11 September 2022.

²³ Article 19.6, paras 2 and 3.

emissions efficiently, and promote environmental integrity in the development of international carbon markets.²⁴

Further uncertainty as to the scope of this clause might derive from the reference, in Article 7.7 of the EU-Mercosur agreement, to the need – as regards the implementation of the Paris Agreement – to reflect «equity and the principle of common but differentiated responsibilities and respective capabilities, in light of different national circumstances». Such clarification can be read, indeed – in line with the approach underpinning the Paris Agreement – as allowing to calibrate each party's actions and to evaluate the adherence thereof with the obligations at stake taking into account the specificities of the situation concerning the said partner.

It is not entirely clear, then, the precise content of the commitments at stake, nor what might constitute a breach thereof.

Some useful hints as to the material scope of the clauses at stake might be inferred, though, indirectly, from the recent Advisory Opinion delivered by the International Court of Justice with reference to the *Obligations of States in respect of Climate Change*.²⁵ By means of such opinion, the Court clarified, inter alia, that the States parties to the Paris Agreement have a legally binding obligation *a)* to act with due diligence in taking measures capable of making an adequate contribution to achieving the temperature goal set out in the agreement; *b)* to prepare, communicate and maintain successive and progressive nationally determined contributions (NDCs) which, when taken together, are capable of achieving the temperature goal of limiting global warming to 1.5° C above pre-industrial levels; *c)* to pursue measures which are capable of achieving the objectives set out in their successive NDCs; *d)* of adaptation and co-operation, including through technology and financial transfers, which must be performed in good faith.

More in detail, the Court pointed out that the obligations to prepare, communicate and maintain successive NDCs, to account for them and to register them are obligations of result and – as regards their content – that parties are required to do their utmost to ensure that they reflect

²⁴ Article 19.6, para. 4 (c).

²⁵ International Court of Justice, Advisory Opinion 23 July 2025, *Obligations of States in Respect of Climate Change*.

each Party's "highest possible ambition",²⁶ bearing in mind that – consistent with the varying character of due diligence and the principle of common but differentiated responsibilities and respective capabilities – the standard to be applied when assessing them will vary depending, for instance, on historical contributions to cumulative GHG emissions and the level of development and national circumstances of the party in question.

There is no doubt that failure to fulfil the above mentioned obligations would amount to a failure to implement the Paris Agreement.

In addition to the said commitments, the EU-Mercosur agreement places great emphasis on cooperation. Both Article 18, para. 3 and Article 7.7, para. 2 prescribe that «the Parties shall also cooperate, as appropriate, on trade-related climate change issues».

It could be argued that, as a matter of fact, the key to effectively implement the Paris Agreement – especially as regards partners with different development levels – lies, precisely, in adopting a cooperative approach,²⁷ rather than on imposing strict and binding standards whose breach can hardly be sanctioned both for normative and political reasons. Anyways, in spite of such considerations and of the choice of the verb «shall», the obligations arising from these provisions are significantly weakened by the phrase «as appropriate».

4. *The enforcement of the TSD commitments*

Enforcement mechanisms generally tend to be weak as regards the commitments at stake.

Traditionally, issues arising from the TSD Chapter are dealt with by means of a dispute mechanism which is separate and different from the one envisaged for the violation of the other clauses, whose functioning

²⁶ *Ivi*, para. 240 ff.

²⁷ I. ESPA, M. TOKAS, *op. cit.*, p. 28 observe that climate change and other TSD provisions in FTAs negotiated with different development levels should primarily be supplemented with cooperation mechanisms, monitoring and non-compliance mechanisms such as dialogue, capacity building and shaming. This view is shared also by D. PRÉVOST, I. ALEXOVICOVA, *Mind the Compliance Gap: Managing Trustworthy Partnerships for Sustainable Development in the European Union's free trade agreements*, in *International Journal of Public Law and Policy*, 2019, p. 236 ff.

is demanded to a panel of experts in charge of adopting non-binding recommendations.

