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## Research Report

# Breaking the mold: An evaluation of the EU-New Zealand Free Trade Agreement as a new "gold standard" for Trade and Sustainable Development chapters

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**Ulrike Carrillo**

Breaking the Mold:  
An Evaluation of the EU-New  
Zealand Free Trade  
Agreement as a New „Gold  
Standard“ for Trade and  
Sustainable Development  
Chapters

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**Breaking the Mold:  
An Evaluation of the EU-New Zealand  
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Trade and Sustainable Development Chapters**

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## A. Introduction

Negotiations on a trade agreement between the European Union (EU) and New Zealand were launched in June 2018 and concluded on June 30, 2022, after four years and 12 rounds of negotiations.<sup>1</sup> Just over one year later, on July 9, 2023, the EU and New Zealand signed the agreement, bringing the deal closer to implementation.<sup>2</sup> Finally, on November 27, 2023, the EU completed the formal process of ratifying its free trade agreement (FTA) with New Zealand.<sup>3</sup> The decision came less than a week after the European Parliament voted in favor of the agreement, with 524 of the 705 members of European Parliament consenting its ratification.<sup>4</sup>

Although the agreement still awaits ratification by New Zealand, its Trade and Sustainable Development (TSD) Chapter has, from the start, been praised as “the gold standard for future trade agreements.”<sup>5</sup> This paper assesses whether the TSD Chapter of the EU-New Zealand FTA (hereinafter EU-NZ FTA) meets this expectation and sets a new benchmark for future sustainable development chapters in EU trade agreements.

## I. Outline and Purpose

Rather than conducting an extensive analysis of the EU-NZ FTA, this paper will narrow its focus to the agreement’s TSD Chapter and its provisions. The purpose of this paper is not to advocate or reject TSD Chapters in general but to evaluate the commitments outlined in the EU-NZ FTA Chapter within the context of the EU trade agenda.

The paper begins by reviewing the political and economic context of the EU-NZ FTA to provide a backdrop for the analysis. Next, it explores the developments leading up to the EU’s revised approach to its TSD Chapters. An in-depth analysis of the substantial and institutional provisions in the TSD Chapter will follow. The next section will focus on the dispute settlement mechanism (hereafter DSM) in Chapter 26 as it relates to implementing TSD commitments. Where appropriate, the paper will draw comparisons to other modern EU FTAs, such as the EU-Canada Comprehensive Economic and Trade Agreement

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<sup>1</sup> *European Commission*, press release from June 30, 2022, EU – New Zealand Trade Agreement: Unlocking Sustainable Economic Growth: <[https://ec.europa.eu/commission/presscorner/detail/en/ip\\_22\\_4158](https://ec.europa.eu/commission/presscorner/detail/en/ip_22_4158)>, last accessed on January 4, 2024.

<sup>2</sup> *European Commission*, press release from July 9, 2023, EU and New Zealand sign ambitious free trade agreement: <[https://ec.europa.eu/commission/presscorner/detail/en/ip\\_23\\_3715](https://ec.europa.eu/commission/presscorner/detail/en/ip_23_3715)>, last accessed on January 4, 2024.

<sup>3</sup> *European Commission*, press release from November 27, 2023, EU completes ratification of state-of-the-art trade agreement with New Zealand: <[https://ec.europa.eu/commission/presscorner/detail/en/ip\\_23\\_6056](https://ec.europa.eu/commission/presscorner/detail/en/ip_23_6056)>, last accessed on January 4, 2024.

<sup>4</sup> *European Parliament*, press release from November 22, 2023, Parliament approves EU-New Zealand free trade agreement: <<https://www.europarl.europa.eu/news/en/press-room/20231117IPR12221/parliament-approves-eu-new-zealand-free-trade-agreement>>, last accessed on January 4, 2024.

<sup>5</sup> Bernd Lange, Chair of the European Parliament Committee on International Trade, as quoted in *Scotcher, RNZ*, EU Boss Says Trade Deal with NZ a ‘Gold Standard’ for Future Agreements, September 22, 2022: <<https://www.rnz.co.nz/news/political/475335/eu-boss-says-trade-deal-with-nz-a-gold-standard-for-future-agreements>>, last accessed on January 6, 2024.

(CETA) and the EU- South Korea (hereinafter EU-Korea) FTA. The analysis concludes with a forecast of the potential impact of the EU-NZ FTA on future EU trade deals.

## II. Unequal Partners: The Political and Economic Context of the EU-NZ FTA

Trade liberalization aims to reduce trade barriers, foster economic growth and prosperity, and encourage fair competition.<sup>6</sup> Following the impasse in negotiations under the World Trade Organization (WTO)<sup>7</sup> and dissatisfaction with the WTO's ability to adequately address environmental and labor issues<sup>8</sup>, the EU has increasingly turned to bi- and multilateral trade agreements to ensure the free flow of goods and services while also striving to protect the environment and secure social welfare.<sup>9</sup> As of 2023, 44 percent of the EU's external trade with goods and 46 percent of trade with services were conducted under preferential trade agreements, meaning FTAs shape almost half of the EU's trade with third countries.<sup>10</sup> Furthermore, in 2022, despite the geopolitical challenges affecting international trade in recent years, the EU's trade with its top 20 preferential partners grew by 30 percent on average,<sup>11</sup> underscoring the stabilizing traits attributed to trade agreements. On October 15, 2023, the Commission announced that EU exports to preferential partners under FTAs surpassed two trillion Euros in 2022.<sup>12</sup> These developments underline the importance of FTAs as the EU's preferred means to promote trade and bolster economic ties with its partners. At present, the EU is the largest trading block of its kind and has the largest network of trade agreements made up of currently 42 preferential trade agreements with 74 countries.<sup>13</sup> More are scheduled to follow in the coming years.<sup>14</sup>

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<sup>6</sup> Tietje, in: Tietje/Nowrot (eds), *Internationales Wirtschaftsrecht, WTO und Recht des Weltwarenhandels*, p. 172.

<sup>7</sup> For a comprehensive analysis of the current state and future of WTO negotiations, see *Wolff*, Peterson Institute for International Economics, Working Paper 22-7; *Lindberg/Alvstam*, *International Negotiation*, Vol. 17, 2012, no. 1 pp. 163-187.

<sup>8</sup> See *Eglin*, *The North American Journal of Economics and Finance*, Vol. 12, 2021. For an overview of the complicated relationship between the WTO and environmental and social standards, see *Charnovitz*, Social Science Research Network.

<sup>9</sup> *Bastiaens/Postnikov*, *Environmental Politics*, p. 2.

<sup>10</sup> *European Commission*, report from November 15, 2023, Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: On Implementation and Enforcement of EU Trade Policy: <<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM:2023:740:FIN>>, last accessed on January 4, 2024.

<sup>11</sup> *Ibid.*

<sup>12</sup> *European Commission*, press release from November 15, 2023, Value of EU trade deals surpasses €2 trillion: <[https://ec.europa.eu/commission/presscorner/detail/en/IP\\_23\\_5742](https://ec.europa.eu/commission/presscorner/detail/en/IP_23_5742)>, last accessed on January 4, 2024.

<sup>13</sup> *European Commission*, report from November 15, 2023, Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: On Implementation and Enforcement of EU Trade Policy: <<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM:2023:740:FIN>>, page 2, last accessed on January 4, 2024.

<sup>14</sup> See the EU Commission's website on EU trade agreements for a comprehensive overview of EU FTAs that have been concluded, await ratification, or are currently being negotiated or updated: <[https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/negotiations-and-agreements\\_en](https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/negotiations-and-agreements_en)>, last accessed: on January 4, 2024.



The FTA with New Zealand is one of the newest additions to the EU’s “spaghetti bowl” of preferential trade agreements.<sup>15</sup> In 2022, trade in goods between the EU and New Zealand was worth €9.1 billion, and New Zealand ranked 50<sup>th</sup> among the EU’s trading partners.<sup>16</sup> This prompts a valid question: why the EU pursued an FTA with a small, geographically distant country responsible for just under 0.2 percent of the bloc’s trade volume?<sup>17</sup> The answer to this question lies in the geopolitical climate under which the agreement was concluded. The trade deal comes at a time of heightened economic and geopolitical uncertainty as a result of various disruptive events such as, inter alia, Brexit, increasing protectionism, China’s growing dominance, and shocks on global supply chains induced by the COVID-19 pandemic and Russia’s war against Ukraine.<sup>18</sup> These circumstances set the stage for the EU to deepen its economic alliances with partners. More specifically, the EU-NZ FTA is part of the EU’s Indo-Pacific strategy, through which the EU “intends to increase its engagement with the region”, including through trade.<sup>19</sup> In this regard, New Zealand presents itself as a key partner to the EU,<sup>20</sup> granting deeper integration and access to value chains in the region.<sup>21</sup>

Thus, the EU-NZ FTA aligns with the EU’s goals to diversify its supply chains, mainly from Russia<sup>22</sup> and China, and counterbalance China’s dominance in the Asia-Pacific

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<sup>15</sup> The U.S. economist Jagdish Bhagwati coined the term “spaghetti bowl effect” in 1995 when he used it to describe the proliferation of FTAs in his paper: Bhagwati, Department of Economics Discussion Papers, 726, p. 4.

