Trade policy for fairer and more equitable global value chains

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Introduction

Today’s GVCs operate in a very different context to the late 20th century when the concept was first developed. With the recent rise in populism, new tariffs are changing cost structures and thus the geography of several GVCs. Many commentators link this rise in protectionism to concerns about the spread of GVCs and the ‘fairness’ of competition between countries with very different labour and environmental standards (Rodrik, 2018). At the same time, civil society in many countries is increasingly critical of trade agreements and there are calls for the re-assessment of their governance, especially in order to ensure a stronger voice for labour and the environmental movement (see FoE, 2018, for a recent summary of some of the key proposals of European civil society). In this context, it seems indispensable to reform the system of policy making and implementation to address these criticisms and make trade policy more responsible.
Achieving a ‘fairer’ global trading system will require a mix of measures – some national, some EU level and some subject to bilateral and multilateral negotiations. In this short chapter, it is not possible to cover all of them. Rather we will focus on the EU level, particularly in relation to its trading relations with developing countries. In the trade policy arena, the EU sees itself as a progressive power, favouring responsible business (Hogan, 2020). It is thus incumbent on it to seek progressive solutions that could subsequently be multilateralised. If the EU can more effectively leverage its trade policy to encourage trading partners to adopt domestic regulation that better protects workers and the environment, it would complement national and EU level regulation, which increasingly requires companies to pay greater attention to negative externalities from their corporate strategies along their supply chains (Hogan, 2020).

This chapter will explore the key areas of EU trade policy where new approaches, or more effective implementation of existing trade regimes, could secure meaningful change. It will focus on those areas where there is the potential for policy shifts in the relatively short timescale of this Commission (up to 2024), rather than more systemic radical change. We will explore the policy options through which trade between EU countries and their partners can be made ‘fairer’. Drawing on academic literature, civil society position papers and interviews, we will highlight potential trade policy reforms which could be mobilised to limit the potential negative social and environmental impacts of trade. Our focus on trade policy is, almost by definition, an approach which is primarily focused on influencing behaviour at the state level, although such policy change is often aimed at changing the behaviour of private actors within GVCs. Beyond trade policies, there are many complementary measures which focus on influencing company strategies, such as tax avoidance and due diligence. These are addressed elsewhere in this book.
Setting the context

In any discussion on trade policy options, it is important to note that membership of the WTO implies certain commitments which shape, and indeed constrain, the policy options available to the EU. In the context of promoting fairer trade, countries are not allowed to discriminate between similar members and products. Specifically, they cannot provide different market access to countries ‘where the same conditions prevail’ or to ‘like products’. There are exceptions to these general rules, including for environmental objectives and there is a wealth of WTO jurisprudence which informs the flexibilities on these issues within WTO rules.

In terms of discrimination between similar countries, the EU has lost several cases at the WTO which inform its position, most notably in relation to its banana regime for certain developing countries (where some countries faced high tariffs whereas others were duty free\(^1\)), and its former ‘Drug GSP’ special access programme. The Drug GSP ruling in particular is significant, in that the EU lost the case not on its right to provide special market access to certain developing countries, but on the fact that it only provided access to countries which were considered to be taking action to address the global drug trade. The subjective nature of this criteria was a key reason that the regime failed to pass legal scrutiny (Shaffer and Apea, 2005).

Thus, any future improved preferential access programme must ensure that it conforms to WTO requirements in that differentiation between countries is based on objective criteria. The EU has largely integrated this requirement into its current GSP+ programme, which uses criteria based on international treaties and commitments to decide eligibility. Were the EU to revise its market access regime to favour ‘fairer’ trade, it is likely to seek to avoid discrimination that would be judged unfair under WTO rules. It is not impossible to contravene the rules. The US AGOA programme is not WTO compliant, as
it only applies to African countries; however, the US secured a waiver – other WTO countries agreed not to challenge it. However, such waivers are politically challenging and historically have only been accepted if the preferences are provided to small peripheral exporters which pose no major threat to key traders.

