

# **Integration of Environmental Concerns into the EU Trade Agreements**

## **– The Real Stakes of the Transatlantic Trade Negotiations?**

Balazs HORVATHY<sup>1</sup>

### **1 INTRODUCTION**

The ‘Trade and Environment’ debate is in centre of attention of the international trade discourses since the 1980s.<sup>2</sup> The importance of the subject can be explained partly by the fact that the two areas represent an ‘ideological’ policy conflict between the free trade concept and the environmental thinking, which underpin the policies behind the international regulation. The European Union (EU) is involved into this debate from the very outset, and for the last two decades, it has a very strong commitment to introduce significant reform with the aim of providing wider accommodation for environmental measures within the world trade law.<sup>3</sup> Besides, it is notably that the EU’s focus is put not separately on the environmental aspects, but it attempts to include these interests in conformity with other societal concerns, like the social policy or human rights.<sup>4</sup>

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<sup>1</sup> Research Fellow (HAS CSS Institute for Legal Studies, Budapest, Hungary). The underlying research of this paper was supported by the János Bolyai Research Scholarship of the Hungarian Academy of Sciences. Email: [horvathy.balazs@tk.mta.hu](mailto:horvathy.balazs@tk.mta.hu)

<sup>2</sup> See for ‘Trade and Environment’ debate, Araya, M. – Figueres, J.M. – Salazar-Xirinachs, J.M.: Trade and Environment in the World Trade Organization. The Need for a Constructive Dialogue. In: The Role of the WTO in Global Governance (Ed.: G. Sampson.), New York: United Nations University Press, 2001. p. 156.; Santarius, T. – Dalkmann, H. – Steigenberger, M. – Vogelpohl, K.: Balancing Trade and Environment: An Ecological Reform of the WTO as a Challenge in Sustainable Global Governance. Wuppertal Institute, 2004., p. 18.

<sup>3</sup> Mario Prost: Is European Law Becoming More Sustainable? In Marie-Claire Cordonier Segger and Markus Gehring (eds), Sustainable Development in World Trade Law (Kluwer Law International, The Hague 2005), 329, 411–59.

<sup>4</sup> See for human rights requirements: Karin Arts: Integrating Human Rights into Development Cooperation: The Case of the Lomé Convention. Martinus Nijhoff Publishers, Hague, 2000., For

The integration of environmental – and other societal – concerns is a flagship issue also in the ongoing negotiations on the Transatlantic Free Trade and Investment Partnership (TTIP) between the European Union and the United States, and it is obvious that a successful compromise in the TTIP can be reached only if the striking divergence regarding the integration of the ‘Trade and Environment’ provisions are reconciled.

The main objective of the present paper is to put the ‘Trade and Environment’ debate in context of the TTIP and to show which compromise the European Union and United States have to negotiate with the purpose of resolving the policy conflicts between the trade and environmental concerns. The first part sets out a general regulatory frame, which lays down the possible scope of the incorporation of environmental goals into the trade agreements. The next chapter then explains the EU sensitiveness to the environmental aspects of trade and looks at the relevant EU law provisions, which confine the EU policy leeway regarding the incorporation of environmental concerns and require the EU to come only into an ‘environmentally conscious’ trade agreement. The last part of the paper examines the TTIP in the light of the main substantive and procedural elements of the regulatory frame to integrate the environmental objectives into the TTIP.

## **2 THE REGULATORY FRAME TO INTEGRATE ENVIRONMENTAL CONCERNS INTO THE TRADE AGREEMENTS**

Since the 1990s, the environmental concerns became a standard item in the negotiation of international trade agreements. The principal reason of picking up the environmental issues to the trade agenda is closely connected to the policy tensions which are rooted in the fact that domestic environmental measures can oppose the efforts to further liberalisation in trade and it leads often to trade barriers. Moreover, the liberalised and growing trade are tending without doubt to environmental impacts in terms of conventional pollution, as well as in air pollution, forest and species depletion etc. This ‘tension’ can be observed as typical policy conflicts, which the negotiating parties, according to their domestic policy priorities want (or intentionally do not want) to address<sup>5</sup> in the trade

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labour requirements in general context, Chantal, Thomas: Trade-Related Labor and Environment Agreements? *Journal International Economic Law* (2002) 5 (4): 791-819.