In the light of the above, in its (already cited) 2022 FTA Policy Review,²⁸ the EU Commission committed to pursuing a more holistic approach to the effective implementation of climate change provisions, by opting for a more assertive enforcement model. According to this amended approach, EU FTAs are supposed to provide for *i*) the alignment of TSD enforcement with the general State-to-State dispute settlement mechanism; as well as *ii*) the possibility to apply trade sanctions, even in the form of suspension of trade concessions, as a matter of last resort, in case of serious violations of core commitments.²⁹

The above notwithstanding, the ordinary dispute settlement mechanism established in the EU-Mercosur agreement does not cover, though, its TSD Chapter. Consequently, any dispute concerning such commitments is to be addressed by a panel of experts, whose duty is to deliver a report containing the assessment of facts, findings and, more interestingly, non-binding recommendations.³⁰

As a matter of fact, there is no legal avenue to enforce compliance with the report, since the panel of experts does not have the power to apply sanctions in situations where their recommendations are not followed. However, the parties are obliged to discuss specific measures that would ensure the observance of recommendations issued by the panel.³¹ In addition, the Sub-Committee on Trade and Sustainable Development established by the agreement is in charge of monitoring the follow-up to the report.³²

So far, actually, the EU-New Zealand agreement is the only EU trade agreement allowing the examination of climate change and labour

²⁸ COM (2022) 409final, cit., at 11.

²⁹ For further reading, see C. VAN DER VEN, *GT12- Make or Break: Including Multilateral Environmental Agreements as “Essential Elements” in RU Free Trade Agreements*, in *Europe Jacques Delors Policy Papers*, 5 December 2022.

³⁰ Article 17, para. 9 of the TSD Chapter.

³¹ As G. ADINOLFI, *A cross-cutting legal analysis*, cit., at 40, puts it, «An obligation to negotiate arises, to be fulfilled in good faith and with the purpose of identifying a measure or an action plan suitable to put an end to the unlawful conduct».

³² Article 17, para. 11.

claims under the ordinary dispute settlement procedure.³³ It is interesting to note, moreover, that such deal envisages the use of sanctions, in the form of compensation or even of suspension of the application of obligations under the covered provisions, as a temporary remedy to induce compliance with a decision of the panel,³⁴ expressly including – among the selected disputes under the TSD Chapter to which such mechanism is applicable – the situation when it is found that the Party complained against failed to refrain from any action or omission that «materially defeats the object and purpose of the Paris Agreement».³⁵

Article 30.4, combined with Article 7.7, provides, however, some interesting innovations consisting in the possibility, for the parties themselves, to apply trade sanctions for the violation of the commitments at stake.

A key element of the deal is – in line with the treaties previously concluded with UK³⁶ and New Zealand³⁷ – the qualification of the Paris Agreement, on the basis of its Article 7.7, para. 3, as an «essential element».³⁸ This means that each party can suspend the agreement, in whole or in part, if it considers that there is a serious breach of such

³³ Chapter 26, *Dispute settlement*.

³⁴ Article 26.16.

³⁵ Article 26.16, para. 2.

³⁶ Article 772, para. 4. It is worth mentioning that the EU-UK agreement elevates – for the first time in history – the “*fight against climate change*”, rather than the Paris Agreement (or the membership to it) in particular, to the rank of essential element of the agreement. Article 771 (“*essential elements*”) expressly states that Article 764, para. 1, entitled “*fight against climate change*”, constitutes – along with other provisions – an essential element of the partnership. Article 764, entitled “*fight against climate change*”, states that such objective «inspires the domestic and external policies of the Union and the United Kingdom» so that «accordingly, each Party shall respect the Paris Agreement and the process set up by the UNFCCC and refrain from acts or omissions that would materially defeat the object and purpose of the Paris Agreement». In this perspective, the breach of the Paris Agreement (when consisting of a conduct which materially defeats its object and purpose) represents just as an example of the wider range of serious and substantial failures of obligations that shall be considered as essential element under such treaty.

³⁷ Similarly to the EU-UK deal, while not containing an “essential element clause” referring to climate change, the EU-New Zealand Agreement clarifies – by means of Article 27.4, para. 3 – that an act or omission that would materially defeat the object and purpose of the Paris Agreement would constitute a reason to invoke the essential element clause and suspend or terminate the treaty in accordance with the procedure set out in Article 54 of the Partnership Agreement.

³⁸ Article 7.7., para. 3.

essential element.³⁹ More in detail, by virtue of para. 3 of Article 30.4, if either Party considers that its counterpart has committed a violation of the obligations which are described as essential elements, it may take «appropriate measures», which may include the suspension, in part or in full, of the agreement.