On the question of ‘like products’, in general, WTO members must treat similar products originating from their domestic market and other members in the same way. However, there are exceptions. These include the right to ban or restrict goods made by prison labour, or which offend public morals, as well as the right to incorporate restrictions which are ‘necessary’ to protect the environment or human health. The latter two exceptions, in particular, are subject to a lot of jurisprudence including on tobacco control legislation (US–Indonesia clove cigarettes, Australia plain packaging) and restricting imports of tuna and shrimp because of concerns on by-catch (the US cases: tuna–dolphin and shrimp–turtle).

The key take-aways from these cases are that members can ban or restrict imports of certain products if there is a clear public interest and the measure is ‘necessary’ according to objective scientific evidence (plain packaged tobacco). In addition, the means by which the policy objective is achieved cannot be arbitrarily imposed by the importing country (tuna–dolphin and shrimp–turtle), which also cannot arbitrarily discriminate between products which are essentially the same (clove and menthol cigarettes). (See Howse and Levy, 2013, for a legal analysis of several key cases).

The current international trade rules thus make it difficult to provide trade preferences to certain developing countries that are not afforded to others, or to goods which are produced in ‘fairer’ GVCs, with higher social and environmental standards and more equitable distribution of gains. Although the WTO is in a considerably weakened position due to the US blockage of its dispute settlement body, the EU remains committed to its multilateral rules (Hogan, 2020). It is therefore unlikely that
WTO incompatible measures would be instigated by the EU in order to favour fairer value chains.

The potential to increase WTO flexibilities to enable the favouring of socially responsible and fair trade goods has been discussed in the past. In 1995 the European Banana Action Network launched an intensive campaign calling on the EU to include a specific quota for Fairtrade labelled bananas within its import regime. They report that, in response, the European Agriculture Commissioner indicated that the EU could consider a trade policy that differentiated between like products (Fairtrade bananas and ordinary bananas) if civil society were to mobilise opinion in favour of such a move.\(^2\)

Thus, at the time, there was some willingness in the EU to try to push the boundaries of interpretation of Articles III and XX of the WTO. If there had been a favourable political environment among WTO members to do so, this might have resulted in increased flexibilities enabling the differentiation between certain ‘like products’. However, this proved not to be the case. In particular, the quashing of the US ‘Social Clause’ proposal at the WTO Ministerial Conference in Singapore in 1996, due to concerns in the Global South about protectionist motivations, undermined the chances of the social aspects of trade being more effectively integrated into WTO.

In a sense, though, the EU already favours trade from countries which have imposed a minimum level of labour and environmental protection under its GSP+ programme. However, these preferences are provided at the level of the country, not the firm or value chain and civil society considers that the guarantees provided in terms of worker and environmental protection are insufficient. As the rules stand, tariff preferences for Fairtrade or other certified goods would be impossible, unless an argument could be made that this is ‘necessary’ ‘to protect public morals’. The EU won a recent WTO case on its ban on importing seal skin products on the basis of this exception, but it has been rarely mobilised in the WTO.
Given this legal backdrop, the rest of this chapter will explore policy actions to favour more sustainably produced goods which could be instigated within WTO rules, in the relatively short timescale of the current Commission. As indicated we focus on two key policy areas which are particularly relevant to the EU’s trade with developing countries: free trade agreements (FTAs) and the preferential trading regime – GSP. In both there is increasing pressure for policy tools which enable the voice of labour and the environmental movements to be taken seriously and thus the potential to secure real advances.

**Bilateral agreement: FTAs**

A key means by which the EU secures market access to other countries and provides access to its own market is through FTAs. Especially since the beginning of this century, these agreements have sought to address issues of sustainable development and trade, laterally through specific chapters on trade and sustainable development (TSD). Recent EU FTAs go further than previous ones in incorporating these issues into trade relations, yet concerns persist about FTAs enabling the development of trade without adequate guarantees that minimum labour and environmental standards are respected. In recent years, the Commission has begun to take concerns about non-respect of TSD commitments more seriously and business groups, conventionally hostile, have become more open to these ideas. The key proposals which emerge from recent inputs to the debate and their feasibility are discussed.