<sup>16</sup> In contrast, the EU is New Zealand’s 3<sup>rd</sup> (sometimes 4<sup>th</sup>) largest trading partner. See DG Trade website: <[https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/new-zealand/eu-new-zealand-agreement\\_en](https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/new-zealand/eu-new-zealand-agreement_en)>, last accessed on January 4, 2024.

<sup>17</sup> *European Commission*, press release from February 17, 2023, EU-New Zealand Trade Agreement: A Trade Deal for Green and Just Growth: <[https://ec.europa.eu/commission/presscorner/detail/en/IP\\_23\\_921](https://ec.europa.eu/commission/presscorner/detail/en/IP_23_921)>, last accessed on January 6, 2024.

<sup>18</sup> Elżbieta Majchrowska maps the geopolitical factors contributing to the EU-New Zealand FTA in *Majchrowska*, *Teka of Political Science and International Relations*, p. 103 – 105.

<sup>19</sup> *European Commission*, Joint Communication to the European Parliament and the Council, The EU strategy for cooperation in the Indo-Pacific: <[https://www.eeas.europa.eu/sites/default/files/jointcommunication\\_2021\\_24\\_1\\_en.pdf](https://www.eeas.europa.eu/sites/default/files/jointcommunication_2021_24_1_en.pdf)>, p. 1, last accessed on January 4, 2024.

<sup>20</sup> Upon signing the EU-NZ FTA, President of the European Commission Ursula von der Leyen is quoted saying “New Zealand is a key partner for us [the EU] in the Indo-Pacific region, and this free trade agreement will bring us even closer together.” See: *European Commission*, press release from July 9, 2023, EU and New Zealand sign ambitious free trade agreement: <[https://ec.europa.eu/commission/presscorner/detail/en/ip\\_23\\_3715](https://ec.europa.eu/commission/presscorner/detail/en/ip_23_3715)>, last accessed on January 4, 2024. As early as 2015, The EU’s “Trade for All” strategy, which played a significant role in the agreement’s conclusion, identified the Asia-Pacific region as a strategic interest of the EU, highlighting the close alignment between New Zealand’s and Australia’s values and beliefs and those of the EU, emphasizing that “[s]trengthening these relationships should be a priority.” See: *European Commission*, Trade for All: Towards a More Responsible Trade and Investment Policy, <<https://op.europa.eu/en/publication-detail/-/publication/d90eda7c-7299-11e5-9317-01aa75ed71a>>, p. 32, last accessed on January 4, 2024

<sup>21</sup> The “Trade for All Strategy” clearly communicates the EU’s strategic interest in deepening economic ties with Australia and New Zealand. See page 32 of the *European Commission*, Trade for All: Towards a More Responsible Trade and Investment Policy, <<https://eur-lex.europa.eu/legal-content/en/ALL/?uri=celex%3A52015DC0497>>, last accessed on January 6, 2024.

<sup>22</sup> Valdis Dombrovskis, EU Commissioner for trade, told reporters “[i]t’s clear that we need to diversify away from Russia... (and) look for new markets, supply chains and so forth and this is exactly what this deal contributes too [sic]”, as quoted in *Blenkinsop*, Reuters, EU, New Zealand Seal Free Trade Deal in ‘Geopolitical Signal’, June 30, 2022: <<https://www.reuters.com/markets/eu-new-zealand-conclude-negotiations-trade-deal-eus-von-der-leyen-2022-06-30/>>, last accessed on January 6, 2024.

region.<sup>23</sup> From a Brussels perspective, the EU-NZ agreement sends a clear “geopolitical message,”<sup>24</sup> helping to advance negotiations on other FTAs in the Pacific, such as with Australia, a close economic partner of the EU.<sup>25</sup>

### III. TSD Chapters in EU Free Trade Agreements

One of the biggest challenges facing policymakers today is ensuring that trade does not hinder sustainable development and vice versa.<sup>26</sup> The EU addresses this dilemma by incorporating TSD Chapters into its trade agreements. In a nutshell, TSD Chapters include provisions to safeguard economic, social, and environmental standards. These chapters typically contain binding commitments to multilateral environmental and labor agreements as well as a broad range of institutional provisions to help implement and monitor these commitments.<sup>27</sup> The first EU trade agreements to pioneer TSD Chapters were the 2008 EU-Caribbean Economic Partnership Agreement and the 2011 EU-Korea Free Trade Agreement.<sup>28</sup>

### IV. Status Quo and Critique of TSD Chapters

Since 2011, TSD Chapters have become permanent fixtures of EU trade agreements and an important tool in the EU’s value-driven approach to trade.<sup>29</sup> Recently, however, some observers have begun questioning their effectiveness.<sup>30</sup> The primary source of frustration is the

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<sup>23</sup> China is New Zealand’s largest trading partner. After the conclusion of the 2008 New Zealand trade agreement, trade between the two countries quadrupled. In April 2022, shortly before reaching an agreement with the EU, New Zealand and China revised significant areas of the FTA, including its environmental policy. See: *New Zealand Ministry of Foreign Affairs and Trade*, press release from April 7, 2022, NZ-China FTA: <<https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/nz-china-free-trade-agreement/fta-upgrade>>, last accessed on January 6, 2024. Some view the timing of these revisions as evidence of New Zealand’s efforts to maintain a balance between its relationships with China and the West. See *Köllner*, GIGA Focus Asien, no. 4, 2019, for a comprehensive overview of China-New Zealand relations.

<sup>24</sup> *Blenkinsop*, Reuters, EU, New Zealand Seal Free Trade Deal in ‘Geopolitical Signal’, June 30, 2022: <<https://www.reuters.com/markets/eu-new-zealand-conclude-negotiations-trade-deal-eus-von-der-leyen-2022-06-30/>>, last accessed on January 6, 2024.

<sup>25</sup> Negotiations between the two countries commenced in 2018. Today, the EU is Australia’s third-largest trading partner and fourth-largest source of foreign direct investment. See *Australian Government Department of Foreign Affairs and Trade*, website, Australia-European Union Free Trade Agreement, <<https://www.dfat.gov.au/trade/agreements/negotiations/aeufta>>, last accessed on January 6, 2024.

<sup>26</sup> Several WTO disputes illustrate the balancing act between free trade and environmental protection particularly well. See for instance United States, Restrictions in Imports of Tuna (Tuna I), Report of the GATT Panel, August 16, 1991, and United States, Imports of Tuna (Tuna II), Report of the GATT Panel, June 16, 1994.

<sup>27</sup> For a comparative analysis of the structure, content, and purpose of TSD Chapters, see the London School of Economics study that was commissioned by the EU Commission as part of its TSD Chapter evaluation process: *Velut et al.*, Trade Policy Hub, LSE Consulting.

<sup>28</sup> *Ibid.*, p. 39.

<sup>29</sup> At the latest since the “Trade for All Strategy,” the EU has committed itself to a value-based economic policy. Drieghe and Potjomkina map the EU’s long tradition of infusing values into its trade policies in: *Drieghe Potjomkina*, *Global Affairs* Vol. 5, 2019, no. 1, pp. 63-72.

<sup>30</sup> See *Kanalan*, *Europarecht*, 57, no. 4; *Prévost/Alexovicova*, *International Journal of Public Law and Policy* 6, no. 3; and *van’T Wout*, *Asia Europe Journal* 20, no. 2.

absence of compliance mechanisms under the TSD Chapter's current design.<sup>31</sup> This situation led the EU to consider criticisms from various stakeholders, including the European Parliament, the European Economic and Social Council, trade unions, and other interest groups, resulting in the 2018 document titled "Feedback and Way Forward on Improving the Implementation and Enforcement of Trade and Sustainable Development Chapters in EU Free Trade Agreements" (hereafter referred to as the "15-Point Action Plan").<sup>32</sup>

## **B. Strengthening the Implementation and Enforceability of TSD Commitments under EU FTAs**

### **I. The 15-Point Action Plan**

The action plan's recommendations include fostering greater cooperation among member states, improving stakeholder transparency and communication, and delivering on TSD commitments.<sup>33</sup> The document places particular emphasis on the role of civil society in implementing TSD Chapters and monitoring compliance.<sup>34</sup> While the document mentions the option of trade sanctions as a potential remedy for non-compliance with TSD commitments, the communiqué states that "a majority of voices [support] the current model for enforcing TSD Chapters"<sup>35</sup> and argues that such a trade-sanction approach is unlikely due to the "absence of consensus on a sanctions-based model."<sup>36</sup> One of the main obstacles to sanctions presented by the communiqué is the challenge of quantifying economic outfall resulting from breaches of TSD Chapters to serve as the basis for sanctions.<sup>37</sup> Despite not advocating for a sanction-based model, the communiqué acknowledged the calls to strengthen enforcement mechanisms under TSD Chapters, subsequently leading to improvements in other areas.<sup>38</sup>

### **II. A Strong Institutional Framework**

To affirm its dedication to enforcing trade agreements and in line with the belief that "enforcing existing trade agreements is as important as negotiating new trade agreements,"<sup>39</sup>

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<sup>31</sup> See examples of these exemptions in CETA Articles 23.11 and 29.2.; EU-Korea FTA, Article 13.14 and 13.15.

