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External Developments Influencing Dutch Trade and Investment Policy Making

Study for the Policy and Operations Evaluation Department (IOB), Netherlands Ministry of Foreign Affairs

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List of Acronyms and Abbreviations

ACP	African, Caribbean and Pacific States
AI	Artificial Intelligence
AIIB	Asian Infrastructure Investment Bank
ASEAN	Association of Southeast Asian Nations
BEUC	Bureau Européen des Unions de Consommateurs
BIT	Bilateral Investment Treaty
BRICS	Brazil, Russia, India, China, South Africa
CAP	Common Agricultural Policy
CARIFORUM	Caribbean Forum
CEIEB	Collective of European Importers of Electric Bicycles
CEMAC	Communauté Économique et Monétaire de l'Afrique Centrale
CETA	Comprehensive Economic and Trade Agreement
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
CO_2	Carbon Dioxide
COLIPED	Association of the European Two-Wheeler Parts and Accessories Industry
COMESA	Common Market for Eastern and Southern Africa
CONEBI	Confederation of the European Bicycle Industry
COVID-19	Coronavirus disease 2019
CSF	Civil Society Forum
CSM	Civil Society Mechanism
CSO	Civil Society Organisation
CSR	Corporate Social Responsibility
CTEO	Chief Trade Enforcement Officer
DAG	Domestic Advisory Groups
DDA/DDR	Doha Development Agenda/Doha Development Round
DET	Differentiated Export Tax
DG	Directorate-General
DG DEVCO	Directorate-General for International Cooperation and Development
DG EMPL	Directorate-General for Employment, Social Affairs & Inclusion
DG ENV	Directorate-General for the Environment
DG EXPO	Directorate-General for External Policies of the Union
DG TAXUD	Directorate-General for Taxation and Customs Union
DG TRADE	Directorate-General for Trade
DSB	Dispute Settlement Body
DSM	Dispute Settlement Mechanism
DSU	Dispute Settlement Understanding
EAC	East African Community
EBA	Everything but Arms
EBB	European Biodiesel Board
EBMA	European Bicycle Manufacturers Association
EC	European Commission
ECF	European Cyclists' Federation
ECT	Energy Charter Treaty
ECOWAS	Economic Community of West African States
EESC	European Economic and Social Council
EGC	General Court of the EU (informally known as European General Court)
EP	European Parliament
EPA	Economic Partnership Agreement

ESA	Eastern and Southern Africa
ESF	European Service Forum
ETUC	European Trade Union Association
EU	European Union
EUVIPA	EU-Viet Nam Investment Protection Agreement
FAME	Fatty Acid Methyl Ester (biodiesel type)
FDI	Foreign Direct Investment
FEDIOL	European Vegetable Oil and Proteinmeal Industry
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GCS	Global Coalition of Services
GDP	Gross Domestic Product
GDPR	General Data Protection Regulation
GSP	Generalised System of Preferences
GVC	Global Value Chains
HVO	Hydrogenated Vegetable Oil (biodiesel type)
ICS	Investment Court System
ICSID	International Centre for Settlement of Investment Disputes
IGAD	Inter-Governmental Authority on Development
ILO	International Labour Organisation
INTA	Committee on International Trade (EP)
IOB	Policy and Operations Evaluation Department
IOC	Indian Ocean Commission
ISDS	Investor to State Dispute Settlement
ITA	International Technology Agreement
ITUC	International Trade Union Confederation
JEEPA	Japan-EU Economic Partnership Agreement
LCIA	London Court of International Arbitration
LDR	Lesser Duty Rule
MAI	Multilateral Agreement on Investment
MARPOL	International Convention for the Prevention of Pollution from Ships
MEA	Multilateral Environmental Agreement
MEP	Member of European Parliament
MES	Market Economy Status
MPIA	Multi-Party Interim Appeal Arrangement
mRNA	messenger RNA
MS	Member States (EU)
NAMA	Non-Agricultural Market Access
NAFTA	North America Free Trade Agreement
NGO	Non-Governmental Organisation
OACPS	Organisation of African, Caribbean and Pacific States
OECD	Organisation for Economic Co-operation and Development
PCA	Permanent Court of Arbitration
RBC	Responsible Business Conduct
RBC WG	Responsible Business Conduct Working Group
RCEP	Regional Comprehensive Economic Partnership
R&D	Research and Development
RTA	Regional Trade Agreement
SACU	Southern African Customs Union
SADC	Southern African Development Community
SARS-CoV-2	Severe Acute Respiratory Syndrome Coronavirus 2
SC	Sub-Committee

SD	Sustainable Development
SDG	Sustainable Development Goal
SIA	Sustainability Impact Assessment
SMEs	Small and Medium-Sized Enterprises
SPE	Special Purpose Entities
STABEX	Système de Stabilisation des Recettes d'Exportation
SYSMIN	Système d'Aide aux Produits Miniers
TDI	Trade Defence Instrument
TFEU	Treaty on the Functioning of the European Union
TiSA	Trade in Services Agreement
TiVA	Trade in Value-added database
TRIMs	Agreement on Trade-Related Investment Measures
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
TSD	Trade and Sustainable Development
TTIP	Transatlantic Trade and Investment Partnership
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNECA	United Nations Economic Commission for Africa
USA	United States of America
USMCA	United States–Mexico–Canada Agreement
USSR	Union of Soviet Socialist Republics
WHO	World Health Organization
WTO	World Trade Organization

Executive Summary

This study is part of a broader evaluation of Dutch trade and investment policy between 2013 and 2019. The evaluation aims to identify on which policy issues the Netherlands has focused and why, as well as the extent to which Dutch policy goals were realised. This study feeds into this evaluation by identifying the key external trends and factors that influenced Dutch trade and investment policy as well as its results during this time period. The study aims to answer the following research questions:

- What were the trends and developments in the field of trade and investment policy?
- Which economic trends and external factors in the field of trade and investments (indirectly) have (positively and/or negatively) affected the political and institutional context of trade and investment policy making at the EU and/or WTO level?
- Which economic trends and external factors outside the field of trade and investments (indirectly) also have (positively and/or negatively) affected the political and institutional context of trade and investment policy making at the EU and/or WTO level?
- Which external factors have influenced the Dutch efforts with respect to each of the five cases, either positively or negatively?

A wide range of trends, developments and factors influences trade and investment policy making, from socio-economic factors such as a changing demography, over geopolitical developments such as the rise of China or public debates such as those on inequality, to business and technological developments and environmental issues. Between 2013 and 2019 trade and investment policy was often a prominent issue, including debates on the Transatlantic Trade and Investment Partnership (TTIP), the erosion of the WTO, the environmental impact of the EU-Mercosur Free Trade Agreement or debates on investor-state dispute settlement mechanisms (ISDS) in investment agreements. Other developments had a strong impact on trade and investment policy, including the rise of China, the election of Trump, or the exit of the United Kingdom from the European Union.[1]

Likewise, trade and investment policy is shaped and influenced by a wide range of institutions, actors and stakeholders. These include the World Trade Organisation, the European Commission, having exclusive competence for the EU's trade policy, other international organisations such as UNCTAD and various regional organisations and economic blocs. It includes individual countries, and within these countries the business community, academia and research organisations as well as civil society. It is this complex interplay of institutions, actors, stakeholders and external trends, developments, factors that shapes and influences trade and investment policy.

Trade and investment policy is not a precisely defined policy area, clearly delineated from other policy areas. Rather, trade and investment policy increasingly overlaps with and relates to a number of policy areas, areas that traditionally would have been seen as unrelated. These include policy areas such as competition policy, environmental protection or labour standards. Also as a consequence of this broad scope, different stakeholders have different views and perspectives on what factors shape and influence trade and investment policy, and how far multilateral trade-related rules should extend to discipline government policies and allow trade measures to be taken. And furthermore, while specific issues within trade and investment policy might differ, they often have in common that similar factors shape them. For example, the increasing interest of civil society in trade and investment has an impact on trade and investment policy issues as diverse as the EU's Economic Partnership Agreements with Africa, sustainable development chapters in free trade agreements and investment protection.

[1] This wide range of trends, developments and factors is a key focus of this study. A comprehensive summary of key developments is also provided in Annex B.

Given the diversity of trade and investment policy issues this study focuses on five specific case studies. The selection aims to be both representative of the full range of trade and investment policy issues as well as being of relevance for Dutch trade and investment policy. The five issues are:

- **Economic Partnership Agreements** between the EU and African partner countries;
- The **Trade in Services Agreement** (TiSA);
- Sustainable development, in particular **sustainable development chapters in free trade agreements** between the EU and third countries;
- **Investment protection and investor duties**, in particular the change from *Investor to State Dispute Settlement* to an *Investment Court System* in newer free trade agreements of the EU, as well as the new Dutch template for Bilateral Investment Treaties and investor duties;
- **Trade defence instruments**, in particular covering developments to reform the mechanism, and focusing on the electric bicycle and the biodiesel cases of the EU.

Our case study on Economic Partnership Agreements (EPAs) between the EU and African partner countries highlights how an ambitious trade and development policy agenda fared, in the face of powerful countervailing forces and developments. The EU had set out to conclude comprehensive free trade agreements with all ACP-countries in sub-Saharan Africa (except Somalia) in the early 2000's, to address the WTO incompatibility of the trade arrangements under the Cotonou convention, and go beyond that by negotiating so-called WTO plus issues. However, twenty years later only a patchwork of trade agreements in goods has been achieved. EPAs have been concluded between the EU and the Southern African Development Community (SADC) and the Eastern and Southern Africa (ESA) country group. Otherwise negotiations have not succeeded, or have only resulted in interim EPAs with Cote d'Ivoire and Ghana.[2]

Decisive for this outcome was the simple fact that almost all countries already had preferential market access to the EU or did not need it, and thus had not much to gain by having to offer duty free market access to EU exports in an FTA. In the first group are all least-developed countries, enjoying preferential market access under the Everything but Arms (EBA) scheme. In the second group are countries dependent on commodity exports, such as Angola or Nigeria, exporting commodities that do not face any tariff barriers in the EU market. This left only a number of countries and regional blocs that are dependent on duty free market access to the EU, but are not least-developed, willing to negotiate under the pressure of losing the preferential treatment. These countries consequently are also those countries that negotiated and ratified an EPA for goods only, sometimes as the only country within a regional bloc. Whether or not EPA negotiations were successful can thus be explained by a simple calculation of economic costs and benefits.

This does not mean that other factors were not important. The negotiations and the outcome were shaped by various external trends and developments. There were contentious issues, and there were the interests and influences of various stakeholders. All of these had an impact. And yet, in the end, those countries for which an export sector was at stake decided to sign and ratify their EPA. And those countries for which little was at stake decided not to. Key issues that were contentious during the negotiations included the loss of tariff revenue and the impact of the EPAs on regional integration efforts. Key factors that shaped the negotiations included geopolitical developments, including the rising importance of China as a trade and investment partner for Africa, the revival of the African Continental Free Trade Area and industrial development strategies, opposition from civil society in both Europe and Africa, among others.

Our case study on the Trade in Services Agreement (TiSA) looks at the negotiations of a specific trade agreement among a selected group of WTO Members, of particular interest as it exclusively covers trade in services. The desire to negotiate TiSA emerged as the WTO negotiations on services under the GATS Agreement in the Doha round reached an impasse. A key difficulty for TiSA is that trade in services is more challenging to liberalise than trade in goods. Trade in services often requires proximity between suppliers and customers, and thus relies on modes of supply that require a physical presence of the supplier in the importing country (e.g. a subsidiary

[2] Cameroon and Kenya have also ratified the EPA, and enjoy market access under the market access regulation.

or through business travel and temporary labour movement). Even where trade in services can be conducted remotely (e.g. digital trade), services face a high level of regulation of domestic service markets, that is often highly sector-specific or raises controversial issues of privacy protection of consumers. Domestic regulations can also be discriminatory for foreign service providers or even close the market completely in certain service sectors.

Consequently, TiSA negotiations were complex, having to cover highly sector-and country specific regulations and a myriad of stakeholders, such as regulatory authorities or ministries with responsibility for specific service sector (e.g. health or education). TiSA negotiations involved an evolving group of countries, including in particular the EU, Australia and the US as main initiators, but excluding major emerging countries such as Brazil, China and India or Russia. This structure and the original intention to negotiate TiSA as a plurilateral agreement created challenges for possible future multilateralisation in the WTO under current rules. One reason is that application of the Most-Favoured Nation Principle in GATS would make negotiated new market access available to all WTO members, whether they participated in the negotiations or not, in a sense creating a free-rider problem. Another reason is the rule that making a plurilateral agreement a covered agreement under the WTO requires consensus among the whole WTO membership.

While TiSA is officially still under negotiation, the negotiations came to a halt in 2016. Apart from the issues above, negotiations faced several other contentious issues. Among these are, first, the trade-off between liberalising and binding market access and the right to regulate, with any bound national treatment commitments limiting countries' policy space to discriminate foreign service providers. Second, the question whether to use a positive or negative list approach to liberalisation, the former implying that TiSA only covers explicit commitments, and the latter implying that TiSA liberalises everything, unless explicitly excluded. In the end a hybrid approach similar to GATS was adopted, in which all market access commitments follow a positive list approach to covered sectors, while national treatment – the requirement not to discriminate between domestic and foreign providers – followed a negative list approach explicitly listing reservations. Third, the question whether and how TiSA should cover public services (e.g. education, health or audio-visual services). And fourth, how issues around cross-border data flows and in particular privacy rights of consumers should be treated.

Our case study on sustainable development chapters looks at a key element of recent free trade agreements between the EU and third countries. These so-called Trade and Sustainable Development (TSD) chapters are linked to the value-based EU trade policy agenda, ambitiously aiming to ensuring that liberalised trade goes hand in hand with higher labour and environmental standards based on international agreements. Among the first agreements with a dedicated TSD chapter was the EU-Korea free trade agreement. It was preceded by the EU Economic Partnership Agreement with the Caribbean Form (CARIFORUM), which already included provisions covering social and environmental issues as well as a mechanism for referring disputes on social issues to independent experts. Since then, TSD chapters have been included in EU trade agreements, including agreements with high income countries such as Canada or Japan, or middle income countries such as Mexico or Vietnam.

With TSD chapters having been negotiated and come into force, attention has shifted towards implementation, and on the effectiveness and enforceability of TSD chapters as well as their purpose as a tool for achieving non-trade objectives. These are also the issues faced by the multitude of multilateral agreements, including the ILO core labour standards, various multilateral environmental agreements, the OECD guidelines for multinational enterprises on responsible business conduct and the UN sustainable development goals. These agreements have been widely adopted, by a large number and often even a majority of countries. And yet, the most important issue remains the implementation by countries, and in some cases, whether these agreements are binding and enforceable and whether the removal of trade benefits under these FTAs could be used as leverage.

TSD chapters have emerged, and subsequently evolved, in response to several developments. The key developments include the influence of civil society, and in particular the anti-globalisation movement, and ensuing debates on the real and alleged negative impacts of trade on social, labour and environmental conditions. The increasingly global nature of environmental issues, in particular climate change, and shifting consumer preferences, were also important contributing factors. Furthermore, the business community had an important influence on TSD chapters, based on business' concerns about a level playing field with foreign competitors not subjected to the often more stringent labour and environmental standards in the EU.

Our case study on investment protection and investor duties focuses on proposals to shift from investor to state dispute settlement (ISDS) to an investment court system (ICS) in newer trade agreements or bilateral investment agreements (BITs). While traditionally the focus was on protecting foreign investors, increasingly there is also an emphasis on the duties of foreign investors in investment agreements of the EU. Investment protection (and more recently, investor duties) is typically enshrined in bilateral investment agreements (BITs), and sometimes in comprehensive trade agreements, in particular newer ones. Traditionally this entailed investor-to-state dispute settlement, with the ad hoc arbitration mechanism following different models, usually under the ICSID convention[3] and often specific to one of the more than 3000 BITs.

However, most ISDS mechanisms share a lot of similarities, including the ability of investors to directly challenge the host state's measures in arbitral proceedings outside the statutory domestic court system. These ad hoc arbitral tribunals have the power to provide binding decisions and award financial claims. Facing criticism and concerns about its opaque character, an investment court system (ICS) has been proposed by the EU as an alternative mechanism to ISDS in some FTAs. In this system, arbitral tribunals are replaced with a standing adjudicatory body, with a first instance tribunal and an appellate tribunal, and independent judges from the host country, the partner country and third countries. Criticism and concerns centred around the fragmentation of the ISDS mechanism, and the consequent inconsistency and unpredictability of arbitral decisions, the extensive interpretation of fair and equitable treatment of foreign investors based on precedents, and not on interpreting the agreements purpose and objectives, resulting in concerns. And especially strongly expressed in public debates, criticism and concerns focused on the often politically sensitive nature of disputes and how foreign investors can sidestep the domestic court system via arbitral tribunals , thereby potentially undermining the democratic legitimacy of policy and legal decisions of the host country and have a regulatory chill effect on future policy making.

These developments, and the specific criticisms and concerns were shaped and influenced by several key trends and developments. First, with the Lisbon Treaty the EU gained exclusive competence for negotiating investment agreements with third countries, thereby enabling an EU policy on investment protection and investor duties; though inclusion of ISDS or ICS still requires ratification by parliaments of member states. Secondly, events such as the 2007-08 financial crisis fostered a growing scepticism of globalisation, thereby fuelling criticism of the existing investment protection framework and raising demands for complementing investment protection with investor duties. In this regard the negotiations of the Transatlantic Trade and Investment Partnership (TTIP) with the US as well as the Comprehensive Economic and Trade Agreement (CETA) with Canada were catalytic in strengthening the opposition of civil society to including investment protection in trade agreements. Individual and prominent arbitration cases also played a role, including several cases in which EU countries were the subject of arbitration.

Lastly, our case study on trade defence instruments reviews the development of the EU's trade defence policy, including the recent 'EU TDI modernisation' and illustrated with two cases, on biodiesel and on electric bicycles. The current WTO framework permits WTO Members to adopt trade defence instruments (TDIs) to protect domestic industries against unfair trade practices by foreign exporters (anti-dumping and anti-subsidy/countervailing measures) or a sudden and unforeseen influx of foreign goods (safeguards). An absolute majority of measures adopted are meant to counter dumping practices or unfair subsidies. In comparison, safeguard measures against fair trade are rare because of the trade compensation that has to be offered.

Anti-dumping and anti-subsidy procedures typically follow a very similar path in the EU. The procedure is demand-driven, almost always starting with a complaint by an affected domestic industry. If supported by sufficient *prima facie* evidence, the European Commission (EC) will start an official investigation. A provisional or a definite measure may be imposed by the EU, and is then notified to the WTO. All measures are monitored by the EC. They can be challenged by affected countries, through the WTO dispute resolution mechanism, or by affected companies in EU courts. In the last decade the number of trade defence investigations launched by the EC has remained roughly constant, while the number of cases challenged in the General Court of the EU has significantly increased since 2012.

[3] The ICSID Convention is an international treaty that established the International Centre for Settlement of Investment Disputes, under the umbrella of the World Bank, as an arbitration tribunal.

While attempts to amend the EU trade defence system date back to 2008, a reform was implemented only in 2018. Some of these changes focused on technical aspects of TDI, including the elimination of the distinction between market economies and non-market economies for the purpose of calculating price distortions through unfair trade practices. Other changes focused on procedural aspects, shortening the timeframe for the imposition of provisional measures, or improving the transparency and predictability of the procedure. Changes also provided improved access to TDIs for SMEs and anchored environmental and social interests in the procedure.

Several factors shaped and influenced the reform, as well as specific cases such as the ones on biodiesel and electric bicycles. Among these are geopolitical developments and in particular the rise of China. Overcapacities in key Chinese export sectors such as steel, aluminium or cement and the role of state-owned companies in the Chinese economy, and thus the question whether China is a market or non-market economy, raised concerns about unfair trade practices impacting EU industries. Similarly, a US trade policy more focused on short-term national interest under Trump and unilateral safeguard measures on steel and aluminium exports from the EU as well as the blockade of appointments to the WTO appellate body (mostly related to alleged overreach of the Appellate Body in anti-dumping cases that the US had lost), also had an impact on EU trade defence reforms and policy.

These influences are also highlighted by two specific trade defence cases. The biodiesel case concerned alleged dumping by producers in Argentina and Indonesia, leading to the imposition of definite anti-dumping duties on imports, and challenges in EU courts as well as a case in the WTO dispute settlement mechanism. Key factors in this case where economic factors, related to the EU policy on renewable energy and EU support for biodiesel production. EU biodiesel producers were driving the case, while environmental and consumer NGOs showed only limited interest. The electric bicycle case centred around imports of electric bicycles from China, and alleged dumping and subsidies threatening the European bicycle industry. Anti-dumping and countervailing duties were imposed by the EU and are currently challenged in General Court of the EU. This case was and is shaped by the competing interests of EU producers and EU importers or distributors of bicycles. However, over time the latter also adapted their supply chains, sourcing increasingly from third countries other than China.

The study is rounded up with a discussion of the developments of 2020 and their implications for the years ahead. The year 2020, of course, was a historic year, with the COVID-19 pandemic having an outsized impact on almost all areas of life, including trade and investment policy. Among these were questions related to supply chain reliability, in particular with regards to medical supplies, and the impact of travel restrictions on economic sectors and cross-border trade and investment. COVID-19 strongly affected institutions such as the WTO or the EU, forcing them to react to the pandemic, and to adopt new priorities. Beyond COVID-19, other developments such as the election of Joe Biden in the US and the exit of the United Kingdom from the EU, exerted and will continue to exert their impact on trade and investment policy.

Chapter 1: Introduction

This study is part of a broader evaluation of Dutch trade and investment policy between 2013 and 2019. The evaluation aims to identify on which policy issues the Netherlands has focused and why, as well as the extent to which Dutch policy goals were realised. This study feeds into this evaluation by identifying the key external trends and factors that influenced Dutch trade and investment policy as well as its results during this time period. To this end five specific policy issues were selected, aiming to be both representative of the full range of trade and investment policy issues as well as being of relevance for Dutch trade and investment policy. These five policy issues are:

- **Economic Partnership Agreements** between the EU and African partner countries;
- The **Trade in Services Agreement** (TiSA);
- Sustainable development, in particular **sustainable development chapters in free trade agreements** between the EU and third countries;
- **Investment protection and investor duties**, in particular the change from *Investor to State Dispute Settlement* to the *Investment Court System* in newer free trade agreements, as well as the new Dutch template for Bilateral Investment Treaties and investor duties;
- Trade defence instruments, focusing on the **electric bicycle and the biodiesel cases**.

These five policy issues are analysed in separate case studies, answering the following research questions:

- What where the trends and developments in the field of trade and investment policy?
- Which economic trends and external factors in the field of trade and investments (indirectly) have (positively and/or negatively) affected the political and institutional context of trade and investment policy making at the EU and/or WTO level?
- Which economic trends and external factors outside the field of trade and investments (indirectly) also have (positively and/or negatively) affected the political and institutional context of trade and investment policy making at the EU and/or WTO level?
- Which external factors have influenced the Dutch efforts with respect to each of the five cases, either positively or negatively?

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An observer of trade and investment policy could hardly have felt bored in the last decade. She would have seen that with the Transatlantic Trade and Investment Partnership (TTIP) a proposed trade agreement has become an object of intense public debate. She would have watched transformational events unfold, from the slow erosion of the WTO, the rise of China over Brexit to trade wars between long-time partners. She would have followed heated debates and disputes, such as those on the environmental impact of the EU-Mercosur Free Trade Agreement, the tax evasion by multinational enterprises, the row over appointments of judges resulting in the (temporary) suspension of the WTO Appellate Body and the investor-state dispute settlement mechanism (ISDS) in investment agreements in the EU.

One thing is clear: Trade and investment policy is shaped and influenced by a wide range of factors and actors. Policymakers have to consider and balance competing and overlapping issues, from the impact of trade and investment on employment to the impact on climate change. Furthermore, they have to consider and balance a wide variety of stakeholders, from the business community over labour unions to civil society. And finally, amidst this complexity they have to advance domestic interests while facing international realities and forces.

Annex B provides an overview of the factors that shape and influence trade and investment policy, in general and with respect to the specific policy issues of the five case studies of this evaluation. Clearly, not only is this a wide

range of factors, this wide range is also interwoven in complex ways. Before discussing how this complex web of factors can be classified and structured, a few considerations are in order.

First, **trade and investment policy is not a precisely defined policy area**, clearly delineated from other policy areas. There are overlaps and interconnections with a number of policy areas that might traditionally be seen as unrelated. For example, competition policy or labour standards have traditionally been located outside the realm of trade and investment policy and the current multilateral, rule-based system embodied in the WTO. Yet, the increasingly global and politicised nature of competition , labour and environmental issues have drawn these policy areas into the field of trade and investment policy. As one consequence of this development, bilateral and regional trade agreements increasingly include provisions on competition policy and labour and environmental standards, often referring to existing international standards negotiated elsewhere. This is notwithstanding the different views among WTO Members whether such connections should be made and accommodated in new WTO-disciplines.

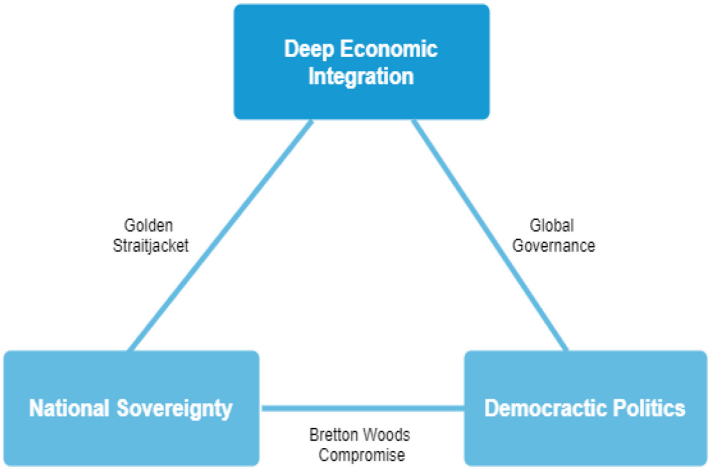
Second, **different stakeholders have different views and perspectives on what factors shape and influence the political economy of trade and investment policy**. The assessment of trade lawyers will differ from the assessment of economists, as will the assessments of the business community or NGOs and civil society, and varies between countries. Even the same factors and policy issues might be seen and weighted in different ways, with a lawyer having a different perspective on investment protection than a businessperson or civil society. Single issue advocates might miss unavoidable trade-offs with other trade and investment rules that governments have to make; and certainly so in weaker countries (e.g. balancing attracting FDI against providing direct access to ISDS for foreign investors)

Third, similar to zooming into a fractal, the **range and nature of factors does not fundamentally change as we zoom into specific policy issues**. For example, even an ostensibly narrow and technical policy issue such as trade defence instruments (TDI) to combat unfair trade practices can relate to broader issues such as environmental and social standards or the role of China as a non-market economy in the world trading system. It is also for this reason that five case studies on specific policy issues were selected.

The political dilemma of globalisation

The sheer number of factors that influence trade and investment policy poses a challenge for the evaluation. However, as diverse as these factors might seem, they share commonalities in how they shape and influence trade and investment policy. Typically policymakers have to address and balance conflicting domestic and international demands. For example, we might see that a trade agreement leads to gains in one economic sector, but to losses in another. Conflicts of this type – one policy objective against another or the short-term interest of one group or sector against another or national welfare – are not specific to trade and investment policy. Rather, they are a reality in almost all areas of policymaking.

Figure 1 The political trilemma of globalisation



Source: Rodrik (2011)

And yet, there is one specific conflict that is at the heart of trade and investment policy, differentiating it from other policy areas. Policymakers face the political trilemma of globalisation, the impossibility of simultaneously attaining and maintaining deep economic integration, national sovereignty and democratic politics. We can combine deep economic integration with democratic politics, but only if we sacrifice national sovereignty to a (democratic) global governance framework. We can also combine deep economic integration with national sovereignty, but in this case the nation state will be solely responsive to the

needs of deep economic integration, at the expense of democratic politics and akin to a golden straitjacket[4]. Similarly, national sovereignty can be compatible with democratic politics, but only if deep economic integration is sacrificed.[5]

Consider the following three examples. First, labour standards are a thorny issue in trade policy exactly because of the political trilemma of globalisation. A country might decide on its own labour standards, thereby attaining national sovereignty and democratic politics. However, with deep economic integration the country would have to implicitly accept the labour standards of her trade and investment partners, by virtue of granting market access. Similarly, we might have a global governance framework setting and enforcing global standards.[6] This, however, may limit national sovereignty.

Second, the political trilemma of globalisation is also relevant for investor-state protection and the question where international arbitration of disputes is conducted. While there is no global governance framework for investment, for the sake of the argument we can consider international arbitration to serve some of the functions of such a framework, at least from the perspective of the private investor. International arbitration follows the rules of the International Centre for Settlement of Investment Disputes (ICSID) or other institutions such as the United Nations Commission on International Trade Law (UNCITRAL) or the London Court of International Arbitration (LCIA). However, accepting investment arbitration and its rulings implies a transfer of national sovereignty. Furthermore, it has been argued that investment arbitration itself lacks democratic legitimation, as it enables foreign investors to file lawsuits against liberal democracies outside their own court systems.[7]

Lastly, the political trilemma has also been at the core of Brexit. While European integration goes along with democratic politics, unavoidably it also implies a loss of national sovereignty. Brexit could thus be seen as a preference for national sovereignty and democratic politics at the national level. However, with the EU–UK Trade and Cooperation Agreement implying some level of integration between the UK and the EU the trilemma will continue to stay one for the UK.

Looking back at 2013 to 2019

From the perspective of 2020, a tumultuous year by any account, it is easy to forget what our world looked like at the start of the evaluation period in 2013. By itself 2013 was not a remarkable year. Rather, it can be said that it was bookending two periods of upheaval: the period before 2013, a period characterised by the still ongoing recovery from the 2008 global financial crisis and the first culmination of the European debt crisis. And the period that was to come, after 2013, with major geopolitical changes, from Russia's annexation of the Crimea over the Brexit referendum to the US-China trade war.[8]

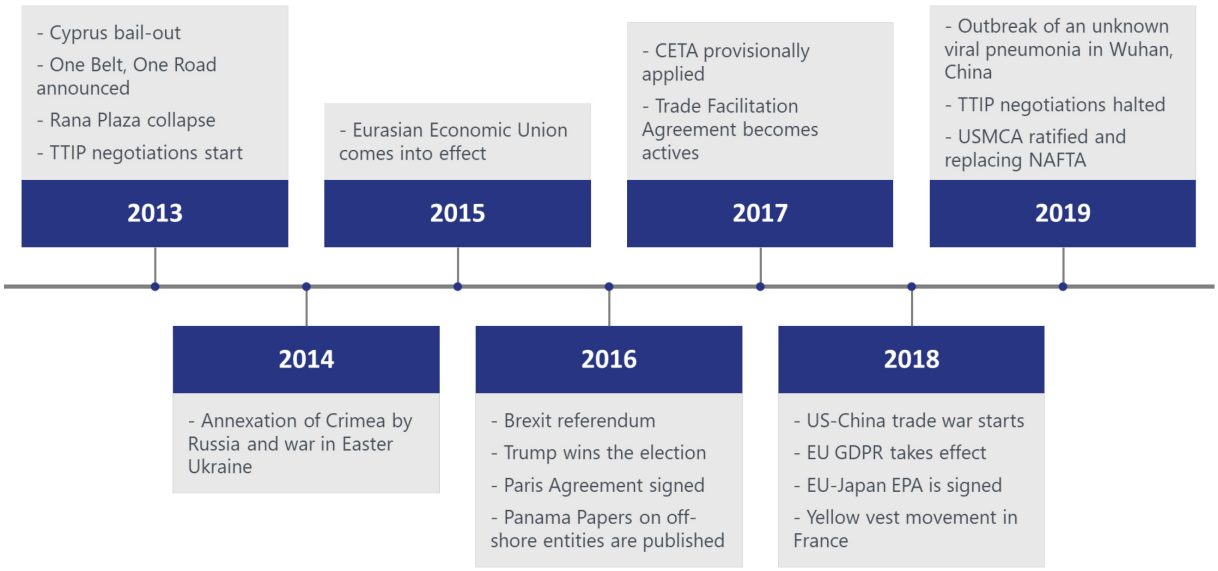
To be sure, 2013 was not completely uneventful. While the Greek debt crisis was still ongoing, Cyprus had to be bailed out by the Eurogroup, the European Central Bank and the International Monetary Fund. The TTIP negotiations between the EU and the US started, putting in motion a process in which a trade and investment agreement became a topic of intense public debates. Other developments and events were more low-key, such as the legislation for

[4] First coined by Thomas Friedman, the term golden straitjacket initially describes the general trade-off between national sovereignty and the demands of a global economy and global institutions (Friedman, 1999, page 87f.)
[5] Rodrik (2011).
[6] However, we also note that this global governance framework does not come out of nowhere. Rather, it is the result of negotiations and the power play between nations. With regards to labour standards the ILO has defined core labour standards. The issue is then one of enforcement (which is weak) and whether these standards should be part of WTO rules and allow trade sanctions (they are not, as affirmed by the 1996 Singapore Ministerial Declaration). See also Hughes and Wilkinson (1998).
[7] Adkins and Singh Grewal (2016).
[8] This view has been echoed by other authors and sources, see for example Creutz et al. (2019).

the Brexit referendum clearing the House of Commons, an event whose consequences were probably anticipated by few in this moment.

Other events are not so much relevant because of their own significance, but rather because they are emblematic of wider long-term developments and trends. Highlighting the rise of China as a major global power, in particular with regards to trade and investment, the One Belt, One Road initiative was announced during a state visit of Xi Jinping to Kazakhstan (as the Silk Road Economic Belt).[9] Emerging economies continued to play a greater and more active role in global trade and investment, also buoyed by the commodity boom that would end in the years after 2013.[10]

Figure 2 Some key developments between 2013 and 2019

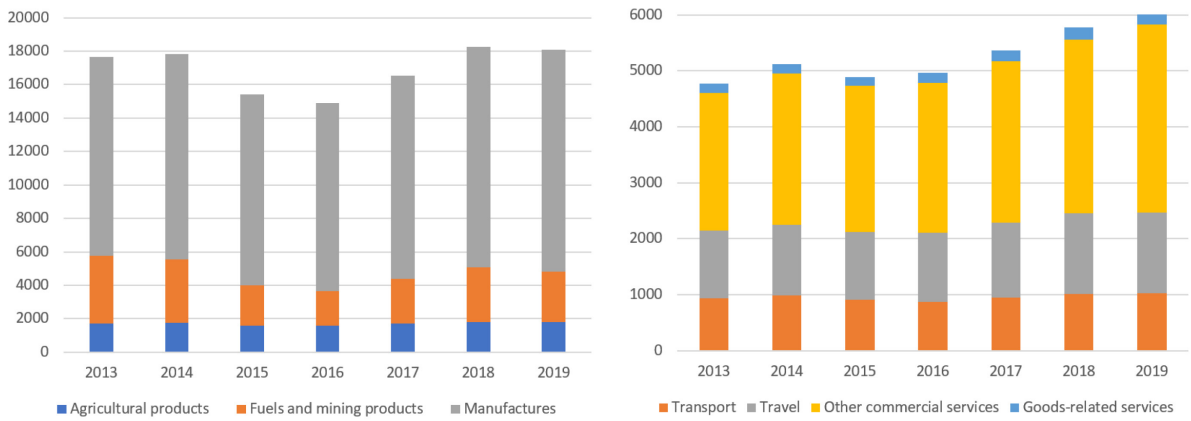


Other events included the Rana Plaza collapse in Bangladesh, having a profound impact on debates and initiatives on ethical trade and how to distribute added value in global supply chains fairly; the publication of *Capital in the Twenty-First Century* by Thomas Piketty, igniting global debates on inequality and the returns on capital and reward for labour; or the approval of the Bali Package by the World Trade Organization Ministerial Conference, simultaneously highlighting some progress in reducing trade barriers by virtue of the trade facilitation agreement and, as the last real progress made, the continuing Doha Round impasse.

How has the world changed since 2013? Arguably there have been three large-scale competing and contradictory developments that can be framed along the three corner points of the political trilemma of globalisation:

[9] See http://english.www.gov.cn/news/top_news/2015/04/20/content_281475092566326.html, last visited 05.10.2020.
[10] See, for example, Gruss (2014).