*Making the entering into force of an agreement conditional on ratification and application of a list of conventions*

The question of sequencing of commitments has been highlighted in several academic studies, as well as in inputs to EU consultations. The EU already uses a list of international agreements to accord GSP+ status and one idea would be to
include the requirement to ratify these agreements (or at least the key ones) in its FTAs. In this context, the EU has already indicated that ratification of future FTAs will be contingent on partners adhering to the Paris Climate Accord, with the EU–Japan FTA being the first to incorporate such a requirement. Extending such conditionality to other environmental and labour agreements, by making the launch or conclusion of negotiations conditional on a partner country having ratified and implemented a certain number of core conventions, is perfectly feasible. In fact, the EU–Japan FTA contains obligations for the parties to make sustained efforts to ratify fundamental ILO conventions.

An issue of concern in this context is that, even if such sequencing is secured, there is often a gap between the ratification of international conventions and their application. There would need, therefore, to be an effective monitoring system to ensure that the commitments on environmental protection and labour standards that are made prior to the signature of the FTA are actually implemented on the ground. NGOs are concerned that implementation will not be effective and that the EU does not have the mechanisms in place to hold partners who do not respect their commitments to account. Key to this issue is the question of enforcement, which we will discuss further.

Concerns about non-respect of international commitments will be particularly high profile in the upcoming discussions on the ratification of the EU–Mercosur FTA. Civil society has long expressed concerns that environmental protection has not been effectively integrated into FTAs. The EU has responded to these concerns by making membership of the Paris Agreement a prerequisite for signing an FTA with partner countries. Yet there are fears that Mercosur countries, especially Brazil, are not respecting their Paris commitments in practice. These concerns contributed to the decision by the French government to appoint an independent committee of experts to evaluate the effect of the agreement on sustainable development.
Their conclusions – that the FTA is likely to increase carbon emissions and deforestation – make the ratification of the accord extremely problematic (Ambec et al, 2020). This debate will be a key one in framing the Commission’s position on linking FTAs to environmental objectives.

**Making the TSD chapters subject to the same dispute settlement as other parts of the agreement**

Formal dispute settlement procedures exist within most FTAs to provide a mechanism for the parties to seek redress in case of non-respect of their engagements. In cases where agreements are not honoured such disputes can lead to the complainant party taking action against the other party. In the EU–Japan and EU–South Korea FTAs there are even specific expedited dispute settlement systems for the car sector, where the EU reserves the right to roll back trade liberalisation if the partner does not respect their commitments on non-tariff barriers.

Many NGOs consider that the credibility of the TSD chapters is undermined by the fact that they are not subject to the same formal dispute settlement system as the rest of the FTA. It is a consistent demand that non-respect of environmental and social commitments be similarly subject to dispute settlement and, ultimately, sanctions (for example, FoE, 2018). This is the approach in the US and there is evidence that their more ‘muscular’ approach to linking FTAs and labour standards can result in progress on the ground, for example in Vietnam (Tran et al, 2017). However, after an extensive consultation on TSD in 2018, the Commission rejected a sanctions-based approach because of the lack of consensus across stakeholders. Instead they launched a 15-point action plan to improve the TSDs, which includes more assertive use of the existing mechanisms to address non-compliance, including dispute settlement (CEC, 2019).

Within this context, a mechanism is needed to ensure that countries accused of social or environmental ‘dumping’ can
be held to account in a meaningful way. The obvious way to do this would be formally integrating the TSD chapters into the dispute resolution procedures of the rest of the agreement. However, given that this option has so far been rejected by policy makers, a mechanism is needed to trigger ‘hard’ action, such as monetary fines or reversal of trade preferences for certain, affected products within the existing structures. The current TSD chapters do contain a dispute mechanism, but its utility has not been tested. The EU mobilised it for the first time against South Korea in December 2018 following longstanding concerns about labour rights in the country. A panel was requested in July 2019 (CEC, 2019). How this process pans out in South Korea will be a key test case for its effectiveness, so civil society needs to follow this action closely.

However the process of dispute settlement operates, increasing the role of civil society also seems both feasible and desirable. NGOs are often well placed to observe and report on the negative effects of non-respect for international standards, through their dense networks of activists and members. Better leveraging this resource, by giving civil society a more formal role in the FTA monitoring process, would address a key concern of its many critics and help to increase public confidence that monitoring is open and inclusive. The Commission has provided €3m to support civil society involvement in implementation, while a dialogue with Peru was instigated at the request of NGOs operating in the country.

