



HIGHLIGHT

THE EUROPEAN COMMISSION TRADE POLICY REVIEW: THE EFFECTIVENESS OF SUSTAINABLE DEVELOPMENT CHAPTERS IN EU FTAs

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On 18 February 2021, the European Commission published its Trade Policy Review, entitled “*An Open, Sustainable and Assertive Trade Policy*”.¹ The new trade strategy aims – in Executive Vice-President and Commissioner for Trade Valdis Dombrovskis’s words – at the improvement “[of] EU’s ability to make its own choices and shape the world around it through leadership and engagement, reflecting our strategic interests and values”.²

The Trade Policy Review consists of a main document plus an attachment regarding the WTO reform, and “is based on a wide and inclusive public consultation, including more than 400 submissions by a wide range of stakeholders, public events in almost every Member State, and close engagement with the European Parliament, EU governments, businesses, civil society and the public”.³ This *Highlight* will first offer an overview of the structure and contents of the strategy and then focus on its Trade and Sustainable Development (TSD) section.

The new trade strategy is framed by several political premises, presented in the introductory chapter. First of all, the now well-known formula of the successful-but-disruptive globalization, with its “dichotomous impact on economies and societies”. Globalization creates both massive growth and inequalities, the latter not always having been dealt with by governments with effectiveness. Second, a focus on the rise of China, which has caused fundamental changes in global economic and political order, pos-

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¹ Communication COM(2021) 497 final from the Commission of 18 February 2021 on Trade Policy Review – An Open, Sustainable and Assertive Trade Policy.

² European Commission Press release IP/21/644 of 18 February 2021 *Commission sets course for an open, sustainable and assertive EU trade strategy*, trade.ec.europa.eu.

³ *Ibid.*



ing new challenges for the “established economic governance system”. Third, the recognition of green transition as the defining objective of the 21st century, in order to contrast the devastating effects of climate change. Fourth, the emphasis on digital transformation, another “key enabler for sustainable development”. All of these have become more evident in the midst of the COVID-19 pandemic, which itself has created new important challenges. Moreover, explains the Commission, EU trade policy has to take into account the prospect that in a few years 85% of world’s GDP is expected to be produced outside its boundaries.⁴

The second chapter lays down the “open strategic autonomy” pursued by the EU, based on three key-combinations: “resilience and competitiveness”; “sustainability and fairness”; “assertiveness and rule-based cooperation”. The Commission emphasizes openness, intended both as market liberalization and international cooperation. Openness means, in another well-known formula, a “stable, predictable and transparent” trade environment, with a responsibility for governments in supporting the resilience and diversification of supply chains – especially in order to guarantee the access to critical supplies – without forgetting sustainability standards across them. Trade policy is also seen as a driver for multilateralism and the rule of law in a “new multipolar” context.

The third chapter identifies three core objectives for the medium term trade policy. First, supporting the recovery and fundamental transformation of the EU economy in line with its green and digital objectives. Second, shaping global rules for a more sustainable and fairer globalization. Third, increasing the EU’s capacity to pursue its interests and enforce its rights, including autonomously where needed. The Commission presents six critical areas and related headline actions to implement its trade policy in the medium term, covering WTO reform, green transition, trade agreements enforcement, digital transition, EU’s partnerships and European regulatory impact.

The fourth chapter underlines the importance of transparency and cooperation with civil society, and the fifth chapter sets out the conclusions, affirming that “the EU’s trade policy has to adapt and reflect the challenges of our times and the expectations of our people”.

Trade and Sustainable Development (TSD) is included in subpara. 3.2.2., entitled “Support the green transition and promote responsible and sustainable value chains”. Since its 2009 FTA with South Korea, the EU has included TSD Chapters in its trade agreements,⁵ committing the Parties to ratify and implement International Labour Organisation (ILO) conventions and Multilateral Environmental Agreements (MEAs), and not to lower environmental and labour standards. Furthermore, TSD Chapters create a specialized Committee to monitor its implementation and a Domestic advisory group

⁴ Communication COM(2021) 497 final cit.