<sup>32</sup> The Commission responded to calls for improvement by engaging an in-house scientific service to draw up a document outlining concrete steps to enhance the effectiveness of TSD chapters in EU FTAs. This paper is commonly referred to as the "15-Point Action Plan". See: *Commission Services*, Non-Paper from February 26, 2018, Feedback and Way Forward on Improving the Implementation and Enforcement of Trade and Sustainable Development Chapters in EU Free Trade Agreements.

<sup>33</sup> The 15-Point Action Plan clusters these 15 recommendations into four groups: Working Together; Enabling civil society including the Social Partners to play their role in implementation; Delivering; and Transparency and Communication.

<sup>34</sup> 15-Point Action Plan, Part B, Enabling civil society including the Social Partners to play their role in implementation, p. 5.

<sup>35</sup> 15 Point Action Plan, p. 2.

<sup>36</sup> *Ibid.*, p. 3.

<sup>37</sup> *Ibid.*, p. 3.

<sup>38</sup> *Ibid.*, p. 7.

<sup>39</sup> See *GSP Hub*, GSP Hub Video-Interview with CTEO Denis Redonnet: <<https://gsphub.eu/news/cteo-interview>>, February 17, 2023, last accessed on January 6, 2024.

the EU introduced several institutional mechanisms to bolster stakeholder participation, subject expertise, and civil society involvement in the implementation and enforcement of TSD Chapters. In July 2020, the Commission established the Chief Trade Enforcement Officer (CTEO) role to oversee the implementation and enforcement of the EU's trade agenda.<sup>40</sup> Among other responsibilities,<sup>41</sup> the CTEO oversees the newly established Single-Entry-Point (SEP) mechanism launched on November 16, 2020, on the Access2Markets<sup>42</sup> platform. The SEP allows EU<sup>43</sup> stakeholders to lodge complaints on (potential) trade barrier issues or non-compliance with TSD commitments under the respective TSD Chapters or the EU's Generalized Scheme of Preferences (GSP).<sup>44</sup> In 2022, the SEP was contacted over 70 times by EU stakeholders, resulting in 48 formal complaints about market access issues,<sup>45</sup> including the first TSD complaint.<sup>46</sup> Although the CTEO has pledged to give complaints related to TSD obligations "the same level of focus and attention as market access barriers,"<sup>47</sup> it will likely take longer for complaints regarding TSD violations to gain traction. This is because stakeholders have not yet accorded TSD commitments the same importance as traditional market access barriers. To support this mechanism, the Commission published operational guidelines on June 22, 2022, to improve civil society's access to

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<sup>40</sup> *European Commission*, press release from July 24, 2020, European Commission Appoints Its First Chief Trade Enforcement Officer: <[https://ec.europa.eu/commission/presscorner/detail/en/IP\\_20\\_1409](https://ec.europa.eu/commission/presscorner/detail/en/IP_20_1409)>, last accessed on January 6, 2024.

<sup>41</sup> The CTEO's mandate encompasses various aspects of implementing and enforcing EU trade agreements, particularly regarding workers' rights, climate change, and the environment. For an overview of the CTEO's role, see: *European Commission DG Trade*, website, Chief Trade Enforcement Officer: <[https://policy.trade.ec.europa.eu/enforcement-and-protection/chief-trade-enforcement-officer\\_en](https://policy.trade.ec.europa.eu/enforcement-and-protection/chief-trade-enforcement-officer_en)>, last accessed on January 5, 2024.

<sup>42</sup> The Access2Markets platform of the EU is a one-stop-shop for EU trade and investment matters. See the Access2Markets website: <<https://trade.ec.europa.eu/access-to-markets/en/home>>, last accessed on January 6, 2024.

<sup>43</sup> The Single-Entry-Point (SEP) is open to various stakeholders, including EU Member States, trade associations, businesses, civil society, and EU citizens. However, third-country Parties are currently exempted and must go through an EU partner. See: *European Commission Directorate-General for Trade*, guidelines from June 22, 2022, Operating Guidelines for the Single Entry Point and Complaints Mechanism for the Enforcement of EU Trade Agreements and Arrangements: <[https://trade.ec.europa.eu/access-to-markets/en/form-assets/operational\\_guidelines.pdf](https://trade.ec.europa.eu/access-to-markets/en/form-assets/operational_guidelines.pdf)>, p. 1 f. last accessed on January 5, 2024.

<sup>44</sup> *Ibid*, p. 2.

<sup>45</sup> Most recent data from *European Commission*, report from November 15, 2023, Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: On Implementation and Enforcement of EU Trade Policy: <<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM:2023:740:FIN>>, p. 42, last accessed on January 4, 2024.

<sup>46</sup> In May 2022, the Dutch organization CNV Internationaal filed a complaint on behalf of trade union organizations from Colombia and Peru. The complaint deals with violations of labor commitments under the trade agreement between the EU and Colombia, concerning fundamental labor rights, such as freedom of association, and the right to equality. The Commission's preliminary assessment points towards potential labor rights violations and investigations are ongoing. See CNV's complaint here: <[https://www.cnvinternationaal.nl/\\_Resources/Persistent/7/e/a/d/7eaded188057bc7dd0e1b6fbf1569d3a5883b119/CNVI-0334%20Complaint%20Colombia%20Peru%20SEP%20EU%20Trade%20Agreement.pdf](https://www.cnvinternationaal.nl/_Resources/Persistent/7/e/a/d/7eaded188057bc7dd0e1b6fbf1569d3a5883b119/CNVI-0334%20Complaint%20Colombia%20Peru%20SEP%20EU%20Trade%20Agreement.pdf)>, last accessed on January 6, 2024.

<sup>47</sup> Commissioner for Trade Valdis Dombrovskis quoted in *European Commission*, press release from November 16, 2020, Commission Launches New Complaints System to Fight Trade Barriers and Violations of Sustainable Trade Commitments, <[https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_2134](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2134)>, last accessed on January 6, 2024.

the SEP.<sup>48</sup> It remains to be seen whether these guidelines will encourage better stakeholder monitoring.

The 2011 EU-Korea trade deal introduced Domestic Advisory Groups (DAGs) to EU FTAs. Since then, DAGs have become an essential element of new-generation FTAs, and multiple DAGs have been established under various EU trade treaties.<sup>49</sup> Generally, their role is to monitor and provide feedback on the implementation of TSD commitments in EU FTAs.<sup>50</sup> Recently, however, DAGs have faced criticisms for their lack of ability to effectively address TSD commitment violations. Some voices even accuse the EU of using them “to legitimize [their] policies and counterbalance opposition” without demonstrating “any real intent to take their suggestions on board.”<sup>51</sup> In response, the 15-Point Action Plan proposed to enhance civil society’s role in implementing TSD Chapter by broadening the DAGs’ mandates and providing them with more resources.<sup>52</sup>

### C. Reinventing TSD Chapters: The EU-NZ FTA

On November 27, 2023, the EU ratified the FTA with New Zealand.<sup>53</sup> This analysis is based on the final text of the agreement which was signed by the EU and New Zealand on July 9, 2023.<sup>54</sup> The agreement is expected to enter into force following New Zealand’s completion of the ratification procedure. Even before negotiations concluded, a great deal of speculation surrounded the agreed text, and it was clear, based on statements by EU officials and earlier position papers that the EU-NZ FTA would contain some of the most progressive TSD provisions ever negotiated by the EU.<sup>55</sup>

In June 2021, the EU conducted an open public consultation to enhance its trade agenda, gathering contributions from various stakeholders, including businesses, trade unions, environmental and human rights groups, research institutions, think tanks, parliamentarians, and civil society organizations. The Commission reviewed and aggregated the views in a communiqué titled “The Power of Trade Partnerships: Together for Green and Just

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<sup>48</sup> See: *European Commission Directorate-General for Trade*, guidelines from June 22, 2022, Operating Guidelines for the Single Entry Point and Complaints Mechanism for the Enforcement of EU Trade Agreements and Arrangements: <[https://trade.ec.europa.eu/access-to-markets/en/form-assets/operational\\_guidelines.pdf](https://trade.ec.europa.eu/access-to-markets/en/form-assets/operational_guidelines.pdf)>, last accessed on January 6, 2024.

<sup>49</sup> Examples include Canada, Japan, and the Andean Community (Columbia, Ecuador, Peru). See: *Martens/Potjomkina/Orbie*, Friedrich Ebert Stiftung, p. 9.

<sup>50</sup> *Ibid.*

<sup>51</sup> *Potjomkina/Orbie/Shahin*, Cambridge Review of International Affairs, p.2.

<sup>52</sup> See points 3 and 4 of the 15-Point-Action Plan.

<sup>53</sup> *European Commission*, press release from November 27, 2023, EU completes ratification of state-of-the-art trade agreement with New Zealand: <[https://ec.europa.eu/commission/presscorner/detail/en/ip\\_23\\_6056](https://ec.europa.eu/commission/presscorner/detail/en/ip_23_6056)>, last accessed on January 4, 2024.

<sup>54</sup> See the final version of the agreement, including its annexes and tariff schedules, here: <<https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/88659965-1441-46a1-9368-2c6c15b8fb44>>, last accessed on January 5, 2024.