Figure 3 Global exports of goods by product group (left) and services by sector (right), 2013 to 2019, in billion US-dollar



Source: World Trade Organization (2020)

First, **economic integration has at best moderately progressed.** Between 2013 and 2019 world merchandise exports increased only slightly by about three percent per year. This is largely because of the slump in 2015 and 2016, driven by the end of the commodity super cycle, and thus lower prices for fuels and mining products, as well as lower global demand. In contrast, trade in services grew strongly by more than 21 percent. (Figure 3) Global foreign direct investment (FDI) flows fell by almost ten percent between 2013 and 2018.[11] Even if this should be taken with a pinch of salt, given large year-to-year fluctuations, overall trend growth in recent years has been well below growth in the previous decade.[12]

Concerning the second corner point, **the democratic or accountable governance of trade and investment has been intensely debated and contested.**[13] In particular, given the increased focus on regulatory co-operation, trade agreements have been under heightened scrutiny by parliaments, non-state actors (ranging from business actors, civil society organisations to research institutes and academia) and the general public, with the TTIP negotiations as a watershed moment in the EU-US trade and investment relations. In the area of investment, debates on the impact of FDI coalesced as well into heightened scrutiny of investment arbitration and investment tribunals and their potential effect on the right to regulate by governments.[14] There were also growing concerns for national security in vital areas of the economy, as highlighted by the introduction of a screening mechanism for FDI by the EU.[15] Increasing inequality and concerns about not all benefiting from deeper economic integration and rules seen to benefit only multinational companies that simultaneously benefit from tax evasion due to lax global tax rules, have been a key driver of these debates. However, many of these debates also focused on what traditionally might have been seen secondary impacts of trade and investment, namely on social and environmental standards and human rights.

Furthermore, international inter-governmental institutions that embody the multilateral rule-based system and possibly provide an element of democratic accountability experienced deadlocks and challenges in specific areas and a lack of leadership. This includes the Doha round impasse and the (ongoing) Appellate Body crisis in the WTO because the US refused to accept new appointments to the Appellate Body. Concerning the European Union, the

[11] UNCTAD (2019)
[12] ibid.
[13] See Bisbee et al. (2020), Rodrik (2020), Colgan and Keohane (2017), Lübbe-Wolff (2016), among others.
[14] See for example The Economist "How some international treaties threaten the environment", 05.10.2020, highlighting concerns about how investment arbitration might limit countries' ability to impose environmental standards.
[15] See https://eur-lex.europa.eu/eli/reg/2019/452/oj

unity of the bloc was challenged by developments such as the European debt crisis, the refugee crisis, the Brexit referendum and controversies on the rule of law in some Eastern European Member States.[16]

Lastly, concerning the third corner point, **national sovereignty has moved to the forefront,** following the lead of the (today former) Trump administration that increasingly presents trade as a zero-sum game and unwilling to be bound by multilateral rules and unfavourable rulings.[17] This shift is closely related to the rise of populist politics in various countries, as the most visible development that has heightened the role of the national state in the world trading and investment system. However, other developments have also been of importance, including the increasing importance and assertiveness of emerging economies, that also stems from the increasingly complex web of trade and investment relations that transcends traditional North-South trade and investment patterns.[18] Given the size of its economy as well as its political influence, the question to what extent China has balanced national sovereignty with integration into the traditional global governance system is particularly noteworthy. Emblematic is the debate and dispute on whether China is a market economy or not, which touches on expectations some countries had when China joined the WTO in 2001.

In short, we could argue that globalisation has frayed along the edges of the political trilemma of globalisation, leading to increased uncertainty and an increased potential for conflict. Economic integration overall has at best moderately progressed, while democratic governance has been contested and the role of the nation state has been raised. Furthermore, the past decade could be seen as a decade of increasing divisions, within countries (e.g. Brexit in the UK or the election of Trump in the US), within the EU (e.g. the North-South divide on economic policy), and between countries and regions (e.g. China-US, Russia-EU or EU-US).

Key external developments

As we noted already, the sheer number of factors that influence trade and investment policy in countries and the necessity to address them in international rules of the game, are a major challenge for this evaluation. We thus chose a bottom-up approach within the EU and The Netherlands, focusing on relatively narrow policy issues within the larger universe of trade and investment policy. Tractability is not the only justification for this approach: we noted already the fractal-like nature of trade and investment policy, where the factors influencing narrow trade and investment policy issues are broadly similar to those influencing trade and investment policy at large because of the political economy nature of the policy realm.

In general, we adopt the view that policy and policymakers are influenced by the complex interplay of the various stakeholders and external trends and developments. We document this complex interplay, distinguishing between different groups of stakeholders and their roles and their impact, as well as between the different trends and developments. We classify these into five broad categories - socio-economic factors, geopolitical developments, public opinion and politics, business and technological developments and lastly, environmental issues.

Representative of this complex interplay might be the policymaking process behind sustainable development chapters in free trade agreements. The European Commission as the policymaker is not just influenced by those co-decision makers with an official role in the policymaking process such as EU Member States, DG Trade and other Commission services and the European Parliament. The European Commission is also influenced by stakeholder groups, ranging from civil society groups, business representatives or thought leaders in academia and think tanks.[19] These stakeholders in turn are influenced by pressures from society or the business community, with these pressures emanating from broader socio-economic, business or technology developments, among others. Furthermore, geopolitical developments and consequently the positions and role of other countries as well as international institutions exert a strong influence on policymakers (see diagram in Annex C).

[16] See Markakis (2020).
[17] See Copelovitch and Pevehouse (2019), Lester and Manak (2018), Chryssogelos (2017), Krasner (2001), among others.
[18] See Subramanian and Kessler (2013), and Shirotori and Molina (2014).
[19] Beyers (2004).

In what follows we highlight some of the trends, developments and factors that the five case studies identified:

Socio-economic factors

A strong influence on trade and investment policy has been **increasing inequality**.[20] There is a broad consensus that inequality within many developed countries has increased in recent years.[21] There is less of a consensus as far as inequality between countries is concerned, given the progress made in reducing extreme poverty in developing countries.[22] Furthermore, there is even less of a consensus to what extent trade and investment liberalisation had a causal impact on inequality.[23] At the same time there is a widespread perception that the benefits of globalisation have not been equally shared.[24] And these perceptions, even if not necessarily justified, are what had a profound impact on trade and investment policy.

The impact of increasing inequality and perceptions thereof has been both direct and indirect. The direct impact includes increased scrutiny of free trade agreements with regards to the impact on income and income distribution. Far more important are the indirect impacts, however. A perception that the benefits of globalisation are not equally shared has fed into broader discontent with globalisation and the fairness of the rules underpinning it. This discontent goes beyond inequality, including concerns about tax avoidance by multinationals[25] and a perceived lack of a level playing field under current rules for trade and investment, fearing for example social or environmental dumping.[26]

This discontent manifested itself, for example, during the TTIP negotiations in protests and demonstrations. From the view of EU trade negotiators, this was an unprecedented development leading to an expansion of public consultations and contributing to a more pronounced emphasis on non-economic impacts in trade and investment policy. Even more importantly, increasing inequality and perceptions thereof have arguably contributed to the emergence of populist politics, including the election of Donald Trump, Brexit and scepticism about too tight EU integration.[27]

Born out of the recognition that trade has an impact on **gender equality**, policymakers have increasingly focused on the role of women in trade and the impact of trade liberalisation on women.[28] Gender equality has been mainstreamed into trade policy (e.g. Sweden's Feminist Trade Policy[29]) or included in trade agreements. However, most of those trade agreements that include a reference to gender do so only by asserting gender equality as a fundamental principle. Only few trade agreements include specific provisions, such as for example provisions that set minimum legal standards or provide gender-targeted reservations or waivers.[30] Gender was not part of the EU's

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[20] World Trade Organization (2013, page 222ff.); Gonzalez, Kowalski and Achard (2015); OECD, Making Trade Work for All at https://www.oecd.org/trade/understanding-the-global-trading-system/making-trade-work-for-all, last visited 05.10.2020: "not only is income inequality rising in many economies, but inequality of opportunity is also increasing…".

[21] See OECD (2019), in particular page 17, or Gaspar and Garcia-Escribano (2017).

[22] See https://www.brookings.edu/blog/future-development/2019/05/28/is-inequality-really-on-the-rise, last visited 05.10.2020.

[23] See Pavcnik (2017).

[24] Kirkegaard (2008).

[25] See, among others, https://www.project-syndicate.org/commentary/oecd-proposal-multinational-tax-avoidance-by-joseph-e-stiglitz-2019-10 or https://www.europarl.europa.eu/news/en/headlines/economy/20191213STO69020/corporate-taxes-meps-want-to-tackle-tax-avoidance-by-big-companies, visited 05.04.2011

[26] See Burgoon (2009) on labour standards, or OECD (2017): "Perceived risk of negative environmental impacts from increased trade and competition from regions with lower environmental standards is one part of the picture".

[27] See Pastor and Veronesi (2020) and Norris and Inglehart (2019), among others.

[28] See UNCTAD (2009), among others.

[29] See https://www.government.se/information-material/2019/09/feminist-trade-policy, last visited 05.10.2020.

[30] International Trade Centre (2020).

2015 Trade For All strategy, and conversely, trade was not included in the 2010–2015 Strategy for Equality between Women and Men.[31] However, the updated Gender Equality Strategy 2020-2025 explicitly includes gender equality as an objective of EU trade policy.[32] Furthermore, the 2017 WTO ministerial conference adopted the Joint Declaration on Trade and Women's Economic Empowerment.[33]

Since the 1990s, **global value chains**, trade in intermediary inputs and the increasing unbundling of production have increased in prominence and have contributed disproportionally to growth in trade and investment.[34] Global value chains have contributed positively in several ways, from welfare gains for consumers to creating niche opportunities in countries that have hitherto been mostly isolated from the world economy.[35] However, global value chains have also created challenges. Among these are the dislocation of production and thus negative impacts on local communities or increased interdependence and thus risks.[36] The former has contributed to changing attitudes to trade and investment and can be linked to a broader discontent with globalisation. The latter has been a concern even before COVID-19 brought to the forefront concerns about supply chain resilience. However, global value chains have also impacted trade and investment policy, for example in the push for trade facilitation, of paramount importance for producers linked through global value chains.

Geopolitical developments

"Geopolitics is back" would be an apt description of the developments between 2013 and 2019. One development in particular stood out, even if it started decades before: the rise of China[37] continued in the last few years, with China overtaking the US as the world's largest economy in purchasing power parity terms in 2013.[38] A WTO Member only since 2001, China has increased its influence in international institutions in the last few years or has even created its own, such as the Asian Infrastructure Investment Bank (AIIB). China has also increased its global footprint, as highlighted by the One Belt, One Road initiative, the opening of a military base in Djibouti or an increasing number of bilateral trade agreements with third countries.

The rise of China has had profound impacts on trade and investment policy. On one side there is cooperation, as China has become a major market for EU exporters and increasingly a source of investments in the EU. Furthermore, given China's size and influence, global trade and investment governance crucially depends on China. However, cooperation on one side is increasingly overshadowed by increasing strategic competition, notably between China and the US, but also between China and the EU. This includes competition for geopolitical influence, and geographical trading blocs, competition on the leadership in setting dominating standards and in future technologies and data protection, or focus on a lack of reciprocal market access. China's role in the WTO has also been a point of concern, given the dispute on China's obligations for market reforms and whether it can be seen as a market or non-market economy.[39]

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[31] Viilup (2015).
[32] See https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0152, last visited 05.10.2020.
[33] See https://www.wto.org/english/thewto_e/minist_e/mc11_e/genderdeclarationmc11_e.pdf, last visited 05.10.2020.
[34] See UNCTAD (2020, page 123ff.) and WTO (2019, page 37ff.).
[35] For example, Ethiopia has recently emerged as a major exporter of textiles and footwear.
[36] World Trade Organization (2014, page 108ff.).
[37] See Bluth (2021), van der Putten et al. (2016); Podcast: Maaike Okano-Heijmans on the Dutch China Strategy at https://www.clingendael.org/publication/podcast-maaike-okano-heijmans-dutch-china-strategy; and https://www.clingendael.org/publication/active-approach-netherlands-towards-belt-and-road-needed, last visited 05.10.2020.
[38] See https://blogs.worldbank.org/opendata/tracking-gdp-ppp-terms-shows-rapid-rise-china-and-india, last visited 05.10.2020.
[39] Or as summarised by European Commission (2019): China is, simultaneously, in different policy areas, a cooperation partner with whom the EU has closely aligned objectives, a negotiating partner with whom the EU needs to find a balance of interests, an economic competitor in the pursuit of technological leadership, and a systemic rival promoting alternative models of governance.

The other major development has been the election of Donald Trump and decreasing international leadership of the US including in the WTO, and the re-emergence of managed trade policies seeing trade as zero-sum game.[40] The US-China trade war as well as increased, mostly illegal tariffs on EU exports to the US are only the most visible manifestations of this development. More subtle, but not necessarily less impactful, has been the blocking of appointments to the WTO Appellate Body.[41] Among the other policies of the Trump administration with a profound impact on investment policy has also been the corporate tax reform, reducing overall tax rates as well as tax rates on worldwide income, potentially leading to a reshoring of FDI to the US.[42] To what extent these policies will be reversed under the Biden administration, however waits to be seen.

While the US retreated from its international leadership position, developing countries played a more prominent role in international trade and investment, and in international organisations.[43] This can be traced to the growth of various developing countries on the back of the commodity super cycle or integration into global value chains[44]. This has created a more complex multilateral trading and investment system, as the number of parties, country groupings and special interests has multiplied.

Lastly, an increasing number of countries have made use of trade policy for political or protectionist purposes. Paradoxically one reason for this development is the success of the WTO in reducing tariff barriers. With applied tariffs at low levels for manufactures, the remaining trade barriers are mainly in the form of non-tariff barriers.[45] These however can be more easily used to protect domestic industries, in the sense that non-tariff barriers are more opaque or more easily to conceal than tariffs. Furthermore, non-tariff barriers have also risen in relative importance, as tariffs are rarely, if ever, relevant for trade in service and digital trade. We might also note that industrial policy and promotion of industrial champions with subsidies have made a comeback.[46]

Public opinion and politics

We noted already how increased inequality and perceptions thereof have led to changing attitudes to trade liberalisation. While these changing attitudes are often grounded on real developments, they are also part of a cycle that has a direct impact on policymakers. Public opinion triggers the engagement of non-state actors such as business associations, NGOs and trade unions, which through their work inform, educate and mobilise public opinion. An example of this was the effective mobilisation of public opinion by NGOs during the negotiations of the Transatlantic Trade and Investment Partnership (TTIP) with the US, the multilateral Trade in Services Agreement (TiSA) or the investment chapter of the EU-Canada Comprehensive Economic and Trade Agreement (CETA).

Furthermore, globalisation itself has contributed to these changing attitudes, as debates and perceptions are increasingly global.[47] Thomas Piketty's Capital in the Twenty-First Century was read and debated not just in his native France; rather, it started a global intellectual debate. This globalisation of debates has real implications for trade and investment policy, as an impact of trade and investment that might have been a local issue a few decades ago, nowadays can raise attention globally. Policymakers thus have to deal not only with changing and possibly more sceptical attitudes towards trade, but also a far more complex mosaic of opinions, stances and interests.

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[40] See Dekker, van der Meer and Okano-Heijmans (2019), and van der Putten (2018)
[41] Preceded by the blocked appointment of Jennifer Hillman in 2011 and Seung Wha Chang in 2016 under the Obama administration (Charnovitz, 2016).
[42] See https://unctad.org/news/united-states-tax-act-could-lead-repatriation-2-trillion-overseas-investment, last visited 05.04.2021.
[43] See International Trade Centre (2019), among others.
[44] This in particular means the BRICS countries (Brazil, Russia, India, China and South Africa), which were buoyed by rising commodity prices (Brazil, Russia and South Africa) or their participation in global value chains (China and India).
[45] See Kinzius, Sandkamp and Yalcin (2019): "A growing share of modern trade policy instruments is shaped by non-tariff barriers".
[46] See Aiginger and Rodrik (2020).
[47] However, this does not mean that debates have lost their national characteristics.

Business and technological developments

The business and technology community have experienced **increased internationalisation and connectivity**, even if in the last decade this process seems to have stagnated.[48] We noted already the more prominent role of global value chains. We also noted how debates on trade and investment are also increasingly global. This stands in contrast to other developments, such as the rise of populist and nationalist movements or increasing protectionism. In principle, this could imply that the business and technology community can counterbalance these developments. However, perceptions of increasingly internationalised businesses have arguably contributed to a backlash towards globalisation.[49] For example, businesses face increasing scrutiny over unethical or unsustainable practices in their supply chains. This scrutiny has prompted an emergence of stronger expectations and rules by governments, financial investors and consumers on responsible business conduct. The internationalisation of businesses had also other impacts, including, among others, a heightened importance of trade defence instruments or concerns on the impact of international investment arbitration by the business community on the policy space of governments.

Furthermore, the needs of increasingly internationalised businesses and technologies also raise the bar for trade and investment policy. To facilitate the movement of goods, services, investments and ideas, **increasingly policymakers have to pay attention to very specific and technical issues**. Examples include digital trade and its very specific demands, for example on intellectual property rights protection, privacy laws or the protection of personal data, competition issues and tax treatment. This can at times facilitate policymaking, if the formulation of policies is left to technocrats. However, it can equally complicate policymaking when competing strategic objectives interweave with technical questions.

Environmental issues

Climate change and mitigation policies increasingly impact trade and investment policy. Given the global nature of climate change, policy responses are often international, if not global, as for example the 2016 Paris Agreement. The challenge faced by individual countries is that strict climate change policy at home, might do little to reduce greenhouse gas emissions if this policy might, through international trade and investment, lead to higher emissions in another country ('carbon leakage'). However, unilateral adjustments at the border, for example through carbon tariffs or a carbon border adjustment, are difficult to implement, or might even be introduced with a protectionist intent.[50]

Key international institutions

EU Member States have delegated authority for their external trade and investment relations largely to the European Commission. However, this does not mean that Member States have no influence and agency. Furthermore, trade and investment policy is also shaped, influenced and governed by various international organisations, in particular the World Trade Organization where the Members negotiate the rules of the game for trade, though the negotiating role of the WTO seems to have grinded to a halt. The exact role of international organisations and their secretariats varies by issue and circumstances, with roles ranging from being a forum for their member countries over being an agenda-setter to the active shaping of policies.

World Trade Organization

Created in 1995 as successor to the General Agreement on Tariffs and Trade (GATT), the World Trade Organization is arguably the one multilateral organisation that governs international trade and to some extent international

[48] See European Commission (2012), UNCTAD (2020, page 123ff.), WTO (2019, page 37ff.), among others.
[49] See for example Silver et al. (2020): "Industrial change, automation and the influence of multinationals were prime catalysts in stories of being left behind by globalization".
[50] See European Parliament (2020).

investment. While a comprehensive survey of the World Trade Organization is beyond the scope of this introduction, a few key developments are worth highlighting.[51]

In general the WTO is a member-driven organisation with very little real executive power for the Director-General. Decision making power by member countries is further reduced by the consensus rule except in dispute resolution. The broader international institutional and policy context in the 2000s was characterised by slow and difficult trade negotiations at the multilateral level. Progress was necessarily slow due to the nature of negotiating with up to 164 member countries[52] and the rising number and complexity of matters negotiated. Slow progress (and the eventual break-down) of the Doha Development Round was also brought on by stalemates between various groupings of countries, notably the developing and emerging countries on the one hand and the rich developed countries on the other. The stalemates evolved around issues of reciprocity, where developed countries wanted more concessions from emerging economies such as India and China, while conversely developing countries felt that the trading system was favouring developed countries; agricultural protectionism, which OECD producer countries were reluctant to give up for the alleged reason of food security and safety; and attempts by developed countries to bring in the so-called Singapore issues, which ultimately were rejected by developing countries, with the exception of trade facilitation.[53]

Doha Development Round

In 2001 the Doha Round of negotiations among WTO Members was launched. A fundamental objective of the Doha Round was to improve the trading prospects of developing countries, for example, by addressing the practical issues faced by developing countries in implementing WTO agreements. NGOs and developing countries' governments had long stressed the need for a rebalancing of the existing rules for trade and investment liberalisation, seeing on one side limited benefits, and on the other side significant implementation costs. In addition, as trade rules encompassed an increasing range of non-trade (domestic) issues and became more complex, there was also a need to address supply-side constraints, e.g. in the form of reforms and capacity building within developing countries to enable them to benefit from trade preferences in the first place. It was under the Doha Round that the WTO led Aid for Trade Initiative was therefore launched to assist developing countries in doing so.

Sources: Hallaert (2013), Prowse (2009) and Gallagher (2007).

And yet, the WTO also made some progress in several other areas. Several plurilateral agreements came into force, including the revised Agreement on Government Procurement in 2014, the Trade Facilitation Agreement in 2017, and an amendment to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) in 2017, aiming to enhance access to pharmaceuticals to developing countries.

Another development in the WTO was the emergence of informal coalitions or friends groups within the WTO. Among many others, these include the Friends of Ambition (NAMA)[54], a group composed of mostly EU countries and the EU, focusing on maximizing tariff reductions in certain sectors, the Friends of Fish, seeking to reduce harmful fisheries subsidies, or the Cairns Group, focused on further liberalisation of agricultural trade.[55] Noteworthy is also the Really Good Friends of Services coalition, a group of mostly industrialised countries seeking to further liberalise trade in services through the plurilateral Trade in Services Agreement (TiSA).[56]

Various reform proposals have been put forward to address what are seen as structural issues with the WTO, though without results. With regards to the institutional features of the WTO, reform proposals have often focused on the consensus practice, the Single Undertaking approach to conclude a launched negotiations round (the principle that "Nothing is agreed until everything is agreed" in multilateral negotiations), or the lack of the formal authority of

[51] For a comprehensive overview of the history of the WTO and the multilateral trading system see, for example, https://www.wto.org/english/thewto_e/history_e/history_e.htm, last visited 05.10.2020. Furthermore, the annex of the main report describes key WTO developments.
[52] The latest two additions to the WTO were Liberia and Afghanistan in July 2016.
[53] Kleimann and Guinan (2011), and Narlikar and Wilkinson (2004).
[54] NAMA referring to the Non-Agricultural Market Access negotiations.
[55] See https://www.wto.org/english/tratop_e/dda_e/negotiating_groups_e.htm, last visited 05.10.2020.
[56] Ecorys (2017) and Sauvé (2014).

the Secretariat to take the initiative.[57] The 2020 work programme of the European Commission explicitly foresees a WTO reform initiative.[58] A particular initiative aims to create a temporary alternative to the appellate body by using arbitration under Article 25 of the WTO Dispute Settlement Understanding, or possibly even a plurilateral general arbitration agreement.[59]

EU trade and investment policy

The Lisbon Treaty (2007) updated regulations for the EU, establishing a more centralised leadership and foreign policy, a proper process for countries that wish to leave the Union, and a more streamlined process for enacting new policies. The Treaty updated a series of previous treaties; the Treaties of Rome (1965) and Paris (1954), the Merger Treaty (1965), the Single European Act (1986), the Treaties of Maastricht (1992), Amsterdam (1997) and Nice (2001). Most of these treaties are fundamental for EU trade policy and its evolution. However, the Lisbon Treaty, given its recency, and related rulings by the European Court of Justice[60], is particularly worth highlighting in this study focusing on the period between 2013 and 2019.

The Lisbon Treaty explicitly includes the provision of 'fair' as well as 'free' trade as an EU external policy objective (Treaty on European Union Art. 3.5). The Lisbon Treaty also addressed the institutional set-up as well as responsibilities and mandates of EU trade policy. With the Lisbon Treaty external trade became an exclusive responsibility of the EU, including trade in goods and services, commercial aspects of intellectual property rights, public procurement and foreign direct investment (Treaty on the Functioning of the European Union Art. 207(1)). EU trade policy is part of the EU's external action and thus has to comply with the principles of democracy, rule of law, human rights, and natural resources sustainability (Treaty on the Functioning of the European Union, Chapter 1, Title V). Lastly, the Lisbon Treaty also conferred greater authority in trade policymaking to the European Parliament, as well as involving national parliaments in the EU decision-making process.[61]

The Lisbon Treaty thus changed the legal and institutional framework for EU trade policy making, in particular providing for a stronger role of the European Parliament. Indirectly, this is also contributed to greater scrutiny and interest by civil society in trade policy. This in combination with debates on the alleged 'democratic deficit' of the EU triggered the establishment of more structured public and civil society consultation mechanisms in relation to trade. In recognition of the fact that trade liberalisation can have both positive and negative effects, sustainability impact assessments (SIAs) became a feature of all negotiated trade agreements (since 1999).[62] Increasingly trade agreements also include investment chapters. With investment being a shared competency, national parliament have a say in the ratification of these agreements, with the potential for delays or even a derailing of these "mixed" trade agreements.[63]

The evolving EU Trade Policy Strategy by the late 2000s was characterised by increased bilateralism and an emphasis on more reciprocal trade relations with a view towards creating a level playing field internationally.[64] In addition, there was an expansion of the scope of the bilateral trade agreements into WTO-plus areas[65], including regulatory cooperation, intellectual property rights, investment, government procurement, competition policy, among others.

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[57] Hoekman (2011).
[58] See Policy Objective 30, https://eur-lex.europa.eu/resource.html?uri=cellar%3Af1ebd6bf-a0d3-11ea-9d2d-01aa75ed71a1.0006.02/DOC_2&format=PDF, last visited 05.10.2020.
[59] See https://www.csis.org/analysis/article-25-effective-way-avert-wto-crisis, last visited 05.10.2020.
[60] Advisory Opinion on EU-Singapore FTA, see https://trade.ec.europa.eu/doclib/docs/2017/september/tradoc_156035.pdf
[61] Leblond and Viju-Miljusevic (2019).
[62] Jarman (2011), and Kröger (2008).
[63] See https://data.consilium.europa.eu/doc/document/ST-8622-2018-INIT/en/pdf, last visited 05.10.2020.
[64] See the Trade for All strategy, which emphasizes the EU's bilateral agenda and a level playing field.
[65] Defined as commitments that go beyond multilateral commitments.

With the Trade for All strategy[66] published in 2015 the EU furthermore emphasised that EU trade policy is value-based and also pursues non-trade objectives such as development, sustainability or human rights.[67] The strategy recognises many of the external developments discussed in this introduction and study, from the emergence of global value chains to heightened scrutiny by civil society. Based on this recognition of important developments the strategy defines an EU trade policy that aims to boost economic growth and create jobs, while mitigating potentially unequal or adverse impacts of trade. To this end the strategy foresees a strong involvement of Member States, the European and national parliaments, and civil society. The EU's trade policy is also subject to review, with the latest review resulting in a new trade policy being presented in February 2021.[68]

[66] European Commission (2015).
[67] Bilal and Hoekman (2019).
[68] See https://trade.ec.europa.eu/doclib/docs/2021/february/tradoc_159438.pdf

Chapter 2: Economic Partnership Agreements with Africa

This case study focuses on Economic Partnership Agreements (EPAs) between the EU and African countries[69]. The EU granted non-reciprocal market access to African, Caribbean and Pacific (ACP) countries under the 1975 Lomé Convention. In addition, through the STABEX scheme[70], ACP countries were compensated for swings in world market prices for their commodity exports[71], and development aid was provided through the European Development Fund. However, following a WTO dispute settlement case the EU was forced to replace the Lomé Convention with trade agreements that are compatible with WTO rules.[72]

Under the Cotonou Agreement, signed in 2000, the EU started negotiations on WTO compatible EPAs in the early 2000s, between the EU and groups of African countries, as well as Caribbean and Pacific states. Some EPA negotiations were successful, most notably the very first EPA that came into force, in 2008, between the EU and the Caribbean Forum (CARIFORUM).[73] However, several other EPA negotiations failed or were only partially successful. This case study explores the reasons for this mixed success, in particular in the time period between 2013 and 2019. As such this case study focuses on the following two questions:

- What was the starting point for the EPA negotiations with Africa, and what were the obstacles in the EPA negotiations with Africa, especially during the period 2013-2019, and what explains the differences in progress between regions and countries?
- Which broader lessons on EU-Africa trade relations can the Netherlands and the EU learn from trying to conclude and implement EPAs during the period 2013-2019, lessons that are relevant for the EU-Africa development strategy, for a follow-up Agreement of Cotonou, for further development of the EPAs and also for a possible bilateral FTA between the EU and Africa at continental level?

For this case study it is important to keep in mind the diversity of African countries and thus their specific interests and positions in EPA negotiations as well as their negotiation power and capabilities. Highlighting this diversity are the following examples: There is South Africa, one of the most industrialised countries on the continent, with a significant interest in regional integration as an exporter of manufacturing goods and as a regional investor. There is Burundi, a land-locked, least-developed country with a very limited export basket, already enjoying preferential access to the EU under the Everything But Arms (EBA) initiative. And lastly, there is also a country such as Nigeria, highly dependent on exports of oil and gas, but with industrial development ambitions of its own. Likewise, the diversity of EU countries is also important to keep in mind. While trade policy is an exclusive competence of the EU, individual countries with their differing positions and interests had an impact on the EPA negotiations.

EU-Africa trade and investment relations

Europe and Africa share a long and complicated history. In the last decades, since the decolonisation in the 1960s, trade, investment and development aid are the key elements in the relationship between the European Union and African countries.

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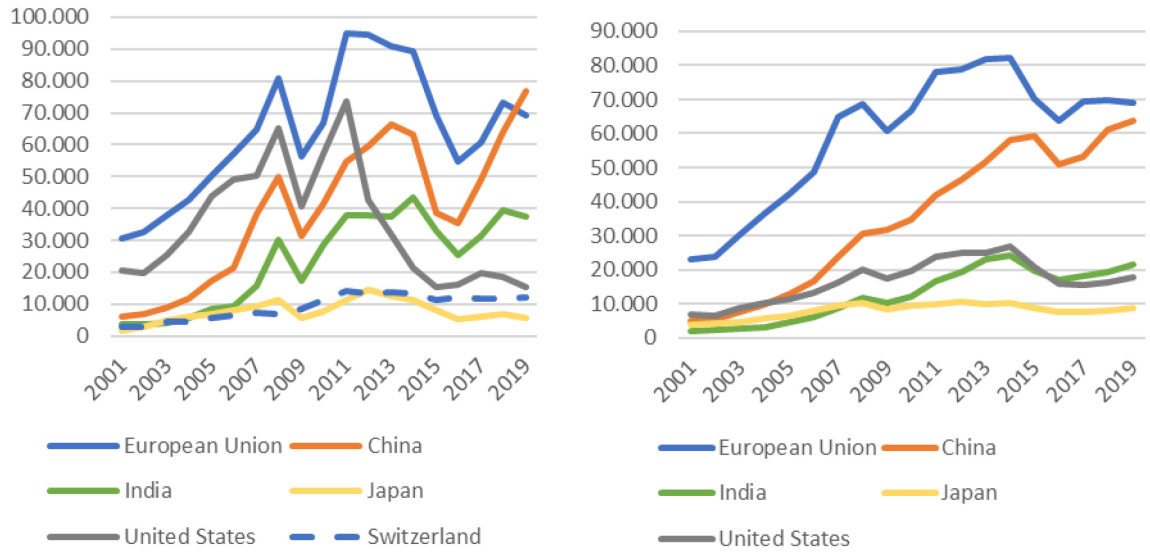
[69] In the context of this case study Africa refers to sub-Saharan Africa, excluding Algeria, Egypt, Libya, Morocco, and Tunisia (and implicitly Western Sahara, as a disputed territory). With the exception of Libya the trade relationship with all four countries is covered by the Euro-Mediterranean Association Agreements. We also note that one country, Somalia, has been completely outside the EPA negotiations.
[70] Stabilisation System for Export Earning (French: Système de Stabilisation des Recettes d'Exportation)
[71] A similar scheme, SYSMIN, was introduced for mining commodities.
[72] For an overview of the dispute, its history and background see Grynberg (1998).
[73] However, this EPA also faced implementation problems. See Ecorys (2021).

When the Cotonou Agreement was adopted in 2000, the European Union was by far the largest trade partner of Africa (see Figure 4). This has changed, in particular in the last ten to fifteen years. In 2001 most of Africa's exports went to the EU and the United States. Reflecting the focus on commodities, exports revenues have been volatile. However, there has also been a broader trend in which exports to China and India have rapidly grown, exports to the EU have stayed flat, and exports to the US have fallen rapidly.[74] Similarly, while in 2001 the vast majority of African imports were sourced from EU countries, imports from China and to a lesser extent from India have more rapidly grown, with China today almost equalling the EU as a source of imports.

Figure 4 Exports (left) from and imports (right) into sub-Saharan Africa, in million US-dollar



Source: IMF Directions of Trade 2019
Note: Large exports to Switzerland can be explained by the activities of Glencore, a major commodity trading company. Most of these exports never physically touch Switzerland. See UNCTAD (2020, page 62ff.)

Likewise, companies from the EU were among the most important foreign investors in Africa in the early 2000s, with France, Germany, the Netherlands and the United Kingdom as the dominant source countries. Besides the EU, only the US (in particular in the energy sector) and Japan were major investors in Africa.[75] By 2012, this traditional dominance of Europe was diminished, with countries such as India, China, the United Arab Emirates and South Africa counting among the most important FDI source countries.[76] Between 2014 and 2018 this trend accelerated, with FDI from China and the European Union drawing level in terms of capital invested and jobs created.[77]

While the pre-eminence of Europe has somewhat eroded in recent years, the European Union nonetheless remains a dominant, if not the dominant, trade and investment partner for Africa. In general, this relationship is asymmetric, with no African country even appearing among the ten largest trade partners of the EU.[78] Even less so, among the thirty largest recipients of outward FDI flows from the EU only South Africa and Nigeria appear.[79]

[74] The former reflecting increasing demand, but also deeper economic linkages between Africa and China and India. The latter reflects increasing domestic production of (shale) oil and gas in the US respectively increasing imports from Canada, at the expense of African oil exporters such as Nigeria or Angola. See https://www.eia.gov/todayinenergy/detail.php?id=30732
[75] See UNCTAD (2000, page 44).
[76] See Ernst & Young (2013, page 34).
[77] See Ernst & Young (2019, page 18).
[78] In 2019 the largest trade partners, South Africa, Nigeria and Côte d'Ivoire are ranked 19th, 28th and 50th, respectively. See https://trade.ec.europa.eu/doclib/docs/2006/september/tradoc_122530.pdf
[79] See https://ec.europa.eu/eurostat/statistics-explained/pdfscache/65110.pdf

Trade policy is formally covered through the Cotonou Agreement, which foresaw that EPAs will be negotiated and will have entered into force by 2008[80], the year the WTO-waiver expired[81]. However, given the failure to conclude EPA negotiations between African countries and the EU before 2008, in practice trade is covered by other trade regimes, including the Market Access Regulation or the Generalised System of Preferences (GSP). We discuss these other trade regimes and the implications of their existence for EPA negotiations subsequently.

In contrast, investment is not formally covered through a single framework. Instead, investment is covered through several frameworks, agreements and initiatives. First, the Cotonou agreement refers to investment promotion and protection (Article 75 and 78), in general terms, and provides for an ACP investment facility, providing a role to the European Investment Bank (Annex II, Chapter 1). In addition, investment protection was covered under many bilateral investment agreements (BITs) between EU member states and African countries. Second, EPAs were foreseen by the EU to also cover investment, in addition to other so-called Singapore issues. However, notwithstanding these initial design preferences on the EU side, in practice most EPAs focused on trade in goods. Investment was only included via a rendezvous clause that foresees future negotiations on investment and other deep integration issues.[82] Third, concrete investments are facilitated through external lending, in particular the recent Africa-Europe Alliance and the External Investment Plan.[83]

Lastly, there is also development aid as an area in which the EU is and remains dominant. While typically development aid would be separate from trade and investment, the Cotonou Agreement and consequently the EPAs integrate development aid with trade and investment. EU institutions, individual member states and EU contributions to multilateral development institutions account for around fifty percent of official development assistance to Africa.[84] However, while the EU and other traditional donors, such as the US or Japan, retain their dominance, in the last two decades China has also emerged. Development aid from China is hard to quantify, given its often opaque nature, a lack of reporting and the non-traditional aid formalities employed by China. Evidence on the increasing importance of Chinese aid is thus mainly anecdotal, but also convincing.[85]

Characteristics of the EPAs

While Economic Partnership Agreements are free trade agreements, they are distinct from other EU free trade agreements. Among their key characteristics are the following: First, EPAs are development-oriented agreements with ACP-regions, aiming to promote sustainable development in EU partner countries. They do so by providing asymmetric market access, include transition periods on the ACP –side and other adjustments, intended to provide partner countries with policy space to pursue their own development objectives. Furthermore, the EPAs are accompanied by development aid, including technical assistance (e.g. aid for trade) and budget support, to compensate for tariff revenue losses. While provided under the umbrella of the EPAs, ACP countries have also always insisted that this should be new and additional to existing European Development Fund-commitments.[86]

Second, reciprocal but asymmetric market access is of particular importance in EPAs. While the EU is fully liberalising market access, ACP partner countries are allowed to exclude sectors from liberalisation and maintain some level of tariff protection for sensitive products. These sensitive products differ by country. For example, they include agricultural products, to protect domestic farmers, or manufacturing products, to promote industrial development. However, in order to be compatible with rules of GATT-article XXIV, a *substantially all trade* requirement and a reasonable transition period need to be met. Initially the coverage threshold was interpreted by the EU as a

[80] In the end only the EU-CARIFORUM met this deadline.
[81] See https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_acp_ec_agre_e.doc
[82] E.g. while the EU-CARIFORUM EPA covers investment somewhat, the EU-SADC and the EU-ESA EPAs do not and only include a rendez-vous clause.
[83] See European Parliament (2020, page 14).
[84] Based on data from the OECD, at https://data.oecd.org/development.htm. This data is focused on Development Assistance Committee member countries, thereby excluding emerging donors such as China.
[85] See Lynch, Andersen and Zhu (2020).
[86] See https://ec.europa.eu/trade/policy/countries-and-regions/development/economic-partnerships

requirement that at least 90 percent of bilateral trade or of covered tariff lines need to be liberalised by the partner country.[87]

Third, EPAs aim to contribute to the regional integration ambitions of EU partner countries (Article 35-2 of the Cotonou Agreement). Partner countries can negotiate individually or as country groups with the EU; in practice, the EU started EPA negotiations with five country groups in Africa, all but Eastern and Southern Africa corresponding to existing regional economic communities (with some small deviations in the inclusion or exclusion of specific countries).