<sup>5</sup> The premise of the following analysis is that the negotiating parties want to regulate and resolve this conflict. However, it cannot be neglected that the parties have other (policy) options as well. There are examples of international agreement provisions, the goal of which is to avoid something special to regulate. In many times, the reason for this option is that the negotiating could not find mutual compromise, or with the avoidance of strict or precise regulation, they want to leave more

agreement. On the one hand, the countries involved are interested in more liberalisation, but on the other hand, the emerging importance of the environmental protection requires maintaining the adequate measures that can manifest as restrictive trade practices. These tensions are stimulated by two concrete factors as well. Since the globalising economic system increases general incentives for engaging in international trade,<sup>6</sup> the growth-oriented policies are causing harmful environmental impacts. In other words, the international trade law, with the single purpose of increasing trade flows, is unlikely to have a neutral effect on the world's environment. Second, it is fact that there is a natural tendency for trading countries to try the effectiveness of their own environmental regulation, as well as to influence the environmental behaviour of others,<sup>7</sup> by resorting to trade measures, including import bans and other restrictive measures. The unilateral trade instruments in question are harshly criticized mostly by the developing countries, which are seeing in these measures nothing else but 'green protectionism'<sup>8</sup> of the developed nations. Both factors are major issue also today and are key elements of the 'Trade and Environment' debate. As a consequence of the evolving environmental awareness, nowadays the countries could not avoid addressing these conflicts and questions in their trade agreements, the examples of the major ongoing trade negotiations support this trend obviously.<sup>9</sup>

From the perspective of the trade negotiations, the real question is how this policy conflict between trade and environment can be addressed and reconciled successfully within the framework of an international trade agreement with incorporated environmental concerns. For the purposes of this chapter, the success is simple the fact that the negotiating parties have found adequate

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space for interpretation (in other words, they do not want to confine the room for the future policy options). However, our starting point is that the parties want to regulate and integrate the environmental objectives in their trade agreement, want to tackle common environmental challenges, and they are aware of these challenges (even though these challenges are not necessarily equally shared in the contraction parties).

<sup>6</sup> Dillon, S.: *International Trade and Economic Law and the European Union*, Hart Publishing Oxford and Portland, Oregon, 2002. p. 120

<sup>7</sup> *Ibid.*

<sup>8</sup> Dagne, T. W.: *The Debate on Environmentally Motivated Unilateral Trade Measures in the World Trade Organization: The Way Forward*, 9 Wash. U. Global Stud. L. Rev. p. 441.; Keukeleire, Stephan – Delreux, Tom: *The Foreign Policy of the European Union*. 2nd edition, Palgrave Macmillan, 2014, pp. 202-203.

<sup>9</sup> Excluding the subject of this paper, the TTIP, and other agreements negotiated by the EU (e.g. with Canada), the United States' recent negotiation on the Trans-Pacific Partnership Agreement can be taken as example. See for detailed analysis, Joshua P. Meltzer: Tania Voon (ed): *Trade Liberalisation and International Co-operation: A Legal Analysis of the Trans-Pacific Partnership Agreement*, Edward Elgar, 2014.

solution to consider the environmental impact of their trade agreement and laid down normative provisions regarding the relationship of the trade and environmental policy objectives. In other terms, the countries do not want to address the trade policy objectives in an isolated context, but want to reflect and incorporate the environmental concerns as well. Consequently the question of the 'how' is to be answered here in a neutral way, only referring to a possible regulatory frame of a negotiated trade agreement. It is evident that the above success is influenced by the regulatory frame, namely by the substantive and the procedural components of the trade agreement. The substantive components refers to the content of the agreement and implies the obligations and rights of the contracting parties, however, the procedural aspect of a trade agreement ensures that these obligations and rights can be really effectuated.

The regulated subject itself, that is to say, the above policy conflict, determines the adequate *substantive components* of a trade agreement. Considering the nature of the policy conflict between the trade and environment, it is obvious that the conflict at hand consists of at least three dimensions, which have to be targeted by the trade agreement. The policy tensions are palpable first, in the objectives of the trade agreement (a. *inherent policy conflicts*); second, in the relation between the international trade agreement and the domestic environmental policy goals of the contracting parties (b. *vertical policy conflicts*); and third, in the relation between the international trade and other – specific environmental – agreements (c. *horizontal policy conflicts*).