<sup>55</sup> It has been argued that the EU-UK Trade and Cooperation Agreement (TCA) contains the strongest TSD commitments to have ever been included in an EU FTA, particularly concerning climate cooperation. See *Gehring*, blog post from January 25, 2021, UK in a Changing Europe: <<https://ukandeu.ac.uk/the-eu-uk-agreement-is-the-first-to-make-climate-a-make-or-break-issue/>>, last accessed on January 5, 2024. However, the author of this paper maintains that the EU-NZ FTA’s TSD provisions are indeed more advanced than the ones contained in the EU-UK TCA, mainly because of the absence of a dedicated TSD Chapter in the TCA and the agreement’s unique status, which resulted from the unprecedented nature of the EU-UK relationship.

Economic Growth” (hereafter, “The Power of Trade Partnerships” communiqué), which it published on June 22, 2022.<sup>56</sup> The communiqué responds to significant criticism of the “compliance gap”<sup>57</sup> in TSD Chapters and presents the Commission’s revised trade and sustainable development strategy, including substantial changes in the operability and enforcement of its FTAs. The EU-NZ FTA reflects many of the changes foreshadowed in the communiqué. Perhaps the most unexpected update is the possibility to impose economic sanctions on specific trade and sustainability issues. Surprising because the 15-Point Action Plan, which had guided the implementation and enforcement of TSD Chapters since 2018, clearly opposed this idea, citing an “absence of consensus on a sanctions-based model,” which made it “impossible to move to such an approach.”<sup>58</sup>

## I. Chapter 19: Trade and Sustainable Development – A New Approach

The EU-NZ FTA is placed within the 2030 Agenda for Sustainable Development and references multiple key documents that shape the modern sustainable development framework. According to the agreement’s preamble, the Parties are “[de]termined to strengthen their economic, trade, and investment relations in accordance with the objective of sustainable development, in its economic, social and environmental dimensions.”<sup>59</sup> While the preamble is not legally binding, referencing sustainable development at the top provides context and guidance for interpreting the agreement’s “object and purpose,” as defined by Article 31 of the Vienna Convention on the Law of the Treaties.<sup>60</sup> Unlike CETA, where the EU and Canada opted for a three-chapter model covering trade and sustainable development,<sup>61</sup> the EU-NZ agreement consolidates the TSD provisions into one chapter. The sustainability lens is, however, not restricted to the TSD Chapter. As sustainability and trade issues often overlap, TSD provisions can be found where these two areas intersect in other sections of the agreement. Examples include provisions on sustainable food systems<sup>62</sup>, energy and raw materials<sup>63</sup>, and fisheries subsidies<sup>64</sup>. The TSD Chapter references specific Sustainable Development Goals (SDGs) in its provisions and provides a blanket commitment to the United Nations’s 2030 Agenda for Sustainable Development and its SDGs in Article 19.1(1)<sup>65</sup>.

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<sup>56</sup> *European Commission*, resolution from June 22, 2022, *The Power of Trade Partnerships*, REX/561-EESC-2022: <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022DC0409>>, last accessed on January 5, 24.

<sup>57</sup> *Prévost/Alexovicova*, *International Journal of Public Law and Policy* 6, no. 3, 2019.

<sup>58</sup> The 2018 15-Point Action Plan dedicated a section to the discussion of sanctions and found that a sanctions approach would not suit the EU’s current model. See 15-Point Action Plan, p. 3.

<sup>59</sup> Preamble of the EU-NZ FTA.

<sup>60</sup> Article 31 Vienna Convention on the Law of Treaties (VCLT).

<sup>61</sup> CETA, for example, contains three TSD chapters: Trade and Sustainable Development (Chapter 22 CETA), Trade and Labor (Chapter 23 CETA), and Trade and the Environment (Chapter 24 CETA).

<sup>62</sup> EU-NZ FTA, Chapter 7 “Sustainable Food Systems.”

<sup>63</sup> EU-NZ FTA, Chapter 13 “Energy and Raw Materials.”

<sup>64</sup> EU-NZ FTA, Article 16.4 “Fisheries subsidies.”

<sup>65</sup> EU-NZ FTA, Article 19.1(1), “The Parties recall [...] the United Nations Agenda “Transforming our world: the 2030 Agenda for Sustainable Development”, adopted on 25 September 2015 by United Nations General Assembly Resolution A/RES/70/1 (hereinafter referred to as “2030 Agenda for Sustainable Development”) and its Sustainable Development Goals.”

## II. Scope and Purpose of the EU-NZ FTA's TSD Chapter

Generally speaking, TSD Chapters aim to offset negative spillover effects that may result from trade liberalization. The underlying rationale is that while trade liberalization raises a country's or region's overall welfare, it may come with an environmental, social, or human rights price.<sup>66</sup> In the case of the EU-NZ FTA, an *ex-ante* Sustainable Impact Assessment (SIA) conducted by the EU found that the agreement was likely to have a slightly negative effect on greenhouse gas (GHG) emissions due to the expected increase in trade volume, growth in the dairy and agricultural sectors,<sup>67</sup> and the geographic distance between the EU and New Zealand.<sup>68</sup> This in-depth assessment of the EU-NZ FTA's impact on sustainability allowed the negotiators to include TSD provisions in the agreement to mitigate environmental damage and harm to human and social rights.<sup>69</sup> In the case of the EU-NZ FTA, the Council's negotiating directives mandated the integration of the SIA's findings in the negotiating process.<sup>70</sup>

## III. Substantive Provisions

### 1. Regulatory Sovereignty and Levels of Protection

The TSD Chapter seeks to promote sustainable development without compromising on regulatory sovereignty. The agreement acknowledges the right of each Party to “determine its sustainable development policies and priorities” as well as the levels of protection it deems appropriate, in compliance with the multilateral agreements and international standards referenced in Chapter 19.<sup>71</sup> However, the Parties may not do so “in a manner that would constitute a disguised restriction on trade or investment.”<sup>72</sup> To avoid “fuelling a race to the bottom,”<sup>73</sup> the Parties are bound to a non-regression clause that establishes minimum

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<sup>66</sup> *Moisé/Rubínová*, OECD Trade Policy Paper, no. 255, November 2021.

<sup>67</sup> *European Commission*, report from March 13, 2020, Trade Sustainability Impact Assessment in Support of FTA Negotiations between the European Union and New Zealand: Final Report, p. 86. <<https://op.europa.eu/en/publication-detail/-/publication/15ac4af7-a374-11ed-b508-01aa75ed71a1/language-en>>, last accessed on January 6, 2024.

<sup>68</sup> *Ibid.*

<sup>69</sup> The Sustainability Impact Assessment identifies four pillars of sustainability which it intends to evaluate in support of the FTA negotiations. The four pillars of sustainability are economic sustainability, social sustainability, environmental sustainability, and human rights. See: *European Commission*, report from March 13, 2020, Trade Sustainability Impact Assessment in Support of FTA Negotiations between the European Union and New Zealand: Final Report, p. 1.

<sup>70</sup> *Council of the EU*, directives from June 25, 2018, Negotiating Directives for a Free Trade Agreement with New Zealand, p. 3: <<https://data.consilium.europa.eu/doc/document/ST-7661-2018-ADD-1-DCL-1/en/pdf>>, last accessed on January 6, 2024.

<sup>71</sup> EU-NZ FTA, Article 19.2(1)

<sup>72</sup> EU-NZ FTA, Article 19.2(7). This language is based on Article XX of GATT 1994, according to which exemptions to the rules governing trade and investment under WTO law are permitted on the condition that they “are not applied in a manner which would constitute a [...] disguised restriction on international trade”. Article XX GATT is incorporated into the agreement, *mutatis mutandis*, by reference in Chapter 25 (Exceptions and General Provisions), Article 25.1(1). See Chapter C.III.3 of this paper.

<sup>73</sup> *Mitchell/Munro*, *International & Comparative Law Quarterly*, Vol. 72, p. 70.

levels of protection.<sup>74</sup> Thus, according to Articles 19.2(4) and (5) of the EU-NZ FTA, a Party shall not “weaken or reduce” nor “waive or otherwise derogate” from its labor and environmental standards to encourage trade or investment.<sup>75</sup>

The tension resulting between the right to regulate and the principle of non-regression<sup>76</sup> can be resolved by applying Article 31(1) of the VCLT (principle of effectiveness), by which “in interpreting a treaty, it should be presumed that provisions are cumulative and complementary.”<sup>77</sup>

## 2. *Multilateral Labor Standards and Agreements*

Labor and environmental provisions are core elements of all TSD Chapters in EU FTAs and thus also included in the EU-NZ FTA. Article 19.3 of the FTA contains the Parties’ commitment to the International Labor Organization’s (ILO) core labor agreements, such as the 2008 ILO Declaration on Social Justice for a Fair Globalization, the ILO Constitution, and the ILO Declaration on Fundamental Principles and Rights at Work.<sup>78</sup> Article 19.3(3) binds the Parties to “respect, promote, and realise the principles concerning the fundamental rights at work” covered by the core ILO Conventions, which include the right to collective bargaining,<sup>79</sup> the elimination of all forms of forced labor<sup>80</sup> and child labor<sup>81</sup>, and the elimination of discrimination with regards to employment and occupation.<sup>82</sup> Furthermore, the Parties commit to “make continued and sustained efforts to ratify the fundamental ILO Conventions if they have not yet done so.”<sup>83</sup> The latter is an area of contention between the EU and New Zealand<sup>84</sup> since, while all EU Member States ratified the fundamental ILO Conventions by the time the agreement was signed,<sup>85</sup> New Zealand has yet to ratify Convention 87, “Freedom of Association and Protection of the Right to Organize, 1948” (C87)

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<sup>74</sup> The principle of non-regression is a key principle in environmental law. It prohibits states from weakening their domestic environmental protection levels to prevent industrial relocation and so-called “pollution havens.” See *Mitchell/Munro*, *International & Comparative Law Quarterly*, p. 37-42.

