

European Trade Policy and the Green Deal

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With its proposed Green Deal, Ursula von der Leyen's European Commission wants to make Europe the first carbon-neutral continent and invest massively in the green transition. Meeting this challenge will require changes to every area of public policy. Producing and consuming in a manner that is more frugal and respectful of biodiversity means rethinking international trade and the rules that govern it.

While greenhouse gas emissions produced in the EU fell by 13 per cent between 1995 and 2016, its actual carbon footprint only dropped by 8 per cent because the bloc remains a net carbon importer. A third of the EU's carbon footprint comes from emissions embedded in imports. What's more, European countries are responsible for more than a third of deforestation related to international trade in agricultural products.

Europe's trade policy inertia

In an article published in the journal *Politique étrangère*, a group of international trade experts have summed up how trade policy continues to lag behind, "All other international economic policies have mainstreamed into Sustainable Development (...). Trade policy alone has resisted such a change, multiplying smoke-and-mirrors tricks, continuing to focus on pure liberalization, as a headless duck continues to run." In bilateral trade agreements, the chapters on labour, the environment, and sustainable development included for the past dozen or so years are limited to encouraging states to honour the international commitments they have already undertaken and are not binding [editor's note: read more on sustainable development chapters]. A prisoner of its support for the unconditional liberalisation of trade, EU trade policy fails to take into account the human and environmental challenges posed by the longer global value chains and broader international trade.

The new European Commission is content with pursuing the existing agenda: ratifying agreements with Vietnam, Mercosur, and Mexico; finalising the investment protection agreement with China; continuing bilateral negotiations with the US, Australia and New Zealand; opening negotiations with the UK; and expanding investment protection measures. The only new commitments are the inclusion of the 2015 Paris Agreement as a key part of certain agreements and the implementation of a border carbon adjustment mechanism. Is this programme consistent and compatible with the objectives of its European Green Deal?

The EU should focus on redefining, in the most coordinated and multilateral way possible, international trade rules so as to give states greater room for manoeuvre in making the ecological transition.

Insisting on the Paris Agreement being a key part of trade agreements makes explicit the possibility – already confirmed by the European Court of Justice – of suspending trade agreements if a signatory leaves the Paris

Agreement. But the Commission only plans to include the Paris Agreement in “global” trade deals, which does not, for example, apply to negotiations underway with the US. Additionally, there is nothing in this mechanism for forcing remedial action from countries who remain in the Paris Agreement but fail to implement it effectively.

As for the border carbon adjustment mechanism, strongly pushed by France and a recurring issue in public debate, it is still far from receiving the backing of all member states. Its implementation will pose many technical and legal problems. Even if it comes to pass, this undoubtedly useful mechanism will not resolve all the environmental and social problems related to trade policy.

The pitfalls of rules

States have made trade the cornerstone of international relations. Today, there is a significant gap between highly globalised commercial law that has mandatory legal force, and human, social, and environmental rights that remain for the most part enshrined at a national level and whose international expressions are non-binding or minimally so. Trade and investment agreements do contain obligations for states that are enforced by penalties. If countries break the rules that they have set themselves, they can be sued through the World Trade Organization’s (WTO) dispute settlement body, or through bilateral dispute settlement mechanisms agreed between states or between investors and states.

However, international environmental and social rules, and human rights, are not backed by equivalent mechanisms. At worst, non-compliance risks reputational damage for states. This partly explains why the international community finds it so hard to make progress towards the climate targets set by the Paris Agreement or to ensure that International Labour Organization and United Nations standards are met. This situation creates a de facto hierarchy and leads to a strange inversion of priorities. Trade has become an end in itself and trade policy is conducted in a way that is independent of, and even at odds with, other areas of public policy. A perfect illustration of this contradiction was the European Commission instructing its negotiators to refuse to allow the Paris Agreement to impose limits on trade.

Of course, international trade rules inherited from the General Agreement on Tariffs and Trade, the forerunner of the WTO, allow some exemptions to commitments to liberalisation for the protection of health, life, and exhaustible natural resources. But states that have tried to use these have almost always failed. When attacked by partners, European public policies based on the precautionary principle have been judged to be in breach of trade law.