Fourth, the EU's aim with the EPAs was deep integration, covering more than just trade in goods. In practice EPAs with African countries failed to achieve the initial ambition to cover trade in services. EPAs did not go beyond confirming existing multilateral commitments under GATS and largely left out the so-called Singapore issues such as investment, competition policy or public procurement. An exception is the EU-CARIFORUM EPA, which provided for a modest market opening for various service sectors.

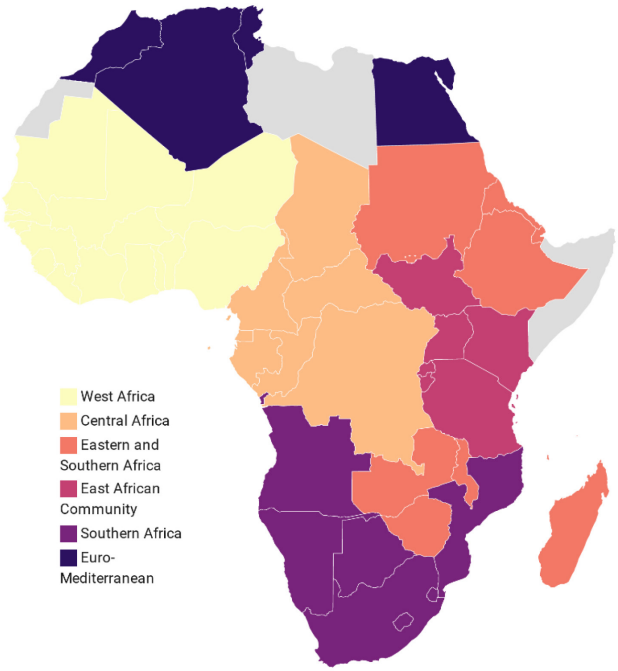
In sum, the EU's ambition initially went beyond ensuring WTO compatibility for the trading arrangements for goods. Compatibility would have required trade agreements that only cover trade in goods. Furthermore, a WTO compatible alternative would have been to apply (and expand) the EU's GSP to all non-least developed ACP countries and to continue to apply the EBA preferential treatment for all least developed ACP countries.[88] Instead, the EU set out for a more ambitious negotiation agenda, including trade in services or other trade-related issues. In addition, EPAs were meant to be development-oriented and to serve regional integration ambitions of partner countries.

There are several reasons for this ambitious initial negotiation position, as discussed in more detail in section 4 on the political economy of negotiations. However, and in short, key factors were the influences of various DGs, in particular DG Development, and the influence of individual member states, collectively leading to an overly ambitious negotiation position.[89] While this ambitious negotiation agenda was created by the EU, ACP partner countries did not share the same ambition. Consequently, there was also no common and shared understanding on the goals of the negotiations.

EPA negotiation process

Negotiations on the EPAs started after the adoption of the Cotonou Agreement, on September 27, 2002. Initially, the negotiations were at the level of all ACP countries. At the end of 2003, negotiations were split into negotiations with six regional groups of countries. In 2007 this was broadened to seven regional groups with the inclusion of the East African Community (EAC).[90] Until 2007, Annex V of the Cotonou Agreement provided unilateral preferential market access to ACP countries, under a WTO waiver[91]. Thereafter, the market access regulation 1528/2007 provided preferential market access to those countries that had made meaningful progress and had signed the EPA[92], but that had otherwise no preferential market access, for example through the Everything But Arms scheme.[93]

[87] See Fontagné, Laborde, and Mitaritonna (2011, page 187-188).
[88] See Doha Work Programme, Ministerial Declaration, WT/MIN(05)/DEC, Annex F at https://www.wto.org/english/thewto_e/minist_e/min05_e/final_annex_e.htm#annexf
[89] See Frennhoff Larsen (2007)
[90] See ECDPM (2014).
[91] This was the second WTO waiver. The first WTO waiver applied from 1996 to 2000.
[92] From 2014 onwards only those countries that had ratified the EPA were eligible to market access under the market access regulation. These are Côte d'Ivoire and Ghana (stepping-stone EPA) and Cameroon and Kenya. All four countries have signed and ratified the EPA, but were held back by their regional partners (ECOWAS, CEMAC and EAC) not having ratified the regional EPA.
[93] European Parliament (2018, page 2).



Country groups

The following African country groups were negotiating with the EU. Details on the timeline of the negotiation process of these country groups can be found in Annex D.

- The **West African** country group, including all countries of the Economic Community Of West African States (ECOWAS) as well as Mauritania (a former member of ECOWAS).
- The **Central African** country group, including all countries of the Communauté Économique et Monétaire de l'Afrique Centrale (CEMAC) as well as the democratic Republic of Congo and São Tomé and Príncipe.
- The **Southern African** country group, including all countries of the Southern African Customs Union (SACU) as well as Mozambique. Angola is not a member of the group, but has an option to join the agreement. Tanzania was initially a member of the group, but moved to the East African Community country group in 2007.
- The **Eastern and Southern African** (ESA) country group is a sub-group of the Common Market for Eastern and Southern Africa (COMESA), including the Comoros, Madagascar, Mauritius and the Seychelles in the Indian Ocean; Djibouti, Eritrea, Ethiopia and Sudan in the Horn of Africa; and Malawi, Zambia and Zimbabwe in Southern Africa. Initially this was a more coherent group, as it also included countries of the East African Community.
- The **East African Community** (EAC) country group includes the countries of the EAC. Negotiations with this country group only started in 2007.

Market access

Economic Partnership Agreements provide reciprocal, but asymmetric **market access**. While they provide full market access to the EU market, EPA countries themselves have to provide only partial market access to EU exporters, with long transition periods. However, most African countries have already substantial market access to the EU under the Generalised System of Preferences (GSP).[94] However, there are also limitations such as the application of tariff-rate-quotas on some agricultural products and the general limitation of GSP being a unilateral agreement, where preferences can be withdrawn or changed by the EU at will.

The standard GSP provides fully or partially reduced duties on two thirds of tariff lines for low and lower-middle income countries, while duty free access to 98 and 99.8 percent of all tariff lines is provided to GSP+ respectively Everything But Arms (EBA) countries.[95] To qualify for GSP+, countries that are not least-developed need to satisfy the vulnerability criterion, that is, their export basket to the EU must be neither too diversified nor to dominant compared to other GSP exporters. These countries must also satisfy the sustainability criterion, that is, must have signed and be committed to adequately implement 27 international conventions on human rights, labour rights,

[94] In general, market access under GSP is comparable to EPAs with regards to rules of origin. See European Commission (2020, page 28ff). An important development in this regard has been the relaxation of rules of origin under the GSP in 2011, allowing in particular for regional cumulation. See https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2010.307.01.0001.01.ENG

[95] In 2016. See Development Solutions (2018, page 50)

environmental protection and good governance.[96] In contrast, access to the EBA scheme is automatic for all least-developed countries.

Consequently, the added value of EPAs for most African countries is limited as far as new market access for goods is concerned. Most African countries are least-developed countries and thus automatically qualify under the EBA scheme that the EU more or less bound under the WTO, in contrast to GSP. A few countries have graduated from least-developed country status, including Botswana in 1997, Cape Verde in 2007 and Equatorial Guinea in 2017. Scheduled to graduate are Angola and São Tomé and Príncipe, in 2021 respectively 2024.[97] Of these, Botswana is covered by the EPA with the Southern African Development Community (SADC) and Cape Verde by GSP+.

In contrast, with a transition period of three years passing in 2021, Equatorial Guinea is scheduled to lose market access under EBA.[98] The impact of the graduation is, however, limited, as the country's main exports, oil and gas, do not face tariffs in the EU. Likewise, the impact of graduation on Angola as an exporter of oil and gas will be limited. Nonetheless, Angola attempts to mitigate the impact by having sought accession to the EU-SADC EPA in 2020.[99] São Tomé and Príncipe is in a different position, and might thus seek market access either under the Central Africa EPA or under GSP+.[100]

A few countries are falling neither under EBA nor GSP+. However, most of these countries have signed and ratified Economic Partnership Agreements (countries within SADC and the Eastern and Southern Africa region), have an interim (stepping stone) agreement, for goods only, in place, or fall under the temporary market access regulation. This leaves only Nigeria and the Republic of Congo (Brazzaville), both qualifying for standard GSP, and Gabon, qualifying only for market access under WTO rules (most-favoured nation rates).[101] However, these countries, as exporters of oil and gas, are less dependent on preferential market access. In short, all African countries either have market access under EBA, have market access under an EPA or the market access regulation, or have an export basket that faces no significant tariff barriers in the EU.

Table 1 Market access of African countries

Country	EPA country group	Trade regime with the EU
Cameroon	Central Africa	Market Access Regulation
Republic of Congo	Central Africa	GSP
Côte d'Ivoire	ECOWAS	Stepping stone EPA
eSwatini	SADC	EU-SADC EPA
Gabon	Central Africa	*Most-favoured nation*
Ghana	ECOWAS	Stepping stone EPA
Kenya	EAC	Market Access Regulation
Mauritius	ESA	EU-ESA EPA
Namibia	SADC	EU-SADC EPA
Nigeria	ECOWAS	GSP
Seychelles	ESA	EU-ESA EPA
South Africa	SADC	EU-SADC EPA
Zimbabwe	ESA	EU-ESA EPA
All remaining countries are least-developed countries		Everything But Arms

[96] See Annex VIII at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32012R0978#d1e32-60-1
[97] See https://www.un.org/development/desa/dpad/least-developed-country-category/ldc-graduation.html
[98] Being classified as a high-income country by the World Bank, Equatorial Guinea will also lose market access under the standard GSP. See https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32018R0148&rid=4
[99] See https://data.consilium.europa.eu/doc/document/ST-8932-2020-INIT/en/pdf
[100] See United Nations (2018).
[101] Nigeria and the Republic of Congo are lower middle income countries, while Gabon is an upper middle income country. See http://databank.worldbank.org/data/download/site-content/OGHIST.xls

Source: https://ec.europa.eu/taxation_customs/business/calculation-customs-duties/rules-origin/general-aspects-preferential-origin/arrangements-list/countries-africa-caribbean-pacific-acp_en

Negotiation issues and obstacles

Economic Partnership Agreements, by providing preferential market access to the EU affect **tariff revenue**. This is an important consideration for several countries, given the large share of tariffs and other import duties in overall tax revenue in several African countries.[102] Economic modelling of the EPAs shows that indeed for most countries the loss in tariff revenue is substantial. When countries prioritise the protection of agriculture tariff revenue, losses range from 58 to 82 percent. And when countries prioritise the preservation of tariff revenue, tariff revenue losses still range from 37 to 57 percent. While to some extent these losses are mitigated by tariffs on imports from other origin countries remaining intact, overall EPAs have a significant impact.

Table 2 Forecasted tariff revenue losses in percent

	Scenario I: Protect agricultural sector		Scenario II: Reduce tariff revenue losses	
	EU products	All origin	EU products	All origin
ECOWAS	-82	-38	-57	-27
CEMAC+	-71	-41	-53	-30
COMESA	-62	-21	-47	-16
SADC	-58	-22	-37	-16

Source: Fontagné, Laborde and Mitaritonna (2011).

The loss of tariff revenue has been a concern in EPA negotiations. In particular, governments and civil society have been concerned with a loss in tariff revenue negatively impacting social programmes and investments in education or health.[103] In the words of a former chair of the ACP[104], ACP countries "depend on tariff revenues to fund social programmes […] the sudden loss of this revenue is likely to create much hardship and possibly lead to social dislocation as the burden will fall disproportionately on the poor."[105]

A stated aim of EPAs is to address the loss in tariff revenue, directly, through budget support, and indirectly, through fiscal reforms. The latter aim to reduce the share of import tariffs in overall tax revenue, for example, through a strengthening of the tax administration or through the introduction of other taxes such as value-added taxes. For example, the EPA with the East African Community (EAC) foresees a dialogue and cooperation on fiscal adaption measures and reforms, as long-term adjustments. And in the short-term, budget support measures to cover the losses from tariff elimination.[106]

Loss in revenue does not just stem from reductions or the elimination of tariffs, but also of export duties on commodities. Another contentious issue in the negotiations, the EU was aiming for an elimination of export duties, thereby improving EU industries' access to raw materials. Conversely, ACP countries saw export duties as critical source of revenue. Export duties have also been seen as important for diversification as well as beneficiation (the transformation of commodities into processed products) efforts.[107]

As with all bilateral and regional trade agreements, EPAs might lead to **trade creation or diversion**. Trade creation is the process of trade being created through a reduction in tariff barriers. In contrast, trade diversion is the process of imports being diverted from low-cost producers towards those producers that enjoy preferential market access.

[102] Reaching as high as 44.8 percent in Botswana or 36.0 percent in Namibia in 2018 (Source: World Bank, World Development Indicators) Furthermore, in some countries, such as Guinea or Côte d'Ivoire, export taxes are an important revenue source. Export taxes are, however, prohibited by EPAs, with some exceptions.
[103] Interviews, but see also Oxfam (2006, page 4-5)
[104] In April 2020 renamed to the Organisation of African, Caribbean and Pacific States (OACP).
[105] See https://www.europarl.europa.eu/intcoop/acp/60_11/pdf/speeches/miller.pdf
[106] See Article 100, page 54 at https://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153845.pdf
[107] See Bilal and Lui (2009, page 14–18)

To some extent the potential for trade diversion between African countries is limited by the fact that intra-African trade flows and regional integration are limited.[108]

And yet, EPAs can lead to trade diversion, away from imports from non-African third countries as well as African countries that are significant exporters to other African countries, such as for example South Africa.[109] This is not always to the disadvantage of African countries. In fact, the dispute that led to the Cotonou Agreement, the banana wars, was about the issue of trade diversion. Involving also Caribbean and Pacific ACP countries, the banana wars evolved around the trade-diverting impact of EU trade policies and other discriminatory arrangements on producers from Central and Latin America, not enjoying the same privileged access to the EU market as producers in ACP countries.[110]

Furthermore, **regional integration** is an ambition for most African countries, in the framework of the existing regional economic communities as well as the African Continental Free Trade Area. From the EU perspective, EPAs are meant to contribute to regional integration by negotiating between blocs of countries. In some cases these coincide with regional economic communities. This is the case for the East African Community (EAC) and the West Africa country group, which with the exception of Mauritania coincides with ECOWAS. In contrast, it is not the case for the Eastern and Southern Africa (ESA) country group, which includes countries that are members of the Intergovernmental Authority on Development (IGAD), the Indian Ocean Commission (IOC), the Southern African Development Community (IOC), and a sub-set of COMESA member countries.[111]

EPA negotiations have also opened fractures within these regional economic communities. A key issue are differences between countries, in their market access to the EU as well as their specific economic and political interests. For example, in the EAC Kenya and Tanzania have somewhat similar export baskets. However, only Tanzania is a least-developed country and thus enjoys market access to the EU under EBA. Consequently, Kenya has a much stronger interest in gaining preferential market access to the EU under the EPA. And at the same time, for Tanzania the EPA would provide only limited gains compared to their current market access. Under a configuration where Kenya has no access under the EPA (and EBA), Tanzania would potentially gain from Kenya being less competitive. Tanzania thus does not only have veto power, but has even an incentive to wield it.[112]

Similarly, in the case of the CEMAC Cameroon has a specific interest in maintaining its EU market access. All CEMAC countries except Cameroon are either least-developed countries, thus enjoying EBA market access, or are mainly exporting oil and gas. Cameroon, with sizeable banana exports is thus uniquely interested in preferential market access to the EU. It is thus also for this reason that Cameroon has started applying the EPA in 2014, under the Market Access Regulation. While less prominent, other trade policy issues were contentious in the negotiations and are presented in Annex E.

Influencing factors and political economy

Economic Partnership Agreement negotiations have been influenced by a wide range of factors. These include the traditional considerations of trade policy, such as market access, loss of tariff revenue due to reduced tariff rates, and the impact of EPAs on regional integration with neighbouring countries. These have been discussed in the preceding section. Other factors include socio-economic factors, geopolitical developments, public opinion and politics as well as business and technological developments. Likewise, these as well as additional factors also shaped the starting point of the negotiations and the negotiation positions of the EU and ACP countries.

[108] See UNECA (2020, in particular page 11).
[109] This trade diversion also compounds tariff revenue losses (Hallaert, 2010, page 244ff.).
[110] See Valenciano, Battistuzzi, and Azcaráte (2015).
[111] IGAD: Djibouti, Ethiopia, Eritrea and Sudan; IOC: Comoros, Madagascar, Mauritius and Seychelles; SADC: Malawi, Zambia and Zimbabwe.
[112] See Krapohl and van Huut (2020).

Geopolitical, economic and business developments

The last twenty years, including the years between 2013 and 2019, have been transformational for sub-Saharan Africa.[113] These include profound geopolitical changes, with Europe losing its traditionally dominant position and other countries gaining in influence and prominence. It includes economic and business developments, in complex ways shaping and changing African countries' interests and perceptions of free trade agreements. And lastly, these changes include the successes of state-led development models in countries such as Ethiopia and Rwanda, or the emergence of new, non-traditional industries such as the film (Nigeria), aviation (Ethiopia), horticulture (Kenya) or tech clusters (Kenya or Nigeria).

Concerning **geopolitical developments**, traditionally Europe and to a lesser extent the United States had a dominant role in sub-Saharan Africa. This relationship extends beyond political and economic considerations, with European culture having an outsized impact on African societies. Conversely, resentment and the wounds of the colonial past profoundly affect attitudes towards Europe. However, in the past twenty years the dominance of Europe has been reduced by the emergence of third countries. First and foremost, China has emerged as a key partner and player. China's economic influence is strong, in particular in countries such as Angola or Ethiopia, with significant trade, investments and movements of people. Beyond China countries such as Turkey, through its *Open to Africa* policy[114], but also India, Japan and South Korea are increasingly active in sub-Saharan Africa, as trade partners, investors and development partners. This influence extends beyond the economic sphere. For example, China is seen as a relevant and inspiring development model by a number of African countries.

Concerning **economic and business developments**, when the EPA negotiations started in the early 2000s, sub-Saharan Africa was at the start of a decade of strong growth that would only end in 2013. This decade of strong growth was driven by high commodity prices, external financial flows, and in particular FDI, as well as improvements to the business environment.[115] However, with declining oil prices this period of strong growth ended after 2013, forcing oil-producing countries to consolidate fiscal balances amidst worsening external imbalances.[116]

Other developments include the growth in intra-African FDI, worth highlighting also against the background of sub-Saharan Africa in general attracting only limited FDI flows. Dominating intra-African FDI was South Africa (in particular in service industries), and to some extent also Kenya, Nigeria and Morocco (African Development Bank, 2020). This (still modest) growth in intra-African FDI also relates to the industrial development ambitions of several African countries. While not crowned by success in all countries, nonetheless a few countries have made significant progress towards industrial development.

These include in particular Ethiopia, having developed industries such as light manufacturing and aviation, Rwanda, having significantly diversified its export basking and aiming to develop knowledge-intensive industries, and Kenya with its tech cluster in Nairobi.[117] While some of these industries and clusters might be small and nascent, these initial successes do inspire, influence the thinking of policymakers and impact policymaking.

Public opinion, special interests and ideology

EPA negotiations were influenced by public opinion, special interests and ideology. These influences were not merely coincidental, but an explicit feature of the negotiations. The European Commission insisted on including stakeholders in ACP countries in the negotiating process, by giving them a voice. In principle this was to be achieved through a consultative committee, as an institutional mechanism that convenes and includes stakeholders in the negotiations. In practice, this committee was used only in the EPA negotiations with the Caribbean Forum

[113] Most of the developments described in this section are long-run in nature, having started before 2013.
[114] See https://ovipot.hypotheses.org/13639
[115] See African Development Bank (2013, pages 10–12).
[116] See African Development Bank (2019, pages xiii–xvi).
[117] See African Center for Economic Transformation (2014, pages 177ff.)

(CARIFORUM), and was absent in the negotiations with African countries.[118] Nonetheless, informally and through invitation, stakeholders, and in particular NGOs, were strongly involved in the EPA negotiations with African countries.

On the side of the EU, the business community showed only limited interest in the EPA negotiations.[119] The main interest was from civil society and NGOs, often in coordination with African civil society and NGOs. NGOs were overwhelmingly critical of the EPAs, seeing them as a hindrance to development, citing issues such as the loss of tariff revenue and the strangling of domestic producers by more competitive EU agricultural and manufacturing imports.

On the side of African countries, several observations are in order. First, civil society and NGO interest was strong and negative, coalescing, for example, in the *Stop EPA!* Campaign. NGOs work was coordinated with NGO work in Europe, and thus arguably this influence on the EPA negotiations was pan-African and cross-continental. Second, a critical factor was also the influence of domestic special interests. There were in particular domestic manufacturers in countries with a significant manufacturing base (e.g. Nigeria), concerned about reductions in imports tariffs and thus increased competition from imports from the EU.[120] Third, NGOs and African businesses were broadly aligned, as both stakeholder groups shared similar concerns about the EPAs affecting opportunities for industrial development. This was reinforced by the resurgence of industrial policy in recent years.[121]

African negotiators, but also businesses, civil society and NGOs were struggling with a lack of capacity, in particular a limited availability of technical expertise and resources. The EU, in a januslike approach, was also a provider of technical assistance to address this capacity gap. And yet, notwithstanding this technical assistance, this lack of capacity made it difficult for African counterparts to fully assess and go along with the deep integration aspects of the EPAs. This explains the focus of the discourse on tariff liberalisation and market access for trade in goods.

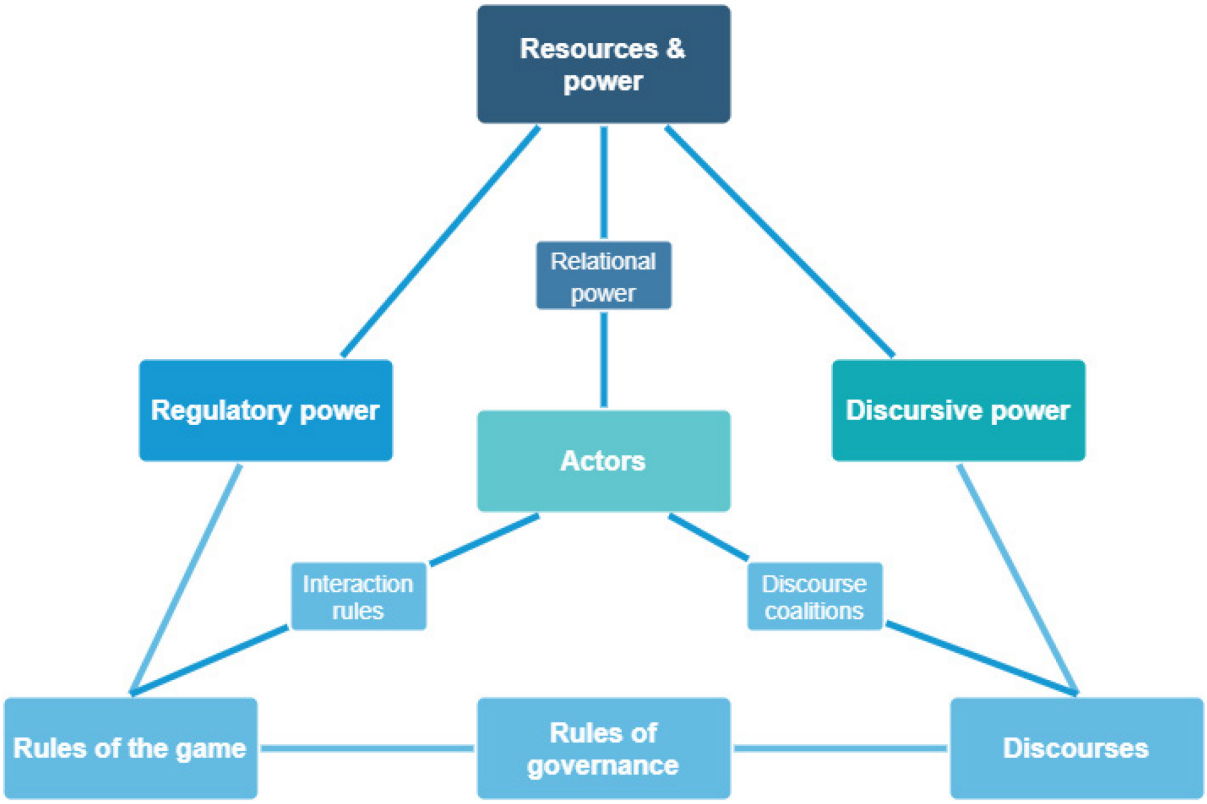
Political economy of the negotiations

In principle the political economy of the EPA negotiations is simple. Whether or not an African country signed an EPA can be explained, with no exceptions, by whether the country needed to maintain preferential market access to the EU or not; and if this market access is needed, whether it is already provided under EBA or GSP+. The vast majority of African countries are least-developed countries and thus fall under EBA. The remaining countries have either signed an EPA, fall under GSP+ or are oil and gas exporters. This does not mean that other factors were unimportant. Rather, these other factors have to be seen against this background.

In what follows we analyse the political economy of the negotiations by relying on the framework proposed by Liefferink (2006). This framework sees the actors as embedded in a system of the discourse, the rules of the games, and the resources and power of these actors. In addition, we also draw on the logic of two level games, originally proposed by Putnam (1988). Two or three level games capture the fact that the outcome of EPA negotiations depends on the complex interplay between the negotiators (level I) and domestic politics (level II).

[118] See Ashraf and van Seters (2020, page 1)
[119] As confirmed by several former participants in the negotiations.
[120] At the same time there was also the influence of the business community in those countries critically dependent on market access to the EU, such as for example horticulture in Kenya.
[121] Discussing these factors in the context of the EU-ECOWAS negotiations is Moerland, Anke, and Clara Weinhardt (2020, page 271–273).

Figure 5 Political economy framework



Source: Adapted from Liefferink (2006).

The **rules of the game** include first and foremost WTO rules, in particular the raison d'être of the EPA, compliance with WTO rules (at least in the interpretation of the EU[122]). Rules governing EU trade policy in general include the EBA scheme, granting preferential market access to least-developed countries, but also trade policy as the exclusive competence of the EU with the European Commission as the negotiator, thus limiting the involvement of individual member states. And lastly, the rules of the game include the rules of the negotiations themselves.

The **discourse**, as also described in the previous section, was characterised by strong and intense opposition from NGOs, and a lack of counterweight in the form of support of the EPAs by other stakeholders. Furthermore, the discourse was also shaped by underlying sentiments such as the love-hate relationship African countries have with Europe, alternative trade arrangements with other major powers and the resurgence of state-led development models and industrial policy.

In principle, the EU held the upper hand in terms of **resources and power**. This include the technical capacity and experience of EU trade negotiators, and the economic and political dominance of the EU. However, several factors empowered African negotiators. First, the emergence of new actors such as China or Turkey in Africa, and the unilateral trade arrangement with the US, the Africa Growth and Opportunity Act. Second, as the EU conducted negotiations with blocs of countries, individual countries in these blocs held considerable power, including the power to veto the agreement. Third, and as already discussed, the EU diminished its power by providing alternative means for market access. This includes EBA, and in the case of Cape Verde also GSP+. Furthermore, the EU deliberately reduced imbalances in technical skills and experience at the negotiating table, by providing capacity building support and technical assistance to African negotiators.

Taken together, the political economy of the EPA negotiations is straightforward. On one side several factors should have led to successful negotiations. These include the economic and political power of the EU and the overarching

[122] In particular, the requirement of "substantially all trade" was interpreted by the EU as a requirement for EPAs to cover at least 90 percent of trade. See also South Centre (2008).

rule of the game, the need to ensure WTO compatibility. However, what was decisive in the end were other, countervailing factors, including the rules of the game providing a strong outside option to most African countries, the unfavourable discourse and the de-facto veto power of individual African countries.

Furthermore, we can also look at the **interplay of negotiators and regional and domestic politics**, following the logic of two-level games described by Putnam (1988). On the side of the EU, the influence of individual member states was important, and included positions that emphasised the development friendliness of the EPAs (i.e. the 'like-minded countries' group of Denmark, the Netherlands, Sweden and the UK)[123] or full market access to African countries (i.e. Denmark, Sweden and the UK). Other countries focused on some protection for sensitive goods (i.e. sugar and rice), as advocated by Italy, Portugal and Spain, or put an emphasis on a special relationship with ACP countries (i.e. France, UK).[124] However, overall the economic interest of the EU was relatively limited, given that relative to other markets, the markets of African ACP countries are relatively small. Taken together, these influences as well as the exclusive competence of the EU gave the trade negotiators autonomy as well as a mostly coherent negotiating position.

Furthermore, within the European Commission, negotiations were influenced by various DGs, all with their own interests and agendas. These include DG Trade, as a driving force, but also DG Development, DG Enterprise and DG Agriculture.[125] DG Trade was mainly interested in liberalising trade, on a reciprocal basis. DG Development was mainly interested in pursuing a development agenda.[126] DG Enterprise was focused on opening markets for EU exporters, while protecting some sectors from import competition. And lastly, DG Agriculture sought to protect EU agriculture from import competition.[127]

On the side of African countries, we have to consider the influence of individual countries of the EPA country groups, as well as other influences, from NGOs or the business community. In contrast to the EU, the interests of individual countries were far less aligned and coherent. This stems from the diversity of countries and their interests. For example, ECOWAS includes countries such as Nigeria, mainly relying on exports of oil and gas, but also with a relatively large domestic manufacturing base, industrial development ambitions and large domestic market. It includes least-developed countries such as Mali or Sierra Leone, with a very limited export basket and limited potential, limited ambition for industrial development and a small consumer market. And it includes countries such as Ghana and Côte d'Ivoire, with significant agricultural exports to the EU, but also a domestic manufacturing base. These countries consequently had very different interests in the negotiations. Similarly, the interests of the business communities differed across countries, but also across sectors.

Lessons learnt and recommendations

The outcome of the EPA negotiations process had real and in parts adverse consequences. While some EPA negotiations have been successful, other EPA negotiations have failed or only led to interim EPA agreements or access under the market access regulation. This has not been a satisfying outcome, given the shallowness of interim EPAs respectively the shallowness and temporary nature of the market access regulation. It has also created issues for regional integration, and has to some extent antagonised political relations between the EU and Africa. However, on the other side, the EPAs with the SADC and ESA can be seen as a success, as evidenced by current negotiations aimed at deepening these EPAs. Furthermore, while NGOs have been critical of the EPA negotiations, their involvement in the process has strengthened them.

[123] It is also in this emphasis on development that the influence of EU-based NGOs was felt.
[124] See Elgstrom and Frennhoff Larsen (2010)
[125] The names of the DGs have changed over time. Today these DGs are known as DG Trade, DG Intpa, DG Grow and DG Agri.
[126] Even more so, at least initially and for some countries or country groups the lead responsibility for the negotiations rested with DG Development. For example, the negotiations for South Africa were lead by DG Development (Frennhoff Larsen, 2007, page 862ff.).
[127] See Frennhoff Larsen (2007)

What lessons can be drawn? First and foremost, and quite trivially, that countries will not agree to EPAs that do not provide an added value. From the perspective of most African countries, and in particular the least-developed ones, EPAs do not provide meaningful market access in addition to what these countries benefit from anyway. And in exchange, they entail an obligation to reduce tariff protection from imports from the EU. It is thus critical to look for such added value in any renewed round of EPA negotiations. Where this added value lies is and will be country-specific, thus requiring flexibility and a willingness to innovate from negotiators.

For example, investment is an area that could potentially provide this added value. Frameworks and best practices that would facilitate investments from the EU in African countries would thus be worthwhile exploring. However, this also faces the caveat that integrating binding investment provisions into trade agreements is challenging. Likewise, EPAs could take into account the specific needs and interests of emerging sectors. An example for such a tailored approach is the cultural protocol in the EU-CARIFORUM EPA, tailored towards the needs of creative industries. However, once again, challenges are abound, as demonstrated by the difficult implementation of the cultural protocol, with CARIFORUM creative industries continuing to face issues related to travel or (temporary) work in the EU.

Second, even the most far-reaching and innovative trade agreement can only do so much for promoting exports. Exporters in ACP countries face a host of challenges, and addressing these might require targeted support and policies. On the one hand, this includes industrial policies, pursued by different African governments, to varying degrees of success. For EPA negotiations to be successful it is thus important to take these industrial development ambitions serious and to provide space for industrial policy in the EPAs, as long as it is genuine and well-designed. On the other hand, such support could also be provided by the EU, in the form of technical assistance. A success story to learn from is the Caribbean rum programme, facilitating the upgrading from bulk to high-value production, within the wider framework of the EU-CARIFORUM EPA.[128]

Third, for negotiations with groups of countries to be successful, regional integration needs to progress. More ambitiously, this could also mean regional integration in the framework of the African Continental Free Trade Area. Going beyond trade integration, this would also include a strengthening of regional institutions and their capacity to negotiate on behalf of member states. The EU and individual member states could play an important role, as providers of technical assistance. However, the challenge is to maintain the fine line between being a (negotiation) party with its own interests and objectives, and an uninvolved and dispassionate provider of technical assistance. A model could be existing Aid for Trade organisations such as Trademark East Africa. While donor-funded, such organisations can operate with a substantial degree of autonomy in their pursuit of regional integration and trade promotion.

Fourth, a consideration is also to eschew EPAs with those regions and countries unwilling to ratify and apply an EPA. Instead, the EU could expand market access under GSP, available to all developing countries. This would entail further unilateral tariff liberalisation, from the current two thirds of tariff lines to a share closer to the 98 and 99.8 percent provided under GSP+ respectively EBA. In general the adverse impact on EU producers and interests will be limited, given the relatively small economic size and export potential of low and lower-middle income countries. However, some products and countries are exceptions, and thus need to be carefully navigated.

And lastly, a continuous dialogue between the EU and African countries matters. It has to be at an equal level, with the EU giving it as much importance as African countries do, no matter how small the country. And it has to be inclusive, taking on civil society, NGOs and the business community. Relations between Europe and Africa are fractious and difficult. But they are also important, close and deep and often personal. A true dialogue is thus not only eminently feasible, but also without alternative.

[128] However, the rum programme was also an exception in the world of EU development aid, as otherwise trade-related programmes by the UK's DFID have been more innovative and more oriented towards impact. See Lodge (2019, page 111).

Chapter 3: Trade in Services Agreement

Introduction: from GATS to TiSA

This case study focuses on the Trade in Services Agreement (TISA). TISA is a plurilateral agreement officially still under negotiation, but in December 2016, negotiations came to a halt.

TISA builds on the General Agreement on Trade in Services (GATS), that was concluded as an integral part of the WTO Agreement, and entered into force in January 1995. The extent of liberalisation of services under GATS was limited, as many members only committed to binding the policies already applied at that time, i.e. they promised not increase protection from the levels at that time. This implies that their markets did not become more open in practice. In addition, not all members covered all sectors and/or subsectors in their individual GATS-schedules or listed Most-Favoured Nation (MFN)-exemptions.[129] GATS was considered to provide a model for further liberalisation through successive liberalisation rounds. While for some specific sectors, additional protocols[130] were concluded shortly after the Uruguay Round, the GATS also had a so-called built-in agenda, which commits members to start a new round of negotiations on services in 2000. In 2001, these negotiations became an integral part of the Doha Round, a new round of comprehensive negotiations (i.e. covering many topics at the same time, as part of a single undertaking), which were launched at the 2001 Doha Ministerial Conference.

Progress in the Doha Round was very slow, as recognised at the WTO Ministerial Conference in Geneva in 2011. Therefore members were invited "to more fully explore different negotiating approaches while respecting the principles of transparency and inclusiveness." Based on the lack of progress, the US and Australia launched an initiative to seek interest among WTO members to negotiate a plurilateral Trade in Services Agreement (TiSA), outside of the WTO framework that binds all WTO members. The group of countries that was willing to negotiate substantive services liberalisation is an ad-hoc coalition of WTO members, referred to as the Really Good Friends of services (RGF). The EU is also part of this group, and as one of the main initiators of TiSA, chaired the negotiations together with the US and Australia.[131] Membership of the group is not fixed, however, as membership increased from 16 participants at the start to 23 at the last round of negotiations. The group mainly consists of higher income (OECD) countries but also includes a few developing countries (e.g. Mauritius, Pakistan).[132]

The idea of TiSA was, that while being negotiated as an economic integration agreement according to article V of the GATS, that it would be set up in such a way that it could be brought back into the WTO at a later stage, "multilateralisation" of the agreement. Therefore, the general provisions of TiSA would incorporate all relevant articles from the GATS but also had to meet the conditions of Article V of GATS, meaning that it should not raise the overall level of barriers to trade in services to WTO Member outside the agreement. In addition, compared to GATS, TiSA was meant to pay more attention to regulatory aspects.[133]

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[129] See for example Hoekman and Mattoo (2013).
[130] These are the Protocols on financial services (adopted in 1995, and a next protocol in 1997), on movement on natural persons (adopted in 1995), and on basic telecommunications (adopted in 1997). For more information, see https://www.wto.org/english/tratop_e/serv_e/s_negs_posturuguay_e.htm#protocols, last visited on 10.11.2020.
[131] In March 2013, the European Commission was given a mandate by the EU Member States to open negotiations on a plurilateral trade in services agreement.
[132] Ecorys (2017).
[133] See https://ec.europa.eu/commission/presscorner/detail/en/MEMO_13_107, last visited on 10.11.2020.