The identification of the specific failures to comply which can trigger the mechanism at stake is subject, however, to significant uncertainties.

According to para. 3 of Article 7.7, only the second sentence of paragraph 2 – stating that «each Party shall remain a party, in good faith, of the UNFCCC and its Paris Agreement» – constitutes an essential element of the agreement. Being elevated to an essential element of the agreement is not, therefore, the Paris Agreement and the obligations undertaken through it, but rather the (mere) ongoing membership to it.

Further obligations whose breach might trigger the application of the mechanism at stake might be inferred, though, by the use of the phrase «in good faith», if interpreted as implying a best effort clause as regards the fulfilment of the commitments undertaken with the Paris Agreement.

On the other hand, the mentioning of the principle of good faith might be read as implying a reference to the principle of common-but-differentiated-responsibilities underpinning the mechanisms set out by the Paris Agreement, entailing, as such, that – for a breach to be found – it is necessary to take into account that, as previously recalled, the demands flowing from such instrument are less stringent upon the Mercosur countries than upon the EU. The emphasis placed by Article 7.7, para. 1, on the need – while endeavouring to implement the Paris Agreement – to reflect «equity and the principle of common but differentiated responsibilities and respective capabilities» seems to point to such conclusion as well. It is therefore uncertain whether, for instance, failure to comply with one's NDCs would be considered, as

³⁹ It is interesting to note that, according to Article 30.4, para. 7 – when concerning a violation of this essential element clause committed by a signatory Mercosur State – the suspension of the operation of the agreement shall be confined to the relationship with such State only. By contrast, in the absence of specific provisions stating otherwise, the violations committed by any Member State seem to entail the suspension of the agreement in relation to the European Union as a whole.

such, as a violation of this essential clause, especially in light of the above-mentioned Advisory Opinion recently delivered by the International Court of Justice, according to which the obligation set out in Article 4, para. 2, of the Paris Agreement to pursue domestic mitigation measures with the aim of achieving the objectives of the Parties' NDCs is an obligation of conduct, rather than of result, so that compliance with it is to be merely assessed in terms of exercise of due diligence.

At the same time, it cannot be underestimated that, in international environmental law, the focus is not placed upon the duality of breach and non-breach, but rather on the grey-area of “non-compliance”, corresponding to those situations which do not reach the level of a breach of a commitment but, still, cannot be considered in line with it.⁴⁰ In this vein, the reference to the principle of good faith might be read, then, as aimed at catching even situations of mere “non-compliance”.

It is not clear, therefore, whether nor under what circumstances the violation of the climate change commitments previously analysed can amount to a breach of an essential element of the agreement.

Further uncertainty can derive from the need, according to the last limb of para. 3 of Article 30.4, that – in order to justify the suspension of the deal – violations of the essential element have to be «particularly serious and substantial»; such requirement implies, indeed, the conferral, upon each party, of significant margins of appreciation as to the weight of the breach under consideration.

While undoubtedly marking an important innovation in the EU's approach to sustainable trade, turning the Paris Agreement into an essential element of the FTA might therefore prove to be quite risky for the functioning of the deal in so far as it entitles each party to decide unilaterally and basically unconstrained whether there has been a breach and to take appropriate action accordingly.

In order to cope with such concerns, it might be advisable, then, to add some specificity to the provision at stake, by including, for instance, an open-ended illustrative list of actions and omissions that would be

⁴⁰ I. ESPA, M. TOKAS, *op. cit.*

presumed to constitute a breach of the principle of good faith as regards the ongoing membership to the Paris Agreement.⁴¹

Anyway, the EU-Mercosur agreement lays down some basic rules of procedure for the application of the remedies in consideration which significantly limit the chances of application of this kind of sanction.

Since the «appropriate measures» shall be taken «in full respect of international law» and be «proportionate» to the contested violation,⁴² suspension is to be deemed as a «measure of last resort» and «priority must be given to those appropriate measures which least disturb the functioning of the Agreement».⁴³ Furthermore, it must be temporary and merely instrumental to fostering compliance or, else, to finding a mutually agreed solution. Article 30.4, para. 3, clarifies that the party which is willing to react to the perceived violation of the essential element clause shall immediately notify its counterpart and may request to hold urgent consultations on the matter with a view to seeking a mutually agreed solution and that suspension «shall apply for the minimum period necessary to resolve the issue in a manner acceptable to the Parties».