**Addressing enforcement**

The proposals can only be effective if they are supported by a system that monitors the extent to which trade partners respect their FTA commitments. Concerns about non-respect have led to the publication of regular reports on the EU’s FTAs (such as CEC, 2019) and the creation of a new post
in the Commission – the Chief Trade Enforcement Officer (CTEO). In July 2019 the first appointee to the post was announced – Denis Redonnet, who is also a deputy Director General of the Directorate-General for Trade. Having a high level official responsible for enforcement is obviously a positive move. However, the appointee is also responsible for two Directorates, one of which is trade defence. This creates a risk that enforcement efforts are disproportionately oriented towards that area – particularly anti-dumping. As with any institutional innovation, how effective the CTEO turns out to be will depend on how much attention is paid to their activities and the extent to which the wider institution supports their operations. If civil society wants to improve the implementation of commitments across the EU’s FTAs, they should advocate for an effective and efficient CTEO.

**Addressing the negative distributional effects of trade within FTAs**

Meyer (2017) has proposed that the unequal distribution of gains through FTAs could be addressed through the inclusion of an ‘Economic Development Chapter’ in FTAs, such that redistribution of gains from FTAs are built into the agreement. This proposal would require developed countries to commit to taking action within their economies to mitigate the negative impacts of trade, in contrast to most efforts within FTAs, which tend to focus on requiring developing countries to commit to change. However, the methodological difficulties involved in identifying losses from trade have proved substantial. The EU already has a mechanism – the Globalisation Adjustment Fund (GAF) – to support regions hit by globalisation; however, it has never been fully used. The Commission has already proposed that the criteria for accessing support should be expanded in order to extend utilisation and active engagement of civil society in this debate in order to ensure that the outcome is a system that is both more accessible, and fair.
Preferential access: the Generalized System of Preferences regime

In the context of the EU’s unilateral trade policy, the Generalized System of Preferences (GSP) is the main policy tool through which sustainable development (SD) can be encouraged in partner nations and, indeed, within this regime the EU has gone substantially further than in its bilateral agreements to incorporate SD concerns into market access arrangements. NGOs, as well as many Members of the European Parliament (MEPs), are sceptical as to whether the provision of generous EU market access, particularly under GSP+, is being accompanied by real progress on the ground in the beneficiary countries; while the Rana Plaza disaster served to further underscore the negative aspects of break-neck growth in supply chains.

There are calls for a more effective use of the existing EU tools to leverage market access to support SD. There is evidence from ILO programmes that market access linked to core labour standards can be an enabling condition to improve working conditions at factory level, as long as they are combined with monitoring and engagement at local level (Rossi, 2015). Others have noted that a combination of ‘carrots’ and ‘sticks’ is required to ensure effectiveness of conditionality (Tran et al, 2017).

A key challenge here is to make the monitoring mechanisms linked to GSP market access more robust and beneficiaries more accountable. There is a substantial literature on the effectiveness of making market access conditional on labour or environmental standards and especially on whether the removal or down-grading of access can stimulate positive policy change (Orbie and Tortell, 2009; Rossi, 2015; Smith et al, 2018). The EU’s GSP conditionality has had impacts, but these have been more related to ratification than implementation of conventions. In the latest evaluation of GSP, although some positive impacts of conditionality on certain countries were noted, the authors also concluded: ‘in several instances, economic growth and export opportunities did not
go hand-in-hand with adherence to fundamental labour and human rights’ (Development Solutions, 2018). As a country’s decision to change its labour or environmental policies is likely to be the result of many domestic and international factors, isolating the effect of trade measures, is, by definition, difficult, yet inaction in the face of clear infringements of commitments is increasingly difficult to justify politically.

There is already a process by which GSP market access can be removed. The 2012 GSP Regulation foresees that preferences can be suspended for ‘serious and systematic violation of principles laid down in the conventions listed in Part A of Annex VIII’. The 15 conventions in this annex cover a variety of rights, including labour standards. Thus, unlike in FTAs, the GSP already incorporates the legal tools for preference withdrawal (Vogt, 2015). Yet NGOs and the labour movement consistently report that the EU has failed to act in cases where they consider suspension to be merited.