*Ad (a):* The *inherent policy conflicts* are rooted directly in the divergent policy objectives of trade and environment. The negotiating parties have several options to tackle and resolve this conflict, and in line with their policy priorities, they have to find compromise on the relationship of trade and environmental concerns. Resolving and regulating the inherent policy conflict can be carried out typically in setting down “umbrella provisions”, like objectives, or principles. Striking example is the WTO agreement, which refers to the sustainable development in its preamble.<sup>10</sup> This formulation is rather restrictive, since the principle of sustainable development and the environmental protection are linked to the in “respective needs and concerns at different levels of economic development” of the Member States, in other words, the integration of the

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<sup>10</sup> “[W]hile allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development [...]”, Agreement Establishing the World Trade Organization, Preamble, para. 1.

environmental concerns can be achieved only gradually within the WTO.<sup>11</sup> This restrictive formulation makes explicit the compromise of the WTO Members on resolving the inherent policy conflict in favour of the trade liberalisation, i.e. the environmental concerns are subordinated to the trade policy objectives.

*Ad (b):* The *vertical policy conflicts* are tangible if the contracting parties aspire to implement domestic environmental policy goals unilaterally, which are incompatible with the trade policy objectives of the foregoing agreement. The trade agreements can address these conflicts in several ways, the conventional method is to apply exception clauses allowing the contracting parties to justify domestic trade measures, eg. trade restrictions, import bans on the ground of the environmental protection. The GATT Article XX demonstrates a typical example of the exception clause, which provides more options to justification of environmental related domestic measures, namely measures necessary to protect human, animal or plant life or health (paragraph b) of GATT article XX); measures relating to the conservation of exhaustible natural resources (paragraph b) of GATT article XX); or indirectly the GATT exception to measures necessary to protect public morals (paragraph b) of GATT article XX) can be also relevant from the perspective of domestic environmental objectives.<sup>12</sup> The general exception clause turns up with the similar scope in the GATS as well, and more additional provisions governing the environmental related domestic trade measures are laid down in specific WTO agreements (TRIPs, Agreement on Agriculture, SPS Agreement, SCM Agreement).

Finally it is worth mentioning that not only the conventional trade measures can have an impact on the international trade, but all domestic environmental technical regulations applied to the import products. Therefore, trade agreements should pay attention also to technical barriers to trade in order to resolve vertical policy conflicts arising from the application of technical norms, eg. environmental standards and other specific regulations.<sup>13</sup>

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<sup>11</sup> For this reason it can be said that the WTO preamble is underpinned directly by the concept of the Environmental Kuznets Curve. For critics on the Kuznets model, see especially: Stern, David I. "The Rise and Fall of the Environmental Kuznets Curve" *World Development* 2004/8. 1419-1439. As a result of that, the WTO agreement includes only the "weak sustainability concerns", see: Tisdell, Clem "Globalisation and sustainability: environmental Kuznets curve and the WTO." *Ecological Economics* 2001/39. 185-196.

<sup>12</sup> Recent example to the linkage between morality and environmental concerns is the seal dispute between the EU, Canada and Norway. For substantial analysis, see Howse, Robert – Langille, Joanna: "Permitting Pluralism: The Seal Products Dispute and Why the WTO Should Accept Trade Restrictions Justified by Noninstrumental Moral Values." *Yale Journal of International Law*, Vol. 37, 2012, 368-432.

<sup>13</sup> WTO TBT Agreement.....