⁵ S Lowe, ‘The EU should reconsider its approach to trade and sustainable development’ (31 October 2019) CER Insight www.cer.eu.

(DAG)⁶ to involve civil society organisations and the European Economic and Social Committee (EESC) in the process,⁷ and a government-to-government consultation process to settle disputes. Neither enforceable dispute settlement procedures nor financial sanctions for non-compliance are provided.

TSD Chapters were included in the EU agreements with Central-America,⁸ Colombia and Peru,⁹ Georgia,¹⁰ Moldova,¹¹ and Ukraine.¹² After the adoption of the UN Agenda 2030 on Sustainable Developments Goals (SDGs) and the Paris Agreement, the Commission started a revision of its TSD, starting with its *Trade for All* communication.¹³ The EU-Japan Economic Partnership Agreement included commitments to ratify and implement the Paris Agreement,¹⁴ while the EU-Canada Comprehensive Economic Trade Agreement (CETA) contained three different chapters covering sustainable development,¹⁵ labour¹⁶ and environment.¹⁷

In 2017, a Commission services non-paper took note of the ongoing debate about the effectiveness of the TSD Chapters soft approach, and the possibility of switching to a dif-

⁶ A Domestic Advisory Group is defined as «a balanced representation of business organisations, trade unions and environmental / other organisations. To become member of an EU DAG, an EU organisation needs to be: Independent not-for-profit organization; Represent and promote EU interests; Have specific expertise or competence on areas covered by the trade and sustainable development chapter; Registered in both the transparency Register of the European Commission/European Parliament and in the civil society dialogue database of DG Trade; Some members are designated by the European Economic and Social Committee (EESC)». Cfr. European Commission, *Implementation of the Trade and sustainable development (TSD) chapter in trade agreements – TSD committees and civil society meetings* trade.ec.europa.eu.

⁷ EU DAGs are set up in the context of the agreements with Canada, Cariforum, Central America, Colombia/Ecuador/Peru, Georgia, Japan, Moldova, Southern African Development Community (SADC), Ukraine (*Ibid.*).

⁸ Agreement of 15 December 2012 establishing an Association between the European Union and its Member States, on the one hand, and Central America on the other, Title VIII.

⁹ Trade Agreement of 21 December 2012 Between the European Union and Its Member States, of the one Part, and Colombia and Peru, of the other Part, Title IX.

¹⁰ Association Agreement of 30 August 2014 between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part, ch. 13.

¹¹ Association Agreement of 30 August 2014 between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part, ch. 13.

¹² Association Agreement of 29 May 2014 between the European Union and its Member States, of the one part, and Ukraine, of the other part, ch. 13.

¹³ Communication COM(2015)497 final from the Commission of 14 October 2015 on Trade for All: Towards a more responsible trade and investment policy.

¹⁴ Agreement of 18 April 2018 Between the European Union and Japan for an Economic Partnership, 2017, art. 16(4)(4).

¹⁵ Comprehensive Economic and Trade Agreement (CETA) of 14 January 2017 between Canada, of the one part, and the European Union and its Member States, of the other part, ch. 22.

¹⁶ *Ibid.*, ch. 23.

¹⁷ *Ibid.*, ch. 24.

ferent model, such as a strong and sanction-based enforcement approach.¹⁸ After one year of debates, in 2018 another non-paper suggested “a set of 15 concrete and practicable actions to be taken to revamp the TSD chapters”,¹⁹ to become more assertive on the existing path of consultation and non-enforceable obligations. Cooperation between institutions and civil society, expanding the role of the latter, better prioritization, awareness raising, transparency and assertiveness in the implementation of TSD dispositions were the most relevant issues addressed by the non-paper.

The Commission services stated that a sanction-based approach was not desirable, based on academic research suggesting the ineffectiveness of the US enforcement of labour obligations.²⁰ The main case law reference was a US-Guatemala case filed by the United States through the Central America-Dominican Republic-United States Free Trade Agreement (CAFTA-DR),²¹ which marked the first time labour complaints were disputed under CAFTA-DR.²² In that case, the arbitration panel found Guatemala failing to enforce its labour obligations under Chapter 16 of CAFTA-DR.²³ In any case, the US did not prove that Guatemala’s failure had the consequence of affecting trade between the Parties,²⁴ leading to the conclusion that it was not relevant under the Agreement.