<sup>75</sup> Non-regression clauses are commonly found in FTAs, albeit for different purposes. For instance, while the EU’s rationale for including non-regression principles in its FTAs is to promote sustainable development, the United States incorporates non-regression clauses in its agreements to prevent industry relocation. For an EU-U.S. comparison of non-regression rationale, see *Mitchell/Munro*, *International & Comparative Law Quarterly*, Vol. 72, 2023, p. 70.

<sup>76</sup> For a discussion of the tension between the right to regulate and the non-regression clause, see *Mitchell/Munro*, *Georgetown Journal of International Law*, Vol. 50, 2019, p. 688-690.

<sup>77</sup> See Article 31(1) of the VCLT.

<sup>78</sup> EU-NZ FTA, Article 19.3.

<sup>79</sup> EU-NZ FTA, Articles 19.3(3) point (a).

<sup>80</sup> EU-NZ FTA, Articles 19.3(3) point (b).

<sup>81</sup> EU-NZ FTA, Articles 19.3(3) point (c).

<sup>82</sup> EU-NZ FTA, Article 19.3(3) point (d).

<sup>83</sup> EU-NZ FTA, Article 19.3(5).

<sup>84</sup> For an overview of the negotiation challenges between New Zealand and the EU regarding the ratification of ILO core Conventions, see: *Coates/Salmon/Johnstone*, *Seeking Progress Toward Climate-Supportive Trade: The EU-NZ FTA Negotiations*, June 2021, *The Greens/EFA in the European Parliament*, p. 31-32.

<sup>85</sup> As acknowledged in a footnote in connection with Article 19.3(5) of the EU-NZ FTA which states: “The Parties note that all Member States have ratified the fundamental ILO Conventions.”



and Convention 138 “Minimum Age Convention, 1973” (C138).<sup>86</sup> This explains why the ratification of C138 and C87 by New Zealand is explicitly mentioned as a key objective in the Council’s negotiating directive.<sup>87</sup>

a) *The Korea-Case: Significance for the EU-NZ FTA’s labor provisions*

The first, and to this date only, dispute related to a TSD Chapter ever to be settled under a specialized EU DSM concerned a disagreement between the EU and South Korea regarding the ratification of core ILO Conventions. While a detailed analysis of the EU-Korea case is beyond the scope of this paper, a closer look at the Panel’s decision is worth examining in the context of the EU-NZ labor provisions due to the comparability of the provisions in question.<sup>88</sup>

In 2018 the EU filed two complaints against Korea based on Article 13.4.3 of the EU-Korea FTA.<sup>89</sup> The first claim addressed a conflict between Korea’s domestic labor law and the labor provisions set out in Article 13.4.3 of the EU-Korea FTA.<sup>90</sup> The second claim referred to the last sentence of Article 13.4.3 of the EU-Korea FTA, according to which the Parties are legally bound<sup>91</sup> to “make continued and sustained efforts toward ratifying the fundamental ILO Conventions,”<sup>92</sup> and which the EU saw as not being met.<sup>93</sup> While the Panel found Korea’s efforts to ratify the outstanding ILO conventions “less-than-optimal”, it concluded that Korea’s efforts did not “fall below” the legal standard set out in the last sentence of Article 13.4.3 of the EU-Korea FTA.<sup>94</sup> Furthermore, the Panel found that the language in Article 13.4.3 imposed an “on-going obligation for the Parties, affording leeway for the Parties to select specific ways to make continued and sustained efforts.”<sup>95</sup> Even though the Panel dismissed the claim, Korea ratified three of the four ILO conventions in

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<sup>86</sup> A third core convention that New Zealand has not yet ratified, but is not mentioned in the negotiating directives, is Convention 187 “Promotional Framework for Occupational Safety and Health Convention, 2006” (C187). See the ILO database for an up-to-date overview: *ILO*, website, “Up-to-Date Conventions Not Ratified by New Zealand,” <[https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11210:0::NO::P11210\\_COUNTRY\\_ID:102775](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11210:0::NO::P11210_COUNTRY_ID:102775)>, last accessed on January 5, 2024.

<sup>87</sup> *Council of the EU*, directives from June 25, 2018, Negotiating Directives for a Free Trade Agreement with New Zealand, p. 17 <<https://data.consilium.europa.eu/doc/document/ST-7661-2018-ADD-1-DCL-1/en/pdf>>, last accessed on January 6, 2024.

<sup>88</sup> For an analysis of the Korea-Case see *Walker*, online blog from October 7, 2021, *Investment Treaty News*: <<https://www.iisd.org/itn/en/2021/10/07/the-trade-related-conundrum-of-the-eu-korea-fta-expert-panel-are-ftas-a-novel-forum-to-enforce-sustainable-development-goals/>>, last accessed on January 5, 2024; *Nissen*, *International Labor Rights Case Law*, no. 7, 2021. See the full panel report: *Murray et al.*, Panel of Experts Proceeding Constituted Under Article 13.15 of the EU-Korea Free Trade Agreement: Report of the Panel of Experts (henceforth EU-Korea Final Report).

<sup>89</sup> *Murray et al.*, EU-Korea Final Report.

<sup>90</sup> The first claim relates to Korea’s domestic labor law and maintains that it is not consistent with the obligations flowing from the first sentence in Article 13.4.3. The Panel upheld three of the EU’s four complaints from this claim, after which Korea took to amend the provision to align with the TSD commitments of the EU-Korea FTA. See: *Murray et al.*, EU-Korea Final Report.

<sup>91</sup> The Panel confirmed in its final report that both sentences in Article 13.4.3 contain several legally binding obligations. See *Murray et al.*, EU-Korea Final Report, marg. notes 127 and 277.

<sup>92</sup> EU-Korea FTA, Article 13.4.3.

<sup>93</sup> The panel’s decision is likely to have implications concerning the obligation flowing from Article 19.3(5) of the EU-NZ FTA according to which, “Each Party shall make continued and sustained efforts to ratify the fundamental ILO Conventions if they have not yet done so.”

<sup>94</sup> See: *Murray et al.*, EU-Korea Final Report, marg. note 292.

<sup>95</sup> See: *Murray et al.*, EU-Korea Final Report, marg. note 278.

question shortly after the Panel's ruling.<sup>96</sup> While Korea denies any connection between its legal actions and the Panels' decisions,<sup>97</sup> the EU cites this case as evidence of the effectiveness of TSD Chapters and their specialized DSMs.<sup>98</sup>

### *b) The EU-Korea Panel Decision: Implications for Article 19.3(5) of the EU-NZ FTA*

The Panel's Korea decision is expected to have an impact on how the Parties will approach the implementation of Article 19.3(5) of the EU-NZ FTA. This suggests that New Zealand may also have some flexibility with respect to the pending ratifications of C87 and C138. While Article 19.3(5) is subject to the FTA's general DSM, a breach of the provision will not trigger sanctions.<sup>99</sup> However, Article 19.3(3) points (a) and (b), which concern freedom of association and the right to collective bargaining and the abolition of child labor, are subject to sanctionable commitments<sup>100</sup> that overlap with the core ILO Conventions C87 and C138. As a result, Article 19.3(3) reinforces the binding commitment to adhere to the principles mentioned in ILO core Conventions C87 and C138, regardless of whether New Zealand fulfills its obligations under Article 19.3(5). It will remain to be seen how New Zealand will address this issue once the agreement comes into force.

### *3. Multilateral Agreements and Climate Protection*

As mandated by the Council's negotiating directive, the TSD Chapter, recognizing the role of international bodies such as the United Nations Environment Programme (UNEP), "should promote adherence to and effective implementation" of international environmental principles and rules, including Multilateral Environmental Agreements (hereinafter MEAs), and in particular the Paris Agreement.<sup>101</sup> Article 19.5 contains legally binding commitments on the effective implementation of the "MEAs, their protocols and amendments" that each Party has independently ratified, provided they have already entered into force.<sup>102</sup> The modal verb "*shall*" is generally considered a stricter obligation, especially when followed by an action "*effectively implement*", than, for instance, the construct "*shall strive to*."<sup>103</sup>

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<sup>96</sup> *Nissen*, International Labor Rights Case Law, no. 7, 2021, p. 257 f.

<sup>97</sup> *Ibid.*, p. 262

<sup>98</sup> *European Commission*, video from October 27, 2021, Understanding Labour Provisions in Our Trade, <<https://www.youtube.com/watch?v=qjo8YobVHqc>>, (Korea-Case starts at minute 2:25), last accessed on January 5, 2024.

<sup>99</sup> Concerning labor provisions, sanctions are only possible for violations of Article 19.3(3). See Article 26.16(2) point (a) sub-point (i) and point (b) sub-point (i).