*Ad (c):* The provisions of the trade agreement can come into conflicts also with multilateral environmental agreements (*horizontal policy conflicts*). The potential incompatible environmental agreements principally attempt to achieve specific environmental goals and empower the contracting countries to apply restrictive trade related measures as well. The CITES can be highlighted as an example of such environmental agreement. It takes aim at protecting the endangered species in a way that the parties of the agreement have to put into operation import and export licensing mechanisms in order to control the international trade in animals and plants falling into the scope of CITES. Knowing the fact that there are currently more than twenty multilateral environmental agreements in force, which covers also restrictive trade related provisions, the chances of horizontal conflicts between trade and the environmental agreements are high. If neither the trade nor the environmental includes specific clauses solving the above conflicts, only general principles of legal interpretation could help to determine which agreement provision has priority on the other. For instance, the principle of *lex specialis derogat legi generali* theoretically would give preference to the specific provision, but the principle is practically inapplicable because it is hard to make difference between international law provisions on this ground, and it is also questionable who could differ between the provisions, because there is no general and compulsory jurisdiction in the international law which cover both the trade and the environmental agreements. The other standard principle, the *lex posterior derogat legi priori* would have also restricted applicability in this context. Even though the Vienna Convention on the Law of Treaties admits that as a supplementary means of treaty interpretation,<sup>14</sup> and it would solve the conflict in an apparently simple way, giving priority to the later agreement provisions, practically it is inoperable. Just because it would provide answer for the conflict on the ground of the time of conclusion, it would not address the underlying policy conflict, and would hardly applicable as general method because of the heterogeneity and specificity of the environmental agreements in questions. As a consequence, it would be reasonable to include specific clauses into the trade agreement itself which could declare its position to the multilateral environmental agreements.

As mentioned above, *procedural components* are also important from the perspective of a successful incorporation of environmental concerns into the trade agreements. Procedural components cover all mechanisms which can help to enforce the substantive provisions of the agreement. Without procedural

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<sup>14</sup> Article 32 of the Vienna Convention on the Law of Treaties of 23 May 1969

guarantees the environmental concerns in the trade agreement are no more than symbolic norms. There is a wide range of instruments, including specific early warning systems, sanction mechanisms, as well as varieties of reconciliation and dispute settlement methods. However, the key element among the procedural components is the way in which the disputes between the countries can be resolved and it is important which effect of the dispute settlement decisions could have on national level.

As a result, the possible regulatory frame of the trade agreement, in which environmental concerns are successfully incorporated, consists of three major substantive elements with the very purpose of resolving the inherent, vertical and horizontal tensions between trade and environmental policy goals. In order to ensure the binding character of these provisions, the substantive components are bolstered by procedural guarantees as well.

### **3 THE REGULATORY FRAME AND THE 'VALUES-DRIVEN' TRADE POLICY OF THE EU**

#### **3.1 Sensitivity of the EU to the 'Trade and Environment' issues**

For understanding the specific relation and sensitivity of the European Union to the 'trade and environment' issues, it is worth highlighting two major factors.

First, Europe has had always a stronger commitment to social and to environmental concerns, in comparison, *eg.* to the United States. More literally, the idea of Adam Smith in *Wealth of Nations* regarding the concept of the 'invisible hand' has never gained great importance in Europe,<sup>15</sup> and as a result, the European Union, and also the Governments of the Members States comparing with US are seen as charged not only to promote liberty, but also to reduce inequalities in the society. This attitude has led to far-reaching regulatory interventions also in the environmental area and explains the social context of the above 'sensitivity' of the EU in these issues (which is, thus, oversensitivity in the eyes of the USA).

Secondly, in contrast to other countries, the environmental awareness in the European Union has actually a strong basis in the founding treaties. The objectives and principles of the Trade Policy of the EU (Common Commercial Policy) before the Treaty of Lisbon were laid down in a homogeneous, consistent and relatively closed structure. This consistency was based primarily, as a leading

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<sup>15</sup> Krämer, L.: *The Roots of Divergence: A European Perspective*, In :*Green Giants? Environmental Policies of the United States and the European Union. American and Comparative Environmental Policy.* (Eds.: Vig and Faure), The MIT Press , 2004. p. 67.

principle, on the liberalization, which allowed the legal and political framework of the Common Commercial Policy to develop according to the own logic in line with its free trade commitments to the international economic law and the legal order of WTO. However, the expansion of the external policy horizon of the European Communities and the introduction of new policy areas led to conflicts of objectives more frequently, causing tensions between the CCP and other external policy areas. Later, thanks to the Treaty of Lisbon, the Common Commercial Policy has become an integral part of the Union's external action. The Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) have made it clear that the EU has to ensure consistency between the different areas of its external action and pursue and implement the general principles and objectives in the whole field of the EU external relations.

Consequently the CCP is founded on a two-level structure of values, principles and objectives which encompasses not only inner principles like as the liberalization but also the peripheral values and principles outside the trade policy including the sustainable development as well. Therefore, the Common Commercial Policy of the European Union can be regarded as a typical example of the 'values-driven' trade policy.