Trade in services: understanding the complexities

In order to understand the main challenges around the negotiations around TiSA, it is important to understand the specificities of trade in services and the complexities of the GATS agreement.

First, in contrast to goods, most services cannot be shipped to another country, but require proximity between the supplier and the customer. The GATS distinguishes four ways in which services can be traded, also referred to as the four modes of supply. These are the following:[134]

- **Cross-border supply** covers services flows from the territory of one member into the territory of another member, without movement of either the service supplier or the service consumer (e.g. banking or architectural services transmitted via telecommunications or mail);
- **Consumption abroad** refers to situations where a service consumer (e.g. tourist or patient) moves into another member's territory to obtain a service;
- **Commercial presence** implies that a service supplier of one member establishes a territorial presence, including through ownership or lease of premises, in another member's territory to provide a service (e.g. domestic subsidiaries of foreign insurance companies or hotel chains); and
- **Presence of natural persons** consists of persons of one member entering the territory of another member to supply a service on a temporary basis (e.g. accountants, doctors, teachers or workers).

The different ways in which services are traded, also imply that rules do not only cover the end product, but also affect factors of production (capital under mode 3 and labour under mode 4), which makes the political economy around rules in these areas more controversial. Under mode 4, there is often a fear for increased migration (even if mode 4 only covers temporary presence)[135] as well as for social dumping,[136] when allowing foreign workers in. Also within the EU, where integration is at a relatively high level, the possibility of cheaper labour coming in from Eastern Europe and its effect on local employment in Western Europe has led to political tensions, as demonstrated by the discussion in France on Polish plumbers around 2005. The importance of employment is also reflected in the labour market test in the Netherlands, where a domestic employer needs to show that he cannot find a (EU-)national to fill the vacancy, even if it has made market access commitments for mode 4 in the relevant service sector.

Political economy aspects are also important, because various service sectors are key for the functioning of the overall economy (e.g. telecommunications, transport, finance). This leads for example to discussions on the risks related to foreign control of economic sectors and critical infrastructure such as ports.

Next to the modes of supply, the type of trade-restrictive measures in services shapes the negotiations and resulting agreements. Services from foreign service providers usually do not face tariffs like goods at the border; but are confronted by domestic regulation that determines access to the market and the way these providers are treated differently than domestic services suppliers. The relatively high degree of regulation in the services sector can be explained by the fact that many services are characterised by some kind of market failure. For example, because of asymmetry of information, it is more difficult for the consumer to judge the quality of a service provider, and therefore the government can demand certain professional qualifications from service providers and/or establish a licensing regime. Imperfect competition (e.g. in network industries like railway or telecommunication), externalities (e.g. related to pollution from transport) and public good/social considerations (e.g. related to health and education

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[134] Taken from https://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm#4, last accessed on 10 November 2020.

[135] See e.g. Sauvé (2014).

[136] Although there is no common definition of social dumping, but one definition that is used in the EU is "The practice whereby workers are given pay and / or working and living conditions which are sub-standard compared to those specified by law or collective agreements in the relevant labour market, or otherwise prevalent there" (Source: https://ec.europa.eu/home-affairs/what-we-do/networks/european_migration_network/glossary_search/social-dumping_en) In the context of TiSA it mainly refers to workers from other nations.

and social security) are also market characteristics that are common for services and have led to regulation of the relevant sectors.[137]

However, many services are also characterised by vested interests, especially in those services with few suppliers. As a result of political capture by well-organised lobbies, regulations sometimes do not only reflect legitimate reasons related to market failures but may also be imposed for other reasons (e.g. the Jones Act in the US, restricting foreign competition in domestic water transport originally because of national security reasons, or the restrictions that the EU has on audio-visual services, to protect its culture). Literature shows that some countries have kept barriers in place or introduced new ones by evoking the public interest motive, because they have a fundamental belief that that cross-border service sector liberalisation is detrimental to the quality of services provided.[138]

All these factors have contributed to a high level of regulation of domestic services markets. And given the different characteristics of the various services, these regulations are also highly sector-specific.

All of these elements have affected the architecture of the GATS and bottom-up manner and pace of liberalisation. Members negotiate commitments both at a horizontal (i.e. across sectors) and at a sector-specific level, as well as by mode of supply. The commitments can relate not only to market access, but also to national treatment, i.e. the extent to which foreign services and service providers are treated in the same way as national services and service providers. These GATS commitments are included in the national schedules of specific commitments. In the GATS, a so-called positive list approach is used: commitments do not apply unless the sector is listed in the schedule. Non-covered sectors can remain closed.

The sector-specific nature of commitments, the differences by mode of supply and the fact that national treatment is not a universal obligation are important differences from the goods trade under the GATT. The national treatment of foreign services providers is negotiable under GATS, in contrast to the national treatment obligation for foreign goods under GATT article III. The ways of trade and high level of regulation in the service sector also have implications for trade costs that foreign service providers face: trade costs for services are estimated to be double the costs of trade in goods.[139] In addition to trade costs, it should be noted that there are also internal costs. Discriminatory measures have anti-competitive effects, thereby increasing the costs of services, and given the role of services as inputs, this affects the competitiveness of other sectors as well.

The fact that issues around services are sector-specific also affects the negotiating dynamics. Because of their importance in the economy, several service sectors each have their own relevant institutions (e.g. telecom authority, financial market authority) and even specific ministries in place (e.g. health, education, energy). Furthermore, semi-public organisations also play a key role (e.g. in network sectors like railway or energy and universities in education). These constituencies make services negotiations challenging both at domestic and international level. Another complicating factor is the lack of a common denominator for liberalisation negotiations, compared to tariffs levels and revenues in negotiations on trade in goods. One consequence is that in GATS negotiations specific ministries have often been the dominant player, with a much smaller role for Ministries with responsibility for foreign trade.

TiSA: Issues and challenges

Various factors provided an impetus into the negotiations of TiSA, but there were also various challenges. In this section we describe the main factors that led up to the negotiations but also those that complicated the negotiations and ultimately led to their stalling.

[137] See e.g. Sauvé (2009).
[138] A point made by Ebeke, Frie and Rabier (2019, page 9).
[139] World Trade Organisation (2019). More information on trade barriers is also available through the Services Trade Restrictiveness Indicators (STRIs) developed both in the World Bank and in the OECD, which highlight the extent of and variation in the barriers across sectors and countries.

The growing importance of services and services trade and the regulatory environment

Services have been the dominant sectors in most advanced countries for several decades already, accounting in many countries for over 60 percent of the economy and also being the most important source of employment. In the EU, the services sector accounted for 65.6 percent of GDP and 71 percent of total employment in 2019; in the Netherlands these shares are 69.8 percent and 82 percent respectively.[140]

Services trade has only become more important in recent decades. New technologies (e.g. providing services online) have greatly facilitated international trade in services. Also the increased importance of global value chains and FDI have increased the demand for services and therefore contributed to internationalisation of the service sector. In addition, the trend towards customisation of products has increased the services component in goods. Between 2005 and 2017, trade in services has even expanded faster than trade in goods, at 5.4 per cent per year on average.[141]The importance of trade in services has also become more visible with new data bases. For example, the trade in value added (TiVA) database of the OECD shows the important role of services in value added trade: services represent more than 50% of the value added in gross exports, and over 30% of the value added in exports of manufacturing goods.[142] This again reflects that services are not only important as a sector itself but also play an important role in facilitating trade in goods.

With the growing importance of services trade, it is also clear that there could be gains from further opening up the services sectors by enhancing competition, choices for consumers and innovation. This is even more important considering that the many innovations in services that have taken place since GATS was concluded are not reflected in the current multilateral framework, while they pose new challenges.[143] First, this concerns the types of services: the GATS list of services under which WTO members have made market opening commitments is considered to be aggregate and outdated, as it is not clear how and where some services are covered, like environmental services or express delivery. Linked to this, it is not straightforward how trends like incorporation of services into products relate to the four modes of supply. Arguments have even been made to create a fifth mode of supply to account for services incorporated in a product (e.g. the design as an essential element of a car).[144] In addition, there are barriers that are not yet fully covered under the GATS. For example, digitalisation has given rise to new barriers, like forced data localisation requirements[145] or restrictions on data flows due to privacy or national security considerations (relevant and understandable in the context of e-commerce but also for example financial services). Other relevant barriers not covered by the GATS in any depth (in comparison to the GATT) include for example the competitive advantage of state-owned enterprises, differences in services standards and subsidies to national suppliers.

Impasse in the Doha Round but progress in free trade agreements

As indicated in the introduction, progress in the Doha Round had been slow. The main discussions in the WTO evolved around agriculture and non-agricultural market access (NAMA). There was less explicit attention to services trade. However, as services are part of the Doha single undertaking, more controversial discussions on other topics also contributed to the lack of progress on services. Several of the interviewees indicated that they assumed that more could be achieved if the negotiations would only be about services, and not involve trade-offs in other areas.

This assumption was also based on the fact that while progress in the WTO had been slow, more liberalisation was achieved in free trade agreements. Before the GATS was concluded, many free trade agreements did not include

[140] Retrieved from https://data.worldbank.org/indicator/NV.SRV.TOTL.ZS?locations=NL and https://data.worldbank.org/indicator/SL.SRV.EMPL.ZS, last visited 25.01.2021.
[141] World Trade Organisation (2019).
[142] See http://www.oecd.org/trade/topics/services-trade, last visited 25.01.2021.
[143] As put forward by Rentzhog and Anér (2014).
[144] As suggested by Cernat and Zornitsa Kutlina (2014).
[145] Data localisation laws require (personal) data to be collected, processed, and/or stored inside the country.

services, but since that time, many more FTAs started to include services as well. In 2000, there were 79 FTAs in force which had been notified to the WTO, out of which only 8 (10%) covered trade in services. At the end of 2020, there were 305 FTAs in force, out of which 157 (51%) covered trade in services.[146]

Several of these FTAs went beyond the GATS, in terms of the commitments made on market access and national treatment. In an analysis of 56 regional trade agreements, Miroudot, Sauvage, and Sudreau (2010) find a higher degree of market access and national treatment commitments in the regional trade agreements as compared to the GATS, stemming from reductions in restrictive barriers in existing sectors or the extension of commitments to new sub-sectors. In their dataset, 72% of services sub-sectors have market access and national treatment commitments and in 42% of the sub-sectors the FTA commitments go beyond GATS.[147] While this data shows that more progress has been achieved in FTAs, these numbers show at the same time that commitments made in FTAs do not always go further than the status quo in the current GATS Agreement, but are often a confirmation of existing commitments.

Participation in the TiSA negotiations and the potential for multilateralisation

Participation in TiSA was not fixed. When the negotiations were officially announced in 2012, the following WTO members were part of the group: Australia, Canada, Colombia, Chinese Taipei, Costa Rica, the EU, Hong Kong China, Israel, Japan, Mexico, New Zealand, Norway, Pakistan, Peru, the Republic of Korea, Switzerland, Turkey and the US.[148] Later other countries also joined: Chile, Iceland, Liechtenstein, Mauritius and Panama. While Paraguay and Uruguay also joined the group, they decided to step out of the negotiations in 2015.[149] As indicated in the introduction, the US, Australia and the EU were the main initiators of TiSA and chaired the negotiation rounds.

The group of participants accounted for around two thirds of global trade in services. Yet, some of the major emerging economies (for example Brazil, China, India, South Africa, Russia, Indonesia) were not part of the negotiations. While most of these were reluctant to get involved (e.g. because they preferred services to be part of the Doha round agenda, as part of the single undertaking, where there could be trade-offs for example between services and agriculture), China had formally expressed interest to join the negotiations but was never accepted (see also section 1.5). There were no commonly agreed criteria/conditions on the basis of which a country would be able to join the TiSA negotiations.

The size and structure of the group also posed challenges to the possible multilateralisation of the agreement at a later stage. As Sauvé (2014) notes, the closed nature of the talks and the fact that a substantial part of world services trade is not covered, pose challenges to integrate TiSA into the WTO at a later stage. With multilateralisation of the agreement, countries that have not participated in TiSA will still enjoy the benefits of the agreement.[150] That would mean that all WTO members that did not participate in the negotiations would get the benefits of improved access, without making additional commitments themselves (the problem of freeriding). In addition, as there are often quantitative restrictions on services trade (e.g. a maximum number of banking licenses), this would also decrease the value of commitments for the original TiSA participants. Because of these reasons, multilateralisation is not an attractive option for TiSA participants. While there is no minimum share for world trade to be covered, in other agreements (e.g. the International Technology Agreement (ITA) or the Financial Services Agreement) that were also

[146] Based on data from http://rtais.wto.org/UI/publicsummarytable.aspx, last visited 25.01.2021.
[147] At the same time it should be noted that it is not easy to compare PTAs, and that GATS-minus provisions have also been found, e.g. in Adlung and Miroudot (2012).
[148] Advancing Negotiations on Trade in Services, Joint Press Release, at https://eeas.europa.eu/archives/delegations/wto/press_corner/all_news/news/2012/20120705_advancing_negotiations_services.htm, last visited 25.01.2021.
[149] See https://trade.ec.europa.eu/doclib/press/index.cfm?id=1406&title=EU-to-use-its-chairmanship-of-TiSA-talks-on-services-to-push-for-major-progress, last visited 25.01.2021.
[150] Based on the Most-Favoured nation (MFN clause).

negotiated with a smaller group, the members accounted for over 90 percent world trade.[151] Reaching a certain critical mass therefore is key.[152]

The possible multilateralisation of TiSA at a later stage is also affected by other elements. Notably the architecture of the agreement, and how TiSA will deal with elements found in current free trade agreements that are actually more restrictive than the GATS (GATS-minus).[153]

Content of a future TiSA: some contentious issues

Domestic regulation- the right to regulate

The large majority of barriers to services trade are not barriers at the border of a country (as is the case for example with import tariffs on goods), but stem from domestic regulation. This domestic regulation is often introduced for a legitimate reason, but it can in some cases also unduly protect the domestic industry from foreign competition. This makes the negotiations difficult, as governments need to find a balance between the promotion of greater competition with the need for regulation to offset market failures and to achieve public policy objectives.

The advantage of trade agreements is that they can lock in some government reforms. This increases transparency and predictability. Opponents have expressed concerns on how this may affect the right to regulate. There are two specific elements discussed under TiSA worth highlighting in this context:

- The standstill clause: this means that a country has to list all the discriminatory measures at the moment of making commitments and cannot introduce any new barriers afterwards.
- The ratchet clause: this means that a discriminatory measure that a country had previously and unilaterally removed in an area where it had made a commitment cannot be reintroduced.

Both the ratchet and standstill clauses would apply to national treatment only, not to market access. In addition, exceptions can be made, as the EU has done for public services in its TiSA offer.[154] These clauses do not mean that no new regulations can be introduced, but that any new regulation should not discriminate between domestic and foreign service suppliers.[155] Critics have expressed concerns over the impossibility to reverse certain commitments if they prove to have unintended consequences. At national level, there are processes that can be followed to retract or adjust certain policies if they do not reach their objectives or even prove to have adverse effects. However, in international agreements, the process for policy reversals is less clear and would probably require more time.

Provisions on disciplines for domestic regulation often focus on transparency, for example through notification requirements and setting up enquiry points, to ensure that (foreign) service providers at least are able to find out what the applicable rules are. In addition, the disciplines can cover horizontal measures that help avoid

[151] Sauvé (2014, page 7)
[152] It should be noted that there are also other options for TiSA, e.g. to be considered as a services PTA or to become a plurilateral agreement within the WTO. But all options have their challenges. For a discussion, see for example Nakatomi, N. (2015) Sectoral and plurilateral approaches in services negotiations: Before and after TISA. ECIPE Policy Brief 02/2015.
[153] For a more detailed discussion, see Adlung, R. (2015) The Trade in Services Agreement (TISA) and Its Compatibility with GATS: An Assessment Based on Current Evidence, World Trade Review (2015), 14: 4, 617–641
[154] In services negotiations, parties make requests, which specify what they want from other parties, and offers, which show the extent to which they are willing open up. While requests are usually presented in the form of a letter, an offer normally consists of a draft schedule of commitments. Source: www.wto.org › serv_e › gsintr_e, last accessed on 22 December 2020.
[155] Source: European Commission, DG Trade, Trade in Services Agreement (TiSA) factsheet, 26/09/2016, p. 10.

discrimination of foreign service providers, for example in licensing procedures.[156] In the debate around TiSA, three elements have attracted particular attention:[157]

- Requirement for consultations as part of the transparency provisions. This would give all stakeholders, including foreign companies, the opportunity to ask questions or provide comments on proposals for new policies or legislation affecting the service sectors. There is a concern that this could delay or even prevent new or enhanced regulation, possibly leading to a regulatory chill.
- The necessity test: This test would require that measures or regulations do not constitute unnecessary barriers to services trade. While in the GATS there is no formal test, some TiSA participants argued for this. There is concern on how notions like 'unnecessary' would be interpreted in practice.
- The requirements for transparent and objective criteria in for example licensing procedures have also been questioned, in terms of their feasibility and how these would be interpreted in practice.

These three elements have thus further raised concern over the right to regulate.

Positive versus negative list approach

As explained in the previous section, under the GATS a positive list approach is used: only sectors for which explicit commitments are made are covered under the agreement. Many FTAs, especially those modelled after NAFTA, use a negative list approach. Under a negative list approach, everything is liberalised, unless specified otherwise. Countries can still make exceptions to this, by excluding certain measures or sectors (i.e. in the annex of non-conforming measures).

Proponents of the negative approach argue that this approach usually provides a higher ambition level. Liberalisation automatically covers new services and service sectors which are not explicitly excluded. In addition, in the negative list approach, governments have to present their exceptions at the level of the applied law, and thus have to list the relevant laws explicitly in the annex. They consider the negative list therefore as more transparent compared to the positive list approach, where restrictions can be made at the level of choice (at the level of measures, but also e.g. at the level of modes of supply). Based on the standstill and ratchet clause, the negative list approach locks in currently or future rules, which increases certainty and predictability for business. [158]

In principle, a positive or a negative list approach can achieve the same level of opening, it is only presented in a different way (different scheduling techniques). However, as exceptions have to be explicitly listed, opponents are concerned that this introduces more risks e.g. if certain measures are not properly reflected in the exceptions. This risk also applies to new services, which are automatically covered under a negative list approach if they are not explicitly exempted. Furthermore, it could affect the negotiating dynamics, since a negative-list approach is favoured by large demandeurs, who would like to limit the list of exceptions.[159]

In the TiSA negotiations, parties followed a hybrid approach. For market access commitments, a positive list approach was used, while for national treatment, a negative list was used. The hybrid approach was chosen as the

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[156] Building on article VI:4 and VI:5 of the GATS Article VI:4 calls for further negotiations in relation to the unnecessary barriers to services trade and Article VI:5 aims to ensure that commitments are not impaired through regulatory requirements (licensing and qualification requirements, and technical standards) not based on objective and transparent criteria or are more burdensome than necessary to ensure quality.

[157] As also presented in Ecorys (2017, page 20).

[158] See for example a presentation by Sherry Stephenson (2015), Overview of Various Approaches to Services Liberalization, Training Workshop on Trade in Services Negotiations for AU-CFTA Negotiators, August 2015, at: https://unctad.org/system/files/non-official-document/ditc-ted-Nairobi-24082015-USAID-stephenson.pdf, last visited 25.01.2021.

[159] Point raised by WTO (2014), Overview of Services in RTAs: Positive or Negative List? Workshop on Scheduling Services and Investment Commitments in FTAs Singapore, 28-29 October 2014, at: http://mddb.apec.org/Documents/2014/CTI/WKSP5/14_cti_wksp5_010.pdf, last visited 25.01.2021.

partial use of the positive list approach facilitates the economic integration agreement to be integrated back into the WTO.

It was a point of debate, however, as many of the TiSA participants use negative list approaches in their FTAs, for example in the Trans-Pacific Partnership (TPP), that was concluded in January 2016. However, the EU has traditionally used positive list approaches in its FTAs, but in recent years, it has also concluded trade agreements with a negative list approach for certain modes of supply, such as mode 3 "Commercial Presence" (e.g. with Canada, Japan).[160] In TiSA, the EU offer excludes new services. In addition, for public services some cross-cutting exceptions are made (see also below).[161]

Public services

Public services have always been a sensitive topic in services negotiations, because of the public policy objectives related to these services, though the scope of public services may differ considerably among countries, especially in areas like social security, health services, education and audio-visual services and public utilities with semi-natural monopolies like rail transport. There is a fear of disruptive effects of foreign competition and that it would become more difficult to regulate the sector.

Provisions in TiSA can help to reduce this risk. Similar to GATS,[162] all "services provided in the exercise of governmental authority" would be excluded in TiSA, i.e. those services that are provided neither on a commercial basis, nor in competition with one or more service suppliers (like military, police or fire brigade services). In addition, participants can make further exceptions (carve-outs) in their specific schedules of commitments. The EU offer contains a horizontal reservation that stipulates that 'public utilities' may be subject to (public) monopolies. This would apply to all sectors except telecommunications and computer and related services. The EU offer also excludes publicly-funded health and social services; publicly-funded education; water collection, purification, distribution and management services; film, TV and other audio-visual services; and air transport (except for ground handling and aircraft maintenance services).[163]

The EU Commission argued that this approach has never led to any issues or problems in its existing trade agreements. In March 2015, the EU Trade Commissioner made a statement on public services was made, together with the US Trade Representative, to confirm that public services are not at risk in trade agreements.[164] However, opponents consider it not sufficient to protect public services. They criticise the lack of clarity on definitions (e.g. what is a public utility, when is a service considered publicly funded) as well as the scope of the carve-outs, and therefore request a full exclusion of public services from the agreement. The European Parliament also requested the EC to "exclude current and future services of general interest and services of general economic interest from the scope of application of the agreement."[165]

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[160] See also European Commission- DG Trade (2016) Services and investment in EU trade deals Using 'positive' and 'negative' lists, April 2016, at: https://trade.ec.europa.eu/doclib/docs/2016/april/tradoc_154427.pdf, last visited 25.01.2021.

[161] For a full overview and the exceptions, see the information of the EU's second revised offer of 21.10.2016, at: https://ec.europa.eu/trade/policy/in-focus/tisa, last visited 25.01.2021.

[162] GATS Article I-1 sub 1.3

[163] Source: Viilup (2015, page 20-22). Please note that the exception on air transport is provided for all Members in the GATS Annex on Air Transport Services because access to countries' airspace and landing rights are always negotiated in bilateral civil aviation agreements.

[164] Joint Statement on Public Services by EU Trade Commissioner Cecilia Malmström and the United States Trade Representative Michael Froman, 20.03.2015, at https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_15_4646, last visited 25.01.2021.

[165] European Parliament resolution of 3 February 2016 containing the European Parliament's recommendations to the Commission on the negotiations for the Trade in Services Agreement (TiSA), (2015/2233(INI)), P8_TA(2016)0041.

Cross-border data flows and data protection

Cross-border data flows have become increasingly important in international trade and investment. This is one of the topics not covered by the GATS, but considered a key issue to be clarified. In an increasingly globalised world, international transfers of data also increase. This can be through international money transfers through banks, online purchases from abroad (e.g. Amazon, Alibaba) but also social media platforms like Facebook. It is an important element of the current economy, as it facilitates trade (e.g. a platform can make it easier for companies to enter foreign markets, or make it easier to enter into global value chains) and creates new business (e.g. in the collection and analysis of data) but can also raise competition issues when platforms become de facto global monopolies, which can lead to anti-competitive practices.

Where the data transferred concerns personal data, this raises the issues of privacy protection and data ownership, as not all countries have the same level of privacy protection. In addition, there can be national security concerns, or more protectionist tendencies focused on improving countries' own competitiveness. The number of restrictions on data flows and storage has increased because of these concerns. The restrictions can take different forms, from the requirement that personal data can only be stored and processed within the territory, to requiring prior consent before data flows abroad are allowed.[166] Also within the EU it proved to be a contentious issue, as the EU considers privacy as a fundamental right and in 2016 introduced high privacy standards in its General Data Privacy Regulation (GDPR). As a result of internal discussions, the EU was not able to take a formal negotiating position on this before the TiSA negotiations came to a halt.

Evolution of the TiSA negotiations and beyond

The first round of TiSA negotiations took place from 18 to 22 March 2013 and subsequently 21 rounds of negotiations were held, the last one from 2 to 10 November 2016. In the first rounds of negotiations, the focus was on the overall outline and process of the agreement and its negotiations, and progress was considered smooth. Later in the negotiations, parties exchanged requests and offers on a bilateral basis (a similar process to previous GATS negotiations), and engaged in the more difficult discussions on the contentious issues (see also previous section). While participants agreed to submit their "best FTA" commitments for TiSA market access offers, they did not always do so, also because the level of commitments in their FTAs could vary considerably across countries.

While initially the awareness among the general public of the negotiations was relatively low, this increased over time. This was partly related to the slipstream of protests against the TTIP, which created a lot of public attention and also increased attention to other trade agreements, including TiSA. There have been various instances where TiSA negotiation texts were leaked and criticised.[167] This raised public opposition in several TiSA countries, where criticism focused notably on concerns over the right to regulate, public services, as well as the lack of transparency of the negotiations. Data flows and privacy protection were also an important topic of debate. Various petitions were started to stop TiSA.[168]

In February 2016, the European Parliament published a resolution, with recommendations for the TiSA negotiators. It reflected a balanced perspective, expressing on the one hand support for ambitious and comprehensive negotiations, while on the other hand asking for properly dealing with some of the above-mentioned contentious issues that are sensitive for EU stakeholders.

As the negotiations took place behind closed doors, there is little information on the specific positions of the different participants and the discussions around the contentious issues.[169] While the European Commission published more information on the negotiations[170] compared to earlier negotiations on other trade agreements,

[166] For a further explanation see Melzer and Lovelock (2018), among others.
[167] See https://wikileaks.org/tisa, last visited 25.01.2021.
[168] See for example https://secure.avaaz.org/campaign/en/stop_tisa_en_eu_b, last visited 25.01.2021.
[169] Although the positions of countries on services-related negotiating issues are to some extent reflected in the position papers posted on the WTO website in the context of the GATS negotiations.
[170] For an overview of the reports of the negotiating rounds and other relevant information, see: https://ec.europa.eu/trade/policy/in-focus/tisa, last visited 25.01.2021.

the reports of the meetings mainly present the *topics* under discussion, but do not provide details on the discussions that took place. And while the EU also published its offer, which allows to understand its position in more detail, most other TiSA participants have not publicly shared their offers.

The ambition was to conclude the TiSA negotiations by December 2016. Considering the difficult discussions on specific issues, it became clear that this goal was too ambitious. Several contentious issues on the negotiating tables were still not resolved towards the end of 2016. Main outstanding issues included, reportedly, cross border flows of data and new services.[171] Following the election of Donald Trump as President of the United States in November 2016, the negotiations were put on hold, and they were still on hold in March 2021.

According to some interviewees, the idea of continuing TiSA negotiations without the US was raised by some at the time, but was never seriously considered, among others because of the important role of the US in services trade. In the meantime, work has continued in the WTO. The Working Party on Domestic Regulation in which all WTO-members participate discusses some of the issues negotiated under TiSA and the WTO also has a work programme on e-commerce, which covers several aspect relevant to services, like data flows.[172] While many of the stakeholders consulted for this case study follow these initiatives or even participate in them, progress is described as slow, with small, incremental steps. On data flows and privacy, major trade partners are still not aligned. In recent FTAs (e.g. Canada, Japan), the EU has taken up specific provisions on data protection based on its General Data Privacy Regulation (GDPR).

Key stakeholders

Several key stakeholders were influential in the debate on TiSA. In this section, we describe some of the main groups of stakeholders.

Business has been an important driver in the negotiations. Business has worked together at the international level, as part of the Global Coalition of Services (GCS), a coalition of business associations of multiple countries, and encouraged their respective governments to advance negotiations on the issue. In the EU, the European Services Forum (ESF) has been actively involved, but also BusinessEurope, DigitalEurope and sector-specific associations have promoted TiSA. Given the growing importance of services trade and the lack of progress in the WTO on the issue, and the need to revitalise their economies, governments were also sensitive to accommodate this pressure for more competition and market opening.

Business is in favour of an ambitious agreement, encouraging binding existing liberalisation to the highest degree possible. They favour including the ratchet and stand still clauses, the automatic binding of new services and the facilitation of free flow of data. While they favour a negative listing approach, they understand the choice for a hybrid approach, also because they favour the agreement to become part of the WTO and extend it to other WTO members in the future. Other important elements of their position include the promotion of regulatory coherence and the promotion of transparent and fair domestic practices.[173]

Civil society has also become increasingly active in the debate on TiSA. As noted in the previous section, this was partly in the slipstream of protests against TTIP, and the larger public protests mainly took place in 2015/16. One of the reasons for the lower level of attention for TiSA is the nature of the agreement. Whereas for example in the TTIP, negotiations related to the chlorine-washed chicken and hormone treated beef from the US was something

[171] European Parliament, Plurilateral Trade in Services Agreement, legislative train 10.2020, 6a a balanced and progressive trade policy to harness globalisation, at: https://www.europarl.europa.eu/legislative-train/theme-a-balanced-and-progressive-trade-policy-to-harness-globalisation/file-trade-in-services-agreement-(tisa), last visited 25.01.2021.

[172] Next to these initiatives, there is a working party on GATS rules (subsidies, government procurement and safeguards) as well as the regular negotiations on services. The two initiatives highlighted in the main text here were considered most relevant by the interviewees.

[173] See for example the GCS position paper on TiSA of September 2014 at: http://www.esf.be/new/wp-content/uploads/2014/09/GSC-Statement-on-TiSA-Final-Sept-2014.pdf, last visited 25.01.2021.

the general public could easily relate to, this was more difficult in the context of TiSA. This is due to the intangible nature of services, the narrower scope of the negotiations as compared to FTAs, as well as the technical elements in the negotiations.

NGOs as a part of civil society have in general been quite critical on the agreement and the negotiations. The right to regulate and lack of transparency of the negotiations are recurring elements in their critique, as well as the power that the agreement would give to multinational companies (e.g. giving them the possibility to delay or event prevent the introduction of new regulations that could harm them, see also section 1.3.4). While some of them opposed TiSA altogether, there are also organisations that focused on specific parts of the agreement. Prominent examples of the latter type of NGOs include the consumer organisation BEUC and EDRi, a European network of 44 digital civil rights organisations.

BEUC sees benefits of TiSA, as it could help lower consumer prices, increase choice, improve quality and increase innovations. However, it calls for more concrete benefits to consumers: e.g. it could improve consumer protection by upholding EU consumer rights also with international online purchases. BEUC also calls on the negotiators to ensure that TiSA prevents geoblocking (i.e. technology that restricts access to Internet content based upon the user's geographical location, e.g. for the purpose of charging different prices) and enhances data protection.[174]

EDRi focuses in particular on digital rights and argues that a balance needs to be sought between the need for an open internet and the need to protect privacy, opposing to data localisation (but not opposing local data storage). It also emphasises that the agreement should not affect the principle of net neutrality (i.e. open internet, without restrictions on what people can access over the Internet) arguing that net neutrality should not be discussed in a trade agreement, nor limit the access to software source codes.[175]

Next to NGOs, **trade unions** have also been very vocal in the debates around TiSA, and they have often worked together with NGOs, especially in mobilising the public. ETUC calls for an explicit carve-out of public services in the core text of the agreement and argues that TiSA "must not result in an opening of service sectors to foreign suppliers at the cost of high European labour, environmental and consumer standards." In addition, ETUC opposes further deregulation of the financial markets through TiSA.[176]

Similar to business, NGOs and labour unions have also co-operated with like-minded international organisations (e.g. consumers international, ITUC) and/or national organisations in other countries participating in TiSA, to increase pressure on several negotiators at the same time, with the aim of having more effect on the negotiating outcomes.

The **European Parliament** has also become active in the debate on TiSA. It has published a resolution with recommendations for the negotiators (see also previous section).[177] Within the Parliament, the Committee on International Trade (INTA) was leading on this file. However, other committees were also involved and provided their inputs, such as the Committee on Civil Liberties, Justice and Home affairs (LIBE).[178] While the EP has been

[174] For a full overview of BEUC's position, see BEUC position paper on TiSA, "How to make TiSA a good deal for consumers," 12 October 2015, available at: https://www.beuc.eu/publications/beuc-x-2015-095_lau_tisa_position_paper.pdf

[175] For a full overview and explanation of their position, see their position paper of January 2016, available at: https://edri.org/files/TiSA_Position_Jan2016e.pdf

[176] For a full overview of ETUC's position, see ETUC position on the plurilateral trade in services agreement (TiSA) of 14 January 2016, available at: https://unionsyndicale.eu/wp-content/uploads/2017/01/20160114-ETUC-Position-TiSA.pdf

[177] European Parliament resolution of 3 February 2016 containing the European Parliament's recommendations to the Commission on the negotiations for the Trade in Services Agreement (TiSA) (2015/2233(INI)), P8_TA(2016)0041,

[178] For an overview of the inputs of the various committees, see the EP report (rapporteur Viviane Reding) leading up to the resolution, available at: https://www.europarl.europa.eu/doceo/document/A-8-2016-0009_EN.pdf?redirect

generally supportive of TiSA, several concerns expressed by stakeholders as outlined above were clearly reflected in the recommendations.

TiSA negotiating partners also have had their internal dynamics. The US, the EU and Australia were chairing the negotiating rounds in turn. While the ambition to further open the sector was shared by all TiSA participants, viewpoints on specific issues could differ, not only depending on specific sectoral interests but also on more general principles. For example, according to stakeholders interviewed, the EU attaches more importance to the possibility of integrating TiSA back into the WTO, while the US would be in favour of a more ambitious agreement, if needed with a smaller group of countries. The US is said to have been the main opponent to include China in the negotiations, blocking China's entry mainly for political reasons.[179] Some see it as a turning point in the negotiations as one country was given the ability to impose a veto in the negotiations.

The WTO secretariat has not been directly involved as negotiations took place outside WTO. However, negotiation rounds were often taking place at the premises of the WTO. Hence, while the WTO secretariat did not have an official observer status, the WTO Secretariat could follow the negotiations. In the regular WTO meetings of the GATS Council in which all WTO Members participate, the Chair of TiSA negotiations usually also provided an update of progress in the negotiations. Several countries not included in the negotiations, and especially countries opposed to TISA, criticised the WTO secretariat for facilitating the TiSA negotiations.

Conclusions

Negotiations on trade in services have continuously shown how difficult it is to make real progress on further liberalisation. Since 2000 already, it has been difficult to reach agreement on further opening up the services sectors and binding the unilateral liberalisation in the WTO. With the growing role of services in trade and the overall economy, a trend that is only increasing with digitalisation, the need for better rules on services trade is undisputed. Given the larger progress made in bilateral and regional trade agreements, TiSA was seen as an opportunity to move ahead with a like-minded set of countries.

The TiSA negotiations have shown that even with a smaller group of like-minded countries, negotiating a deal on trade in services is still a challenge,. Given the important role that services play in the economy, there is general caution in opening up the sector. The extent of commitments made varied considerably across the TiSA participants. But on some points there are also some more fundamental differences, as the EU discussion on data flows have shown.

The EU discussions on data flows are also illustrative of the challenges negotiators face with balancing trade and other interests at national (or in the case of the EU: regional) level, where protection of privacy has become a key issue in the debate on data flows. The challenges with respect to balancing of interests within the EU between member states is also reflected in the EU Commitments under GATS and in the EU offer for TiSA, which shows that some of the offered commitments and restrictions can vary by member state. This is also reflected in the decades long experience within the EU, where the level of integration in the internal market is much higher than in any FTA. However, also there the deepening of the single services market has not been completed with many regulatory barriers to services trade still in place.