<sup>100</sup> EU-NZ FTA, Article 19.3(3) in combination with Article 26.16(2) point (a)(i) or (b)(i).

<sup>101</sup> *Council of the EU*, directives from June 25, 2018, Negotiating Directives for a Free Trade Agreement with New Zealand, p. 17 <<https://data.consilium.europa.eu/doc/document/ST-7661-2018-ADD-1-DCL-1/en/pdf>>, last accessed on January 5, 2024.

<sup>102</sup> EU-NZ FTA, Article 19.5(2).

<sup>103</sup> Phrases like *shall*, *should*, *commit to*, etc. are continuously subject to interpretation. Generally, aspirational constructs such as "should" or "shall strive to" are understood to emanate weaker obligations than "shall." Nevertheless, a majority of observers understand both to be legally binding. However, it is important to note that aspirational constructs are typically vague and not subject to adjudication and therefore also weaker. See *Mitchell/Munro*, *Georgetown Journal of International Law*, Vol. 50, 2019, p. 662-666. For a contrarian view on the binding nature of "shall" vs. "should" in the Paris Agreement, see *Bodansky*, *American Journal of International Law* 110 (2016), Issue 2, p. 9.

These strong obligations set the EU-NZ MEA provision apart from MEA provisions in other EU FTAs.<sup>104</sup>

Because the drafters anticipate situations in which the implementation of an MEA may be inconsistent with the rights set out elsewhere in the FTA,<sup>105</sup> the Parties are reminded of the general exceptions in Article 25.1.<sup>106</sup> The provision contains several exception clauses which allow governments to adopt or enforce measures to implement MEAs, provided these are “necessary to protect human, animal or plant life or health”<sup>107</sup> or relate to “the conservation of living and non-living exhaustible natural resources.”<sup>108</sup> Article 25.1(3) specifically states that such measures may include “measures taken to implement MEAs.”<sup>109</sup> Therefore, Article 19.5, in combination with Article 25.1, provides a legal basis for exemption from certain obligations of the FTA, provided these violations arise from the enforcement of an MEA.

Concerning climate protection, Article 19.6 (Trade and climate change) commits the Parties to “effectively implement the UNFCCC and the Paris Agreement, including commitments with regard to nationally determined contributions.”<sup>110</sup> The article also contains a strong non-regression clause in Article 19.6(3) which forbids the Parties from engaging, actively or through omission, in any action “that materially defeats the object and purpose of the Paris Agreement.”<sup>111</sup>

#### 4. Trade and Gender Equality

Recognizing that women are often unable to reap the benefits of trade liberalization to the same extent as men,<sup>112</sup> the Parties commit to advancing women’s participation in international trade and labor markets by ensuring equal access to trade and investment opportunities through gender-sensitive trade policies. While this is not the first time the EU has included gender-specific commitments in its trade agreements,<sup>113</sup> articles specifically dedicated to trade and gender equality are rare.<sup>114</sup> The documentation of negotiations between the EU and New Zealand reveals that New Zealand pushed the agenda on trade and gender, resul-

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<sup>104</sup> In Article 13.5 of the EU-Korea FTA for instance the Parties merely “reaffirm their commitments” concerning the implementation of MEAs, including the UN Framework Convention on Climate Change and Kyoto Protocol.

<sup>105</sup> The chapters in question are defined in paragraphs 1 and 2 of Article 25.1 of the EU-NZ FTA.

<sup>106</sup> Article 19.5(4) of the EU-NZ FTA states that “a measure adopted or enforced to implement such MEAs may be justified under Article 25.1 (General Exceptions)”.

<sup>107</sup> EU-NZ FTA, Article 19.5(4) in conjunction with Article 25.1(2) point (b).

<sup>108</sup> EU-NZ FTA, Article 19.5(4) in conjunction with Article 25.1(3) points (b) and (c).

<sup>109</sup> EU-NZ FTA, Article 19.5(4) in conjunction with 25.1(2) point (b) and 25.1(3) point (c).

<sup>110</sup> EU-NZ FTA, Article 19.6(2). UNFCCC stands for “United Nations Framework Convention on Climate Change.”

<sup>111</sup> EU-NZ FTA, Article 19.6(3).

<sup>112</sup> See: *Zamfir*, European Parliament Research Service, PE 633.163, 2019, p. 1; *Klimke/Tietje*, Feminist Foreign Trade Policy is a Demand of the EU Treaties, online blog article from March 6, 2023, <https://verfassungsblog.de/feminist-foreign-trade-policy-is-a-demand-of-the-eu-treaties/>, last accessed on January 5, 2024; and *Monteiro*, World Trade Organization, Research and Analysis: Working Papers, 2021, p. 16.

<sup>113</sup> See for instance Article 47 (gender) in the EU-Central America Association Agreement (EU-CAAA).

<sup>114</sup> A search on the WTO’s “Database on Gender Provisions in RTAs” found 13 entries related to gender aspects in EU TSD Chapters, most of which were linked to multilateral labor standards and agreements or monitoring commitments. See WTO database: [https://www.wto.org/english/tratop\\_e/womenandtrade\\_e/gender\\_responsive\\_trade\\_agreement\\_db\\_e.htm](https://www.wto.org/english/tratop_e/womenandtrade_e/gender_responsive_trade_agreement_db_e.htm), last accessed on January 5, 2024.

ting in Article 19.4 on trade and gender equality.<sup>115</sup> This is not surprising, as New Zealand has been moving the needle on trade and gender issues as a driving force behind the Global Trade and Gender Arrangement (GTAGA), which commits the Parties to promote trade and gender policies and thereby improve women's economic empowerment and gender equality.<sup>116</sup> The inclusion of such gender-specific provisions in the context of the EU-NZ FTA are indicative of a positive trend pointing toward a more gender-sensitive EU trade policy.<sup>117</sup>

### 5. *Other Relevant Provisions*

The EU FTA TSD Chapter contains several substantive provisions on combatting climate change and supporting the transition to a low-carbon economy. The agreement is the first EU FTA to remove all tariffs on green goods and services<sup>118</sup> and contain novelty provisions on the circular economy.<sup>119</sup> The TSD Chapter includes multiple provisions on ecological conservation and sustainable management and trade, including biological diversity<sup>120</sup>, deforestation<sup>121</sup>, and the protection of the marine environment<sup>122</sup>. The chapter also features new provisions on emissions trading<sup>123</sup> and carbon pricing<sup>124</sup> to encourage ambitious climate policies and cooperation between the Parties. A dedicated "trade and fossil fuel subsidy reform" article<sup>125</sup> flanks the agreement's climate change provisions. It ensures that economies refrain from subsidizing climate-damaging energy sources, which would undermine the FTA's climate-friendly provisions, particularly its enforceable and sanctionable commitment to the Paris Agreement.<sup>126</sup>

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<sup>115</sup> The initial draft proposal tabled by the EU did not include a dedicated trade and gender provision. Based on the documentation provided both by the EU and NZ on their respective trade websites, the Parties negotiated gender-specific provisions in rounds 9, 10, and 11 of the trade negotiations. It is worth noting that New Zealand played a more proactive role in advocating for gender and trade provisions during negotiations. See the negotiation rounds here: <<https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-concluded-but-not-in-force/new-zealand-european-union-free-trade-agreement/history-of-negotiations/>>, last accessed on January 5, 2024.

<sup>116</sup> The GTAGA, initiated by the Inclusive Trade Action Group (ITAG) and spearheaded by Canada, Chile, and New Zealand, currently comprises six members. The GTAGA is open to any interested Party. While the GTAGA is a non-enforceable and non-binding side agreement, it demonstrates the Parties' political will to drive the gender equality agenda forward, including through trade. See the New Zealand Foreign Affairs & Trade website for an overview of the ITAG's composition and activities <<https://www.mfat.govt.nz/en/trade/nz-trade-policy/inclusive-trade-action-group/>>, last accessed January 6, 2024.

<sup>117</sup> The preliminary text of the EU-Kenya Economic Partnership Agreement (EPA), concluded on June 16, 2023, is proof of a shift in gender and trade provisions. See Annex V, Article 4 of the provisional EU-Kenya EPA.

<sup>118</sup> EU-NZ FTA, Article 19.11. List A of Annex 19 (Environmental goods and services) contains a non-exhaustive list of examples.

<sup>119</sup> Provisions on the circular economy are found in Articles 19.5, 19.6, and 19.11 of the EU-NZ FTA.

<sup>120</sup> EU-NZ FTA, Article 19.8.

<sup>121</sup> EU-NZ FTA, Article 19.9.

<sup>122</sup> EU-NZ FTA, Article 19.10.

<sup>123</sup> EU-NZ FTA, Article 19.6(4) point (c).

<sup>124</sup> EU-NZ FTA, Article 19.6(5) point (b).

<sup>125</sup> EU-NZ FTA, Article 19.

<sup>126</sup> This sanctionable obligation arises from Article 19.6(3) in combination with Article 26.16 (2) points (a)(ii) and (b)(ii) of the EU-NZ FTA.