### **3.2 Legal basis of the EU's 'values-driven' trade policy**

In terms of Article 205 of Treaty on Functioning of the European Union (TFEU), the Union's action at the international stage – including the Common Commercial Policy – has to be based on principles, guided by the objectives and conducted in line with the general provisions of the Treaty.<sup>16</sup> In other words, the internal principles of Common Commercial Policy driven by the free trade concerns are not isolated anymore and on account of the concept of uniform foreign relations introduced by the Treaty of Lisbon, also the general principles and objectives must be taken into consideration. These general principles and objectives are laid down in Article 21 TEU,<sup>17</sup> which includes approaches *e.g.* to the human rights, solidarity, freedom and equitable (fair) trade, principles of international law, and the most important from the current perspective is that the sustainability and the protection of the environment are incorporated too. Article 21 paragraph 2 subparagraph f) emphasizes that the EU, working for a high degree of cooperation in international relations, helps develop international measures to

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<sup>16</sup> Article 205 TFEU: "The Union's action on the international scene, pursuant to this Part, shall be guided by the principles, pursue the objectives and be conducted in accordance with the general provisions laid down in Chapter 1 of Title V of the Treaty on European Union."

<sup>17</sup> See commentary for the principles: Grabitz, E. – Hilf, M. – Nettesheim, M.: *Das Recht der Europäischen Union*. C.H. Beck, München, 2011. (via Beck-Online), Art. 21 EUV side-note 1.



preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development.

This language of the principle does not explain the extent of the term “sustainable development”, but it is clear that the sustainable development in this formulation puts the emphasis on the environmental aspects. In this regard it should be highlighted the importance of the ambitious sustainable development strategy of the EU which was launched by the Member States at the Gothenburg Summit in 2001. The strategy was complementary to the Lisbon Strategy of economic and social renewal, adding a new, environmental dimension to that. The strategy proposed policy measures to overcome several unsustainable trends and set up a so called new approach to policy-making which attempted to effectuate that the environmental, economic and social policies of EU mutually reinforced each other. In order to achieve this purpose the European Commission was obliged to submit new policy proposals to impact assessment.<sup>18</sup> The European Council renewed the sustainable development strategy in 2005 which set out main objectives and actions for priority – mainly environmental – areas.<sup>19</sup> Besides in 2009, in the same year when the Treaty of Lisbon entered into force, the European Commission adopted a review of the EU’s sustainable strategy and confirmed that sustainable development remains a fundamental objective of the European Union under the Lisbon Treaty, but a number of unsustainable trends required urgent actions. In this regard, the review emphasized the need to additional efforts in the field of climate change policy, energy policy and biodiversity.

The term “international measures” is questionable because it can be interpreted in two ways. Its first reading could be that the “international measures” encompasses only cooperative, *i.e.* bi- or multilateral instruments which are suitable for ensuring the sustainable development. Although the Article refers to the “a high degree of cooperation in all fields of international relations”, this interpretation would quite restrict the scope of Union’s external action. Consequently, my view is that the term “international measures” could be interpreted in a wider sense, specifically it can cover beyond the bilateral and multilateral measures also the unilateral actions of the EU (*e.g.* restrictions, taxes for environmental purposes etc.).

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<sup>18</sup> A Sustainable Europe for a Better World: A European Union Strategy for Sustainable Development. (15.5.2001). COM(2001) 264 final

<sup>19</sup> Climate change and clean energy; sustainable transport, sustainable consumption & production; conservation and management of natural resources; public health; social inclusion; demography and migration; global poverty and sustainable development challenges. See Review of the Sustainable Development Strategy – A platform for action. (13.12.2005), COM (2005) 658 final.

Hypothetically speaking, it does not mean anyway that the article would provide reasons for justification of measures contravening international law, but its second interpretation would not disregard the possibility of taking unilateral actions in order to ensure sustainable development in advance.

Moreover, the sustainable development principle appears in another context too. According to subparagraph d) the EU foster the sustainable economic, social and environmental development of developing countries with the primary aim of eradicating poverty. However, this formulation differs from the sustainable development principle in subparagraph f). On the one hand, this conception of sustainable development seems to be much wider, because not only the environmental but the economic and social dimensions are referred too. Second, it focuses on the social aspects, to be more precise, the accent is put on the fight against poverty. Third, this quotation is applied only to the relations established with the development countries; consequently the scope of this objective is restricted to a specific area of the Union's external action. Despite these contexts the concept of the 'sustainable development' seems to be quite fluid, therefore the EU has relatively wide discretion to determine the concrete extent of the concept, which can be represented, eg. in the trade negotiation.