Given the general difficulty in negotiating agreements on services trade, and the differences in positions of TiSA participants before negotiations were halted, it is highly questionable whether TiSA will be relaunched and concluded soon. Even if the negotiations would be concluded, TiSA may not even meet the threshold criteria for an Article V economic integration agreement, given that many restrictions remain in place between TiSA participants. In addition, the revival of the talks will also depend on factors not directly related to the content of the agreement. For example, the position of the new US administration towards trade liberalisation is of key importance. So far, it does not seem very likely that President Biden will push for new trade agreements.[180] Therefore, the

[179] As also noted by Fefer, R.F. (2017) Trade in Services Agreement (TiSA) Negotiations: Overview and Issues for Congress, Congressional Research Service, available at: https://fas.org/sgp/crs/misc/R44354.pdf

[180] For example, see https://www.cfr.org/in-brief/after-trump-what-will-biden-do-trade, last visited 25.01.2021.

prospects for TiSA are not very promising. But also more generally, experience has shown -whether in TiSA, the WTO or FTAs- that negotiations on services liberalisation are likely to move ahead only in small, incremental steps.

Chapter 4: Trade and Sustainable Development Chapters in Free Trade Agreements

Introduction

This case study focuses on the inclusion of sustainable development objectives as an integrated part of bilateral trade and investment agreements between the EU and third countries in the form of so called Trade and Sustainable Development (TSD) chapters in FTAs. The aim of this case study is to identify and assess the (f)actors and forces that have shaped and influenced the inclusion, negotiation and implementation of these TSD chapters in EU FTAs.

TSD chapters are a key element of the values based agenda of the EU trade policy. They include both social and environmental protection provisions and aim to *protect*, as well as *promote* EU standards and values. TSD provisions in EU FTAs are meant to ensure that economic growth goes hand in hand with higher labour and environmental standards, and as such are meant to make trade policy 'not just about interests but also about values'.[181] They aim to *strengthen* the multilateral governance system and standards on labour and environment (as laid down in relevant international agreements) as well as *enhance* a level playing field and *prevent* a race to the bottom through a deliberate weakening of domestic labour and environmental protection Since these are key topics of debate and focus for European and National Parliaments, business and civil society alike, TSD provisions play a key role in supporting the political viability of EU FTAs and their ratification.

The first fully fledged TSD chapter was included in the EU-Korea FTA (2011). However, as a point of departure for *labour provisions* in EU FTAs, it was arguably the 2008 CARIFORUM[182] Economic Partnership Agreement (EPA) that can be seen as the first major shift. "Unlike its predecessors, this agreement contained more references to international social policy norms and core labour standards." It included specific provisions and commitments to uphold such standards. "It also allowed for disputes on social issues to be referred to independent experts, and institutionalised dialogue about the trade agreement within a civil society mechanism (CSM)."[183] However, it was not until the EU-Korea FTA negotiations that the EU gave such labour provisions, along with environmental provisions a more prominent place by including them in a separate chapter.[184] TSD chapters have their own dispute resolution mechanism (DSM) and thus do not fall under the regular DSM of the agreements.[185] TSD chapters have been included in all subsequent EU bilateral trade and investment negotiations and agreements.[186]

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[181] European Commission (2015, page 5).

[182] The CARIFORUM is a regional organisation of fifteen independent countries in the Caribbean region incl. Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, the Dominican Republic, Grenada, Guyana, Haiti, Jamaica, Saint Lucia, Saint Vincent and the Grenadines, Saint Christopher and Nevis, Surinam, and Trinidad and Tobago. The Caribbean EPA was the first comprehensive EPA concluded. It replaced the non-reciprocal Cotonou Agreement, which expired at the end of 2007.

[183] Harrison, Campling, Richardson and Smith (2019).

[184] It should be noted that some sustainability issues are tackled in other parts of the EU's trade agreements as well, for example in the Procurement chapters (promote sustainable public procurement) or in relation to Energy Trade (remove barriers to trade and investment in renewable energy).

[185] The EU-CARIFORUM EPA does subject its sustainable development chapter to its regular dispute settlement mechanism, although there are no penalties available (e.g. a suspension of market access concessions) in the event of a violation.

[186] As confirmed again in December 2019 by new Commission President Von der Leyen's mission letter to the Commissioner-designate for Trade which stated that the EU "will use [its] trade tools to support sustainable development. Every new trade agreement concluded will have a dedicated chapter on sustainable development."

The FTAs negotiated and concluded since the 2011 Korea FTA have been with an array of different partners and groupings, ranging from high income countries (Canada, Japan and Singapore), to upper middle-income countries (Mercosur countries such as Brazil and Chile, Mexico), and lower middle-income countries (CARIFORUM countries, Central American countries, Moldova, Georgia, Ukraine and Vietnam). They include region to region agreements, trade agreements within the framework of more comprehensive cooperation agreements (e.g. CARIFORUM, Mercosur and particularly the neighbourhood countries Moldova, Georgia and Ukraine) and updates of existing agreements (e.g. Mexico). For an overview of all EU FTAs with a TSD Chapter and their status, we refer to Annex F.

Given that the first TSD chapter entered into force in 2011, attention has increasingly shifted to implementation issues. In the period under evaluation the basic approach to the TSD chapters has not changed fundamentally, but the scope and depth of the chapters (and FTAs more generally) have increased. As implementation issues have come to the fore, the debate on the effectiveness, enforceability and real purpose of TSD chapters among key stakeholders has intensified. Increased scrutiny necessitated a response from the Commission, which mainly took the form of targeted actions to improve the delivery of the TSD chapters. The more general debate on whether bilateral FTAs are an effective tool for the achievement of non-trade policy objectives (such as those related to sustainable development) remain, however, largely unresolved. While there are opposing views and positions on the use of trade measures to enforce or promote labour and environmental standards, there is lack of conclusive evidence on the most effective approach. This means the discussions remain largely value based and determined by the interests and (economic) power of the various stakeholders.

Evaluation methodology and structure of the case study

The case study is based on a review of relevant literature and documentation (see the bibliography) as well as interviews with stakeholders (see Annex A).

The structure of this case study is as follows: The first section, background and rationale, discusses the external trends and developments as well as the multilateral and EU policy frameworks and context that have influenced the EU TSD agenda and ultimately the inclusion, design and implementation of TSD chapters in EU FTAs. Subsequently, in the next section, the objectives, design and key features of the TSD chapters are presented. In addition an international comparison of TSD provisions and a brief description of the internal policy process at EU level is included in this chapter. Following this, in the section thereafter, the key issues and challenges for the negotiation and implementation of the TSD chapters are highlighted, followed by a reflection on key stakeholders and their interactions in the policy domain. Based on the understanding of the relevant external trends and developments, the policy context, the internal issues and challenges and the key stakeholder interactions, the section on the evolution of the TSD approach provides and overview of the main changes that can be observed in the EU TSD approach and the drivers behind these changes. It also considers the remaining contentious issues.

The case study concludes with a summary of main findings and some reflections on achievements and results. We stress that this is not an impact evaluation and as such the aim of this case study is not to assess and draw conclusions on the effectiveness of the TSD chapters / the underlying policy per se.

The evaluation covers the period between 2013-2019, however, given the importance of the first TSD chapter in the EU-Korea FTA, we have expanded this period to 2011-2019. Reference is also made to the period before that, insofar relevant, e.g. when discussing the background and rationale of TSD chapters.

Background and rationale

Global trends and developments

The general introduction clearly illustrates that a complex interplay between socio-economic, environmental and business trends, public concerns and the international political and institutional context influences trade policy.

Here we highlight some of the most relevant trends and developments that have influenced the EU TSD agenda and ultimately the inclusion, design and implementation of TSD chapters in EU FTAs.

Socio-Economic developments and public concerns related to trade and sustainable development

Without a doubt trade liberalisation and globalisation have brought substantial benefits. According to the World Bank, since 1990 trade has helped to halve the number of people living in extreme poverty.[187] However, by the late 1990 it also became clear that benefits were not always spread evenly and that there were social and environmental externalities that needed to be addressed through policy action, mostly at national levels. This led to an **anti-globalisation movement**, formed by a diverse group of labour, environmental and other non-governmental organisations, which directed its anger mostly at corporations, trade liberalisation and the institutions behind it, notably the WTO.[188]

The 2001 accession of China to the WTO and the rapid rise of the country as a global economic powerhouse added to concerns among labour movements, businesses and governments alike. Labour and human rights organisations lamented poor labour conditions and human rights violations, while environmental organisations pointed to the problem of exporting pollution by shifting environmentally damaging activities to developing or emerging economies.[189]

The 2008 financial crisis was further proof to many that globalisation was not always a force for good. While inequality between countries has declined,[190] the crisis as well as the austerity measures that followed contributed to rising **inequality** within countries. The crisis also demonstrated the risks of closer international integration, as shocks in one country quickly spread across the globe.[191] Arguably, what this demonstrated was not so much that globalisation as such is 'bad' but that trade liberalisation can act as a magnifier of both good and bad domestic policies and governance.[192]

The policy responses that emerged to address these concerns were aimed at rebalancing or harnessing globalisation and the notion that trade policy should be more closely integrated with other policy areas firmly took

[187] World Bank (2016) www.worldbank.org/en/news/opinion/2016/08/08/globalization-is-the-only-answer
[188] The Seattle WTO protests of 1999 are often seen as the birth of this anti-globalisation movement
[189] Such labour, human rights and environmental concerns did not relate to China alone (many South and Southeast Asian countries befell the same concerns), but given its economic rise the debate on the unfair competitive advantages this conferred often focused/focuses on China.
[190] According to the World Bank, between 2008 and 2013, global inequality fell for the first time since the industrial revolution, largely driven by rising incomes in populous developing countries such as China and India that helped close the gap with high-income countries (www.worldbank.org/en/news/feature/2019/10/23/yes-global-inequality-has-fallen-no-we-shouldnt-be-complacent).
[191] As the Guardian's economic editor (2015) pointed out: "If the 1990s were largely dominated by the good aspects of globalisation – faster growth, a narrowing of the gap between rich and poor countries, more rapid communications, cheaper goods – the 2000s have exposed a darker side: financial instability, growing inequality within countries, burgeoning corporate power and the rise of the surveillance state." https://www.theguardian.com/business/2015/nov/29/doha-trade-talks-failure-end-second-age-of-globalisation-wto
[192] While the increasing global economic and financial integration that took place since the mid 1990s should ultimately have resulted in effective allocation of resources, what happened in reality was an accumulation of risk in the global financial system due to deregulation and poor governance. This spilled over into the global economy and in Europe was the trigger for the European sovereign debt crisis. However, the debt crisis itself was as much a consequence of global systemic failures, as it was of "structural defects of the Euro project", as "heterogeneity of Eurozone countries, the lax fiscal policy and the application of different monetary policies have contributed to the emergence and spread of the crisis." (Ruščákováa and Semančíková, 2016, p.1).

hold.[193] In this context, the proliferation (internationally) of particularly labour clauses in (bilateral) trade agreements in the 2000s can be explained through the "interplay of 'top-down' and 'bottom-up' social and political forces."[194]

Environmental issues and public concerns related to trade and investment

The past two decades have been characterised by an increased sense of urgency in relation to global environmental degradation and climate change. The global warming/climate change debate has taken centre stage, as have issues with regards to plastic pollution, bio-diversity loss (mass extinction), deforestation, overfishing and the unsustainable use of non-renewable natural resources, to name but a few. Calls for more sustainable practices worldwide have therefore gained momentum, both internationally (see e.g. the UN's Sustainable Development Goal 12: Ensure sustainable consumption and production patterns)[195] and nationally, where many countries have placed combating climate change and environmental pollution high on the policy agenda. However, environmental issues are by nature global issues: pollution and emissions do not respect borders, natural resources and biological diversity are recognised as having an international public goods character and climate change affects all regions (albeit not evenly). Addressing these issues thus requires concerted international efforts and cooperation, as recognised most clearly in e.g. the 2015 Paris Climate Agreement. It also requires national regulation and pricing policies that better reflect environmental costs (polluter pays principle) thus internalising the environmental externalities of production and consumption.

Trade agreements could potentially provide an (additional) platform for cooperation and leverage for addressing environmental issues.

The potential negative environmental impacts of trade and investment became an increasingly prominent part of the anti-globalisation debate. Public awareness and opinions on the environmental impacts of trade and investment in natural resources such as timber/forest products, bio-fuels, palm oil, fish and aquaculture, and even animal welfare, etc. have grown and the overall sustainability of free trade and FTAs has been put into question. On the other side, (trade) policy makers, businesses and other proponents have pointed out the potential positive impacts of trade on the environment, e.g. through efficiency gains, trade in environmentally friendly products and services and technology transfer.

From a trade policy perspective then, environmental protection has two sides: (1) increased trade and investments – key objectives of a trade and investment agreements – may have negative environmental impacts (emissions, pollution, trade in non-renewable natural resources). This raises questions about prevention, mitigation and true costs of trade. At the same time (2) trade preferences could also provide the carrot (leverage) for cooperation on environmental issues and disciplining harmful domestic policies such as e.g. fisheries subsidies.[196]

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[193] This is reflected in some of the main policies and strategies since the late 2000s, including the Lisbon Treaty (2008), the EU's "Trade for All" and "Harnessing Globalisation" Strategy (2015), the Dutch Policy note on "Wat de Wereld Verdient" (2013), the OECD publications on "Making Trade Work for All", the joint WTO/World Bank publication on "The Role of Trade in Ending Poverty" (2015), etc.

[194] Barbu et al (2018) "The Trade-Labour Nexus: Global Value Chains and Labour Provisions in European Union Free Trade Agreements".

[195] https://www.un.org/sustainabledevelopment/sustainable-consumption-production/ "Sustainable consumption and production is about doing more and better with less. It is also about decoupling economic growth from environmental degradation, increasing resource efficiency and promoting sustainable lifestyles."

[196] E.g. according to UNCTAD: "Trade serves as a transmission mechanism for cross-border impacts and is traditionally seen through the lens of a competitive relationship, but it has an enormous cooperation potential, too. The challenge is to change the approach from one of allocating or shifting burdens among countries through trade restrictive measures, to figuring out ways in which trade could help all countries share the benefits of transforming their economies." https://unctad.org/en/Pages/DITC/ClimateChange/Climate-Change.aspx

While trade policy makers were faced with the need to integrate environmental issues more explicitly into international trade policy, at multilateral level, the tensions between trade and environmental policy remained largely unresolved, as will be discussed below.

Consumer preferences and voluntary schemes and initiatives

In part as a response to the developments discussed above, the past two decades have been characterised by a change in consumer awareness, preferences and demand. This is reflected in increased concerns about sources of food, labelling, packaging and waste, treatment of animals, workers, etc. and a general desire to consume more sustainably.[197] A shift towards responsibly sourced, produced, packaged or treated products can thus be observed. While such products were initially associated with small, niche suppliers and came at a substantial premium, they have become common among even mainstream retailers (notably large supermarket chains) and producers in a bid to capture such growing markets and as part of their responsible business practices (RBC) (see below). This trend was complemented and further enabled by voluntary fair and sustainable trade labelling schemes, such as Fair Trade Initiatives and other (EU approved) labelling schemes in relation to bio-fuels, palm oil, fisheries, forest management, etc..[198]

Business developments and concerns related to trade and investment

In the business arena, a number of (ongoing) developments are key to understanding the increasing support from EU businesses for the trade and sustainable development agenda. These relate principally to (the interplay between): (1) The further globalisation of production and consumption and development of increasingly complex global value chains; (2) Compliance with strict EU standards and - in response to this - calls for a level playing field; and (3) The need and increased pressures for socially and environmentally sustainable business management practices.

The ever increasing scale, breadth and complexity of global value chains (GVCs) have implied increased interdependence and thus risks. GVCs offered opportunities for developing countries to integrate more rapidly into the global economy, but have also created socio-economic and policy challenges (see general introduction).

The rising power of (private and state) corporations from emerging economies has raised concerns among EU businesses. While presenting business opportunities for trade and investment through insertion in GVCs, they have increasingly become direct competitors for EU companies, able to compete in more sophisticated / higher value added / technologically advanced markets. However, the EU business sector has argued that competition from emerging economies (and China in particular) has not been 'fair'.[199] Due to stricter EU environmental rules and regulations and the generally higher labour standards regulations (related to e.g. working hours, workplace safety, worker right, minimum wages, etc.) EU businesses have argued, that their costs have increased to the extent that it puts them at an 'unfair' disadvantage vis-à-vis trade and investment partners and competitors with lower standards.[200] The terms on which they compete have become a key issue and EU businesses have expressed their

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[197] See https://www.beuc.eu/press-media/news-events/eu-trade-policy-must-enable-sustainable-consumer-choice, last visited 30.10.2020, "50% of Europeans think that one of the priorities of EU trade policy should be to ensure that EU environmental and health standards are respected…"

[198] For instance the Marine Stewardship Council (MSC) label for sustainably sourced fish and seafood, Forestry Stewardship Council (FSC) for timber and Roundtable on Sustainable Palm Oil (RSPO) for palm oil.

199 See also e.g. BusinessEurope (2020) The EU and China – Addressing the systemic challenge. "This is why the European business community now advocates for a stronger and fairer economic relationship between the EU and China." https://www.businesseurope.eu/publications/eu-and-china-addressing-systemic-challenge

200 This view is not just taken by businesses, but also echoed by several member states governments. For instance, while EU member states' agricultural ministers have supported the EU Farm to Fork and Biodiversity strategies (two core elements of the European Green Deal), several member states have voiced concerns about the risk of asymmetries between the new high demands on EU producers and lower standards of imported products. These asymmetries in their view risked increased import from countries without such higher standards

concerns about e.g. 'social or environmental dumping.'[201] The notion of the **level playing field** therefore became a popular concept; it brought together the ideas of 'fair competition' and 'sustainable development' and has been applied extensively by the sector in its lobbying of trade policy makers.[202]

A final development in the business arena concerns the rise of (socially and environmentally) sustainable business management practices.[203] Such practices support a firm's *bottom line* (resource efficiency reduces costs), are necessitated by *EU regulations* (e.g. regarding waste, recycling, emissions, labour standards, etc.) and driven by *public concerns about accountability* as well as *consumer awareness* and *demand* (e.g. in relation to fair trade, green products, business practices in overseas factories, but also health and safety concerns, animal welfare concerns, etc.).

Perceptions of unscrupulous international businesses had contributed to the back-lash against globalisation and resulted in increased public demands (spurred on by NGOs) for greater transparency and accountability on the part of multinational corporations in particular. This related not just to their own practices, but also to those of their sub-contractors and suppliers. Among businesses there was an acknowledgement that sustainable practices were necessary to avoid reputational damage and adjust to changing consumer attitudes. Many companies adopted voluntary so called Corporate Social Responsibility (CSR) strategies,[204] often associated with philanthropic corporate conduct external to business operations. More recently CSR is being replaced by the more comprehensive concept of responsible business conduct (RBC), which emphasises the integration of responsible practices within internal operations and throughout business relationships and GVCs.[205] Some have even argued that sustainable business management potentially creates competitive advantage for companies.[206] For instance, leading business advocacy group BusinessEurope argues that *"Competitiveness and sustainability are not in opposition. In fact, there is evidence that where EU companies are relatively advanced in this field, they can have easier access to finance, and/or this can be a competitive advantage for them on international markets."*[207] However, this argument does not seem to reduce the perceived need for a level playing field internationally – as also strongly advocated by the business sector.

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and/or shifting of production towards such countries (https://www.euractiv.com/section/agriculture-food/news/new-sustainable-food-policy-bears-risk-of-unsustainable-imports-ministers-warn/)

[201] It should be noted that concerns do not just relate to social and environmental standards but also (and possibly more importantly) to lack of IPR protection (e.g. problems with enforcement of the TRIPS agreement), lack of investment protection, the substantial involvement of the State in notably the Chinese economy and businesses, restrictions on exports of certain crucial resources, etc.

[202] The level playing field is not just a concept invented by businesses, but has been used and to an extent mainstreamed by many actors in relation to trade (see e.g. OECD, Making Trade work for all https://www.oecd.org/trade/understanding-the-global-trading-system/making-trade-work-for-all/) although perhaps not always with the same understanding: what businesses may view as 'level' may differ from how labour organisations view this.

[203] Defined as the practice of managing a company's impact on the triple bottom line—people, planet, and profit—so that all three can prosper in the future (see e.g. https://whatis.techtarget.com/definition/business-sustainability).

[204] Corporate social responsibility (CSR) is a self-regulating business model that helps a company be socially accountable—to itself, its stakeholders, and the public. It should be noted that it can take many forms and can also relate to environmentally responsible behaviour. It can include programs to invest in local communities or project or relate to international issues (e.g. in relation to labour conditions in overseas factories).

[205] The 'voluntary' association of CSR often means CSR strategies are often peripheral to a company's core business conduct. In contrast, RBC, as promoted by the OECD, provides a more integral perspective; it is a core business function, and as such must be integrated within corporate governance, procurement, finance, and so on. In addition, core elements of RBC as outlined in the UN Global Compact or the OECD MNE Guidelines are not voluntary in most jurisdictions. (see: http://oecdinsights.org/2016/01/22/2016-csr-is-dead-whats-next/)

[206] See, for instance, Bağlayan, Başak, Ingrid Landau, Marisa McVey & Kebene Wodajo (2018). Good business: The economic case for protecting human rights: https://corporatejustice.org/2018_good-business-report.pdf ; Feng, Penglan and Cindy Sing-bik Ngai (2020). Doing More on the Corporate Sustainability Front: A Longitudinal Analysis of CSR Reporting of Global Fashion Companies.

[207] https://www.businesseurope.eu/policies/social/sustainability-and-corporate-social-responsibility

Businesses were increasingly expected to behave as socially and environmentally responsible actors in society and internationally and were required to account for their conduct worldwide. This had since long been codified internationally in the OECD Guidelines for Multinational Enterprises (originally adopted in 1976 and most recently updated in 2011) and the UN Guiding Principles on Business and Human Rights (UNGPs). But given the socio-economic developments of the 2000s, the issue of RBC and accountability gained renewed attention.[208] Demands for RBC along entire global value chains present dilemmas for EU businesses as some of these GVCs have become so complex and extensive that tracing all contents and subcontractors has become virtually impossible.[209] Including measures in trade agreements aimed at improving overall labour standards and human rights issues in trading partner countries can therefore complement RBC implementation by businesses.[210]

The link between trade policy and sustainable development

The trends and developments described above underlined the need for a closer integration of trade policy and sustainable development issues internationally. Whilst multilateral frameworks for cooperation and global rule-setting exist, integration of these have proved unsuccessful (and for many countries undesirable, contributing to the lack of success).

Multilateral framework for trade and for sustainable development issues

The **WTO** provides the multilateral framework for trade policy and market access rights for its members. The EU is an active member and proponent of the WTO. However, stalemates between members on various issues have meant slow progress and eventual collapse of the Doha Round, resulting in a proliferation of bilateral trade agreements worldwide. For more details see the general introduction.

Sustainable development has been promoted at international level through a number of organisations and agreements. The main ones include the UN system including the ILO and its core conventions and Sustainable Development Goals (SDGs), numerous multilateral agreements (MEAs) and, in relation to RBC, the OECD and UN's Guiding Principles on Business and Human Rights (UNGPs), among many others.[211]

The **ILO** is a tripartite UN agency, established in 1919. It brings together governments, employers and workers of 187 member States with the aim to set labour standards, develop policies and devise programmes promoting decent work for all women and men. See the box below for a summary of the relevant standards.

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[208] There are a number of internationally recognised guidelines and developments driving CSR globally, these include notably: EU Commission CSR Strategy (2011); OECD Guidelines for Multinational Enterprises; The UN Sustainable Development Goals; The 10 principles of the United Nations Global Compact; ISO 26000 Guidance Standard on Social Responsibility; United Nations Guiding Principles on Business and Human Rights; ILO Tripartite Declaration of Principles concerning Multinational Enterprises on Social Policy; Global Reporting Initiative and to the International Integrated Reporting Council.

[209] Here a caveat is in order, given the potential impact of the Covid-19 pandemic on supply chains. With many multinational companies looking to build resilience into their supply chains, we may see an accelerating trend of regional rather than global supply chains networks, in addition to the strategic use of inventory locations. See EIU (2020) "The Great Unwinding: Covid-19 and the regionalisation of global supply chains." https://www.eiu.com/n/campaigns/the-great-unwinding-covid-19-supply-chains-and-regional-blocs/

[210] See Barbu et al (2018) for an analysis of the interaction between public regulation of labour standards through FTAs (aimed at addressing societal concerns) and private regulation through corporate codes of conduct and CSR (aimed at addressing consumer or buyer concerns). See also Marx, A. (2018) on how private and public instruments for promoting sustainable development through trade can be complimentary.

[211] See footnote 27. The OECD Guidelines and UNGPs are highlighted here as they are the guidelines commonly referred to in the TSD chapters.

ILO Labour Standards

The ILO Declaration of Fundamental Principles and Rights at Work, which was adopted in 1998, commits Member States to respect and promote eight principles and rights in four categories (the Core Labour Standards), whether or not they have ratified the relevant Conventions:

- The freedom of association and the effective recognition of the right to collective bargaining;
- The elimination of forced or compulsory labour;
- The abolition of child labour; and
- The elimination of discrimination in respect of employment and occupation.

The standards are among the most widely ratified ILO conventions – 124 of the ILO's 178 member States have ratified all eight. However, according to the ILO: "There has been an increased urgency among international policy-makers, particularly in the wake of the global financial and economic crisis of 2008, to deliver quality jobs along with social protection and respect for rights at work to achieve sustainable, inclusive economic growth, and eliminate poverty."

The Decent Work Agenda was developed in 1999 around four pillars: employment creation, rights at work, social protection and social dialogue. It achieved high-level international endorsement, first in 2008, when it was included in the Millennium Development Goals (MDG)s under MDG 1, and later as part of the UN 2030 Agenda for Sustainable Development and the accompanying Sustainable Development Goals (SDGs), where it is specifically included in SDG 8: 'Promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all'. The Decent Work Agenda thus focuses on a much broader range of labour rights than those captured in the core conventions.

See https://www.ilo.org/global/standards/lang--en/index.htm, last visited 15.10.2020.

There are over 250 MEAs covering a wide range of issues from emissions and climate change, hazardous waste, chemicals & pesticides, trade in endangered species, biological diversity, air pollution, and the ozone layer, to name but a few. The proliferation of MEAs clearly illustrates the urgency of environmental issues and a common understanding of the need to address them in an internationally coordinated way. However international policy making on environmental issues has been challenging. This is in large part due to the wide range of issues and related to this the lack of an overarching framework (e.g. comparable to the ILO core conventions) and single international body (such as the ILO). Overall, enforcement provisions in most MEAs are relatively weak, relying heavily on non-governmental organisations for monitoring and 'naming and shaming' to report incidents of non-compliance.[212] This can be observed in the UNFCC and Kyoto agreements - neither of which seem to have been particularly successful in reducing emissions globally[213] – and more recently still in the Paris Agreement, which lacks hard and enforceable commitments and actual translation in national measures. In addition the implementation of compensation measures in the form of new funds for climate adaption in vulnerable developing countries has lagged.

Moreover, multilateral negotiations "have become increasingly slow and polarised (and) even established multilateral agreements are weakened by the withdrawal — and threat of withdrawal — of some countries." As a result the number of new environmental agreements concluded has been declining since the mid 2000's, and "membership to existing agreements has plateaued."[214]

Other international framework agreements on sustainable development issues of relevance include the UN SDGs and the OECD Guidelines for Multinational Enterprises (see the box below).

[212] Trade and Sustainable Development: A chance for innovative thinking. Study by Transport & Environment, Oct. 2017 (https://www.transportenvironment.org/sites/te/files/publications/2017_10_Trade_sustainable_development_final.pdf)

[213] Or rather, results are very mixed at best, depending on which data are considered and how one considers these; see e.g. https://www.newscientist.com/article/2093579-was-kyoto-climate-deal-a-success-figures-reveal-mixed-results/

[214] Morin, Jean-Frédéric and Bialais, Corentin (2018) "Strengthening Multilateral Environmental Governance through Bilateral Trade Deals."

OECD Guidelines for Multinational Enterprises on Responsible Business Conduct

The OECD Guidelines for Multinational Enterprises (the Guidelines) are the first international instrument to integrate respect for human rights as a corporate responsibility, thereby aligning with the UN's Guiding Principles on Business and Human Rights (UNGPs). The Guidelines extend the UNGPs to other areas of responsible business conduct such as the environment and climate change, conflict, labour rights, bribery and corruption, disclosure and consumer interests, as well as in the ILO Tripartite declaration of principles concerning multinational enterprises and social policy ("MNE Declaration")

The Guidelines provide non-binding principles and standards for responsible business conduct (RBC) in a global context consistent with applicable laws and internationally recognised standards. The Guidelines are the only multilaterally agreed and comprehensive code of responsible business conduct that governments have committed to promoting. They reflect the expectation from governments to businesses on how to act responsibly. They bring together all thematic areas of business responsibility, including human rights and labour rights, as well as information disclosure, environment, bribery, consumer interests, science and technology, competition, and taxation. This makes the Guidelines the only member government-backed instrument covering all major sustainability risks.

National Contact Points (NCPs) for RBC have been set up to conduct promotional activities and act as mediation and conciliation platforms to help resolve cases of alleged non-observance of the Guidelines.

Based on experiences with sectoral due diligence guidelines developed over the years, in 2018 the OECD Due Diligence Guidance for Responsible Business Conduct was adopted, providing practical support to enterprises on the implementation of the Guidelines by providing explanations of its due diligence recommendations and associated provisions.

Sources: http://mneguidelines.oecd.org/mneguidelines and http://mneguidelines.oecd.org/Responsible-business-conduct-and-human-rights.pdf, last visited 15.10.2020.

The UN's 2030 Agenda for Sustainable Development and its SDGs were adopted in 2015 (as a follow up to the MDGs) and set targets in areas such as poverty reduction, health, education and the environment.[215] The SDGs put an explicit and "significant emphasis on the role that trade plays in promoting sustainable development and recognise the contribution that the WTO can make to the 2030 Agenda."[216]

A common issue with all these multilateral frameworks (both in relation to labour and environment) is that they lack strong enforcement mechanisms, but rely heavily on goodwill, cooperation, dialogue, or naming and shaming. This lack of enforceability led to calls for the inclusion of such issues in the WTO, with its more effective enforcement mechanisms.

The nexus of trade with labour and the environment at the multilateral level

While attempts were made to bring labour and environment into the fold of multilateral trade agreements, this was fraught with difficulties that often proved impossible to overcome. Below the linkages between trade and labour and trade and environment at multilateral level are briefly discussed to illustrate this.

Trade and labour linkage

The trade-labour linkage proposition (through a so-called 'social clause') has been a controversial issue that was hotly debated in the WTO, but ultimately could not be resolved at multilateral level. Labour clauses in trade agreements are seen by developing countries as a form of protectionism and therefore flatly rejected. See the box below for details on the trade-labour linkage debate.

[215] For more details visit: www.undp.org/content/undp/en/home/sustainable-development-goals/background.html
[216] https://www.wto.org/english/thewto_e/coher_e/sdgs_e/sdgs_e.htm

Social Clause in Trade Agreements

The linking of trade and labour protection standards is typically based on economic and values-based arguments, or as some would argue on 'egoistical' motivations (lower wages and collapse of labour standards at home) or 'altruistic' concerns (promoting better standards world-wide).[217] The economic argument goes that diverging labour standards between different countries lead to unfair competitive advantages in global trade. There is also a concern over a race to the bottom, whereby countries would be encouraged to lower their labour standards to counteract such unfair competitive advantage. The solution proposed by developed countries (the US in particular) to this perceived problem has been to impose minimum standards of labour protection in trade agreements and allow for trade sanctions against trading partners that fail to comply or enforce such standards for protectionist purposes – the so-called social clause. The value based argument to the trade-labour linkage (propagated notably by the EU) holds that certain labour rights are also recognised as fundamental human rights, which should be protected. Thus, when there is evidence that a competitive advantage has been gained by not applying such fundamental rights trade concessions should be withheld.

The trade-labour linkage is, however, a controversial issue. Empirical evidence for a race to the bottom and unfair competitive advantage is ambiguous at best, while even the value based approach has been criticised for its limitations. There are very few labour rights that are universally accepted as human rights and the importance attached to particular human rights may vary significantly depending on the cultural preferences and economic conditions of each country.[218]

While developed countries pushed for inclusion of a social clause at WTO level, developing/emerging economies have consistently rejected this because of the perception that the real objective pursued is to 'protect developed countries against the competitive advantage of the availability of low skilled labour in developing countries.'

Source: Melo Araujo (2017) and Bhagwati (2001b).

Ultimately the only consensus that could be reached in the WTO Ministerial Conference in Singapore in 1996 included that:

- All WTO member nations oppose abusive work place practices, through their approval of the United Nations Universal Declaration of Human Rights.
- The ILO holds primary responsibility for labour issues.
- Trade sanctions should not be used to deal with disputes over labour standards.
- Member states agree that the comparative advantage of low wage countries should not be compromised.

Labour standards are thus currently not subject to WTO rules and disciplines, with the exception of products produced by prison labour where the exceptions GATT article XX allows trade measures.

Trade and environment linkage

While at WTO level there was awareness and recognition of the importance of the linkage between trade and environment, there is no specific agreement dealing with the environment.[219] At the end of the Uruguay Round in 1994 the Committee for Trade & Environment (CTE) was set up with the purpose of studying the relationship between trade and the environment, and to make recommendations about any changes that might be needed in the trade agreements.

[217] See Bhaghwati (2001a).
[218] Melo Araujo (2017) "Labour Standards and Mega Regionals: Innovative Rule Making or Sticking to the Boilerplate?" https://core.ac.uk/download/pdf/83925945.pdf
[219] After a decade-long negotiation at the WTO on the reduction of tariffs on environmental goods (EGs) failed to produce an agreement, in 2014 a group of 14 countries entered plurilateral negotiations aiming for an Environmental Goods Agreement (EGA) that would have substantially reduced or eliminated tariffs on a long list of EGs. However, due to a number of issues and stalemates (see de Melo & Solleder, 2019), these negotiations stalled in December 2016.

The committee's work is based on two principles:

- *The WTO is only competent to deal with trade. In other words, in environmental issues its only task is to study questions that arise when environmental policies have a significant impact on trade. The WTO is not an environmental agency. Its members do not want it to intervene in national or international environmental policies or to set environmental standards. Other agencies that specialise in environmental issues are better qualified to undertake those tasks.*
- *If the committee does identify problems, its solutions must continue to uphold the principles of the WTO trading system.* [220]

The WTO puts the total number of MEAs at over 250. Of these approximately 20 include provisions that could affect trade[221] or that could be affected by trade. For example they ban trade in certain products, or allow countries to restrict trade in certain circumstances. Among them are e.g. the Montreal Protocol for the protection of the ozone layer, the Basel Convention on the trade or transportation of hazardous waste across international borders, and the Convention on International Trade in Endangered Species (CITES).

Because many of the trade measures in MEAs effectively restrict the free flow of goods between countries, they also potentially conflict with trade rules contained in the WTO Agreements[222] - although countries have rarely challenged measured purportedly undertaken as part of MEAs before the WTO.[223] Be that as it may, the potential for conflict remains and efforts at multilateral level to make the relationship between WTO and MEAs more compatible have been largely unsuccessful.[224] More fundamentally perhaps, remains the question of the effectiveness of trade measures in MEAs, often due to their specific formulation[225] or form. As Neumayer (2010) illustrated, in some cases trade measures in the form of trade bans seemed to have negligible or possibly even negative impacts on the issue. Taking CITES as an example he argues that "*Complete trade bans often merely raise the value of illegal trafficking and render stringent controls more difficult.*"[226]

EU trade policy context

In the general introduction, the EU trade policy strategy and framework are described, as well as the process of EU trade negotiations. Noteworthy here are the increasing scope and complexity trade agreements and negotiations, the Lisbon Treaty, which emphasised *fair* and free trade, and accorded a bigger role to the European Parliament and - in the case of mixed agreements - national Parliaments[227] in trade policy making.

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[220] WTO: www.wto.org/english/thewto_e/whatis_e/tif_e/bey2_e.htm

[221] WTO: www.wto.org/english/tratop_e/envir_e/envir_neg_mea_e.htm retrieved 4/4/2020

[222] Neumayer, E. (2010) Trade Measures in Multilateral Environmental Agreements and WTO Rules: Potential for Conflict, Scope for Reconciliation (December 7, 2010).

[223] It is noteworthy that while trade measures under MEAs can be brought before the WTO if they are alleged to breach WTO rules, conversely MEAs have no such recourse in case of alleged breaches of environmental protection standards due to trade liberalisation (see e.g. Eckersley, 2004).

[224] While the CTE was mandated to start negotiations on the relationship between existing WTO rules and specific trade obligations set out in MEAs, these negotiations ultimately "resulted in a stalemate between a minority of WTO members who have sought clear and explicit rules to exempt MEAs from WTO challenges and those who oppose any further environmental compromise of the trade rules." (Eckersley, 2004, p.31). In contrast to the social clause, this was not simply a North-South divide, as illustrated by the US' opposition to such exemptions, due the fact that it was not a party to the Convention on Biodiversity (see also: https://qz.com/872036/the-us-is-the-only-country-that-hasnt-signed-on-to-a-key-international-agreement-to-save-the-planet/).

[225] For instance, it could be argued that had the parties to the Paris agreement agreed on CO2 pricing of emissions through carbon-taxes, this would have reduced the risks of unilateral border tax levies and protectionist abuse.

[226] Neumayer (2010, page 6-7).