It is worth recalling that – despite the widespread inclusion of essential element clauses in its FTAs – the EU has never suspended nor terminated any agreement. Part of the reason might be that – given the reciprocal nature of trade agreements – the consequences of doing so would be very costly not only for the trading partner but also for the EU itself.⁴⁴

In the line of the above, the «appropriate measures» envisaged by the provisions at stake might preferably take the form of financial penalties proportionate to the weight and the duration of the violation might. Such sanctions might indeed prove to be more efficient as a compliance inducement mechanism, especially if required to be paid into a fund and subsequently used to promote environmental enforcement in the responding country.

Considering the above-mentioned uncertainty as regards the precise identification of the scope of the “essential element” clause, it is worth

⁴¹ C. VAN DER VEN, *op. cit.*, at 14 ff.

⁴² Article 30.4, para. 5.

⁴³ Article 30.4, para. 3 (last limb) and para. 5.

⁴⁴ C. VAN DER VEN, *op. cit.*, at 4.

wondering whether the parties can apply trade sanctions – other than the suspension of the agreement – in the event of a violation of commitments included in the TSD Chapter which cannot be qualified as “essential”.

It seems arguable that para. 4 of Article 30.4 covers the breach of such obligations as well.

The scope of this provision is defined, indeed, in negative terms as concerning failure to fulfil any obligation in the agreement «save those falling within the scope of paragraphs 2 and 3», which correspond to the ones set out in Part III of the agreement (*Trade and trade related matters*) and to the ones described as essential elements.

This paragraph as well confers to the parties the power to adopt «appropriate measures»,⁴⁵ which, supposedly, include trade sanctions, when convinced, on the basis of the factual situation, that its counterpart has failed to fulfil one of the undertaken obligations.

Unlike para. 3, such provision specifies, though, that «for the purpose of this paragraph «appropriate measures» may include the suspension only of Part I [General principles and institutional framework], II [Political dialogue and cooperation], and IV [finale provisions] of this Agreement». In the case of violation of those obligations stemming from the TSD Chapter which cannot be qualified as “essential”, the parties cannot be considered then, to be allowed to suspend any of the commitments listed in Part III of the Agreement, concerning, as said, *Trade and trade related matters*.

Quite differently from the situation concerning the breach of an essential element clause, the application of sanctions for these violations must follow not only *i*) an attempt to «consult and cooperate in order to resolve the issues in a timely and amicable manner», but also *ii*) consultations held under the auspices of the Joint Council⁴⁶ with a

⁴⁵ In keeping with the prescriptions described above, such measures shall be taken in full respect of international law and be proportionate to the contested failure.

⁴⁶ According to Article 2.2, para. 3 «The Joint Council shall be composed of representatives of each of the Parties at ministerial level in accordance with the Parties’ respective internal arrangements and taking into consideration the specific issues to be addressed. The Joint Council shall meet in all necessary configurations, by mutual agreement». Subsequent para. 4 specifies that «When the Joint Council addresses any matter related to Part III of this Agreement, it shall be composed of representatives of each of the Parties with responsibility for trade-related matters».

view to reaching a mutually acceptable solution. Only where such body proves to be unable to reach a mutually acceptable solution within 90 days of the date of the notification by the party convinced that a breach has occurred, appropriate measures can be taken. The adoption of such measures seems therefore to be subject to a more stringent and complex procedure than the one prescribed for the violation of an essential element clause.

It is unclear, however – in the absence of any clarification to this point – whether the adoption of such measures can be unilateral, as in the situations described above, or it has to follow a proper finding – by means of the specific dispute settlement procedure – that a breach has actually occurred. It is worth recalling, in this regard, that according to the (repeatedly mentioned) 2022 Communication *The power of trade partnerships: together for green and just economic growth*, «the application of trade sanctions for violations of dedicated TSD provisions will follow the general dispute settlement rules» and «they will be possible only in the event that a panel finds a party in breach of its TSD commitments, and the latter does not bring itself into compliance within the arranged time period».⁴⁷

5. Final remarks

Even with the above stated *caveats*, the EU-Mercosur agreement can undoubtedly be said to give unprecedented attention to the promotion of sustainable development and the fight against climate change, as evidenced by the inclusion of specific and innovative provisions devoted to such issues and, more importantly, to their enforcement.