As the above analysis has shown, the Common Commercial Policy is generally subordinated to the values, principles and objectives of the European Union laid down in Article 21 TEU that includes environmental protection and sustainable development as well. Accordingly, this hierarchical structure determines the position of the European Union also to trade agreements.

### **3.3 'Environmental conscious trade agreement' – The regulatory frame from the EU perspective**

The previous chapter has outlined the possible regulatory frame in a neutral way and has left the floor open to the options for resolving the policy conflicts between trade and environment. If we try to re-examine the general frame in the light of the CCP, it reveals a very strict negotiating mandate, which can result in a 'environmental conscious trade agreement'. Due to the hierarchical structure of the CCP and its 'values-driven' character restricts the options regarding the substantive components. More concretely, the agreement concluded by the European Union has to resolve the *inherent policy conflict* in favour of the environmental concerns. In other terms, the principles of the free trade should not overrule the environmental principles and objectives, and it is also important to ensure that these principles and objectives have legal effects as well. Moreover, with respect to the *vertical policy conflicts*, the agreement has to make sure that on the one hand, unilateral trade related environmental measures can

be applied, but on the other hand, also the guaranties have be established which can prevent the contracting parties from introducing illicit discriminatory measures in this way. Finally, the agreement must take into consideration its relationship to the multilateral environmental agreements, in other words, the specific *horizontal conflicts* are to be addressed as well. From this perspective, the most important agreements are in which the EU (and/or its Member States) are participating,<sup>20</sup> and an 'environmental conscious' trade agreement would have to give priority in a likely collision to the provisions of the multilateral environmental agreement.

The question of the procedural components might leave more space, no specific obligation can be derived from the founding treaty provisions in this respect, but the EU is obviously interested in setting up smooth structures and providing legal certainty, which could be well underpinned by establishing a compulsory dispute settlement mechanism in the trade agreement.

## **4 ENVIRONMENTAL ASPECTS OF THE TTIP**

### **4.1 Background of the Transatlantic Trade Negotiations**

Within a Summit meeting held on 28 November 2011, Commission President Jose Manuel Barroso, EU President Herman Van Rompuy and US President Barack Obama established the High Level Working Group on Jobs and Growth (HLWG). The task of the Group was to identify policy measures, which are capable to increase trade and investment between the two major economic areas, the United States and the European Union.<sup>21</sup> The HLWG has issued an interim report in 2012, which referred to the conclusion of a bilateral trade agreement as the best policy option. The final report has been adopted on 13 February 2013, and

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<sup>20</sup> The most significant agreements are as follows: Montreal Protocol on Ozone Depleting Substances, Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Stockholm Convention on Persistent Organic Pollutants, Convention on International Trade in Endangered Species of Wild Fauna and Flora, Convention on Biological Diversity, Rotterdam Convention on Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticide

<sup>21</sup> The bilateral trade relationship is extremely important for both partners. The EU is first trading partner of the US (17.6% in trade in goods), and the US is the EU's second largest trading partner with 13.9% in trade in goods. Together the EU and the US account for approx. 50% of global GDP, 1/3 of total world trade. Bilateral trade volume of goods and services amounted to 702.6bn euro (2011), bilateral investment stock was 2.394 trillion euro (2011). See Commission Staff Working Document – Executive Summary of the Impact Assessment on the Future of the EU-US Trade Relations, SWD(12.3.2013) 69 final, p. 2.

the Free Trade Agreement was cordially announced by US President Obama and EU Commission President Barroso.

According to the report, the subject of the negotiations shall be the liberalisation of agricultural products, industrial goods, services, of public procurement and investments as well as a regimentation of intellectual property rights. Due to the low tariffs in most areas (according to the EU Commission an average of 4 %), tariff reduction will be far less significant for non-tariff barriers (NTB), which are typical for well-developed industrial nations.<sup>22</sup>

#### **4.2 Environmental concerns in the EU's negotiation mandate**

The European Commission has elaborated the draft mandate for the negotiation that was published in March 2013.<sup>23</sup> It was not surprising, that the draft and the later adopted final version have already contained references to 'Trade and Environment' issues. According to this document, the environmental concerns should be included into the text of the proposed agreement and it can be said that the three substantive components, as well as the procedural element are explicitly covered in varying detail by the EU mandate.