Faced with these pitfalls, not only has the EU not sought to reshape international trade law into a stronger multilateral framework for correcting the major structural imbalances caused by previous multilateral agreements (particularly in terms of agriculture and environmental and social emergencies), but it has negotiated even more bilateral agreements with the same flaws.

The dangers of “new generation” bilateral trade agreements

This new bilateralism is based on “new generation” trade agreements whose characteristics present additional obstacles to national policies for ecological transitions.

- **The widening scope of trade agreements**

Their first characteristic is that they go beyond simple matters of trade. Tariffs, once one of the main barriers to trade, have been cut considerably, except for a few sectors such as agriculture. Almost three quarters of imports into the EU are now subject to reduced tariffs or exempt entirely. Trade negotiations now focus on other measures deemed “non-tariff barriers” to trade, and which arise from regulatory divergence not just in production, but in

health, social, and environmental protection too. Widening the scope of trade negotiations creates a tendency to consider regulations in terms of their impact on trade, to the detriment of their role in protecting health, working conditions, or the environment. To quote former WTO Director-General Pascal Lamy on the stalled Transatlantic Trade and Investment Partnership negotiations between the EU and the United States: “TTIP seeks to bring down non-tariff barriers, i.e. differences that exist between precautionary standards that protect consumers against different types of risks. Today these make up 80% of barriers to trade between the two economies. (...). It’s precisely because the protection of consumers, rather than producers, is at stake that these negotiations are causing such a stir.” Sustainability impact assessments examine the benefits for trade of harmonising standards but never address the environmental or social impact of reducing non-tariff barriers. The widening of the scope of trade policy has not been accompanied by making it more democratic. The opacity surrounding negotiations prevents citizens and their elected representatives from meaningfully contributing to their drafting.

- **“Living” agreements**

The environmental and social impact of trade agreements is even more difficult to evaluate when they are not time bound. New generation agreements are designed to be “living” agreements. They put in place committees and dialogue mechanisms whose role is not just to ensure the implementation of the agreement but to continue negotiating further progress, sector by sector.

The EU-Canada Comprehensive Economic and Trade Agreement (CETA), provisionally in force since 2017, created a joint committee and over a dozen other specialised committees and forums on issues including biotechnologies, sanitary and phytosanitary measures, financial services, and regulatory cooperation. Their power is significant: some can even change parts of the agreement following its signature without being subject to democratic oversight. The goal is to facilitate the convergence of standards and regulations and to reduce compliance costs for businesses. This mechanism should also ensure that all existing and future legislation in member states complies with treaties and will not have a negative impact on trade. There is a very large risk that, following interventions by these committees, governments will abandon or reduce the scope of whole swathes of legislation indispensable for the protection of consumers, workers, and the environment.

- **The addition of an investment component**

The majority of these new agreements are accompanied by an investment protection component that requires an investor-state dispute mechanism to be put in place. This system allows foreign investors to sue the EU or member states, and to challenge public policies that harm their interests in special courts with rules that are extremely favourable towards them.

This mechanism is certainly not new, having been used to protect the businesses of investors from rich countries against the risk of expropriations and arbitrary decisions in former colonies, whose legal systems were considered to be inadequate or even corrupt. But it was then introduced into a plethora of bilateral agreements (over 3300 to date) and the number of disputes exploded. Before 1995, there were just three known cases. Since then, there have been 983 cases to date. The mechanism has been used by American conglomerate Cargill against Mexico to challenge a tax on sugary drinks aimed at combatting obesity, as well as Swedish power company Vattenfall against Germany following the city of Hamburg’s strengthening of environmental regulations aimed at Vattenfall’s coal power station. Despite increasingly evident risks, the EU continues to use this system with as many trade partners as possible, including those – like Canada, the US, and Japan – that have an effective legal system and are home to multinational companies with a track record of suing states.

