

THE ROLE OF THE EU IN THE 'TRADE AND ENVIRONMENT' DEBATE – TRANSATLANTIC DIVERGENCE?

Balazs Horvathy

HAS CSS Institute for Legal Studies (Budapest, Hungary)

Abstract: The paper examines how the EU shapes the 'Trade and Environment' debate and makes efforts to include environmental issues in the international trade law. The EU has been a principal '*demandeur*' of environmental policy in trade discussions, and recently, the EU's main objective is to set up a multilateral legal framework which promotes the liberalization, but includes minimum environmental standards and enables the Members to restrict imports which do not meet those requirements. The EU's efforts led to numerous conflicts within the WTO which can be interpreted at least in two ways. First, the inherent conflict can be understood in terms of the policy behind the regulation, therefore it is an 'ideological conflict' between the free trade concept and the environmental thinking. Second, it is also a typical conflict of rules and appears in contradictions between the WTO law and the EU environmental measures. The paper shows that there is actually significant divergence regarding these conflicts between the position of the EU as well as US and examines these questions in the case of the ongoing negotiations on a transatlantic free trade and investment partnership agreement.

Key words: Trade and Environment, International Trade Law, EU Common Commercial Policy, Transatlantic Free Trade and Investment Partnership

1 INTRODUCTION

Since the beginning of the end of the 80s, the 'Trade and Environment' debate¹ is in centre of attention of the world trade lawyers. The importance of the subject can be explained partly by the fact that the two areas represent an 'ideological conflict' between the free trade concept and the environmental thinking, which underpin the policy behind the international regulation. In this context, two facts regarding the relationship of the trade to the environment should be taken into consideration. First, a globalizing economic system increases general incentives for engaging in international trade.² The growth-oriented policies are leading without doubt to environmental impacts in terms of conventional pollution, as well as in overbuilding, forest and species depletion etc. In other words, the international trade law, which are representing within the World Trade Organization (WTO) 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 behavior of others,³ 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'⁴ of the developed nations. Both facts are major issue also today and are inherent elements of the debate as well.

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. Besides it is notably that the EU's focus is put not separately on the environmental aspects, but it attempts to

¹ This paper was supported by the János Bolyai Research Scholarship of the Hungarian Academy of Sciences. See for 'Trade and Environment' debate, Araya, M. – Figueres, J.M. – Salazar-Xirinachs, J.M. Trade and Environment in the World Trade Organization, 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, p. 18.

² Dillon, S. International Trade and Economic Law and the European Union, p. 120

³ Ibid.

⁴ Dagne, T. W. The Debate on Environmentally Motivated Unilateral Trade Measures in the World Trade Organization: The Way Forward, p. 441.

include these interests in conformity with other societal concerns, like the social policy or human rights. It is obvious that in contrast to the stance of the European Union, the WTO is based on a simpler quality nowadays, which is reflecting only on the economic and trade policy concerns and its mainstream components, e.g. trade liberalization.

This paper gives a short overview of the EU position in this debate (Chapter 2), and the question is also put into a recent context, namely the negotiation on the Transatlantic Free Trade and Investment Partnership with the United States (Chapter 3). The paper is closed with the concluding remarks (Chapter 4).

2 EU'S POSITION IN THE TRADE AND ENVIRONMENT DEBATE

In Europe the active environmental protection began in the 1960s, but the Rome Treaty establishing the European Economic Community (EEC) of 1957 did not contain any explicit provision to the Community's competence in this policy field. Although thanks to the wide interpretation of the European Court of Justice, the internal market competences helped to lay down also environmental measures (e.g. product related provisions); at international level the EEC had no complete competence to act. It has responsibilities for commercial matters, but exact extent and nature of environmental competence were constantly disputed by the Member States.⁵ Contrary to that, from the 1970s However, regional environmental conventions in Europe provided for EEC signature gradually more. At a global level, the first important convention to provide for the EEC's accession was the 1979 Convention on Long-range Transboundary Air Pollution, and EEC had asked to have a clause inserted into the convention according to which "regional economic integration organizations" could also accede to it.⁶ After that, In the 1980s the EEC is an active participant of the environmental negotiations at global level. Striking examples are the amendment to the CITES and the Montreal Protocol. The latter is expressly notable, because that was the first international environmental negotiation, in which the EEC and the US confronted each other. The compromise on the protocol showed the success of the EEC which found a common language for all members of the Community. The joint EEC position primarily established the protocol in which the United States did not fully impose its position, but had to accept considerable concessions.⁷ The obvious conclusion of this event was that the negotiating positions of the Members States were essentially improved by the fact that they could act together. In the 1990 there was no small wonder that EEC intensively participated in the Uruguay Round and attempted at influencing the Trade and Environment debate. During these negotiations the priority of the EU was the possible reconciliation of the world trade law with the multilateral environmental agreements, containing various trade measures, import and export bans, licensing procedures etc. (e.g. CITES). Later, within the current Doha negotiations the EU, as a main objective, is trying to globalize the environmental standards through particular international agreements as well as its broader effort is to make more 'green' the international trade regime with 'creative' interpretation of the existing trade rules, and with inclusion of new, specific trade rules with environmental relevancy.