In any event, it is crucial to bear in mind, for the purposes of this evaluation, that hard commitments and strict enforcement procedures with regards to climate change may not only *a)* be incompatible with the spirit of the Paris Agreement and its principles, but also *b)* constitute a major disincentive to EU trade partners, especially if developing countries, to negotiate more ambitious commitments.⁴⁸

⁴⁷ See *ivi*, p. 11.

⁴⁸ I. ESPA, M. TOKAS, *op. cit.*, p. 27 ff.

It is worth underlying that this is commonly a sensitive issue for developing country partners. The higher standards – as regards both labour and environmental protection – stemming from the clauses dedicated to trade and sustainable development tend, almost by definition, to increase domestic costs of production, lowering the competitiveness of domestic products, in contrast with the very same objectives underpinning the agreement. Additionally, Trade and Sustainable Development commitments can be perceived as having a neocolonial flavour: since EU law is already in line with them, they are, as a matter of fact, much more unidirectional than they seem.⁴⁹

It cannot be underestimated, then, that seeking to impose solutions which bluntly reflect EU standards and demand their strict observance may even result in the redirection of trade towards less demanding markets.⁵⁰

In this vein, the clauses included in the EU-Mercosur agreement might be deemed to strike a fair balance between the opposing needs, on the one hand, to ensure that both parties display their best efforts with regards to the issues at stake, and, on the other hand, to reach a deal which would otherwise prove quite impossible to conclude. Even though appearing as not entirely adequate at first sight, especially if compared to the ones included in the recently concluded EU-New Zealand FTA, these provisions might actually represent, as a matter of fact, the most efficient instrument for the promotion of environmental protection and the fight against climate change within the specific partnership under consideration.

Finally, it cannot be overlooked the potential contribution to the promotion of sustainable development which might stem – once they are entirely in force – from the unilateral measures targeting corporate conduct abroad which the EU recently adopted with regards to

⁴⁹ L. GOVAERT, *op. cit.*, p. 336; A. LEHMEN, G. VIDIGAL, *op. cit.*, p. 88.

⁵⁰ A. LEHMEN, G. VIDIGAL, *op. cit.*, p. 112 ff. The Authors observe that «the risk exists that the EU will overestimate its economic might, and consequently its ability to induce change by threatening to sanction countries and producers. As the negotiations over the EUMPA show, unilateralism is at its most useful when employed as a potential alternative to an agreement, fostering such agreement rather than replacing it».

deforestation⁵¹, due diligence,⁵² forced labour⁵³ and cross-border greenhouse gas emissions.⁵⁴ Such instruments might not only encourage – in conjunction with the agreement under consideration – the exportation of EU standards, but also put forth the remedies specifically entailed for their violation.

For more conclusive remarks as to the EU’s contribution to the promotion of sustainable development within the relationship at stake to be made, it seems hence necessary to wait until all the above-mentioned instruments will be able to produce their (combined) effects.

⁵¹ Regulation (EU) 2023/1115 of the European Parliament and of the Council, of 31 May 2023, on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010.

⁵² Directive (EU) 2024/1760 of the European Parliament and of the Council, of 13 June 2024, on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859.

⁵³ Regulation (EU) 2024/3015 of the European Parliament and of the Council, of 27 November 2024, on prohibiting products made with forced labour on the Union market and amending Directive (EU) 2019/1937.

⁵⁴ Regulation (EU) 2023/956 of the European Parliament and of the Council, of 10 May 2023, establishing a carbon border adjustment mechanism.

ABSTRACT (ITA)

Il presente lavoro si propone di analizzare le pattuizioni dell'accordo di partenariato UE-Mercosur che si occupano di sostenibilità e, in particolare, di contrasto ai cambiamenti climatici, nella prospettiva di vagliarne l'effettivo carattere innovativo rispetto agli accordi preferenziali di libero scambio finora stipulati dall'Unione, nonché la concreta portata precettiva, anche alla luce dei meccanismi di *enforcement* apprestati al riguardo.

ABSTRACT (ENG)

This paper analyses the provisions of the EU-Mercosur partnership agreement that deal with sustainability and, in particular, with climate change, with a view to assessing their actual innovative nature compared to the preferential free trade agreements signed, so far, by the Union, as well as their concrete prescriptive scope, especially in light of the enforcement mechanisms put in place for their violation.