The first substantive component, the *principles and objectives* (and the *inherent policy conflict* of trade and environment) are affected in essentials by the Commission's draft. First, the Commission's mandate obviously shows that the structure of principles and objectives of the intended agreement should have clear reference to the environment. The preamble should express the commitment to sustainable development and the contribution of international trade to sustainable development "[...] in its economic, social and environmental dimensions, including economic development, full and productive employment and decent work for all as well as the protection and preservation of the environment and natural resources [...]"<sup>24</sup> However, the draft mandate does not clarify explicitly how the 'sustainable development' has to be interpreted. As it was indicated in the previous chapter, the 'sustainable development' is a concept easy to shape under the EU law, therefore the EU has a relatively wide margin to determine the context in which the sustainable development shall be interpreted. The limitation is the founding treaty provisions analysed above, namely, in sense

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<sup>22</sup> Recommendation for a Council Decision authorizing the opening of negotiations on a comprehensive trade and investment agreement, called the Transatlantic Trade and Investment Partnership, between the European Union and the United States of America. COM(12.3.2013) 136 final

<sup>23</sup> Ibid.

<sup>24</sup> See COM(12.3.2013) 136, paragraph 6.

of the Articles TEU 21 and TFEU 205 the sustainable development is a governing principle (“shall be guided by the principles...”),<sup>25</sup> consequently the principle shall have a priority over the trade related principles, or objectives of the negotiating treaty. This interpretation excluded the limited views of sustainable development, and for that reason, the scope of the principle in the TTIP might be quite wider than the principle is formulated e.g. in the WTO preamble.

Second, the mandate of the EU, similarly to the general principles, covers also the possible objectives of the treaty, highlighting explicitly the importance of the sustainable development. The proposal of the EU is that the agreement should recognise the sustainable development as an overarching objective, in other terms, the sustainable development should be a principle, as well as an objective of the agreement at the same time. In addition, the mandate establishes that the agreement should express the aim of the parties at promoting high level of protection for the environment as an objective. It is important to note in this regard, that the mandate emphasises a specific aspect of the high level of protection as well, i.e. the negotiated agreement should also recognise that the contracting parties will not encourage trade or foreign direct investment by lowering domestic environmental standards. In other words, the agreement should prevent the ‘race to the bottom’ effect, which could lead to sinking the level of protection in the contracting parties.

Third, the mandate of the EU requires a separate chapter, which focuses on the ‘Trade and Environment’ issues. The mandate is not clear enough, it refers only general statements, which are in line with the proposed principles and objectives, and therefore, the substantial content of this chapter is questionable. The mandate stresses only that the separate chapter of ‘Trade and sustainable development’ will include commitments by both Parties in terms of the trade and sustainable development.

The position of the *domestic measures* is stressed by the mandate as well (*vertical policy conflict*). First, it has to be laid down at the level of the principles in the proposed agreement that the parties are entitled to take any measures necessary to achieve legitimate public policy objectives that they deem appropriate. This sort of unilateral measure should include also the measures based on environmental concerns.<sup>26</sup>

Second, the mandate refers also to specific measures. With respect to that, among the market access rules, the mandate refers to the general exceptions, noting that the agreement should contain a general exception clause based on

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<sup>25</sup> See TFEU Article 205 as cited above

<sup>26</sup> COM(12.3.2013) 136, paragraph 6.

Articles XX and XXI GATT and Articles XIV and XIVbis GATS. Moreover, In context with the non-tariff barriers, the agreement should reflect also on the specificity of Sanitary and phytosanitary measures (SPS). Due to the mandate, the negotiations shall follow the former negotiating directives of the EU on the SPS measures.<sup>27</sup> In terms of that, the Parties shall establish provisions that build upon the WTO SPS Agreement and on the provisions of the existing veterinary agreement, introduce disciplines as regards plant health and set up a bilateral forum for improved dialogue and cooperation on SPS issues. Moreover the chapter on the SPS measures should be based on “[...] the key principles of the WTO SPS Agreement, including the requirement that each side’s SPS measures be based on science and on international standards or scientific risk assessments, applied only to the extent necessary to protect human, animal, or plant life or health, and developed in a transparent manner, without undue delay [...]”<sup>28</sup> In addition to that, the proposed agreement should also touches upon the technical regulations, which is also an important regulatory area from environmental perspective. In line with the WTO Agreement on Technical Barriers to Trade (TBT), the EU’s mandate foresees also provisions in this regard. The objectives of these provisions would be to generate greater openness, transparency and convergence in regulatory approaches and requirements and related standards-development processes, as well as, inter alia, to reduce burdensome testing and certification requirements, promote confidence in our respective conformity assessment bodies, and enhance cooperation on conformity assessment and standardization issues globally.<sup>29</sup>