[227] Since 2018 the EC has taken a new approach to negotiating agreements, essentially avoiding the occurrence of mixed agreements. The new approach involves splitting between separate agreements the provisions related to

It is within this policy framework that the EU response to external trends and developments and the stalemate at multilateral levels in relation to trade and sustainable development took shape.

TSD chapters in EU FTAs: Approach and design

Sustainable development had been a fixture in EU trade policy for some time, albeit sometimes involving different terminology, and the EU has used a number of policy devices to implement this commitment to sustainable development in its trade relations, including conditionality. For instance, the EU has included so-called 'human rights clauses' into all its trade agreements since 1995.[228] Likewise, the EU has long sought to address labour standards in its preferential trade policy e.g. through references to labour rights in its unilateral Generalised Scheme of Preferences (GSP).[229]

With the impasse and eventual stalling of the Doha Round an increasing number of FTAs between countries and regions worldwide emerged (see general introduction). While the EU has been a major proponent of the multilateral approach through the WTO, the more ambitious (or as some would argue prescriptive[230]) elements of the EU policy agenda including those related to labour and the environment were hard to achieve at this level. In bilateral and regional trade agreements, there was potentially more scope for inclusion of such issues.[231] It was therefore within EU bilateral FTAs that the link between trade and sustainable development was given a more prominent place with the inclusion (since 2011) and further expansion of TSD chapters.

Overall approach and objectives

TSD chapters are based on the overarching policy objective of the EU Treaties to integrate sustainable development in all policies and on the premises that EU trade policy should contribute to sustainable development by maximising the leverage of increased trade and investment for social development and environmental protection. They are considered by the EC as a key element of its values based trade policy.[232]

The objectives of TSD chapters have been formulated as follows:

- Foster real and lasting change on the ground in the partner countries;

investment (including ISDS), which would require approval by the EU and all its member states, and other trade provisions falling under the exclusive competence of the EU ((www.consilium.europa.eu/en/press/press-releases/2018/05/22/new-approach-on-negotiating-and-concluding-eu-trade-agreements-adopted-by-council/)

[228] Marx, Axel; Franz Ebert; Nicolas Hachez & Jan Wouters (2018) "Dispute Settlement in the Trade and Sustainable Development Chapters of EU Trade Agreements."

[229] The Generalised Scheme of Preferences (GSP) removes import duties from products coming into the EU market from vulnerable developing countries, thereby aiming to help these countries in achieving poverty alleviation and job creation, based on international values and principles, including labour and human rights. The GSP also covers the GSP+ a special incentive arrangement for sustainable development and good governance , and the Everything but Arms (EBA) Agreement for Least Developed Countries (LDCs) . The EU has included human rights and labour conditions in these agreements, and given their character can withdraw preferences unilaterally should it assess such provisions to be violated.

230 Westlake (2017) "Asymmetrical institutional responses to civil society clauses in EU international agreements: pragmatic flexibility or inadvertent inconsistency?" (www.coleurope.eu/system/files_force/research-paper/wp66_westlake.pdf?download=1)

231 As Westlake (2017) argues "the collapse of the Doha Round could be seen as both a disappointment but also as a sort of liberation that has enabled the Union to go further bilaterally (…) than would have been the case under the multilateral/global approach."

[232] Non-paper of Commission Services (11.07.2017). "Trade and Sustainable Development (TSD) chapters in EU Free Trade Agreements (FTAs)." (http://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155686.pdf) and DG Trade website (https://ec.europa.eu/trade/policy/policy-making/sustainable-development/#_trade-agreements).

- Create and promote a level playing field / prevent a "race to the bottom" through weakening of domestic labour or environmental protection for the purpose of gaining a competitive edge or attracting foreign direct investment;
- Strengthen the multilateral governance and standards on labour (ILO) and environment (MEAs) – no parallel set of bilateral rules on labour or environment to be created by FTAs.

TSD provisions thus seek to commit both Parties to:

- Ratification and effective implementation of the ILO core conventions and beyond (notably the Decent Work Agenda) (see box 1)
- Effective implementation in their laws and practices of the multilateral environmental agreements (MEAs) to which they are party.

The TSD chapters further aim to promote:

- Thematic areas of mutual interest such as e.g. sustainable management of natural resources in areas of low carbon development, forestry, fisheries, biodiversity, including fighting illegal harvesting practices, etc..
- Cross-cutting provisions, including the uptake of corporate social responsibility (CSR) and RBC through to the OECD Guidelines, fair and ethical trade initiatives, and cooperation on e.g. impact assessment, monitoring and evaluation of the agreement and on the thematic articles.

Scope and structure of the chapters

While there is some variation across the different agreements, the TSD chapters share three key types of provisions. First there are *substantive standards*, related to the commitments as listed above. Second, there are *procedural commitments*. These include dialogue and co-operation between the parties, transparency in introducing new labour standards measures, monitoring and review of the sustainability impacts of the agreement, and a commitment to upholding levels of domestic labour protection. Third, there are *institutional mechanisms*,[233] elaborated further below. All agreements have this tripartite format[234], as will be explained below. The structure of the TSD chapters is based on 3 pillars:

Pillar 1: Substantive provisions based on adherence and effective implementation of internationally recognised standards and agreements - ILO conventions and multilateral environmental agreements (MEAs). Substantive provisions in relation to labour include:

- Respecting the 8 core labour standards;
- Effective implementation of all ILO conventions ratified (and commitment to process leading to ratification);
- Beyond core labour standards: promoting decent works agenda, notably operational health and safety (OHS) standards and labour inspection requirements.

Annex G includes examples of substantial provision on labour and environmental standards from the EU-Korea FTA.[235]

The substantive provisions related to MEAs include the effective implementation of MEAs, the upholding of levels of protection, as well as thematic trade and climate and thematic, on e.g. Biological Diversity, Sustainable Forest

[233] Barbu et al. (2018, page 264).
[234] Harrison et al. (2019).
[235] Full text of the Korea and other EU trade agreements and their TSD chapters can be found on https://ec.europa.eu/trade/policy/countries-and-regions/negotiations-and-agreements/index_en.htm

Management and Trade in Forest Products, and Trade and Sustainable Management of Living Marine Resources and Aquaculture Products.[236] The main MEAs included in the TSD chapters so far are:

- Convention on International Trade in Endangered Species (CITES) of Wild Fauna and Flora
- UN Framework Convention on Climate Change
- 2015 Paris Agreement
- Kyoto Protocol on Climate Change
- Montreal Protocol on Ozone Layer Protection
- The Convention on Biological Diversity
- Stockholm Convention on Persistent Organic Pollutants
- Rotterdam Convention on international trade in hazardous chemicals and pesticides
- Basel Convention on hazardous waste movement and disposal.

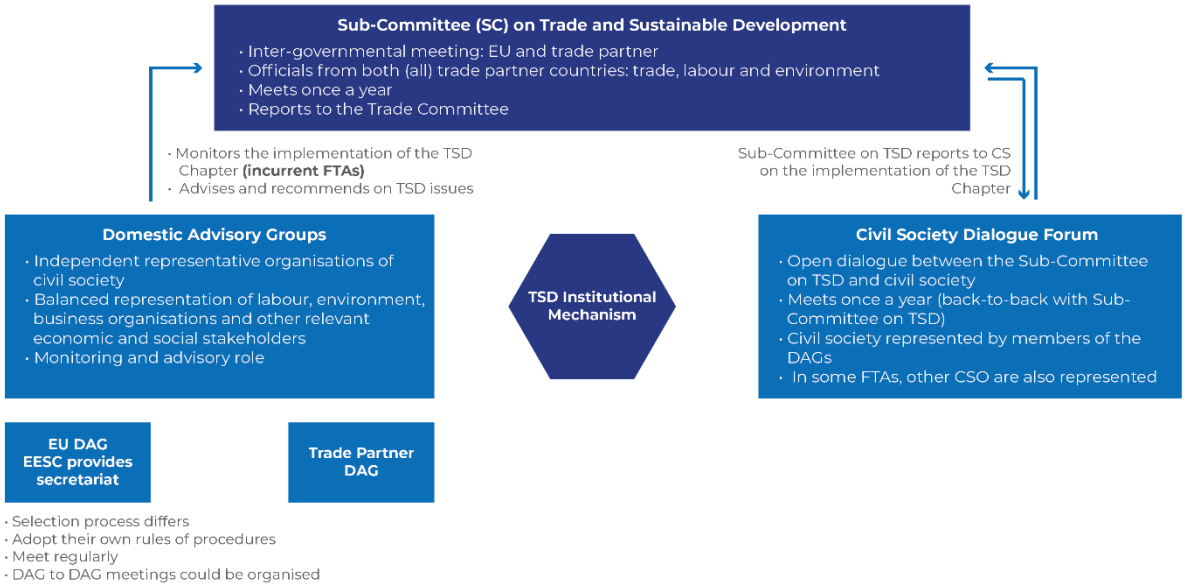
The tri-partite institutional mechanisms are included under pillars 2 and 3.

Pillar 2: Institutional structures for monitoring and implementation of the commitments, including FTA-specific civil society structures. The EU TSD chapters include the set-up of institutional structures designed to be inclusive, through platforms where civil society can play an advisory and monitoring role.[237] Civil society in both trading partners is encouraged to participate in the monitoring of the FTA implementation through direct exchanges amongst civil society actors and with governments.

Figure 8 below illustrates this structure and includes the Government to Government governance structure (the sub-committee on TSD) as well as the civil society structures on both sides. While initially these civil society structures were only tasked with the monitoring and implementation of the TSD chapters, in the newer agreements (starting with Mexico and Mercosur) they cover sustainable development horizontally across all other provisions.[238]

[236] These are examples of thematic articles in the EU-Vietnam FTA under Article 13 (TSD Chapter). Other agreements may contain different thematic articles depending on the relevance for the specific country.
[237] The purpose of these mechanisms is only broadly defined by the EC and in practice civil society stakeholders have varying perspectives of what these mechanisms really are and what role they should or could play - as will be discussed further in the next chapter (see also www.ecdpm.org/dp276).
[238] Already in the text with Mexico and Mercosur, Proposed in the negotiations with Chile, Indonesia, Australia and New Zealand.

Figure 6 TSD chapters – Institutional Structures



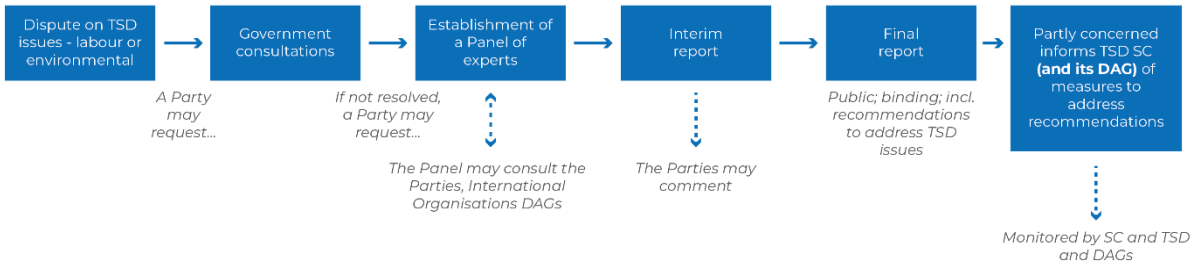
Source: DG Trade (2020).

Pillar 3: Dedicated dispute settlement mechanism. While the EU focuses on cooperation and incentives to ensure compliance with the TSD provisions, these provisions in an FTA *are* binding and therefore also subject to a dispute settlement mechanism (DSM). The DSM establishes the following procedure with the possible involvement of civil society and international organisations (ILO, MEAs) at every stage:

- Government-to-government consultations,
- Setting up a panel consisting of independent experts on trade, labour and environment,
- Drafting a panel report that is public and that neither party can block,
- Monitoring of the implementation of the panel report

See figure 2 below for a schematic representation of the DSM procedure in case of a dispute.

Figure 7 TSD Dedicated dispute settlement mechanism



Source: DG Trade (2020)

The approach for the TSD chapter differs from the general dispute settlement procedure foreseen for the FTA where no explicit role is foreseen for civil society and international organisations. In addition, the DSM for the TSD chapter has no binding character (i.e. recommendations from the Panel of Experts are not binding and can thus not lead to

removal of preferences if not followed up) and does not include sanctions.[239] The TSD chapters explicitly indicate that the provisions under the chapter do not fall under the dispute settlement system applicable to other chapters.

Enforcement of the TSD provisions is clearly based on a soft approach with dialogue and cooperation as the main tools for ensuring compliance with the commitments made.[240] Ratification of labour standards or MEAs is not a *condition* for the conclusion or ratification of the FTA. Even in the case of e.g. labour or environmental law violations there is no recourse to (unilateral) trade sanctions (withdrawal of preferences or fines) - the DSM is *the* final recourse.

International comparison

While the EU is a strong proponent of the trade and sustainable development agenda, it is by no means alone in this.[241] As ILO (2016) has pointed out, there has been a major increase not just in the number of bilateral and regional trade agreements since 2008. Specifically, nearly half of trade agreements concluded between 2011-2016 included either a labour chapter or labour provision that makes reference to international labour standards and ILO instruments.[242] As for environmental provisions, the practice of introducing references to MEAs in trade agreements has increased significantly since the early 1990s. Morin & Bialais (2018) note that "Not only the share of trade agreements with references to MEAs (…) has increased over time, but also the average number of references per trade agreement." In addition "trade agreements increasingly refer to MEAs that are not directly trade-related, such as the UNFCCC and MARPOL [International Convention for the Prevention of Pollution from Ships]."[243]

The main proponents of including sustainability provisions into their bilateral trade agreements are arguably the US and EU alongside Canada, although many other countries, including developing and emerging countries, now apply such principles.[244]

Comparing the EU provisions in FTAs to similar provisions in US agreements, the overall approaches are similar, although there are also some notable differences:[245]

- **Provisions:** The scope of standards covered by US FTAs is narrower than that of EU FTAs. US FTAs typically only include reference to the core labour standards established by the ILO Declaration on Fundamental Principles and Rights at Work. This difference is mainly explained by the fact that that the US, unlike EU Member States, is not a signatory to most ILO Conventions. Similarly, in relation to environmental provisions, the US does not include references to climate change agreements but refers more to MEAs that are consistent with US priorities.

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[239] European Commission (2017) Non-paper of Commission Services (11.07.2017). "Trade and Sustainable Development (TSD) chapters in EU Free Trade Agreements (FTAs)."

[240] This is in contrast with the EU's unilateral GSP regime, where preferences can be withdrawn unilaterally in response to violations of the provisions of the agreement (e.g. see a recent example in the case of Cambodia: https://trade.ec.europa.eu/doclib/press/index.cfm?id=2113). This would obviously not be as simple in a bilateral agreement, where both parties need to agree and unilateral removal of preferences can result in violation of WTO commitments.

[241] Often the North American Free Trade Agreement (NAFTA) between Canada, the US and Mexico, concluded in 1994 is seen as the forerunner. It included side agreements with (conditional) labour and environmental provisions intended to uphold labour and environmental standards.

[242] International Labour Organization (2016) "Assessment of Labour Provisions in Trade and Investment Arrangements". https://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_498944.pdf

[243] Morin, Jean-Frédéric and Bialais, Corentin (2018) "Strengthening Multilateral Environmental Governance through Bilateral Trade Deals."

[244] As of 2016, 136 countries had at least one trade agreement that included labour provisions (ILO 2016, see previous).

[245] Based on: Melo Araujo (2018) "labour provisions in EU and US mega-regional trade agreements: Rhetoric and reality."

- **Procedural frameworks:** While US agreements foresee in mechanisms for consultation with civil society, no consultation mechanisms are set-up in partner countries, as is the case in the EU TSD chapters.
- **Enforcement:** US FTAs adopt a conditional approach. Labour and most MEA provisions are subject to a dispute settlement mechanism and allow the suspension of benefits against a FTA party "if it is shown that non-enforcement resulted from a sustained or recurring course of action or inaction and has occurred in a manner affecting trade or investment between the parties."[246]

The most notable difference between EU and US approaches is clearly the enforcement mechanism. Enforceability has been a topic of criticism and debate with regard to EU TSD provisions, and often reference is made to the US approach by comparison. The suggestion being that the US' sanctions based approach is more effective in achieving compliance – an assertion which has not been conclusively established. We will elaborate on this discussion in more detail in the next chapter.

Formulation and negotiation of TSD chapters – responsibilities within the Commission

The overall process of initiating, negotiating and concluding an EU Trade/Investment agreement involves a number of different parties. Main responsibilities lay with the European Commission and the EU Council, with involvement and eventual consent from the European Parliament and in some cases (mixed agreements) National or Regional Parliaments.

Internally, within the Commission, the formulation and negotiation of the TSD chapters is led by DG Trade, with support and inputs from notably DG Employment, Social Affairs & Inclusion and DG Environment.

DG Trade

While within DG Trade, Geographical Units head up the negotiations of trade agreements over the evaluation period (and up to 2020) there has been a separate Unit (D1)[247]responsible for Trade and Sustainable Development and the Generalised System of Preferences (GSP). From DG Trade's point of view, the agreements it negotiates are (increasingly) vast in scope. All negotiated aspects of the agreements have to subsequently be implemented and monitored. The TSD chapters are among the more difficult to negotiate and to implement,[248] and arguably are not seen (by negotiators) as being part of their core responsibility. Moreover, with the increasing number of bilateral trade and investment agreements concluded, DG Trade's role has changed from an institution tasked primarily with negotiations to an increasingly dynamic one involved in negotiation *as well as* implementation.[249] Particularly in relation to the TSD chapters, experience with such implementation is still evolving.

DG Trade cooperates primarily with DG employment and DG Environment in the negotiation of the TSD chapters, although DG Trade is firmly in the driver's seat. While DG Employment joins all negotiation rounds, DG Environment only joins the negotiations in Brussels (due to resource constraints). Cooperation with other DGs, e.g. DG MARE, DG DEVCO and DG CLIMA, is less structured and some civil society stakeholders have lamented that cooperation

[246] Melo Araujo (2018), p.8
[247] Under a restructuring that took place in 2020 the responsibilities of the Unit D1 have been transferred to a new Unit C4 for Multilateral Trade and Sustainable Development Policy, Green Deal, and Conflict Minerals under Directorate C for Africa, Caribbean and Pacific, Asia (II), Trade and Sustainable Development, Green Deal. See https://ec.europa.eu/info/sites/info/files/tradoc_145610_2.pdf for full details of the DG Trade internal structure.
[248] Westlake (2017)
[249] Therefore the position of a Deputy Director-General, Chief Trade Enforcement Officer (CTEO) directly under the Director General for Trade has been created and is now functional (2020). The CTEO oversees two Directorates responsible for Enforcement, Market Access, SMEs, Legal affairs, Technology and Security Directorate F) and for Trade Defence (Directorate G). The CTEO will thus oversee compliance and enforcement of the EU's Market Access rights as well as GSP and TSD agreements.

with DG DevCo in particular leaves much to be desired.[250] This cooperation is seen as becoming increasingly important as it could support the implementation process, particularly by supporting the procedural commitments on cooperation in the TSD chapters through targeted capacity building and other support projects in the partner countries.[251]

Cooperation with these other DGs is important for the effectiveness of the TSD chapters and more broadly speaking in relation to the integration and effectuation of SD relevant for other chapters in the agreements. This is because of the substantial interplay between the chapters. For instance they need to be coherent, but can also offer trade-offs in negotiations with third parties – concessions in one chapter can achieve gains in another. The actual level and the intricacies of cooperation between the DGs could, unfortunately, not be established in this case study. However, one of the interviewees did remark that since the late 2000s substantial improvements had been made in terms of communication and cooperation between the different Commission Services, which contributed to more coherence between DG Trade and DG EMPL in particular.

DG Employment, Social Affairs & Inclusion

The EU's Directorate General for Employment, Social Affairs & Inclusion (DG EMPL) primarily focuses on 'contributing to the development of a modern, innovative and sustainable European social model with more and better jobs in an inclusive society based on equal opportunities.'[252] On TSD, DG EMPL has pushed for an increasing number of labour rights to be included in the TSD chapters, beyond just the fundamental rights, in line with the Decent Work Agenda, promoted at international level and at EU level. It also wants and has pushed for provisions on labour inspections and remedies.

DG EMPL joins the DG Trade TSD negotiator in each negotiating round and usually joins the Sub-Committee meetings with Member States. In the words of one of the DG EMPL officers, these rounds and the interaction with the trade negotiations more generally provide a platform for access to stakeholders in partner countries – access that without DG Trade (or more broadly speaking without the leverage of a trade deal) would have been harder to achieve.

DG Environment

The EC Directorate General for the Environment (DG ENV) aims to protect, preserve and improve the environment for present and future generations, proposing and implementing policies that ensure a high level of environmental protection and preserve the quality of life of EU citizens. It also makes sure that MS apply EU environmental law correctly and represents the EU in environmental matters at international meetings.[253] There are two units within the DG involved with the TSD chapters: the Bilateral and Regional Environmental Cooperation unit and the Multilateral Environmental Cooperation unit. The latter is involved mostly in the negotiations, while the former is more involved in the implementation phase.

For DG ENV trade and the TSD chapters form a relatively small part of its work. International cooperation and cooperation networks are often already established. TSD chapters and the institutional structures they establish provide DG Environment with an *additional* platform for international cooperation, giving it access to a broader range of stakeholders (e.g. different line Ministries in certain partner countries). DG ENV has limited resources to engage fully with the TSD chapters (e.g. it does not join the negotiating rounds in partner countries), which is in part a reflection of its priorities. The added value of the TSD chapters for achieving its objectives is considered limited (in other words objectives are pursued directly through the MEAs rather than indirectly through TSD chapters).

[250] See e.g. Harrison et al (2018)
[251] See e.g. Ebert (2016)
[252] https://asksource.info/organisations/european-commission-employment-social-affairs-and-inclusion
[253] https://ec.europa.eu/dgs/environment/

Issues and challenges

In the above we outlined the background and rationale of the EU's trade and sustainable development policy and described the design and structures of the TSD chapters and the processes involved in their negotiation. We now turn to the key issues and challenges faced by the EU in negotiating and implementing TSD chapters in its FTAs.

Key issues and challenges range from the more ideological to the practical, are often interlinked and include:

- The balancing of potentially conflicting interests;
- Limitations to trade leverage;
- Implementation issues.

Balancing conflicting interests

As illustrated in the previous chapters, inclusion of TSD chapters was to support a value based trade policy. However, it can also be seen as a means to address some of the wider concerns related to trade and investment – as encapsulated in the anti-globalisation movement. Finally, the TSD approach tries to capture some of the business concerns related to trade and investment, by incorporating the notion of the level playing field. These notions are not without ambiguity, however, which means the EC is often trying to balance potentially conflicting interests.

The anti-globalisation movement has its roots in both nationalistic agendas / sentiments on the one hand and global social and environmental concerns on the other. Both movements posed the same questions albeit with different motivations: Why trade more with faraway countries if you can produce it yourself and keep jobs here? Why buy from countries with flagrant human rights and/or labour abuses? Why make trade deals with countries that have a disregard for international environmental conventions? Why push for more trade when this causes more pollution, more emissions, more environmental damage and dislocation of local communities? Or, as the President of Wallonia put it: "is [it] reasonable to import beef from the other side of the Atlantic when we are at the same time supposed to be fighting global warming."[254]

These sentiments neglect the potential benefits from market access for developing countries in particular, but perhaps more importantly they do not always apply the same thinking to practices in the EU. For instance questions can be raised about the sustainability of certain EU production processes (particularly related to agriculture) such as growing crops in greenhouses, the societal costs of intensive farming practices and subsidies to large scale farmers that perpetuate intensive (and less sustainable) farming practices.[255] As such the 'fairness' of the level playing field is subject to debate, as it can also serve as a form of protection (and is often experienced as such by other countries, who may argue that it infringes on their comparative advantages). Moreover, they potentially clash with WTO rules on non-discrimination, which apply the concept of 'like' products. Creating a level playing field increasingly extends from products standards to non-product related processes and production methods (PPM) i.e. production conditions and circumstances including labour but also animal welfare, environmental conditions and CO2 emissions. Establishing what are 'like' products in such cases is much harder as PPMs are not inherent in the final product. The distinction between product and non-product related PPMs has increasingly been blurred and has resulted in calls for trade and border adjustment measures that are potentially non-compliant with current WTO rules. Any such measure could thus be disputed and brought before the WTO by member states.[256]

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[254] https://www.theguardian.com/commentisfree/2016/nov/14/wallonia-ceta-ttip-eu-trade-belgium

[255] See e.g. www.theguardian.com/environment/2018/mar/23/eu-in-state-of-denial-over-destructive-impact-of-farming-on-wildlife; and www.foeeurope.org/new-report-60bn-unustainable-farming-eu-140519;

[256] With the current Covid-19 pandemic a level playing field and fair competition have come under even more pressure, even within the internal market, as EU Member States' Governments have rolled out substantial State support programs, including subsidies and bail outs for companies. It is of yet unclear whether, how and when such support measures will be rolled back (see e.g. Economist, May 28th, 2020 edition: "The visible hand. Europe's

From a social perspective, issues within the EU such as the migrant crisis, modern slavery and migrant worker conditions, etc. also imply that pointing the finger at others can be viewed as hypocritical and belligerent – an issue that the EC appears well aware of.

By taking these conflicting issues and interests into account, the purpose of the TSD chapters as such has been challenged. While this purpose has been formulated by the EC as promoting sustainable development through trade, criticism from civil society, but also some in academia has been that underlying the approach is the aim of legitimising trade liberalisation and promoting or protecting EU businesses.[257] The argument goes that at the heart of the EU's trade policy still lies the aim of trade liberalisation and deep economic integration. Including TSD chapters thus aims to support the viability and democratic legitimacy of FTAs, seen as necessary due to the increased public and political scrutiny of trade and investment agreements. Civil society organisations are well aware of this and some have criticised the TSD chapters, including the civil society mechanisms created as part of these, as "window dressing."[258] Having principled objectives against the neo-liberal trade liberalisation paradigm as such, these organisations are faced with the so called *inside-outside dilemma*. While critical of the impact of free trade and of the purpose of the TSD provisions and mechanisms, being part of the process may provide opportunities to effect change or improvements from within.[259]

Trying to incorporate the various interests, with their inherent conflicts and dilemmas, thus is a balancing act for the EC, which has an impact on how TSD provisions are formulated, implemented and enforced.

Formulation of TSD chapters

The formulation of the provisions in the TSD chapters has, by some, been criticised as "vague" and "soft" making the provisions unable to deal adequately with e.g. labour violations. As Melo Araujo (2018) explains:

"Although the commitments to maintain and uphold levels of labour protection are phrased in strong terms, rather than as a best endeavour obligation, the normative implications of such provisions are not entirely clear. Firstly, broad references to 'domestic labour laws' indicate that these obligations go beyond the mere application and enforcement of minimum standards enshrined in the international instruments listed in the FTAs. The obligation is wide in scope in that it covers any form of domestic legislation relating to labour or environment protection issues. However, the agreements do not define more precisely what would constitute a labour law, nor do they list the laws of FTA parties that would be covered by such obligations.

(….) Another practical difficulty presented by such clauses is that they would only be applicable if the lowering of standards is designed "to affect" trade between parties or promote foreign investment. There is no guidance provided (…..) clarifying how to determine the trade effects[260] *of the failure to apply or enforce labour standards."*[261]

From a positive stance, such formulation reflects the EU's cooperative approach in dealing with labour and environmental issues. As the EU does not want to interfere with domestic policy processes there are no specific requirements for modifications to domestic law, as long as 'core labour rights are not systematically violated' and

habit of propping up firms may outlast the pandemic."), but clearly it goes against the principle of fair competition and would make it hard to demand such 'fairness' in a trade agreement.

[257] This touches on the discussion of where the power balance lies in terms of influencing the EU position in FTAs. As Orbie (2017) argues, (it is) "still unclear whether the EU is actually able to 'square current neo-liberal trade policy with the preservation of ecological and social diversity'. Such doubts are based on the observation that EU trade policy-making features unequal power relations in which corporate interests dominate at the expense of social and environmental voices." (p.529)

[258] As one interviewee noted, "it feels like it is all just to get our buy-in, but we have no real say in the agreements."

[259] For a full discussion on this dilemma see Orbie et al (2016).

[260] Despite the fact that US labour provisions are backed up by sanctions, the wording of the provision are fairly similar to those in EU FTAs and this problem of establishing trade effects therefore applies equally to the US as it does to the EU agreements.

[261] Melo Araujo (2018) "labour provisions in EU and US mega-regional trade agreements: Rhetoric and reality." P.7

as long as changes to domestic labour laws 'do not have an impact on trade and investment.'[262] The EU approach thus aims to leave the implementation of the labour and environmental commitments (as well as the functioning of the civil society mechanisms) at the domestic level up to the discretion of governments.

This approach to the TSD chapter is in sharp contrast to economic concessions, which are generally formulated in a much more binding and precise way. Therefore, some civil society organisations and academia have argued, from a more negative stance, that the chapter is only included to ensure support for the free trade agreement, while making sure that it will not form a stumbling block for negotiations.

Another issue relates to the global governance structures that the provisions refer to: the ILO standards and MEAs. Both are voluntary[263] and often have their own commitment and enforcement problems.[264] It is questionable whether these can be resolved in the context of an FTA. In addition, the numerous MEAs included in the TSD chapters without a single organ to coordinate these poses challenges and many are in practice hard to monitor during the implementation stage (which is in part a resources issue, but arguably also one of poor design).

This brings us to another issue related to the formulation of provisions: They are based on a one-size fits all approach, [265] which does not fully take into account specific partner country contexts related to specific sustainable development issues and priorities, the nature of labour relations and markets, the size of informal sectors, the position in GVCs of industries in the country and consequent power relations, etc.. Even if specific issues are identified, this does not seem to translate into more specific substantive provisions (beyond the ILO labour standards for instance) and the link with monitoring of implementation still appears weak (e.g. no clear priority agenda is set for the dialogue and institutional settings to monitor the implementation of the TSD chapters and FTA more broadly).

This has implications for the effectiveness of the provisions to improve or at the very least uphold labour and environmental standards. Related to this is the question of the trade-labour and trade-environment linkages and what the TSD chapters should actually achieve. In other words, which are the channels through which the agreements seek to achieve positive impact? Are they intended to lift general working conditions in a country or are they aimed mostly at making global supply chains more responsible? Are labour provisions meant to address social impacts of all aspects of the FTA? As for environmental provisions, similar questions arise: E.g. are the provisions aimed at ensuring trade of e.g. *legal* timber or fish products or of *sustainable* products? To which extent does it seek to address negative impacts of increased trade (e.g. CO2 emissions) and could this even be done in a WTO compliant way?

Since the provisions are not worded in a way that allows for a clear understanding or common interpretation of the purpose and channels of impact, their effectiveness may be hard to measure.

Enforcement of TSD chapters

The enforceability of TSD chapter provisions has been at the centre of much debate on their use and effectiveness and more fundamentally on the willingness of the EC to truly uphold its stated values. Enforceability is in part dependent on the formulation of the chapters as such (see above) as well as on the mechanisms and procedures to deal with alleged violation developed as part of the chapters. As George & Yamaguchi (2018) concluded "public

[262] Orbie et al. (2016).
[263] No country can thus be forced to join such agreements, unless they are pressured (e.g. in trade negotiations) or as a condition to entry of membership of international organisations (notably the WTO).
[264] See e.g. Neumayer (2010)
[265] Notably Harrison et al (2019 & 2018) highlight this issue and its implications for implementation and effectiveness of labour provisions, but others have flagged this uniform approach as limiting as well (see also e.g. the non-paper by the Netherlands and France for the EU perspective and the need for further disaggregation of potential impact assessments).

accountability mechanisms such as submissions/complaints and access to remedies are a powerful means of achieving effective enforcement of environmental legislation."[266]

The dedicated DSM developed as part of the TSD chapters has come under scrutiny for not allowing the same recourse as other parts of the FTAs and thus as lacking 'teeth.' For instance, in 2016 the European Parliament (EP) explicitly demanded that TSD chapters be covered by FTAs' general dispute settlement mechanism, "on an equal footing with the other parts of the agreement… to ensure compliance with human rights and social and environmental standards". Such commitments should be backed up with "effective deterrent measures", including the "reduction or even suspension of certain trade benefits provided under the agreement" in order to promote compliance.[267]

In part in response to these and other criticism and demands (see also below under implementation issues) the EC published a Non-paper on Trade and Sustainable Development (TSD) chapters in EU Free Trade Agreements (FTAs) in 2017. This publication intended to open up a consultation process and discussions with the EP, the Council and stakeholders from civil society. Two options for the improvement of the TSD chapters were presented: (1) a revamping of the current approach or (2) a sanctions-based approach. However, even in the presentation of these options the EC has been very clear in its stance against a sanctions based (conditional) approach. In the 2018 follow-up, the EC noted that there was no consensus for such a regime, and that it would not be in line with the EU's model. In its view it goes against the principles of cooperation and dialogue as the main avenues for achieving the objectives of sustainable development (promotional approach) - imposing sanctions against developing countries for non-compliance with labour or environmental standards potentially causes further economic harm to such countries. Moreover, according to the EC it would not guarantee effective, sustainable and lasting improvement of key social standards on the ground.[268] According to a former DG Trade official, the EU's goal is to deal with the root causes of violations of labour rights rather than with the symptoms, as the US does by having a binding dispute settlement system for labour violations.[269] The EU thus is reluctant to impose its values by 'bullying' its weaker trading partners into compliance. Moreover it has questioned the effectiveness of sanctions as such, often citing the failed attempt of the US to impose sanctions on Guatemala (see box below).

Enforceability and effectiveness: Do sanctions work?

There has been a lot of discussion on whether sanctions, or the conditional approach, are effective in the enforcement of labour standards in FTAs. Often the US and EU are juxtaposed in such discussions as examples of the conditional vs. the promotional approach respectively. While critics of the EU's soft approach often cite the US labour agreements as having more teeth due to their inclusion of sanctions, in practice enforceability of labour agreements has been limited for both the EU and US. This was in part due to the wording of the provisions, which, as in EU FTAs are rather vague and open to interpretation. In addition the issue of establishing a linkage to trade has proven difficult – to qualify as a breach of the provisions in the agreement, the trade effects of the failure to apply or enforce labour standards had to be proven. However, there is no guidance provided in EU or US FTAs on how to determine this.

The experience of the US-Guatemala arbitration, brought under CAFTA, is often used to illustrate the shortcomings of a sanctions-based approach as applied by the US. This dispute has been the only labour complaint under an FTA to ever proceed beyond consultation to an arbitration panel. The panel subsequently ruled against the US. Critics, however argue that this does not mean a sanctions based approach does not work, but rather it is proof of on the one hand vague wording of the provisions and on the other hand lack of political will to enact enforcement measures.[270]

[266] George, C. and S. Yamaguchi (2018), "Assessing Implementation of Environmental Provisions in Regional Trade Agreements".
[267] EP resolution of 5 July 2016 on implementation of the 2010 recommendations of Parliament on social and environmental standards, human rights and corporate responsibility (2015/2038(INI)). P8_TA(2016)0298, para 21(b) and (d).
[268] Navasartian, A. (2020) EU-Vietnam Free Trade Agreement: Insights on the Substantial and Procedural Guarantees for Labour Protection in Vietnam.
[269] Orbie et al (2016)
[270] See Cross (2017) Legitimising an Unsustainable Approach to Trade: A discussion paper on sustainable development provisions in EU Free Trade Agreements -

As Melo Araujo (2018) indicates "*although there is evidence that developing countries that have signed a trade agreement with the US have tended to experience improvements in the enforcement of labour laws after the entry into force of such agreements, there are also multiple examples of US FTA partners failing to comply with their labour law commitments. Whilst a number of submissions have been filed in relation to violation of labour provisions in US FTAs, only the aforementioned CAFTA-DR dispute has led to actual arbitration procedure and ruling.*" Thus even with sanctions as an enforcement mechanism, compliance is not guaranteed. This appears to be mostly due to a lack of either political will or the resources to monitor, implement and/or enforce the agreement's labour components. Viewed in this way, the underlying intentions of labour (or environmental) provisions and the actual commitment to upholding them are possibly more important than the enforcement mechanism as such.

However, it has also been argued that the EC's stance with respect to conditionality is not consistent with the omission of hard enforcement mechanisms in EU FTAs negotiated with developed trading partners, that are not themselves opposed to enforcement through sanctions, such as the US and Canada. As Melo Araujo (2018) notes "the EU's refusal to allow for the imposition of sanctions in case of violation of the CETA's sustainable development chapter despite the fact that Canada includes such provisions in its own FTAs (….) suggests that the EU is itself against the enforceability of the sustainable development chapters because of concerns that its own labour and environmental protection standards may be contested by its trade partners."[271]

The issue of enforceability is thus clearly a complex trade-off between the **scope** (including more standard means opening yourself up to more scrutiny by trading partners), **formulation** (positively viewed, softer formulation leaves more policy space for domestic governments and flexibility for cooperation on solutions) the **enforcement mechanism** applied (conditional or promotional?) and perhaps more importantly **resources and political will.**

Limitations to trade leverage

An ongoing discussion in relation to trade and sustainable development and the TSD chapters specifically, is what leverage trade (i.e. market access) actually provides for the achievement of non-trade policy objectives.