The *US v Guatemala* case may not so much demonstrate the weakness of the sanction-based model, but rather the ineffective design of obligations in the CAFTA-DR itself.²⁵ In a recent report of the Panel of Experts established under the EU-Korea FTA,²⁶ Korea argued that the Panel had no jurisdiction to examine the matter raised by the EU, referring – in support of its contentions – to the case mentioned above.²⁷ The Panel

¹⁸ Non paper of the Commission services of 11 July 2017 on Trade and Sustainable Development (TSD) chapters in EU Free Trade Agreements (FTAs).

¹⁹ Non paper of the Commission services of 26 February 2018 on Feedback and way forward on improving the implementation and enforcement of Trade and Sustainable Development chapters in EU Free Trade Agreements.

²⁰ D Raess, E Schmieg and T Voituriez, ‘The future of sustainable development chapters in EU free trade agreements’ (Workshop, Directorate-General for External Policies of the European Parliament, 23 July 2018).

²¹ CAFTA-DR Panel Report, In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR, 14 June 2017, *US v Guatemala*.

²² P Paiement, ‘Leveraging Trade Agreements for Labor Law Enforcement: Drawing Lessons From The US-Guatemala CAFTA Dispute’ (2018) *Georgetown Journal of International Law* 765.

²³ TJ Brooks, ‘U.S.-Guatemala Arbitration Panel Clarifies Effective Enforcement Under Labor Provisions of Free Trade Agreement’ (2018) *International Labor Rights Case Law* 45.

²⁴ Central America-Dominican Republic-United States Free Trade Agreement (CAFTA-DR), 43 ILM 514 (2004), art. 16(2)(1)(a).

²⁵ Own-initiative opinion REX/500-EESC-2017 from the European Economic and Social Committee of 14 February 2018 on Trade and sustainable development chapters (TSD) in EU Free Trade agreements (FTA), www.eesc.europa.eu.

²⁶ Report of the Panel of Experts Proceeding Constituted Under Article 13(15) of the EU-Korea Free Trade Agreement of 20 January 2021, *EU v Korea*.

²⁷ *Ibid.*, para. 58.

confirmed its jurisdiction, stating that the CAFTA-DR Panel Report did not assist the Panel in interpreting and applying TSD Chapter of the EU-Korea FTA,²⁸ because, among others things, “CAFTA-DR Agreement’s Chapter 16, which contains the provision upon which the United States of America made its complaint against Guatemala, does not have the same contextual setting of sustainable development as the EU-Korea FTA, nor does it refer to the range of multilateral and international agreements and declarations which the Parties have included in the EU-Korea FTA”.²⁹ For the same reason, it seems impossible to deduce the effects of a sanction-based model applied to the TSD Chapter from an arbitration Panel decision established under the CAFTA-DR Agreement. Rather, the findings of the Panel suggest that also TSD design of obligations may not be sufficiently effective, regardless of the enforcement model.³⁰

To date, the lack of effectiveness of TSD Chapters has attracted much criticism. In this context, the new Trade Policy announces an early review in 2021 of the 15-point action plan, which will consider further actions on the effective implementation and enforcement of TSD Chapters, including among others “the possibility of sanctions for non-compliance”.³¹

Negotiating Free Trade Agreements not only to protect private interests, but to promote global values is crucial to building “a more sustainable and fairer globalization”.³² For this reason, every step in the direction of an effective enforcement of TSD Chapters would be very welcome.

²⁸ *Ibid.*, para. 90.

²⁹ *Ibid.*, para. 93.

³⁰ E. g. the Panel found that Korea did not acted inconsistently with TSD Chapter of the Agreement, for not failing to “make continued and sustained efforts” towards ratification of core ILO Conventions. Indeed, the provision of art. 13(4)(3) of EU-Korea FTA seems to bear little prescriptive force.

³¹ Communication COM(2021) 497 final cit.

³² *Ibid.*, p. 22.