## IV. Institutional Provisions

In addition to substantial provisions, the EU-FTA boasts a comprehensive civil society structure comprising committees, advisory groups, contact points, and forums to facilitate the implementation, enforcement, and monitoring of the FTA's commitments, including those of the TSD Chapter. This sets the EU-NZ FTA apart from previous EU trade agreements and delivers on the EU's commitment to enhance the role of civil society throughout "all stages of the lifecycle of trade agreements."<sup>127</sup>

The DAG and Committee on Trade and Sustainable Development (hereinafter TSD Committee) are two essential functions that have been updated to meet challenges with respect to implementation and enforcement.<sup>128</sup> Unlike previous FTAs, where DAGs were only permitted to advise on TSD matters, the DAGs in the EU-NZ FTA are expected to advise "on issues covered by this Agreement," encompassing the agreement as a whole.<sup>129</sup> This development flows from the 15-Point Action plan, which suggested extending the scope of DAGs "to cover the implementation of the whole agreement in future FTAs."<sup>130</sup> As a result, DAGs play an active role at various stages of the DSM in the EU-NZ FTA.

The TSD Committee<sup>131</sup> comprises representatives from both Parties and ensures that the Parties deliver on the commitments agreed to in the TSD Chapter.<sup>132</sup> The TSD Committee, along with the Trade Committee, to which it regularly reports, monitors the enforcement of compliance measures as set out in Chapter 26.<sup>133</sup> All decisions adopted by the specialized TSD Committee are binding on the Parties and bodies of the agreement.<sup>134</sup> Additionally, the FTA foresees the designation of contact points to liaise between the Parties on matters concerning Chapter 19.<sup>135</sup>

### D. Relation Between the EU-NZ FTA's TSD Chapter and the Agreement's Dispute Settlement Mechanism

#### I. Status Quo Ante: Enforceability of TSD Provisions in Second-Generation EU-FTAs

Until now, EU TSD Chapters were excluded from the FTA's general DS chapters and other DSMs.<sup>136</sup> Instead, TSD Chapters in most EU agreements are subject to specific *sui generis* DSMs based on dialogue and cooperation that are incorporated within the TSD Chap-

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<sup>127</sup> *European Parliament*, resolution from October 6, 2022, Outcome of the Commission's Review of the 15-Point Action Plan on Trade and Sustainable Development, point 7: <[https://www.europarl.europa.eu/doceo/document/TA-9-2022-0354\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2022-0354_EN.html)>, last accessed on January 6, 2024.

<sup>128</sup> Article 24.6(1) of the EU-NZ FTA demands the inclusion of Māori representatives in New Zealand's DAG. This is part of a larger effort to promote Māori participation in trade and investment and provide Māori access to the EU market. Chapter 20 of the EU-NZ FTA is dedicated to "Māori Trade and Economic Cooperation".

<sup>129</sup> EU-NZ FTA, Article 24.6(1).

<sup>130</sup> 15-Point Action Plan (2018) p 6.

<sup>131</sup> Established under Article 24.4(1) point (e) of the EU-NZ FTA.

<sup>132</sup> EU-NZ FTA, Article 24.4.

<sup>133</sup> EU-NZ FTA, Article 26.13(3) point (b).

<sup>134</sup> EU-NZ FTA, Article 24.5(1).

<sup>135</sup> EU-NZ FTA, Article 19.16.

<sup>136</sup> Both CETA and the EU-Korea FTA specify that disputes arising under their respective TSD Chapter shall "only have recourse to the rules and procedures provided for" in the respective chapters. See Articles 23.11(1) and 24.16(1) CETA and Article 13.16 EU-Korea FTA.

ters.<sup>137</sup> These non-sanction-based DSMs typically follow a two-step procedure<sup>138</sup> according to which the Parties seek consultations before presenting their case to a panel of experts.<sup>139</sup>

## II. Chapter 26: One DSM to Rule them All

The EU-NZ TSD Chapter differs from most EU TSD Chapters as it lacks a specialized DSM. Furthermore, while the agreement's general DSM excludes multiple chapters, the TSD Chapter is not one of these. As a result, the EU-NZ TSD Chapter is subject to the FTA's general DSM, marking the first<sup>140</sup> instance an EU FTA's TSD Chapter falls under a general DSM.<sup>141</sup> The EU-NZ FTA's DSM comprises four stages: consultation, expert panel review, compliance, and temporary remedies. It's worth noting that not all stages need to be activated, and the Parties can agree to a settlement at any point during the procedure.

### 1. Consultations

DSMs in EU FTAs, both specialized and general, are modeled after the WTO's Dispute Settlement Understanding (DSU).<sup>142</sup> The purpose of Chapter 26 is to prevent and resolve any disagreement between the Parties relating to the interpretation and implementation of the FTA and the Sanitary Agreement.<sup>143</sup>

The DSM's primary aim is to resolve disputes between the Parties through government-to-government consultations, guided by the principle of "good faith", with the objective of reaching a "mutually agreed solution".<sup>144</sup> Previously, specialized DSMs under EU FTAs did not specify the consultation process timeline.<sup>145</sup> This uncertainty has been criticized and

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<sup>137</sup> See for instance the specialized DSM mechanism in the EU-Korea FTA in Articles 13.14, 13.15, and 13.16.

<sup>138</sup> *Velut et al.*, Trade Policy Hub, LSE Consulting, p. 46 f.

<sup>139</sup> Kanalan compares this model to the WTO's DSU model. See: *Kanalan*, *Europarecht*, 57, no. 4, p. 487.

<sup>140</sup> While the 2008 Cariforum Economic Partnership Agreement (EPA) contains sanctionable TSD commitments, the Commission excludes the Cariforum EPA from modern EU FTAs with TSD commitments. See *Zamfir*, European Parliamentary Research Service, PE 738.220, 2022, p. 5. For a list of agreements the Commission labels 'modern FTAs', see the DG Trade's website: <[https://policy.trade.ec.europa.eu/development-and-sustainability/sustainable-development/sustainable-development-eu-trade-agreements\\_en](https://policy.trade.ec.europa.eu/development-and-sustainability/sustainable-development/sustainable-development-eu-trade-agreements_en)>, last accessed on January 6, 2024.

<sup>141</sup> As records show, the EU's original TSD Chapter proposal was more traditional and hence, lacking the possibility of enforcement, more limited than the final version. The negotiation's documentation shows that New Zealand was the driving force behind the current model, which is based on the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). While the EU did not immediately agree to include the TSD Chapter under the FTA's general DSM, it eventually yielded. See: *Coates/Salmon/Johnstone*, *Seeking Progress Toward Climate-Supportive Trade: The EU-NZ FTA Negotiations*, June 2021, The Greens/EFA in the European Parliament, p 30, 8, and 42 f.

<sup>142</sup> One major difference between EU FTA DSMs and the WTO's DSU is that the EU's model does not provide an Appellate Body.

<sup>143</sup> As defined in Article 1.2(x) EU-NZ FTA, the Sanitary Agreement mentioned in Article 26.1 EU-NZ FTA refers to the 1996 Agreement between the European Community and New Zealand on sanitary measures applicable to trade in live animals and animal products.

<sup>144</sup> EU-NZ FTA, Article 26.3(1).

<sup>145</sup> For instance, the specialized DSMs under the EU-Korea FTA and CETA state in uncertain terms that the consultations must "commence promptly after a Party delivers a request for consultations", without any explicit indication of a time frame. See Article 13.14(1) EU-Korea FTA and Articles 23.9(1) and 24.14(1) CETA.

made responsible for the perceived inefficiency of specialized DSMs. In the EU-NZ FTA, the Party complained against must respond to a written request within ten days.<sup>146</sup> Subsequently, consultations may take up to 30 days,<sup>147</sup> except in cases involving Chapter 19 (Trade and sustainable development), in which case consultations may last up to 90 days.<sup>148</sup> Additionally, the consultation phase permits the Parties to consult international bodies such as the ILO or relevant MEAs, as well as the DAGs and other unspecified “experts”.<sup>149</sup> This high level of involvement granted to civil society addresses widespread concerns regarding the perceived lack of stakeholder influence and monitoring capabilities with respect to the resolution of disputes under TSD Chapters.<sup>150</sup>

## 2. Panel Procedures

If the Parties cannot reach an agreement during the government-to-government consultations or if any of the other conditions set out in Article 26.4(1) are met,<sup>151</sup> they may request the establishment of a Panel, in which case the Party which submitted the request carries the burden of proof.<sup>152</sup> The Trade Committee may appoint an external body to assist the Panel in legal and administrative matters.<sup>153</sup>

Such as the DSU’s default composition,<sup>154</sup> the EU-NZ DSM is also made up of three panelists, including a chairperson.<sup>155</sup> In response to criticisms, the Commission established a detailed selection process. Articles 26.5 and 25.6 provide instructions to facilitate the appointment of panelists, including provisions regulating a complex system of lists and sub-lists. These have specific requirements for disputes under the TSD Chapter and set time-lines for the selection process. The Commission also recently expanded its pool of eligible individuals to serve as panelists and TSD experts, following calls for a “more transparent, independent, and inclusive process” by stakeholders and the European Parliament.<sup>156</sup> Concerning disputes under the TSD Chapter, each Party must select a panelist from its respec-

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<sup>146</sup> EU-NZ FTA, Articles 26.3(2) and 26.3 (3).

<sup>147</sup> Pursuant to Article 26.3(4), an exception is made for consultations on matters of urgency which must be concluded within 15 days after the written request is delivered.