Trade agreements, leverage and trade-offs

While both the trade and labour linkage (social clause) and the trade and environment linkage could not be incorporated into agreements at the multilateral level, the idea is that in bilateral agreements such linkages could be achieved as the EU's trade leverage would be stronger. This could pave the way to eventually achieving such linkages at multilateral level.

From the Commission/DG Trade's point of view, the agreements it negotiates are (increasingly) vast in scope and trade is used as leverage to achieve an increasingly broad non-trade related policy agenda. It warns that the leverage that trade can provide should not be over-estimated or used too strictly. The formulation of the TSD chapters and governance mechanisms applied by the Commission (see above) are clear reflections of this stance – trade is only one tool, which must be flanked by cooperation, dialogue, capacity building and support. More importantly perhaps, disciplines under an FTA can never be a substitute for adequate mitigating and flanking domestic policies in both partner countries to address any potential negative impacts and facilitate necessary structural reforms. As mentioned, the EU stresses its TSD chapters do not set standards related to SD but rather refer to internationally accepted ones and leave it up to domestic policy makers how to implement these – offering assistance where it is needed.[272]

[271] Melo Araujo (2018)

[272] The need for adequate flanking measures is also reflected in the trade sustainability impact assessments that accompany the negotiations of EU FTAs. The final reports of these TSIA studies include recommendations for mitigating and flanking policies and identify the parties best suited to develop and implement such measures (e.g. domestic policy maker or CSOs, etc.).

In a practical sense the limitations to trade leverage are perhaps best illustrated by the type of agreement and trade partner it is being negotiated with. This starts with the choice of partner (starting negotiations with a partner which has not ratified most ILO Conventions has implications for the level of ambition that can be achieved) and extends to the power relationship in the negotiation of the agreement (i.e. how many trade-offs potentially need to be made in the negotiations and to which extent could you even apply a conditional approach given the strength of the other party?).

Trading partners

As mentioned, the EU is by no means alone in including labour, human rights and environmental provisions in its bilateral trade agreements. This means that at an international level momentum is building for the inclusion of such provisions in FTAs and this could imply that jointly these FTAs have an ability to establish change. Be that as it may, the range of trading partners that the EU has negotiated TSD chapters with presented a variety of challenges (or opportunities) with regard to the scope of topics and the trade-off made. Obviously, the EU's negotiating position vis-à-vis these partners varied – relative size matters in negotiations. But in relation to the TSD chapter, this does not always present the whole story.

The main challenges with regards to developed country negotiations included the scope and complexity of the overall negotiations, which included so many non-trade issues that it raised alarms among the general public, some politicians at MS levels, labour and environmental organisations alike (resulting substantial backlash against TTIP and CETA negotiations).. From the TSD chapter perspective these agreements were perhaps somewhat easier to negotiate, as positions and practices were more aligned, meaning more could actually be achieved (e.g. in the CETA).[273] However, cultural and institutional differences (or similarities) play a part as well – as negotiations with Japan, Singapore and Korea (all high-income countries) illustrated.

Particularly in the Asian context labour and industrial relations have a different history and are often strictly monitored if not controlled by governments, while the role of civil society is much more limited / circumscribed. This made it harder and culturally more sensitive to demand hard or extensive commitments, also given the economic power of such partners (i.e. their trade leverage). For instance, Korean negotiators successfully demanded fewer references to international standards and the removal of any immediate obligation to ratify all fundamental ILO conventions.[274] But even Vietnamese negotiators managed to 'water down' the labour provisions since Vietnam has not ratified the core ILO convention on freedom of association (its labour market is still organised based on a Communist Party system). Instead the Commission worked with Vietnam on developing a pathway to achieving ratification of these conventions. From a textual point of view, it would seem that the trade-off for the inclusion of the TSD Chapter was the exclusion of any hard obligations. Even the ratification of the remaining core ILO Conventions was 'conditional' only upon the sustained efforts made by the Vietnamese government, [275] with no date limit or hard obligations for these ratifications.[276] Many stakeholders, including civil society organisations and the EP, lamented the fact that too many concessions were thus already made at the negotiation stage. It is precisely this stage where leverage is seen as greatest while in the implementation phase there is no longer the carrot of concluding and ratifying the FTA in the first place.[277]

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[273] Although one could argue that not much is achieved at all since both parties already committed to the issues and were party to all relevant conventions and MEAs. In such cases the TSD chapter may be seen as a means to underline a common world view or perhaps reiterate cooperation on such issues.

[274] Harrison et al (2018)

[275] Even the EP must have conceded the limitations of trade leverage in this case (in favour of cooperation and dialogue). It voted in favour of the approval of the FTA despite its initial position set out in its prior resolution on the FTA, which was that the concerned ILO Conventions should be ratified ex-ante.

[276] Navasartian (2020).

[277] By contrast, the during the Trans Pacific Partnership (TPP) negotiations the US negotiated parallel bilateral labour agreements with three other TPP countries, including Vietnam. The provisions in this side agreement were conditional: if, after five years of the agreement being in place, the US had found that Vietnam had failed to ensure the rights of workers freely to form and join a labour union of their choosing, the US could have withheld

These examples illustrate Harrison's (2019) point: "third-country actors are more likely to accept modes of external governance that resonate with their domestic institutional mechanisms and are seen as normal and legitimate."[278]

The Mercosur and Central American negotiations presented similar challenges in terms of the practicalities of their labour markets, labour relations and environmental protection policies. Hostility against union leaders were well recorded in countries such as Columbia and Peru[279] and Brazil's response to the raging fires in the Amazon during the summer of 2019 put into question its commitment to environmental protection. Concerned about the potential negative social and environmental impacts of an FTA and the already existing issues in these countries, civil society organisations lobbied against negotiations with these countries. They were obviously aware that once negotiations had started the TSD provisions could be 'traded away' or softened and in any case would not be backed up by strong enforcement measures. Despite these concerns the EU-Mercosur FTA includes in its TSD Chapter provisions not just the core labour standards, but also the respect of standards regarding health and safety at work, compensation for illness or injury and decent wages. In addition "it contains commitments to ensure effective labour inspections and access to administrative and judicial proceedings in case of violation of the labour standards provided for in the TSD Chapter."[280] In this case, however, no deep concessions were needed for Mercosur countries to accept the provisions as they already had legislation in place that provides for the protection of labour rights. While this protection in practice is poorly enforced, the lack of strong conditionality of EU TSD chapters means compliance could not be enforced externally, through the FTA either. This illustrates once again that what is acceptable to a trading partner is dependent on how well it fits in with domestic regulations and mechanisms and the 'hardness' of the enforcement mechanisms.

EU trade negotiators have stressed these trade-offs and limitations to trade leverage and have also consistently argued that the leverage the FTAs provide is in the provision of platforms for cooperation, not conditionality.

Implementation issues

As agreements came into force and some experience with the actual implementation of the chapters and functioning of the institutional structures was gained, issues were raised by several stakeholders, including notably the EP, civil society, but also a number of researchers. These related mainly to: (1) the extent to which trading partners were complying (or able to comply) with the substantive provisions; (2) the response from the EC in case of non-compliance (or rather lack thereof); and (3) the purpose and effectiveness of the institutional mechanisms.

Compliance with provisions

Compliance and implementation issues were identified in several studies[281], in the EC ex-post evaluation of the EU-Korea FTA (see the box below) and the EP ex-post evaluation of the EU-Peru FTA.[282] Such issues were also repeatedly

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or suspended tariff reductions (Lowe, 2019). From the EC's perspective such conditionality flies into the face of its promotional approach, where it does not want to 'bully' its trading partners into an agreement, but rather wants to cooperate to achieve its objectives.

[278] Harrison et al (2019) p.263

[279] See e.g. ITUC (2012) Unions condemn MEPs support for Colombia-Peru Free Trade Agreement (https://www.ituc-csi.org/unions-condemn-meps-support-for) and Franklin (2013) Death Stalks Colombia's Unions (https://pulitzercenter.org/projects/south-america-colombia-labor-union-human-rights-judicial-government-corruption-paramilitary-drug-violence-education).

[280] Navasartian (2020).

[281] See e.g. Orbie & Van den Putte (2016), Marx et al (2016), Ebert (2016), Harrison et al (2019).

[282] Interestingly, no recording was found of non-compliance of environmental provisions. This is probably a reflection of the fact that the environmental provisions are hard to monitor as there is not a single set of clear standards and no clear indicators have been developed and the fact that environmental NGOs have generally been underrepresented in the CSMs and especially the DAGs, implying they would have been less capable of monitoring in the first place (resource constraints).

flagged by stakeholders e.g. through the DAGs[283] and in the EP. This included serious shortcomings in the implementation of core labour standards and even the lowering of standards of labour protection on health and safety at work in Peru. Similarly, concerns had already been raised prior to negotiations with Colombia on the continuing violence and violation of human and labour rights. Labour and human rights organisations therefore opposed the deal[284] as they were concerned that the TSD chapter did not provide the solid basis required to ensure that human and trade union rights are respected.[285] Once concluded it became clear that limited capacity and lack of support for building this capacity to implement and monitor international labour standards in Colombia became a bottleneck for effective implementation of the provisions. This lack of support was noted as a more general shortcoming, as the labour standards provisions have not been accompanied by increases in development assistance for labour-related activities.[286] Such findings raise questions about the effectiveness of the procedural commitments related to cooperation and assistance in the TSD chapters.

Key findings from EU-Korea FTA ex-post evaluation

The ex-post evaluation of the EU-Korea FTA conducted in 2018 highlighted some of the issues with regard to the implementation of labour provisions in the FTA. Prior to the conclusion of the FTA, Korea had not ratified the core ILO labour standard on freedom of association, the right to organise and collective bargaining had. The TSD chapter of the agreement included the commitment in Article 13.4.3 of the FTA to "make continued and sustained efforts towards [ratification]" of this standard. However, at the time of the evaluation this had still not been achieved. More importantly, Korea seemed to have back-tracked on its commitments with a large body of evidence pointing to infringements of labour rights and laws. So large was this body of evidence that Korea was even subject to a mission of a UN Special Rapporteur on the Rights to Freedom of Assembly and Association in 2016, who in his final report noted serious concerns.

The Evaluation also noted that "*The EU Domestic Advisory Group (DAG) has repeatedly brought up the issue of the Korean ratification of ILO conventions at the annual Civil Society Forums under the FTA, but has reported that no concrete actions have been taken by the Korean government to date.*[255] *The ITUC—which has representation on the EU DAG—has since described the situation in Korea as having clearly regressed in the years following the start of the provisional application of the EU Korea FTA*." [287]

EU Response to non-compliance: Use of enforcement mechanisms

Many stakeholders lament the absence of hard(er) enforcement mechanisms for the TSD chapters (this is particularly true for NGOs). The implementation issues with the Peru and Colombia agreements, but particularly with the Korea agreement, led to additional criticism about the reluctance of the EU to trigger the enforcement mechanisms it did have at its disposal (i.e. the dedicated DSM). The EU-DAG created under the EU-South Korea FTA had requested twice (in January 2014 and December 2016) that the Commission initiates formal government consultations to address widespread violations of labour rights in South Korea. MEPs expressed concern as well288 and in a Resolution adopted in May 2017,289 urged the Commission to take action. However, the Commission did not initiate formal consultations until 2019. While this inaction did not necessarily equate to disinterest, it was an illustration of the trade-offs that need to be made in the negotiation and implementation of trade agreements. In

[283] See e.g. the letter to Trade Commissioner de Gucht from the Chair of the EU-Korea DAG: Jenkins, T. 2014. Serious Violations of Chapter 13 of the EU-Korea FTA. Letter to Karel de Gucht of 13 January. www.finunions.org/files/225/Letter_to_Mr_Karel_De_Gucht_Art_13-_Korea_-FTA.pdf

[284] However, business associations were overwhelmingly in favour and the EP eventually approved the deal, although it indicated that work needed to be done to ensure human, labour and environmental rights were upheld.

[285] EPRS (2018) "Trade agreement between the European Union and Colombia and Peru. European Implementation Assessment."

[286] Ebert (2016).

[287] Final Report. Evaluation of the Implementation of the Free Trade Agreement between the EU and its Member States and the Republic of Korea (https://trade.ec.europa.eu/doclib/docs/2019/march/tradoc_157716.pdf)

[288] Euractiv (2017) "MEPs slam labour rights in EU-Korea trade deal review."

[289] European Parliament resolution of 18 May 2017 on the implementation of the Free Trade Agreement between the European Union and the Republic of Korea

such trade-offs TSD provisions are likely to take a lower priority given that they are, from a trade perspective, not at the heart of the agreement.[290] Trade Commissioner Malmström did admit, however, that there was a need to push for progress using available channels and committed to a thorough stock-taking of issues. This wider reflection on the implementation of TSD chapters was also necessary for EP consent to CETA and in the framework of ongoing trade negotiations with Mexico and Mercosur.

Effectiveness of institutional mechanisms for monitoring, dialogue and cooperation

Finally, implementation of the TSD chapters raised issues with regard to the effectiveness of the institutional mechanisms set-up for monitoring, dialogue and cooperation.

There is an emerging literature and research on the effectiveness of labour and to a lesser extent environmental[291] provisions in FTAs and specifically in EU FTAs. In some of this research EU provisions and more specifically the EU's promotional approach is juxtaposed to the US' sanctions based approach. A notable difference between the two approaches relates to enforcement mechanisms, but also to civil society engagement. The EU approach is unique in that it explicitly foresees in dedicated (one for each agreement) CSMs in both the EU *and* the partner country (the EU and counterpart DAGs). The EU's "soft" approach implies that "*improvements in labour standards may emerge through longer-term change in political norms and processes resultant from learning and socialization*."[292] The question of how effective the TSD institutional mechanisms are then becomes central to the question on the effectiveness of the TSD chapters as such.

Comparatively (to the US approach) there is some evidence to suggest that the cooperative approach adopted by the EU[293] contributes positively to improvements in labour rights and environmental standards. For instance Postnikov and Bastiaens (2014)[294] and Bastiaens and Postnikov (2017)[295] have presented evidence that the cooperative frameworks established in EU FTAs and, in particular, the increased involvement of civil society actors in these frameworks, has led to the improvement of labour rights and environmental protection in EU partner states.

Similarly, Raess' (2018) research results suggest that "*FTAs with strongly institutionalised labor-related cooperation provisions are a 'win-win' outcome in North-South relations. Developing country exports benefit from the introduction of labour provisions accompanied by deep cooperation mechanisms in North-South FTAs. At the same time, developing countries that sign into FTAs with deep cooperation see improvements (or smaller deterioration) in their in law FACB [freedom of association and collective bargaining] rights*."[296] These studies support the notion that the design of labour clauses that specifically include key stakeholders fare better in the implementation phase (as

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[290] This was confirmed by a Commission official interviewed as part of a study by Harrison et al (2019), who stated 'It is important to have a positive forward looking agenda. Confrontation would lead to a backlash on behalf of Korea. We want to add investment protection into the agreement. If we took action under this chapter, we might lose benefits elsewhere. So we do need to think about the bigger context" As Harrison goes on to argue "This reluctance to commence formal 'complaint' procedures in Korea is symptomatic of a broader sense that there is inadequate legal duty and political will to at least try and enforce labour standards provisions"(p.269).

[291] Most of the research reviewed focused on labour provisions in FTAs, possibly as these are the more concrete provisions and the ones where most contentious issues have been identified. The fact that environmental provision are harder to monitor and the more limited engagement of environmental NGO with the TSD chapters could also have contributed to this more limited attention to environmental issues..

[292] See Harrison et al (2019)

[293] Here it is important to note that labelling the EU approach as cooperative does not imply that the US approach is necessarily not cooperative. Dialogue, cooperation and assistance are also part of US labour and environmental provisions, but in a more general way and not institutionalised through dedicated mechanisms such as the DAGs for each agreement. See e.g. Oehri (2014) and Van den Putte (2015).

[294] Postnikov, E. & I. Bastiaens (2014). 'Does Dialogue Work? The Effectiveness of Labour Standards in EU Preferential Trade Agreements'

[295] Bastiaens, I. & Postnikov, E. (2017) "Greening up: the effects of environmental standards in EU and US trade agreements."

[296] Raess, D. (2018) "Labour (and environmental) provisions in FTAs: What do they do?"

opposed to more conditional approaches that appear to be more effective in the negotiation stages in prompting change in labour laws). However, there are some caveats. First of all this seems to hold only for North-South trade agreements and second, while outcomes *de jure* were observed, *de facto* outcomes could not (yet) be established. Finally, as these studies are based on quantitative data supplemented with interviews with key informants, they do not provide a detailed understanding of how TSD chapters have been operationalised (or not) in third country contexts. As such they also fail to address questions of causality.[297] This may explain why the outcomes of these studies contrast with experiences with notably the Peru and Korea FTAs (see above), where progress was lacking and even some backtracking on labour standards was observed. There are probably a number of reasons underlying these processes, most of which likely had nothing to do with the FTA or TSD chapters – external pressure alone clearly cannot achieve reform. But there has also been criticism of the actual functioning and relevance of the institutional mechanisms of the TSD chapters.

Specific issues identified in relation to the sub-committee (SC) on TSD and the civil society mechanisms (CSMs)[298] included:

- **Sub-Committee on TSD:** EU negotiators and other trade actors (e.g. trade section at EU delegations) see their role as limited in relation to the implementation of TSD chapters, key interlocutors lack specific information and knowledge on SD issues and involvement of e.g. development cooperation sections is limited. On the trade partner side, government officials involved in the SC often do not see labour or environmental issues as their responsibility or priority.
- **Civil Society Mechanisms:** Issues related to the CSM concerned mostly the DAGs and included: delays in establishing DAGs; unbalanced membership (mainly business and labour organisations); lack of representativeness of the organisations in the partner country DAGs (either because of the limited relevance of the FTA and TSD chapter to these organisations or because their lack of real independence from the government); limits to its mandate (only monitoring of the TSD chapter and not able to trigger investigations under the DSM); limited capacity and understanding by civil society stakeholders (particularly in partner countries); and lack of resources.[299] There was also a general criticism of the lack of transparency and communication on the part of the Commission (especially in response to complaints and in providing feedback on civil society inputs).

At a more fundamental level, the purpose of the CSMs has only been defined in broad terms as "to advice on the implementation of the sustainable development chapters in EU trade agreements."[300] Understanding of the purpose could thus range from mere legitimising of trade agreements to providing a platform for dialogue, monitoring or even influencing policy.[301] Civil society stakeholders in particular seem to feel their role is more limited to the first and the CSMs in place do not allow for substantial engagement in the form of policy influencing.

Key stakeholders and their interactions

Besides the internal stakeholders within the Commission (i.e. DG Trade, DG EMPL and DG ENV), key stakeholders in the policy domain include on the policy side the EU Member States and the European Parliament and on the civil society side business organisations, labour unions, environmental and other NGOs. Other actors include a number of research institutions / think tanks.

[297] Harrison, J; M. Barbu; L. Campling; & F. Ebert (2018) "Labour Standards Provisions in EU Free Trade Agreements: Reflections on the European Commission's Reform Agenda."
[298] The third mechanisms, the panel of experts, has to date not been convened for any of the TSD chapters.
[299] For an overview, see e.g. the EESC Opinion on 'Trade and sustainable development chapters (TSD) in EU Free Trade Agreements (FTA)' (2018/C 227/04); Westlake (2017); and Harrison et al (2018).
[300] See EC: Implementation of the Trade and sustainable development (TSD) chapter in trade agreements - TSD committees and civil society meetings. http://trade.ec.europa.eu/doclib/press/index.cfm?id=1870
[301] See Orbie et al (2016) and ECDPM (2020).

Stakeholder engagement

In principle, most civil society groups appreciate the inclusion of the TSD chapter in the EU's trade agreements and the efforts that the Commission is making in explicitly including sustainable development into its policies. However views on how appropriate TSD chapters are in fully addressing the trade and sustainable development linkages vary from very critical to ambiguous and more positive. Particularly for labour and environmental organisations, which are generally on the more extreme side of the spectrum, this poses what Orbie et al (2016) identify as the insider – outsider dilemma: *"While these organisations hold (very) critical views on the impact of (EU) free trade agreements on sustainable development, they also actively participate in the mechanisms and acknowledge the pitfalls of co-optation. The position of business representatives is more straightforward: they hold more positive evaluations across the board, both on the benefits of free trade and the role of the civil society mechanisms (business representatives even recognise their potential to legitimise free trade)."*[302]

Stakeholder engagement has been both outside the institutional mechanisms of the TSD chapters - in the form of policy influencing, lobbying, or activism – and within these mechanisms. Many of the key stakeholders have been members of DAGs and/or take part in the Civil Society Forums or related to a specific agreement, while most are regular attendees of the regular Civil Society Dialogue meetings at DG Trade.[303]

Below we briefly discuss the key stakeholders and their interactions, starting with the most vocal or at least extreme ones in terms of their positioning vis-à-vis the TSD agenda.

Stakeholders and their interactions

On one side of the spectrum **labour unions, environment and other NGOs** are often fundamentally critical of free trade as such and see TSD chapters and their institutional mechanisms as a second best option, if not as window dressing. They are aware of this dilemma though and often apply an insider – outsider strategy. Thus while participating within the process they also apply pressures from the outside, as was clearly visible during the mass TTIP protest.

Labour organisations are widely acknowledged[304] to have been very successful in pushing labour issues onto the trade agenda and engaging with the Commission and the TSD chapters, both in the negotiation stages and the implementation stages through representation in the DAGs and other civil society forums. This success can be attributed to a number of factors:

- Labour organisations have a fairly focused agenda and are well organised internationally within overarching bodies such as ITUC and ETUC.[305] This also means they can apply multi-pronged strategies and lobby/apply pressure at different levels.
- The labour movement has a clear international institution in the ILO which is a widely recognised body setting labour standards. These standards have been codified in the Core Conventions and Decent Work Agenda and incorporated in other overarching standards such as the Sustainable Development Goals (SDGs).
- Labour organisations have spent substantial resources (at national, European and international levels) on engaging with the trade agenda. They have built up knowledge and capacity in this area, and are therefore increasingly seen as credible partners in the debate, also by policy makers.
- Labour organisation have been successful in building coalitions at important stages in the policy development, albeit that these coalitions and cooperation generally is largely opportunistic and ad-hoc.

[302] Orbie et al (2016), p.527
[303] See: http://trade.ec.europa.eu/civilsoc/
[304] Interviewees across the spectrum, from policy makers to business organisations referred to the successful role labour organisations have played in the more general debate on trade and labour linkages and in relation to the EU trade and sustainable development agenda in particular.
[305] The International Trade Union Confederation and the European Trade Union Confederation.

Coalitions have been formed with sections in the EP, political parties in member states, academia and to some extent with environmental organisations.

Despite this success in pushing labour issues onto the trade agenda, organised labour has been less successful in influencing the extent to which such issues are integrated into FTAs more widely. In their view "*(r)ather than an afterthought, the objectives of labour, environmental protection and sustainable development need to be made the guiding principles of such agreements. (….) In practice, this means looking carefully at everything else in the agreement, not simply adding sections to it.*"[306] Labour organisations have been very outspoken in their views that the TSD chapters should be subject to much more precise wording and to conditionality, possibly even sanctions. In addition, labour organisations have spoken out against the negotiating of trade agreements with countries with poor records on labour protection (e.g. Peru) and have tried to persuade the EP to take this position as well. These points have clearly not been headed by EU policy makers.

Environmental organisations and other NGOs hold the same principled reservations against free trade as labour organisations do. As one interviewee noted, "*trade liberalisation is still at the heart of FTAs. From the perspective of sustainability, trade agreements should not be about liberalising trade, but about regulating trade it in such a way that it ensures truly sustainable trade and not merely the 'greening' of trade.*" Similar to labour organisations environmental NGOs see TSD chapters as a second best option and are of the view that both the wording / design of the chapters and the enforceability mechanisms should be improved (conditionality). This view was echoed by the Green members of the Parliament's international trade committee, who declined to endorse Hogan's nomination as trade commissioner partly because he lacked "ambition" on TSD enforcement.[307]

Growing public concerns for the environment reinforced by actions of environmental NGOs (lobbying, campaigning, public awareness raising, etc.) have given the green agenda a big push, as reflected in e.g. the EU Green Deal and the Paris Agreement. However, the role of environmental NGOs in the TSD chapter mechanisms and processes has been less prominent (especially as compared to the labour organisations), for a number of reasons:

- The environmental agenda is vast in scope, as witnessed in the multitude of MEAs, and trade is not a primary focus for most environmental organisations.
- Related to this, resources to engage with TSD chapters in particular have been relatively limited, also as the organisations that have engaged with the trade agenda have tended to focus on other parts of the FTAs (e.g. procurement, investment protection, agriculture, etc.)
- The grouping as such is diverse and somewhat fragmented; it includes animal rights groups, conservation groups, federations of national environmental groups as well as internationally organised (and operating) organisations.
- There is no single overarching framework or reference agreement such as with the labour agenda (ILO standards).

Environmental organisations are thus underrepresented in the DAGs and other meetings. However, environmental provisions in the TSD chapters have expanded. For instance the chapters have included an increasing number of specific provisions on trade in certain natural resources, next to the provisions on MEA. Moreover, environmental issues are taken up in many of the other parts of the agreements. The influence of environmental organisations has thus perhaps been more indirect. The few organisations that do actively participate in the institutional mechanisms of the TSD chapters mostly do so in the CSF of individual FTAs and in the CSD at DG Trade, although some are

[306] Cross (2017) "Legitimising an Unsustainable Approach to Trade: A discussion paper on sustainable development provisions in EU Free Trade Agreements"
[307] https://www.cer.eu/insights/eu-should-reconsider-its-approach-trade-and-sustainable-development

represented in several DAGs. Environmental NGOs have particularly pushed for much stronger wording and enforcement as regards environmental clauses in the TSD chapters.[308] In this they have so far not been successful.

Given their own internal fragmentation, in the context of TSD chapters, environmental stakeholders have only engaged in cooperation with other stakeholder groups on an ad-hoc or opportunistic basis. Based on their core alignment on TSD chapters, such ad-hoc coalitions have predominantly been with labour organisations.[309] In addition the green fractions within the EP have been natural allies.

EU business associations are well represented among the DAGs and generally actively engaged in the debate. The main organisations active in the debate include BusinessEurope, European Services Forum, the Free Trade Association, Eurocommerce and Amfori, along with a number of sector specific organisations such as Euratex and Food & Drink Europe. The strong representation of this group in parts reflects having more resources as compared to NGOs in particular as well as a stronger direct interest in trade agreements in general.

The EU business community sees the TSD chapters as important for promoting more sustainable practices, but mostly for creating a level playing field (given the high labour and environmental standards they need to comply with in the EU). However, they cautious when it comes to enforceability of such standards and are strongly against a sanctions-based approach.

Business has not needed to push its agenda as actively, as it generally agrees with the position and direction taken by the Commission in the TSD chapters.[310] More importantly, the TSD chapters are not a focus in FTAs for this stakeholder group. For instance, while labour and environmental organisations cautioned strongly against the Mercosur agreement, business was strongly in favour of this agreement, clearly (or perhaps rather predictably) letting business considerations dominate over sustainability ones. More fundamentally it has been argued that businesses have much broader access to the Commission across all departments of DG Trade, while civil society access is mostly constrained to unit D1. The openness to EU industry simply is not afforded to civil society organisations as a principle.[311] Orbie (2016) also notes that business organisations seem well aware of (and support) the fact that TSD chapters and the institutional mechanisms they create add to the legitimacy of FTAs.

Business organisations arguably have no need for coalition building with other civil society groups, given that their interests seem adequately reflected. While one interviewee noted that there is at least sympathy from businesses for labour organisation positions and work in the DAGs, there is no formal cooperation given the fact that their positions often contradict. Business groupings may form coalitions with one another (and indeed usually do when advocating their positions) and with fractions within the EP, but no structured cooperation was observed here either.[312]

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[308] See e.g. Trade and Sustainable Development: A chance for innovative thinking. Study by Transport & Environment, Oct. 2017 (https://www.transportenvironment.org/sites/te/files/publications/2017_10_Trade_sustainable_development_final.pdf); and Client Earth (2017).

[309] While most interviewees indicated there was some cooperation within the existing structures and platforms (e.g. CSD, DAGs, CSF, etc.) and sometimes ad-hoc informal meetings are organised in Brussels around a topic, there is little structured coalition forming. One interviewee did argue that this was an ambition for the future. Given the close alignment between labour and environment and the interlinkages between these two domains (e.g. climate change affects the poor disproportionally and poor work conditions are often directly related to environmentally unsustainable processes and practices) such coalitions could present a more coherent sustainable development agenda in relation to trade.

[310] This was confirmed in interviews, but also highlighted in a recent study by ECDPM (2020) "Making it count: civil society engagement in EU trade agreements."

[311] See e.g. https://corporateeurope.org/en/pressreleases/2015/06/blow-citizens-eu-court-backs-privileged-corporate-access-eu-trade-talks

[312] We note that interviewees were asked about their cooperation with other stakeholders and relevant documents (e.g. position papers) were reviewed, but no in-depth research into coalitions and cooperation was conducted (or possible) within the context of this evaluation.

Perhaps the most structured form of coalition forming is in the institutionalised mechanism of the **European Economic and Social Council (EESC)**. As an organisation, the EESC reconciles the positions and views of business, workers, professionals, farmers, consumers and other stakeholders. The EESC has set up a Follow-up Committee on International Trade to ensure that civil society has a say in the shaping of EU trade policy. Its role is to achieve consensus and find a balance for the various interests of civil society. While the groupings within the EESC are diverse there is, in the words of one interviewee "agreement on the main principles of trade and sustainable development even though the benefits may fall differently."

The EESC has produced several opinions in recent years, covering, and providing its recommendations on various aspects of trade and sustainable development in EU trade policy strategy (opinions on the Trade for All Strategy and on the role of trade and investment in relation to the Sustainable Development Goals and very concretely on the TSD FTA chapter in the EU-Korea).313 In July 2017, the EESC organised a conference on how to make a real impact with TSD chapters in FTAs, involving notably members of various DAGs.314 The EESC prepared an opinion on the Commission services non-paper which included the views of the wider civil society bodies.315

More practically in relation to the TSD chapters, the External Relations Section within the EESC forms the Secretariat of the Domestic Advisory Groups (DAGs) and has members sitting on all of the EU DAGs. The EESC is concerned with the overall implementation of the agreement but, by its very nature and by the role it plays with the DAGs, is particularly concerned with the organised civil society aspects of the agreements. The EESC has played an important role in connecting the various stakeholders across the civil society spectrum as well as connecting to the EP (notably INTA) and to the EC. For instance, the EESC and Unit D1 regularly meet and consult to discuss e.g. capacity constraints for civil society's functioning in the DAGs, to evaluate best practices and exchange information and knowledge. However, given its diverse membership its ability to present a unified position is somewhat compromised and the organisation seems mostly focused on practical coordinating issues.

EU Member States[316] priorities are expressed through the European Council. In addition, Member States (MS) are informed on the status of negotiations and implementation of TSD chapters via the Trade and Sustainable Development Expert Group. Individual MS also engage directly with the Commission on specific elements of the TSD agenda e.g. as in the case of Sweden undertaking the development of a pilot for a TSD Handbook to assist the set-up of institutional structures, particularly in partner countries.[317]

There is generally strong support for the TSD agenda among MS, although the level of engagement, knowledge and experience with the specific issues varies substantially. Generally speaking, Northern Member States are more experienced in dealing with sustainable development issues in relation to trade. They tend to thus be pro-active in their engagement with the TSD agenda, often pushed by their parliaments and civil society. They also cooperate more often on such issues.[318]

While the recent revamping of the approach to TSD chapters (see next chapter) reflects a more assertive stance by the Commission as regards enforcement and implementation, it still seems to fall short of the ambition levels that

[313] EESC Opinion on 'Trade for All — Towards a more responsible trade and investment policy'
[314] See https://www.eesc.europa.eu/sites/default/files/files/summary_conference_on_tsd_chapters_in_eu_trade_agreements.pdf, last visited 30.10.2021.
[315] Opinion of the European Economic and Social Committee on 'Trade and sustainable development chapters (TSD) in EU Free Trade Agreements (FTA)'
[316] No interviews with Member States were conducted; the information included here comes primarily from interviews with other stakeholders and from (written) responses from MS to the non-paper consultation process.
[317] National Board of Trade Sweden (2019) TSD HANDBOOK. Implementation of the chapter on trade and sustainable development in the Trade Agreement between EU and Ecuador. Pilot project. (www.kommerskollegium.se/globalassets/publikationer/guider/2019/handbook-tsd-en.pdf)
[318] For instance, in response to the consultation process following the Commission services non-paper, a total of six member states provided written inputs, including France as well as, in a joint letter, Belgium, Finland, Luxemburg, the Netherlands and Sweden.

some of the more pro-active member states would like to see. Northern MS in particular seem more open to stronger enforcement mechanisms and more ambitious provisions in the TSD chapters, as a recent non-paper by the French and Dutch Authorities illustrates.[319] In this paper France and the Netherlands argue for stronger more ambitious TSD chapters, more effective implementation and improvement of the sustainability impact assessments. As EU Member States often face push back against FTAs at home from their national parliaments and civil society, their interest in the TSD chapters extends not just to the partner country side (exporting EU values), but also to implications for sustainability outcomes in the EU. The level playing field argument and prevention of a race to the bottom thus are likely strong driving forces of support.

The **European Parliament**[320] and particularly its Committee on International Trade (INTA) has been a particularly active contributor to the TSD debate. The EP is seen by various stakeholders as an important contributor to both the inclusion and the evolution of the TSD chapters and it has worked together with civil society through the EESC as well as with various researchers in promoting the TSD agenda. While it frequently engages in the discussions and presents itself as an advocate for the inclusion of labour and human rights provisions in EU FTAs, it rarely insists on them in negotiations. This is probably a reflection of the diverse interests within the EP itself. In the CETA negotiations the EP successfully took a tough stance on a human rights conditionality clause. According to Meissner & McKenzie (2019) the EP's motivation for insisting on conditionality in the agreement with Canada – a country which is among the top five regarding fundamental rights – had a lot to do with the composite hence divided nature of the EP as an institution. "*Due to limited organizational capacity, composite actors, such as the EP, have to select 'strategic issues' among political events that make them appear as unique supporters of public interest*."

More recently, the EP has been pressing for the EU to withdraw trade privileges if partners breach agreed environmental and climate change standards. This was partly in response to the fact that Brazilian President Bolsonaro's anti-environmental domestic agenda and the raging forest fires in the Amazon in the summer of 2019[321], which put the spotlight on the enforcement mechanisms under the EU-Mercosur agreement (a mixed agreement concluded in principle in June 2019 but still awaiting signature and subsequent ratification by the EP and member states).

Whilst the more progressive groupings within the EP have favoured 'comprehensive, enforceable and ambitious TSD chapters' (S&D MEPs) not all parties agree with such a more conditional (sanctions-based) approach. Overall, however, the EP has been instrumental in pushing the Commission to review and re-assert its TSD approach.

Research and academia have actively contributed to the debate on TSD. A wide body of literature has evolved on the effectiveness of TSD chapters, on their features, weaknesses and options for improvement.[322] Civil society and the EP have also worked together with academia to strengthen their arguments, develop their understanding and support their positions. For instance, in cooperation with Bernd Lange MEP, Chairman of the Committee on International Trade a study was commissioned by Friedrich-Ebert-Stiftung for the development of a Model Labour chapter.[323] Independent research has also emerged on e.g. the effectiveness of labour and environmental provisions in FTAs based on the development of datasets (e.g. World Trade Institute, OECD), while a number of

[319] non-paper by Dutch and French authorities on trade, social economic effects and sustainable development (May 2020): https://www.permanentrepresentations.nl/permanent-representations/pr-eu-brussels/documents/publications/2020/05/08/non-paper-from-nl-and-fr-on-trade-social-economic-effects-and-sustainable-development

[320] No interviews with MEPs were conducted, so the information included here comes primarily from interviews with other stakeholders, from (written) responses from MS to the non-paper consultation process and from other EP communications and reports.

[321] Lowe (2019)

[322] A number of these publications were consulted for this evaluation - see the reference list to this report. The following articles and their reference lists also provide a good overview: Barbu et al (2018), Harrison et al (2019); ECDPM (2020) and Westlake (2017).

[323] Stoll, Peter-Tobias; Gött, H.; and Abel, P. (2017) Model Labour Chapter for EU Trade Agreements (DRAFT), In cooperation with Bernd Lange MEP, Chairman of the Committee on International Trade and commissioned by Friedrich-Ebert-Stiftung. (www.fes-asia.org/news/model-labour-chapter-for-eu-trade-agreements/)

researchers have submitted inputs to the debates, e.g. in the consultation process following the Commission services non-paper published in 2017.[324]

The positions of academia do not explicitly favour any side of the debate. Most seem to support the intentions of the TSD chapters, but several question their ultimate effectiveness given institutional shortcomings (e.g. Orbie et al, 2016; Westlake, 2017; Harrison et al, 2019; ECDPM, 2020), lack of enforceability and the need for better articulation of the chapters with the specific country context of trading partners and their integration into GVCs[325] (e.g. Harrison et al. 2019; Barbu et al. 2018).