The EU claims to have reformed the mechanism by introducing some procedural adjustments into CETA and subsequent agreements. But it still refuses to reduce the scope of protection rules offered to investors or to impose obligations on them in return. Moreover, it expends much more energy extending this system to all international

investments by promoting a multilateral investment court than it does modernising old protection agreements signed in the past. Yet, this mechanism has been widely condemned because it is used by multinational companies to deter states from acting, or for making taxpayers carry the cost of public policies that are in the general interest.

The US and Canada, who were the first developed countries to set up this type of investor-state dispute settlement (ISDS) as part of the North American Free Trade Agreement (NAFTA) in 1994, have since decided to abandon it following the recent re-negotiation of the agreement. “ISDS [...] has cost Canadian taxpayers more than 300 million dollars in penalties and legal fees. ISDS elevates the rights of corporations over those of sovereign governments. In removing it, we have strengthened our government’s right to regulate in the public interest, to protect public health and the environment”, explained Canada’s minister of foreign affairs. And there are growing calls for the scope of this mechanism to be reduced. For example, Luxembourg’s energy minister asked EU member states to end investment protection in the fossil fuel sector as part of the negotiations that began in December 2019 on the “modernisation” of the Energy Charter Treaty.

So, not only do current trade rules fuel the growth of an unsustainable economic model, they also hinder the ecological and social transition by reducing governments’ room for manoeuvre in many areas. This is all the more problematic because the economic benefits of new agreements appear to be negligible: less than 0.01 per cent of the EU’s GDP by 2035 is expected to come from CETA.

Trade policy in the Green Deal

If the new Commission’s Green Deal is to be taken seriously, it must make EU trade policy into a tool for ecological and social transition.

To begin with, this involves reviewing the purpose of trade policy. Increasing trade in itself is no longer a desirable objective in the absence of real decoupling, in other words, reducing carbon intensity and natural resource depletion as GDP grows. To respect the planet’s physical limits, not only in terms of climate but also biodiversity and resource conservation, clearer objectives need to be set in the sectors that must grow or shrink as part of trade. It will also be important to establish more comprehensive indicators than trade volume or GDP, like imported emissions, as recommended by France’s High Council for Climate, or the impact on biodiversity.

This movement means accepting some restrictions on free trade and a potential overall reduction in its volume. Indeed, certain goods should no longer be consumed at all (namely, fossil fuels and diesel and petrol cars), and others in a completely different manner. And in reality, some international trade appears to be simply the result of strategies for reducing the social, environmental and tax obligations of multinational companies. According to the UN body for trade UNCTAD and OECD estimates, intra-firm trade may account for between a third and two thirds of global trade. A better understanding of these issues would make it possible to discourage such strategies or even make them impossible.

As a dominant trading power, the EU has the means and duty to promote ambitious and binding international social, environmental and tax rules, as well as reform of trade and investment law. It should, for example, agree to engage constructively in current negotiations for a UN treaty on business and human rights. The order of priorities must be reversed. Regulatory cooperation should serve to ensure the respect of human rights and strengthen protections for citizens and the planet through upward convergence. Trade facilitation would be one possible outcome of this international harmonisation of standards, but it should in no way be a guide or an end in itself. Although the adoption of stricter common rules will limit trade, trade facilitation should still be possible.

It’s a question of reversing the current mindset and making

*trade preferences conditional on meeting environmental and
social objectives.*

The EU should focus on redefining, in the most coordinated and multilateral way possible, international trade rules so as to give states greater room for manoeuvre in making the ecological transition. It should be able to demand the respect of certain social, environmental and tax rules in exchange for access to its market, and even encourage the re-shoring of certain activities, particularly in agriculture.

As for bilateral trade agreements, they are not much use unless they become genuine trade regulation agreements. It is a question of reversing the current mindset and making trade preferences conditional on meeting environmental and social objectives. This was, for instance, one proposal of the 2009 sustainability impact assessment conducted into the EU-Mercosur agreement, which was completely ignored by the European Commission.

The EU has a market of 450 million relatively rich consumers. It should not underestimate its ability to influence international trade rules. The EU's capacity to develop a plan for a Green Deal that takes into account the social and environmental aspirations of European citizens depends on it.



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