<sup>148</sup> EU-NZ FTA, Article 26.3(3). This detail is noteworthy since disputes related to TSD provisions may require more time to resolve given their relatively novel status and the lack of experience Parties will be able to draw from when handling them.

<sup>149</sup> EU-NZ FTA, Article 26.3(6).

<sup>150</sup> A study conducted by a research team from Ghent University on behalf of the Friedrich Ebert Stiftung (FES) found widespread dissatisfaction among EU and non-EU DAG members with the DAGs’ abilities to oversee the effective implementation of FTAs and their “very limited” influence. See: *Martens/Potjomkina/Orbie*, Friedrich Ebert Stiftung, p. 5.

<sup>151</sup> Pursuant to Article 26.4(1) points (a) to (d), the complaining Party may call on a Panel if the Party complained against does not respond to the request within 10 days after its delivery; if consultations are not completed before the agreed deadline; if the Parties agree to skip consultations; or if the consultations were concluded but failed to reach a “mutually agreed solution.”

<sup>152</sup> EU-NZ FTA, Article 26.4(2).

<sup>153</sup> EU-NZ FTA, Article 26.4 (4).

<sup>154</sup> Article 8.5, Annex 2, of the Marrakesh Agreement Establishing the World Trade Organization, 1994.

<sup>155</sup> EU-NZ FTA, Article 26.5 (1).

<sup>156</sup> *European Commission*, press release from June 23, 2022, Stepping up Trade Agreements Enforcement: The European Commission Publishes Pool of Individuals Eligible for Appointment as Arbitrators and TSD Experts, <[https://policy.trade.ec.europa.eu/news/stepping-trade-agreements-enforcement-european-commission-publishes-pool-individuals-eligible-2022-06-23\\_en](https://policy.trade.ec.europa.eu/news/stepping-trade-agreements-enforcement-european-commission-publishes-pool-individuals-eligible-2022-06-23_en)>, last accessed on January 6, 2024.

tive TSD list.<sup>157</sup> The appointed panelists must have specialized knowledge of issues relevant to the TSD Chapter, such as labor and environmental law, the resolution of disputes under international agreements, and other trade and sustainable development matters.<sup>158</sup> The Trade Committee takes over the selection process if the Parties are unable to appoint a panelist or a chairperson from the relevant sub-lists within 25 days after the delivery of the panel request.<sup>159</sup>

Once the Panel is complete, it is required to “make an objective assessment of the matter before it”<sup>160</sup> and provide an interim report to the Parties within 90 days.<sup>161</sup> The Parties may request to review aspects of the report within ten days after receipt.<sup>162</sup> Any requests made during this process must be addressed and discussed in the final report,<sup>163</sup> which is to be delivered to the Parties no later than 120 days after the establishment of the Panel.<sup>164</sup>

### 3. *Compliance and Remedies*

Despite the legally binding nature of TSD provisions, experts have argued that the weak “best-efforts” language<sup>165</sup> and lack of compliance and enforcement mechanisms significantly reduce the effectiveness of these chapters.<sup>166</sup> Specialized DSMs typically conclude once the Parties have received the Panel’s final report and the Party complained against has made “best efforts to accommodate advice or recommendations of the Panel of Experts on the implementation.”<sup>167</sup> This is not the case under the DSM of the EU-NZ FTA. First, the Party complained against must inform the complaining Party, the DAGs, and the complaining Party’s contact point of the measures it plans to take within 30 days of receiving the panel report.<sup>168</sup> Furthermore, during this phase, the TSD Committee monitors the compliance process and may accept the DAGs’ observations.<sup>169</sup> Notably, the EU-NZ FTA foresees civil society involvement at the compliance stage, making it the first to actively involve civil society in a legally binding DSM concerning TSD provisions. Finally, if a Party is found in breach of a TSD provision, it must take “any measure necessary to comply promptly with the findings and recommendations in the final report in order to bring itself into compliance with the covered provisions.”<sup>170</sup> This language creates a strong commitment and contrasts the best-effort clauses often found in specialized DSMs under TSD Chapters.

The Party complained against is given different options if it cannot immediately comply with the report. First, it must notify the complaining Party of the required “reasonable period of time” for compliance within 30 days after the delivery of the final report,<sup>171</sup> and

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<sup>157</sup> EU-NZ FTA, Article 26.6(1) point (b).

<sup>158</sup> EU-NZ FTA, Article 26.7(3) points (a), (b), and (c).

<sup>159</sup> EU-NZ FTA, Article 26.5(3) and (4) in conjunction with Article 26.5(2).

<sup>160</sup> EU-NZ FTA, Article 26.8(a).

<sup>161</sup> EU-NZ FTA, Article 26.11(1).

<sup>162</sup> EU-NZ FTA, Article 26.11(2).

<sup>163</sup> EU-NZ FTA, Article 26.12(2).

<sup>164</sup> EU-NZ FTA, Article 26.12(1).

<sup>165</sup> See: *Kanalan*, *Europarecht*, 57, no. 4, p. 489.

<sup>166</sup> *Ibid.* p. 489.

<sup>167</sup> EU-Korea FTA, Article 13.15.

<sup>168</sup> EU-NZ FTA, Article 26.13 (2) and (3) point (a).

<sup>169</sup> EU-NZ FTA, Article 26.13(3) point (b).

<sup>170</sup> EU-NZ FTA, Article 26.13(1).

<sup>171</sup> EU-NZ FTA, Article 26.14(1).



the Panel may weigh in if needed.<sup>172</sup> If the Party complained against fails to comply, the complaining Party may request consultations “with a view to agreeing on mutually acceptable compensation.”<sup>173</sup> Temporary remedies are only applicable for disputes under Chapter 19 if the conditions in Articles 26.16(1) (a) through (d), which cover different levels of non-conformity by the Party complained against, are met and Article 26.16(2) applies, and the final report, or in the case of point (d), the compliance review, finds a violation of Article 19.3(3) (Multilateral labour standards and agreements), which includes the core ILO principles, or Article 19.6(3) regarding “any action or omission that materially defeats the object and purpose of the Paris Agreement.” Finally, if compensation cannot be provided for reasons defined in Article 26.16(3), the complaining Party may suspend the application of obligations. This could mean the complaining Party no longer extends the trade preferences or benefits previously granted to the country, which may include temporary suspension of tariff reductions or other forms of trade benefits. However, suspending or terminating an FTA’s provisions is considered a last resort and can have significant economic consequences for both Parties. That is why the Panel monitors the compliance and enforcement stage and remains in close exchange with the Parties and relevant bodies throughout the process.<sup>174</sup>

The remaining Articles outline the modalities and formalities of the DSM, including the choice of forum<sup>175</sup> and the option to seek mediation.<sup>176</sup>

## **E. Conclusion: Striking a Balance Between Cooperation and Enforcement**

The TSD Chapter in the EU-NZ FTA sets itself apart from other trade agreements in several ways. Its most significant transformation is the shift from a specialized DSM with limited scope to a general DSM, which carries significant implications for the enforceability of TDS provisions, particularly on labor rights and climate protection. The agreement’s DSM is rightly viewed as trailblazing due to its wide scope and enhanced integration of civil society mechanisms. It carefully balances the EU’s traditional preference for resolving disputes through dialogue and cooperation while also backing the Commission’s commitment to sustainability by strengthening the enforceability of core TSD commitments. While this model’s success will still depend on the Parties’ political will to trigger the DSM in the event of TSD breaches, civil society’s ability to activate the DSM through the SEP will likely increase pressure on the Parties to address violations of TSD provisions, creating more opportunities for TSD proceedings. Sanctions will likely remain rare due to the high hurdle for their application. Yet, as the EU-Korea case demonstrated, the Panel’s rulings should not be underestimated. It is therefore to be expected that New Zealand will ratify ILO Conventions C87 and C138 in the near future.

Whether or not the EU-NZ Chapter can serve as a model for future EU FTAs is yet to be determined. The results of the EU-Kenya negotiations, the political struggle surrounding the Mercosur agreement, and the postponement of the EU-Australia FTA suggest there is still a long way to go before the EU lives up to its ambitious trade and sustainable development agenda. Finally, the EU and New Zealand share similar values and beliefs, which benefitted the conclusion of the TSD Chapter. It remains to be seen whether the EU will succeed

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<sup>172</sup> EU-NZ FTA, Article 26.14(2).

<sup>173</sup> EU-NZ FTA, Article 26.16(1) and (2).

<sup>174</sup> EU-NZ FTA Article 26.17 covers the review of temporary remedies.

<sup>175</sup> EU-NZ FTA, Article 26.24.

<sup>176</sup> EU-NZ FTA, Articles 26.24 and 26.25.

in applying this new model to north-south FTAs, which involve trade partners that may not share the EU's value-driven approach to trade liberalization. The EU's ongoing negotiations with partners from the global south, such as India and Indonesia, will serve as a litmus test.<sup>177</sup>

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<sup>177</sup> See: *EU Commission*, press release from June 17, 2022, EU and India kick-start ambitious trade agenda: <[https://policy.trade.ec.europa.eu/news/eu-and-india-kick-start-ambitious-trade-agenda-2022-06-17\\_en](https://policy.trade.ec.europa.eu/news/eu-and-india-kick-start-ambitious-trade-agenda-2022-06-17_en)>, last accessed on January 6, 2024.

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