At least two factors can be emphasized which are helping to easily understand the exceptional stance of the European Union to the 'Trade and Environment' issues. First, Europe has had always a stronger commitment to social and to environmental concerns, in comparison, eg. to the United State. As commentators highlight 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.⁸ In the European Union, Governments – comparing with US – are seen as charged not only to promote liberty, but also to reduce inequalities in society. This attitude has led to far-reaching interventions also in the environmental area.

Secondly, in contrast to other countries, the environmental awareness in the European Union has 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 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

⁵ Krämer, L. *The Roots of Divergence: A European Perspective*, p. 57.

⁶ Krämer, L., op. cit. p. 58.

⁷ Ibid.

⁸ Krämer, L., op. cit. p. 67.

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.⁹

Consequently the CCP is founded on a two-level structure of principles and objectives which encompasses not only inner principles like as the liberalization but also the peripheral principles outside the trade policy including the sustainable development as well. In terms of Article 205 TFEU, the Union's action on 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.¹⁰ In other words, the internal principles of Common Commercial Policy driven by the free trade concerns are not isolated anymore and as a result 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,¹¹ 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 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.¹² The European Council renewed the sustainable development strategy in 2005 which set out main objectives and actions for priority – mainly environmental – areas.¹³ 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

⁹ Horvathy, B. Sustainable Development and Common Commercial Policy, p. 338

¹⁰ 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.”

¹¹ See commentary for the principles: Grabitz, E. – Hilf, M. – Nettesheim, M. Das Recht der Europäischen Union, Art. 21 EUV side-note 1.

¹² A Sustainable Europe for a Better World: A European Union Strategy for Sustainable Development. (15.5.2001). COM(2001) 264 final

¹³ 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.

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.). 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 also the economic and social dimensions are referred. 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.

3 ENVIRONMENTAL ASPECTS OF THE NEGOTIATION ON TRANSATLANTIC FREE TRADE AND INVESTMENT AGREEMENT

3.1 Background of the Transatlantic Trade Negotiations

Commission President Jose Manuel Barroso, EU President Herman Van Rompuy and US President Barack Obama within a Summit meeting held on 28 November 2011, 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.¹⁴ 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. The Free Trade Agreement was cordially announced by US President Obama and EU Commission President Barroso.

Following the final report of the HLWG was recommended to open negotiations for a Free Trade Agreement of the EU with the United States. According to the report, the subject of the negotiations shall be the liberalization 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.¹⁵

3.2 Environmental concerns in the EU's negotiation mandate

The European Commission has elaborated the draft mandate for the negotiation which was published in March 2013.¹⁶ The draft and the later adopted final version have already contained references to 'Trade and Environment' issues. According to these documents, the environmental concerns should be included into the text of the proposed agreement in the following four manners.

¹⁴ 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.

¹⁵ 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

¹⁶ Ibid.

The principle structure of the agreement and the objectives (1) should have clear reference to the environment. First, this part of the agreement (eg. Its 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 [...]”.¹⁷ The interpretation of the ‘sustainable development’ can be underpinned at least in two ways. First, the EU mandate can be regarded as a reference to the preamble of the WTO agreement. The other – more plausible – option is that we interpret this reference in context with the EU law, which was explained above. Besides, also at the level of the principle the proposed agreement has to be laid down 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.¹⁸

Similarly to the general principles, the mandate of the EU covers also the possible objectives of the treaty, highlighting explicitly the importance of the sustainable development. In this regard the proposition of the EU is that the agreement should recognize the sustainable development as an overarching objective, as well as the aim of the parties at promoting high levels of protection for the environment. In this regard, the mandate emphasizes a specific objective as well. In terms of that the Agreement should also recognize that the 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.

Moreover the mandate of the EU requires a separate chapter which focuses on the ‘Trade and Environment’ issues. In this regard the mandate is not clear enough, it refers only general statements which are in line with the proposed principles and objectives, but the material content of this chapter is questionable. The mandate stresses only that the separate chapter of ‘Trade and sustainable development’ (2) will include commitments by both Parties in terms of the trade and sustainable development. Consideration will 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. Besides the Agreement will also include provisions to promote adherence to and effective implementation of internationally agreed standards and agreements in the labor and environmental domain as a necessary condition for sustainable development,¹⁹ and the importance of implementation and enforcement of domestic legislation on labor and environment should be stressed as well. It should also include provisions in support of internationally recognized 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. The Agreement will foresee the monitoring of the implementation of these provisions through a mechanism including civil society participation, as well as one to address any disputes.