The EU’s conditionality could be a particularly effective lever in the case of beneficiaries of GSP+ or Everything But Arms (EBA) for Least Developed Countries (LDCs). These countries enjoy substantial tariff preferences, which have had significant impacts on trade in certain goods. In 2007 trade unions in Costa Rica and Europe sought unsuccessfully to launch a case over GSP+ preferences granted to Costa Rica over systematic labour rights violations in the tropical fruit industry. At the time the Commission indicated that the ILO processes should be favoured. More recently, the removal of some preferences from Cambodia for human and labour rights violations is widely seen as a step in the right direction. Although the list of products covered is relatively modest, it comes with the threat of more widespread action if progress is not assured. It has even been welcomed by business groups like amfori, representing EU importers. Preferences for Bangladesh are also under threat due to perceived failures to respect workers’ rights and freedom to organise. Four civil society organisations have already complained to the European
Ombudsman that the Commission was failing to act in this case. The Ombudsman’s judgment makes clear that action is feasible, even if all other avenues will likely be exhausted beforehand (European Ombudsman, 2020). How the Commission deals with these criticisms in the coming years will be a key factor in mitigating the criticisms of the failure of its trade preference system to incorporate ‘fairness’.

Concluding remarks

In this short chapter we have sought to highlight the trade policy areas where more ‘progressive’ approaches that integrate greater labour and environmental protection can be better incorporated into policy implementation in the short term. In summary, the three debates which are most likely to move the dial on the EU’s position on these linkages within the timescale of this Commission are:

- The ratification (or not) of the EU’s FTAs with Mercosur and Vietnam and the effective incorporation of commitments on SD in case of ratification.
- Increased pressure on GSP+ and EBA recipients on securing real improvements on core labour standards.
- Mobilisation of the new post of CTEO to monitor the implementation of partner countries’ commitments on SD objectives in both FTAs and GSP.

Pressure could be stepped up on these issues in the EU context, through political action at the level of MEPs and the Commission, but also in member states. In this context, it needs to be borne in mind that the removal of tariff preferences from a trade partner will never be an entirely technocratic decision of the Commission services. It is inherently political and there would need to be consensus across the member states that any sanctions were justified.
In addition, although the EU can, to some extent, impose conditionality on unilateral preferences accorded to developing countries covered by the GSP, FTAs are negotiated with its trade partners. Large emerging powers are likely to strongly resist conditionality in their agreements. India, for example has a long history of resisting any efforts to link labour standards — including those of the ILO — to trade. Indeed, this is one of the stumbling blocks in the (now stalled) EU–India FTA negotiations. It seems likely that the EU will encounter similar resistance in Brazil to linking its FTA with key NGO priorities like reversing deforestation. In the face of such resistance the mobilisation of civil society will be vital to keeping SD priorities on the policy agenda both in Brussels and the national capitals and enabling the EU, if necessary, to put these long-term objectives ahead of short-term commercial gains.

Finally, WTO reform is being actively discussed. It is not impossible that the global rules which frame trade preferences could change, for example to create an exception for certain types of goods made in more sustainable ways. However, the Drug GSP case made it clear that discrimination between different developing countries must be based on clear international standards. In the case of fair trade, the lack of such an international or European public standard would be a major barrier to instituting such an exception. In any case, the engagement of academics and civil society with this discussion could provide opportunities to create an enabling environment to encourage more sustainable trade.

Notes

1 Africa Caribbean Pacific Group (ACP) countries had duty-free access to the EU market, largely for historical reasons, while ‘third’ countries paid a tariff that was €250/tonne in 1993. After repeated challenges in the WTO this has been reduced over time, finally culminating in the ‘Geneva Agreement’ of 2009 which secured a reduction in third country tariffs to €75/tonne in 2020. In the meantime, most ACP countries continue to have duty free access, but under free trade agreements.

The New Commission has announced the creation of the post of Chief Trade Enforcement Officer in the Directorate-General for Trade to ensure that trade agreements are respected.

References