It can be noted, that the mandate does not highlight only the possible restrictive measures of the contracting parties. Among the principles, it stresses that consideration shall be given to measures to facilitate and promote trade in environmentally friendly and resource-efficient goods, services and technologies, including through green public procurement and to support informed purchasing choices by consumers.

Probably the mandate made the least concrete reference to the possible conflict with the multilateral environmental agreements (*horizontal policy conflicts*). The most relevant in this context is that the agreement will also include provisions to promote adherence to and effective implementation of internationally agreed standards and agreements in the labour and environmental domain as a

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<sup>27</sup> Adopted by the Council on 20 February 1995, see Council Doc. 4976/95.

<sup>28</sup> See COM(12.3.2013) 136, paragraph 18.

<sup>29</sup> Ibid.

necessary condition for sustainable development,<sup>30</sup> and the importance of implementation and enforcement of domestic legislation on labour and environment should be stressed as well. It should also include provisions in support of internationally recognised standards of corporate social responsibility, as well as of the conservation, sustainable management and promotion of trade in legally obtained and sustainable natural resources, such as timber, wildlife or fisheries' resources.

As for the *procedural components*, the proposed institutional provisions of the TTIP can be highlighted as well. The proposed agreement will set up an institutional structure to ensure an effective follow up of the commitments under the agreement, as well as to promote the progressive achievement of compatibility of regulatory regimes, including the provisions regarding the environmental concerns. Besides, the mandate intends to set up a dispute settlement system, and also a problem-solving mechanism such as a flexible mediation, but the details of the objectives in this respect are not known yet. Although only in a short paragraph, but the mandate emphasise also the importance of the public participation. Accordingly the intended agreement will foresee the monitoring of the implementation of the provisions on sustainable development and social policy objectives through a mechanism including civil society participation.<sup>31</sup>

## **5 CONCLUDING REMARKS**

As the previous analysis has showed the role and position of the European Union to the 'Trade and Environment' debate, comparing with the US stance, represents a very strong commitment to the real inclusion of environmental concerns into the legal framework of the world trade. It has the consequence observing from the perspective of the ongoing negotiation on a transatlantic free trade and investment partnership agreement that successful compromise can be reached only if the striking divergence between the positions of the parties can be reconciled. However it is hard to pave the way to a mutually acceptable agreement not only because of the broad differences in the positions of the parties, but also because of their specific interest. At the current stage of the negotiations it is hardly possible to foresee, which compromise could be found regarding the disputed issues, in which the EU has expressed crucial interest in the last two decades (from the past e.g. GMOs, hormone treated beef and pork,

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<sup>30</sup> See COM(12.3.2013) 136, paragraph 25.

<sup>31</sup> See COM(12.3.2013) 136, paragraph 24.

chlorine-sterilized chicken, or quite recent disagreements on the so called 'fracking' shale gas reserves).

Therefore the role of the environment can play an important role during the negotiations, and it is not an exaggeration that due to the strong preferences of the European Union, it will be the real stakes at forming the compromise between the contracting parties. It is to say however that technically, the reconciliation of the above positions is not required. In other words, an agreement could be negotiated without real inclusion of 'bridges' between the trade and environmental concerns. But seeing the other side of the coin, it is evident that the chance of the ratification of such a treaty would be precious little. The specificity of the EU's position to the 'Trade and Environment' issues has its roots not only in the EU law which was examined above, but also in a kind of European sensitivity to environmental concerns. Therefore an agreement without the real inclusions would be unacceptable in Europe, consequently only an 'environmentally conscious trade agreement' has practically a chance to be accepted in the EU and its Member States.