The third categories of the projected references are those which are linked to the substantial provisions of the negotiated agreement (3). With respect to that the mandate refers, among the market access rules, to the general exceptions, noting that the agreement should a general exception clause based on Articles XX and XXI GATT and Articles XIV and XIVbis GATS. In context with the non-tariff barriers, the agreement should reflect also on the specificity of Sanitary and phytosanitary measures (SPS). According to the mandate, on SPS measures, the negotiations shall follow the former negotiating directives of the EU.²⁰ 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,

¹⁷ See COM(12.3.2013) 136, paragraph 6.

¹⁸ COM(12.3.2013) 136, paragraph 6.

¹⁹ See COM(12.3.2013) 136, paragraph 25.

²⁰ Adopted by the Council on 20 February 1995, see Council Doc. 4976/95.

and developed in a transparent manner, without undue delay [...].”²¹ 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.²²

Finally the proposed institutional provisions (4) of the free trade and investment agreement can be highlighted as well. The 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 are not known yet.

4 CONCLUDING REMARKS – THE NECESSITY OF CONVERGENCE?

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. From the perspective of the ongoing negotiation on a transatlantic free trade and investment partnership agreement, it means 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 big 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, chlorine-sterilized chicken, or quite recent disagreements on the so called 'fracking' shale gas reserves).

But is the reconciliation of these positions really required? On the one hand, technically, it is not, in other terms an agreement could be concluded without real inclusion of 'bridges' between the trade and environmental concerns. On the other hand, 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 politically unacceptable in Europe. Over this, the question can be raised finally, what kind of compromise could be regarded as a real solution, which can bring the concerns of trade as well as of environment together. Essentially, four basic concerns could be highlighted, which are pivotal elements of an 'environmentally conscious' trade agreement.

First, the agreement set down the most important, environmentally relevant principles and objectives and makes clear the relationship between these and the principles of the free trade. It is important to ensure that these principles and objectives have legal effects as well (eg. as tools of the interpretation in the dispute settlements etc.), and that the principles of the free trade should not overrule the environmental principles and objectives. The principle structure of the EU funding treaties furnishes a good instance of that solution, when introducing a clear hierarchy between the environmental concerns, as the general principle of the EU's external activities, and the free trade and liberalization, as principles of the Common Commercial Policy. The negation mandate of the European Union is a good base towards this compromise, but at this time, the details in this regard are not clear.

Second, the agreement should cover also substantive provisions, which enables the parties to introduce measures with the intention of realize environmental objectives. The EU's mandate – as it was explained above – refers to these possibilities in the market access rules, and regarding the

²¹ See COM(12.3.2013) 136, paragraph 18.

²² Ibid.

SPS and TBT matters. The real question is whether also the guaranties could be established which can prevent the parties from introducing illicit discriminatory measures in this way.

Third, essential element of such an agreement is also a dispute resolution system, which is able to effectively reconcile the disagreements of the contracting parties. In this regard the main point is that the proposed the dispute resolution procedure should be applied to the 'Trade and Sustainable Development' chapter. In other terms the agreement has to express clearly that the same implementation requirements are to be applied to this chapter as for all other content of the agreement. The EU mandate touches upon the question of the dispute resolution but it is silent on its possible extent.

Fourth, a trade agreement which takes into consideration the environmental interest should make clear its relationship to the multilateral environmental agreements. One option could be that the most important relevant agreements previously concluded by the EU²³ are to be listed explicitly in the text agreement. This concern is totally in compliance with the EU commitments to these issues, since mentioned before, the EU has intended to make provision regarding the multilateral environmental agreements already in the course of the Uruguay round.

Bibliography:

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

ARAYA, M. and others: 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.

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

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. 427

DILLON, S.: International Trade and Economic Law and the European Union, Hart Publishing Oxford and Portland, Oregon, 2002.

GRABITZ, E. and others: Das Recht der Europäischen Union. C.H. Beck, München, 2011. (via Beck-Online)

HORVATHY, B.: Sustainable Development and Common Commercial Policy, Acta Juridica Hungarica, LIII., 2012/4. p. 334.

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.

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

Review of the Sustainable Development Strategy – A platform for action. (13.12.2005), COM (2005) 658 final

SANTARIUS, T. and others: Balancing Trade and Environment: An Ecological Reform of the WTO as a Challenge in Sustainable Global Governance. Wuppertal Institute, 2004.

Contact information:

Dr. Balazs Horvathy PhD

horvathy.balazs@tk.mta.hu

HAS CSS Institute for Legal Studies (Budapest, Hungary)

Orszaghaz utca 30.

H-1014 Budapest

Hungary

²³ 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