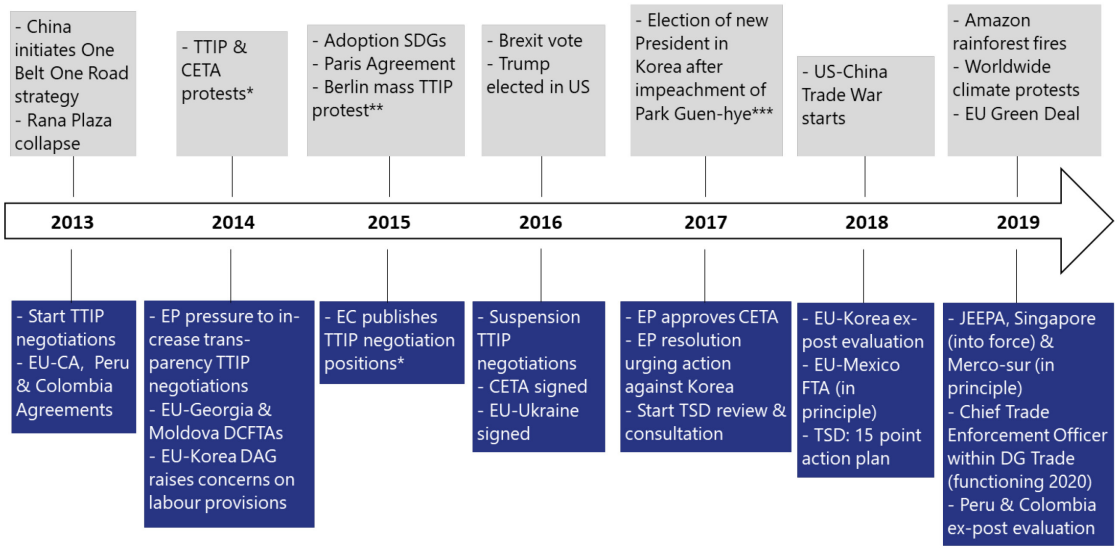
Evolution of the TSD approach in EU FTAs (2013-2019)

Timeline of events

Over the past nine years, starting from the entry into force of the EU-Korea FTA, TSD chapters have been a standard feature of all EU bilateral trade agreements. Changes to the approach of these chapters over this period have been incremental rather than fundamental. Key external drivers of these changes include on the one hand the increased public scrutiny and politicisation of EU trade policy and FTAs and on the other hand the evolving international and EU social and especially environmental policy framework. Internal drivers (within the trade policy realm) include notably the experience with the implementation of the chapters and the related criticism and pressure from key stakeholders as well as an evolving body of research on the effectiveness of the EU's TSD approach.

This is illustrated along a timeline in the figure below, which includes external developments in grey and internal developments in blue.

Figure 8 Timeline of key events



* The unprecedented public protests against the TTIP and CETA led to more transparency in the negotiations (publication of negotiation positions, if not the actual texts) and some institutional adjustments as the Commission engaged more directly with the EP and civil society, e.g. by setting up special advisory committees for TTIP and CETA. These organisations became more

[324] See for details: http://trade.ec.europa.eu/doclib/docs/2018/july/tradoc_157122.pdf

[325] The argument goes that the structure of private sector power relations within GVCs (e.g. keeping prices low for developing country producers) shape the ability of labour provisions in EU FTAs to improve working conditions – while inequalities that exist in such GVC power relations may be compounded by the very process of value chain integration that the FTAs seek to enhance.

directly involved based on their specific knowledge, although more cynically one could argue that the Commission needed their engagement (and thus implicit approval of the deal) to make the agreements politically viable; the advisory committees for TTIP and CETA were not institutionalised as such, i.e. they were not set-up for any of the other FTAs subsequently negotiated and signed.

** It should be noted that the kind of public attention and activism witnessed at the height of the TTIP protests (2015-2016) were not witnessed again.

*** President Park's government was seen as actively trying to weaken labour laws, which contributed to the country's regression on its labour commitments under the FTA. The new administration of Moon-Jae seemed more open in engaging on the key issues of freedom of association and forced labour.

Changes in TSD approach

A number of changes in the TSD approach can be observed. Starting from the EU-Cariforum EPA and subsequently the EU-Korea FTA it is clear that the TSD chapters in the following FTAs have been both widened and deepened. See the overview table of all relevant FTAs in Annex A. While the chapters initially widened in scope (e.g. inclusion of specific articles on trade in fish or forestry products), there was also a deepening of the agreements to include further dimensions of the existing international conventions (e.g. labour inspections and health and safety at work), as well as new conventions/agreements, such as notably the Paris Agreement.

The increasing public scrutiny of FTAs and the growing power of the EP made the TSD chapters an even more important feature of EU FTAs to guarantee public and political support for such agreements. It also led to more transparency in the negotiations (publication of negotiation positions, if not the actual texts) and some institutional adjustments as the Commission engaged more directly with the EP and civil society, e.g. by setting up special advisory committees for TTIP and CETA. Moreover, in the framework of the EP's consent to CETA, the Commission agreed in 2017 on a stock-take of the implementation of the TSD chapters as well as an early review of sustainable development impacts of the CETA.

Following a public consultation (part of the stock-take) in 2017/2018 (see the box below), the period since 2018 included actions aimed at, according to the Commission, an improved implementation and more assertive enforcement of the TSD chapters. These changes were laid down in a 15 point action plan[326] (summarised in Annex H).

Stock-taking and reform of the TSD approach: The EC's 15 point action plan

In response to criticism by various stakeholders (from EP, civil society, academic research, etc.) the Commission published its Non-paper of Commission Services "Trade and Sustainable Development (TSD) chapters in EU Free Trade Agreements (FTAs)" in July 2017. The publication intended to open a discussion with the European Parliament, the Council and stakeholders from civil society in the subsequent months. It comprised a description and an assessment of current practice and presented two options - a revamping of the current approach or a sanctions-based approach - to improve implementation of the TSD chapters. A large number of stakeholders across all groups submitted written comments, position and research papers in response to the non-paper – indicative of the interest in TSD chapters, but also the discontent with the functioning of the instrument and its mechanisms.[327]

In February 2018 Commission services published a second non-paper with a 15 point Action Plan for improvement. The second non-paper rejected the option of a sanctions-based approach and instead proposed stepping up and improving the implementation of the TSD chapters. The 15 point action plan constituted a revamping of the existing approach, by making it more "assertive" in terms of delivery and enforcement. This was to be achieved by (1) improving and streamlining cooperation (with MS, EP and international organisations); (2) enabling civil society to play their role in implementation (e.g. through capacity building and resources) (3) Improving delivery of results under the TSD chapters (through inter alia country

[326] European Commission (2018) Non-paper of the Commission services, 26.02.2018 "Feedback and way forward on improving the implementation and enforcement of Trade and Sustainable Development chapters in EU Free Trade Agreements. https://trade.ec.europa.eu/doclib/docs/2018/february/tradoc_156618.pdf and PPT presentation: https://trade.ec.europa.eu/doclib/docs/2019/may/tradoc_157881.pdf

[327] For a full overview of all responses, we refer to the document compiling these responses as published by the Commission: http://trade.ec.europa.eu/doclib/docs/2018/july/tradoc_157122.pdf

prioritisation, more assertive enforcement of obligations and development of action plans where concerns are identified, encouragement of early ratification, assessment of effectiveness and stepping up of resources for cooperation); and (4) improving transparency and communication, including time-bound responses to TSD submissions.

Parts of the plan were put into action by DG Trade already in the course of the consultation process. For instance, as part of the more "assertive" use of the DSM (i.e. stepping up the monitoring and analysis of compliance), the Commissioner sent a letters to its counterpart in Peru328 setting out compliance concerns and actions to be taken in the absence of which dispute settlement would have to be launched. In addition proceedings under the DSM were launched against Korea with a request for formal consultations. Actions to support and enable the role of civil society have included the launch of a project to support civil society through the EU Partnership Instrument. Moreover, since the Mexico agreement mechanisms were negotiated that would enable civil society stakeholders in the DAGs and CSF to raise and discuss SD matters related to the entire trade agreement. In the Vietnam and Singapore agreements, the Commission's pre-implementation efforts were stepped up and directed to push for the ratification of outstanding ILO conventions. To this end the Commission provided support to Vietnam for the reform of the labour code (through the EU Delegation) and to an ILO project providing technical assistance to the process of ratification of three ILO conventions.

Rather than a comprehensive reform the 15 point action plan constitutes a revamping of the existing approach through incremental changes and additional resources. It also entailed "*connecting the dots and joining up the various means and mechanisms we have at our disposal or that are already in place and can provide leverage*".[329] Thus the Commission looked for additional levers e.g. by linking the TSD implementation to ongoing efforts and work by international organisations such as the ILO, but also OECD (National Contact Points) and donors such as the World Bank.

The Commission particularly sees a role for the private sector in supporting its TSD ambitions e.g. through capacity building and due diligence of global supply chains in an attempt to foster compliance with the e.g. ILO conventions and environmental standards at the level of the producers and their supply chain. See the box below.

Due diligence in global supply chains

Businesses are increasingly required to conduct due diligence along their global supply chains, in some cases even by law. For instance, the EU has instituted a number of initiatives imposing certain due diligence-related obligations for human rights and environmental impacts, including climate impacts. Sector-specific examples include the EU Timber Regulation ("EUTR"), as well as the EU Conflict Minerals Regulation, which will come into force on 1 January 2021. The EU has also adopted the EU Non-Financial Reporting Directive, which requires reporting on due diligence, and is accompanied by Non-Binding Guidelines on non-financial reporting, and the recent Supplement on corporate climate related information reporting.[330] In addition there are various domestic legislative measures addressing supply chain due diligence in EU member states (often sector- or issue-specific). However, at present there is no overall EU legislative framework for due diligence in supply chains. Recently, as part of its Action Plan for Financing Sustainable Growth and spurred on by the EP, the EC commissioned a study on due diligence requirements through the supply chain, which explored possible development of regulatory options at the EU level. This is seen as a first step as developing and EU legislative framework, which could potentially support the ambitions and aims of TSD chapters through private pressure (from EU lead firms) on local actors in GVCs.

Source: European Commission (2020). https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en

[328] The EP commissioned ex-post evaluation of the Trade agreement with Peru and Colombia found serious compliance issues with regards to human and labour rights and lack of institutionalised measure to resolve these. See: https://www.europarl.europa.eu/RegData/etudes/STUD/2018/621834/EPRS_STU(2018)621834_EN.pdf The ex-post evaluation commissioned by DG Trade is currently still in progress (inception report presented in March 2020).

[329] Quote paraphrased from interview with DG Trade official.

[330] Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market ("EU Timber Regulation"); Regulation (EU) 2017:821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas ("EU Conflict Minerals Regulation"); Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 ("EU Non-Financial Reporting Directive").

The table below summarises the main changes in the TSD approach, focusing on the substantive provisions, procedural commitments and institutional mechanisms. As is clear, the scale of change is modest.

Negotiation and implementation of TSD chapters	Changes over evaluation period
Substantive provisions (commitments)	Widening and deepening of substantive commitments, however, one-size-fits all approach remains fundamentally intact. • Strengthened commitments on climate including commitments to implement the Paris Agreement and cooperation and joint actions with respect to the UNFCCC in Mexico agreement and planned for all subsequent. • Extending commitments beyond ILO core labour standards to also cover labour inspection and health and safety at work (in line with the related ILO conventions). • Inclusion of provisions to promote and support the uptake of CSR/RBC, building on international (OECD) guidelines.
Procedural commitments	Commission is planning or has taken actions to ensure better communication and transparency as well as more effective delivery through: • Definition of country priorities for each partner. • Increased cooperation with, EP, MS and international organisations in implementation phase. • Increased resources for implementation of TSD chapters in form of support for projects, e.g. through EU's own resources (Partnership Instrument) and by utilising other funds (e.g. Aid for Trade funding, G7's Vision Zero funds, World Bank, OECD, etc.). • Commitment to annual implementation reports and ex-post Impact Assessments • Time-bound responses to TSD submissions.
Institutional mechanisms	• Extend the scope of civil society involvement, including social partners, to the entire FTA • Streamlining institutional mechanisms (guidelines), and strengthening them through capacity building.
Other: Monitoring of compliance	Installation of a Chief Trade Enforcement Officer (CTEO) within DG Trade to oversee the compliance of market access commitments, TSD chapters and GSP commitments.

Many of these changes were only implemented very recently, i.e. following the 15 point action plan, or not yet in full (e.g. definition of country priorities is still work in progress in relation to the ongoing negotiations with Australia, New Zealand, Indonesia). As such it is not possible to ascertain the true extent of change just yet, or to which extent it works in practice.

Remaining contentious issues

Given that the changes in the TSD approach over the evaluation period were not fundamental, many of the key issues and challenges identified in Chapter 3 essentially remain relevant. At the highest level, the tensions between the various interests remain and the Commission thus makes trade-offs guided by political choices and will, as well as the leverage it deems to have. Discussions on how to further improve the chapters and process also remain, and boil down to the purpose and effectiveness of the TSD approach and its key features. The remaining contentious issues and debates can be summarised as follows:

- **Purpose of the TSD chapters:** Many labour / environmental NGOs still to some extent view the TSD chapters as window dressing and a mere add on to the FTA to enhance the political viability of the FTA as such. The reluctance of the Commission to make the wording of the TSD chapters more ambitious and specific and enforce provisions in a similar way as under other parts of the FTAs is seen as proof of this. Moreover, they still view their role as limited and not amounting to true policy influencing. While the extension (to the entire FTA) of civil society's remit for monitoring SD issues has been welcomed, the fact that CSOs cannot trigger the DSM has been lamented (see last point).

- **One-size fits all approach:** Despite the fact that the Commission has committed itself to identifying country priorities, the substantive provisions in all TSD chapters so far are more or less the same. Academia, NGOs, and several MS have criticised this fundamentally 'one-size-fits-all approach' arguing it makes TSD chapters less effective in dealing with the specific context of partner countries. For instance, it has been argued that the chapters should be more tailored and take into account key sustainability issues/priorities (e.g. the ILO core labour standards may not be the most pressing labour related concern in a trade partner country), but also the specific political and institutional context (including role and from of civil society engagement) as well as the private sector power relations in value chains.[331] This is in part related to the issue of a clearer definition of the channels through which impact may be achieved. Many stakeholders have also argued for clearer, more tailored and more ambitious formulation of provisions. [332] From the Commission's point of view it seems the one-size-fits-all approach is based on the premises that multilateral agreements remain the backbone of the TSD chapters and that the TSD chapters should not create a parallel set of rules. Defining country priorities for pre-implementation and implementation could in part address this issue, but seems to still be applied within the rather uniform framework of the TSD chapters.
- **Enforceability and enforcement of the TSD chapters:** Despite incremental changes, the fundamental approach to the TSD chapters has remained the same: it is strongly anchored on the normative soft power of the EU and not on binding obligations. Where some form of conditionality seems to have been suggested by the Commission, e.g. making agreements conditional on ratification of core labour standards, this has not been followed through (Vietnam, Singapore). Several stakeholders have pointed out that discussion about enforcement and enforceability of the TSD chapters has focused predominantly on the choice between sanctions or no sanctions,[333] i.e. between a conditional and promotional. From the view of the Commission, a promotional approach understandably does not sit well with trade sanctions. However, the supposed juxtaposition seems to miss the point that there may potentially be ways of retaining a promotional approach while introducing some forms of conditionality (i.e. a carrot and stick approach) or of strengthening the existing enforcement mechanism.[334] A number of stakeholders have highlighted these possibilities and provided concrete suggestions, including the setting up of a formal complaint procedure open to civil society,[335] the linking of staged implementation of tariff reduction to the effective implementation of TSD provisions,[336] prioritisation of sectors or specific issues[337] and linking of pressure to comply more directly to assistance with compliance.[338]

[331] Cf. Barbu et al. (2018).

[332] For instance, in a non-paper published in May 2020, Dutch and French authorities suggest to include more specific commitments to cooperate on climate policies such as carbon markets. It even argues that the agreements should go further than merely working within established international frameworks and suggest that in the absence of international agreements the parties should agree on bilateral standards, while leaving sufficient space to develop international regimes (see Non-paper by Dutch and French authorities on trade, social economic effects and sustainable development (May 2020).

[333] This is reflected in a presentation by DG Trade, where the carrot *or* stick philosophy is presented as a political choice.

[334] Focusing too much on how the US and Canadian Agreements differ from the EU approach may also miss opportunities for learning from their approaches, through best practice examples. See e.g. George & Yamaguchi (2018) for some interesting examples (notably from US agreements) of positive impacts of environmental provisions in regional FTAs (pp.25-27).

[335] Client Earth (2017); ECDPM (2020) Making it count: Civil society engagement in EU trade agreements.

[336] Ibid

[337] Harrison et al (2018) p.655

[338] The recently concluded EU-Vietnam agreement is a test case in this respect as specific efforts have indeed been made in this direction. Other examples stem from the unilateral GSP, under which e.g. successful pressure was put on Bangladesh to allow freedom of labour associations in export processing zones linked to free market access under the everything-but-arms (EBA) agreement. This requirement was placed within a broader approach to assist Bangladesh to deal with labour and environmental issues in its garment industry.

- **Role and effectiveness of the civil society mechanisms:** While resources were allocated to the CSM facilitate civil society's role in monitoring, structural barriers persist. The fact that the DAGs have been given a wider remit for monitoring to cover the entire FTA impacts on sustainable development indicators risks diluting the focus of the CSM and potentially exacerbates resources issues as civil society stakeholders would need to spread themselves too thinly[339] particularly if such monitoring is not clearly guided by priority monitoring indicators. Moreover, there seems to still be a sense of '"*political marginalization within the broader institutional mechanisms and processes of the FTA*"[340] while the DAGs are not able to bring a case before the DSM. Various suggestions for improving this have been made, such as the set-up of a formal complaint mechanism open to civil society and the keeping of a 'scorecard' (comparable to the ones used under the GSP) for monitoring and as the basis of dialogue.[341] So far such calls have not been headed and much of the criticism of the CSM's added value and effectiveness remains. This risks losing the interest from stakeholders in participating in these institutional mechanisms (hence undermining one of the main pillars of the TSD chapters).

Conclusion

TSD chapters have been a feature of all EU FTAs since the EU-Korea agreement, concluded in 2011. Since then bilateral agreements have been concluded or are in the process of ratification with a number of developed, emerging and developing countries. The aim of this case study was to identify and assess the (f)actors and forces that have shaped and influenced the inclusion, negotiation and implementation of these TSD chapters in EU FTAs. Below, we summarise main findings and conclusions, based on the discussions in each chapters in this report.

Background and rationale for the inclusion of TSD chapters in EU FTAs

Over the past 10-15 years socio-economic developments (notably rising inequality within countries, in part due to a lack of flanking domestic policies to compensate or assist those negatively affected by trade liberalisation/globalisation) as well as growing concerns over global environmental degradation and climate change have contributed to doubts over the benefits, and concerns over the cost of globalisation. This translated into an anti-globalisation movement that aligned concerns from across the spectrum, ranging from nationalist to environmental and labour movements, development NGOs and industries / sectors facing increased foreign competition and unable to adjust to these pressures.

These movements necessitated a response from (trade) policy makers to show they were serious about addressing imbalances and ensuring trade did not just lead to economic benefits (often only for certain groups), but to sustainable development. While the importance of the trade and labour and trade and environment linkages were widely acknowledged incorporating these in multilateral agreements (WTO) failed – in large part as they were seen by developing countries as a form of protectionism. In bilateral and regional trade agreements, there was potentially more scope for inclusion of such issues. The EU's trade and sustainable development agenda and particularly the inclusion of TSD chapters in FTAs, must be seen in this light. It should also be placed in the context of calls for a level playing field by notably EU businesses; changing consumer preferences and demand; as well as a rise in voluntary initiatives to promote sustainable development and increased calls for (and expectations of) responsible business conduct and accountability by companies. Finally, the inclusion of sustainable development issues into EU

[339] See e.g. ECDPM (2020)

[340] Harrison et al (2019), p.273

[341] Here we should note that, while the EU institutional mechanisms for dialogue suggest a two-way process, as Harrison (2018) notes "there is scant evidence that they have been operationalised in a way that considers labour issues within the EU. This raises questions about whether the EU's model is actually designed to be a two-way process of dialogue, or if it rather represents a form of 'sophisticated unilateralism' wherein more powerful states negotiate provisions that reflect their own unilateral agenda, embedding them within a formally reciprocal structure." (p.464)

trade agreements was linked to the Lisbon Treaty, which accorded greater influence on trade policy to the EP – an institution that had long emphasised the sustainable development dimensions of trade.

The TSD approach in EU FTAs: Objectives and design

TSD chapters are a key element of the values based agenda of the EU trade policy. They include both social and environmental protection provisions and aim to protect, as well as promote EU standards and values. They aim to strengthen the multilateral governance system and standards on labour (ILO Conventions) and environment (MEAs) and create a level playing field by preventing a race to the bottom through a deliberate weakening of domestic labour and environmental protection. Since these are key topics of debate and focus for the European as well as National Parliaments, business and civil society alike, TSD provisions play a key role in supporting the political viability of EU FTAs and their ratification.

TSD chapters share three key types of provisions (1) *substantive standards*, related to ratification and effective implementation of the ILO labour standards and MEAs. (2) *procedural commitments* for dialogue and co-operation transparency, monitoring and review of the sustainability impacts to upholding levels of domestic protection (3) dedicated *institutional mechanisms* for monitoring and implementation of the commitments, including FTA-specific civil society structures and a TSD specific DSM.

Important to note is the 'soft approach' adopted by the EU, anchored on cooperation and dialogue. It is often contrasted with the US approach, which encompasses sanctions and conditionality. While the two approaches have often been juxtaposed, in actual implementation, differences appear more nuanced. Both include dialogue and cooperation, while the stronger enforcement mechanisms at the US's disposal have hardly been (effectively) used. The question of which approach is more effective thus remains undecided.

Key issues and challenges for the negotiation and implementation of the TSD chapters

The inclusion of TSD chapters was to support a value based trade policy, and was in part a response to public and business concerns related to trade and investment. These different objectives, interests and concerns are not without their inherent conflicts and dilemmas – e.g. to which extent is the same thinking applied to practices in the EU and how fair is the level playing field concept really?[342] Trying to incorporate the various interests thus is a **balancing act** for the EC, which has an impact on how TSD provisions are *formulated* (broad in scope, but to a large extent "soft" and "vague" leaving it up to trade partners how to implement, enforce and monitor their own international commitments made elsewhere) and *enforced* (based on cooperation and dialogue, not conditionality). Such choices are ideological but also very much practical (related to resources and political will) and influenced by what can actually be achieved with **trade leverage** given the relative power and specific characteristics of trading partners. Experience with the negotiations to date suggests that trade-offs and the watering down of requirements occurred in cases where the provisions clashed with existing (cultural) practices, power dynamics and politics (as in the case with East Asian partners and India). Conversely, commitments that went beyond the ILO core labour standards (i.e. related to the Decent Work Agenda) were readily accepted in the CETA, but even in the Mercosur agreement, since such standards were already accepted by these countries (ratification of relevant conventions). This confirms – as Harrison et al (2018) note – that "third-country actors are more likely to accept modes of external governance that resonate with their domestic institutional mechanisms and are seen as normal and legitimate." Such observations lend support to the often voiced criticism that the 'one-size-fits-all' approach of the TSD chapters hampers their effectiveness. Researchers in particular have called for a more tailored design of the chapters, taking into account specific sustainability priorities, legal, political and institutional contexts as well as an understanding of how private sector power relations (in GVCs) work.

[342] Even *within* the EU this has been subject to fierce debate. See e.g. the discussion on market access, competitiveness and harmonisation of environmental protection within the European Community in Esty & Geradin (2004)

As agreements came into force a number of **implementation issues** arose, mainly related to non-compliance of Korea, Peru and Colombia with the TSD labour provisions, and to the functioning of the procedural commitments and institutional mechanisms in practice. The slow response of the Commission to the violations observed and reluctance to trigger the DSM despite numerous requests to take action from civil society and the EP, raised questions about the purpose and effectiveness of the procedures and institutional mechanisms.

Key stakeholders and their interactions in the policy domain

There is widespread recognition that the EP and labour organisations in particular have been major drivers in pushing sustainability issues onto the EU trade agenda and keeping it there. They have done this by applying constant pressure, both outside the TSD mechanisms and (in the case of labour organisations) from within through participation in the dedicated CSMs. These two stakeholders were also successful in forming wider coalitions, although most of this was on an ad-hoc, issue basis. Public attention for EU FTAs seems to have waned since the days of mass protests against TTIP, and some momentum thus seems to have been lost. However, the climate emergency and other environmental concerns have pushed the green agenda to the fore (most notable in the EU Green Deal of 2019) and this has translated into a widening/deepening of environmental provisions in the TSD chapters as well.

Business organisations have been active in the debate and in the TSD institutional mechanisms, but have on average been a lot less vocal as they seem to see their interests as adequately presented in the TSD approach. They also seem to recognise (and appreciate) the role the chapters play in legitimising FTAs.

Member States interaction with the TSD chapters varies significantly as Northern Member States are more experienced in dealing with sustainable development issues in relation to trade. They tend to thus be more pro-active in their engagement with the TSD agenda, often pushed by their parliaments and civil society. They also cooperate with each other more often on such issues, as e recent joint non-paper by the Netherlands and France illustrates.

Research and academia have actively contributed to the debate on TSD and there is an evolving body of literature on the effectiveness of TSD chapters, on their features, weaknesses and options for improvement. Civil society and the EP have also worked together with academia to strengthen their arguments, develop their understanding and support their positions.

Main changes in the EU TSD approach (2011-2019) and remaining contentious issues

Considering the period since 2011, the evolution of the TSD chapters and their key features has been incremental, through a widening and deepening of provisions and 'revamping' of the procedures and institutional mechanisms. These changes were triggered mainly by a) changes in the external environment (international agreements forged and increased politicisation of trade policy); b) experiences with the implementation of the chapters; and c) criticism from a wide range of stakeholders, including notably labour and environmental NGOs and the EP, but also Member States and academics. While some of this criticism was addressed in the Commission's 15 point Action Plan, the more fundamental issues many of these stakeholders have voiced seem to remain unaddressed. The still essentially 'one-size-fits-all' approach, the absence of any real form of conditionality and continued challenges to the effectiveness of the institutional mechanisms are seen by many stakeholders to hamper the effectiveness of the TSD chapters in contributing to real change on the ground. While many stakeholders have suggested ways of addressing these perceived shortcomings, the Commission has as of yet not given any indication of taking such recommendations on board. As one DG Trade official interviewed argued "*trade leverage is more limited than what people think or expect and sanctions are not a simple solution. The idea is to consult first, build a strategy and provide outreach to support implementation of this strategy.*" The revamped TSD approach (improving on the process, being more assertive with enforcement and linking to other 'levers') and installation of the Chief Trade Enforcement Officer are seen as sufficient to achieve this.

The reluctance of the Commission to go further in its approach has been interpreted by several stakeholders (notably NGOs) as proof that the Commission still mostly sees TSD chapters as an add-on, included to justify FTAs and ensure buy-in. More subtly, however, this reluctance also reflects the complexity of negotiating trade agreements and TSD chapters (trade-offs, relative bargaining power, WTO compliance, etc.) and possibly concerns that going further could result in the EU's own labour and environmental protection standards being contested by its trade partners. [343] Ultimately the EU sees its promotional approach as incompatible with strong enforcement measures such as sanctions or other forms of conditionality. However, while the momentum of a redesign of the DSM seems to have been lost,[344] the call for stronger enforcement from key stakeholders is unlikely to disappear.

Achievements and results

There is no doubt that including TSD chapters in EU FTAs has firmly incorporated sustainable development issues within the EU trade agenda. The EU's promotional approach has resulted in the set-up of a unique set of institutional mechanisms in both the EU and partner countries (specific to each agreement) and has created platforms for dialogue and cooperation on sustainable development issues. However, whether this has resulted in "real and lasting change on the ground, through the effective application of enhanced social and environmental standards" is still open to debate.

Much of the debate has been framed in terms of a sanctions based or non-sanctions based approach, which potentially misses other options for improving enforceability that do contain some *form* of conditionality. Numerous stakeholders, including NGOs and MS as well as academics have provided suggestions for a more tailored, more ambitious approach, using carrot and stick as well as applying the various instruments at the Commission's disposal (e.g. other parts of the FTA, targeted cooperation). Lessons could perhaps also be drawn from how other proponents of TSD provision in FTAs structure, implement and/or enforce the SD provisions in their agreements (if in principle compatible with a promotional approach).

If the Commission is serious about achieving real change on the ground through its TSD chapters and retaining the interest and engagement of key stakeholders, working together with stakeholders on further improving the approach (including through better internal cooperation within the Commission) to make it more effective would make sense.

Ultimately, however, FTAs can only act as a *lever* for non-trade policy issues, since they can only set rules for *trade* - and regulate unfair competition based on these set, WTO compliant, *trade* rules. Rules related to SD are set elsewhere (internationally and domestically) and can therefore only be enforced (if at all) through these channels. Moreover, the mitigation of potential negative impacts of trade liberalisation and compensation of potential losers ultimately requires adequate domestic flanking policies and governance – trade rules and disciplines in FTAs cannot arrange for / enforce such measures.

[343] One DG Trade official seemed to confirm this, indicating that even within the EU one could argue whether labour standards and environmental protection were always adequately upheld.
[344] Harrison et al (2018), p.653

Chapter 5: Investment protection and investor duties

Introduction

This case study covers the evolution of investment protection over the last decade and focuses on investor duties and the change from investor to state dispute settlement (ISDS) to the investment court system (ICS) in new free trade agreements (FTAs) of the EU and the new Dutch template for bilateral investment treaties (BITs). The deliberations in the World Trade Organization (WTO) about an investment facilitation agreement will be discussed only briefly. The main purpose of this case study is to examine and understand key internal and external factors and actors that influenced policy development in these areas.

This case study starts with a short overview of its scope, giving definitions and background information on the priority topics of the study. We then provide an overview of the developments and changes relevant to the focal points of the study that have occurred over the last decade, followed by a discussion of the main factors that influenced the developments, and a description of those actors who were instrumental in these developments and in what manner. The last section summarises the findings of the whole case study regarding factors and actors and their impacts.

Background and scope

Before analysing trends and developments in the area of investment protection and investor duties, we will briefly define and discuss the subject-matter of this case study.

Bilateral investment treaties

Bilateral investment treaties (BITs) emerged in the 1950s as a result of, on the one hand, inability to reach an agreement on a multilateral system of investment protection[345] and, on the other hand, the desire by home states to protect foreign direct investments of their nationals abroad.[346] The first BITs were concluded mainly between capital-rich developed countries and developing countries that needed foreign direct investment (FDI), often as a response to or prevention of expropriations and nationalisations. The number of BITs exploded in the 1990s after the collapse of the USSR, emergence of transition and new market economies and growing willingness of Latin American countries to conclude such agreements in order to attract FDI.

Contemporary BITs have the following typical features.[347] The preamble of the treaty sets out its objectives that usually are of economic nature (e.g. stimulating foreign direct investment, economic cooperation, expansion of economic relations, sustainable economic growth) and in rare cases include respect for human rights,

[345] The first attempts at a multilateral framework for investment protection were the Havana Charter of 1948 (see Article 12; text available at: https://www.wto.org/english/docs_e/legal_e/havana_e.pdf) and the International Convention for the Mutual Protection of Private Property in Foreign Countries of 1957; see Miller, Arthur S. (1959). Protection of private foreign investment by multilateral convention, in: The American Journal of International Law 53:2, pp. 371-378. DOI: 10.2307/2195809: https://www.jstor.org/stable/2195809.
[346] Kuijper, Pieter Jan (2014). Investor-State Dispute Settlement (ISDS) provisions in the EU's international investment agreements.
[347] Kuijper, Pieter Jan (2014). Investor-State Dispute Settlement (ISDS) provisions in the EU's international investment agreements. Salacuse, Jeswald (2015). The Law of Investment Treaties.

developmental objectives and other values. Among the subsequent substantive provisions, the core part focuses on **investment protection**, containing rules on nationalisation, expropriation, compensation in situations of emergency and guarantees of legal redress for foreign investors either through domestic courts of the host state or through international arbitration. These provisions are seen as additional security where national standards of treatment in certain countries are seen as not sufficient. Whether investment protection rules are necessary and indispensable to achieve the goals of investment agreements has been a moot point for years.[348] Other substantive provisions deal with modalities of admission of foreign investment to the host state.[349] The remaining substantive provisions address the treatment of foreign investors by the host state (e.g. non-discrimination principle, investment-control model or national treatment, most-favoured nation clauses, minimum standards and fair and equitable treatment). These provisions ensure that investors receive as favourable treatment as possible and that capital can flow freely.

This case study will be considering the **Dutch Model BIT**. The Netherlands has one of the largest networks of bilateral investment treaties in the world,[350] and its BITs are frequently invoked in arbitration disputes. Legal experts think that the popularity of Dutch BITs is due to their strong investment protection rules that can be considered "gold standard" internationally.[351] Another reason for the popularity of Dutch BITs may be relatively lax substantive standards[352] and easy establishment of a material connection to the economy of The Netherlands that allow for the creation of the so-called special purpose entities (SPEs) that are established in The Netherlands by foreign owners for tax reasons. SPEs then also enjoy the legal protection of the Dutch BITs, while their impact on the FDI relations with developing countries is controversial.[353]

In October 2018, The Netherlands adopted a new Model BIT[354] that would provide a basis for the renegotiation of the existing Dutch BITs. The new Model BIT contains sweeping changes and innovative features that are characteristic of new generation BITs, which will be discussed further below. In short, the new Model BIT introduced

[348] See a discussion in Dimopoulos, Angelos (2010). Shifting the emphasis from investment protection to liberalization and development: The EU as a new global actor in the field of foreign investment policy. Journal of World Investment & Trade, 11(1), pp. 5-27; empirical evidence is cited in Sornarajah, Muthucumarawamay (2006). A law for need or a law for greed? in: Restoring the lost law in the international law of foreign investment. International Environmental Agreements: Politics, Law and Economics 6, pp. 329–357.

[349] From the perspective of international public law, states are under no obligation to admit foreign investments and can restrict FDI on any grounds. On different models of admission of foreign investment, see Dolzer, Rudolf and Christoph Schreuer (2008). Principles of international investment law. Oxford University Press, pp. 79-82.

[350] According to the UNCTAD International Investment Agreements Navigator, The Netherlands currently has 92 BITs, of which five are signed but not yet in force. Germany has probably the largest network consisting of 133 BITs. Other countries with large number of BITs are Switzerland (113 BITs), France (102 BITs) and Luxembourg (96 BITs). More information available at: https://investmentpolicy.unctad.org/international-investment-agreements .

[351] De Brauw (2018). New model treaty to replace 79 existing Dutch bilateral investment treaties: https://www.debrauw.com/newsletter/new-model-treaty-to-replace-79-existing-dutch-bilateral-investment-treaties/ .

[352] van Os, Roos and Knottnerus, Roeline (2011). Dutch Bilateral Investment Treaties: A Gateway to 'Treaty Shopping' for Investment Protection by Multinational Companies: https://ssrn.com/abstract=1961585 .

[353] See Weyzig, Francis (2013). Evaluation issues in financing for development: Analysing effects of Dutch corporate tax policy on developing countries. Study commissioned by the Policy and Operations Evaluation Department (IOB) of the Ministry of Foreign Affairs of the Netherlands: https://www.government.nl/documents/reports/2013/11/14/iob-study-evaluation-issues-in-financing-for-development-analysing-effects-of-dutch-corporate-tax-policy-on-developing-countries ; Lejour, Arjan, Jan Möhlmann, Maarten van 't Riet (2019). Conduit country the Netherlands in the spotlight. CPB Policy Brief, available at: https://www.cpb.nl/sites/default/files/omnidownload/CPB-Policy-Brief-2019-01-Conduit-country-the-Netherlands-in-the-spotlight.pdf .

[354] The text is available at: https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/publicaties/2018/10/26/modeltekst-voor-bilaterale-investeringsakkoorden/modeltekst-voor-bilaterale-investeringsakkoorden.pdf .

new definitions of investor and investment, more comprehensive provisions on fair and equitable treatment and changes to traditional dispute resolution.

Investor duties

Historically, BITs have been tools for the protection of the foreign investor. Therefore, they focus on the obligations of the host state rather than on the **duties and responsibilities of foreign investors**.[355] Only fairly recently, the international community and researchers started to question the interrelation between rights of the host state and the corresponding duties of foreign investors arguing that BITs fail to protect the public interest and the right to regulate of the host state. The turning point was reached in the 1970s when developing countries started raising investment issues at the UN level following their bitter experiences with foreign investors.[356] Discussions about how to control large multinationals, to curb abuse of corporate power and to develop and introduce guidelines for corporate behaviour in host countries resulted in the draft UN Code of Conduct on Transnational Corporations. While this document was not adopted, the work on addressing corporate behaviour continued in UNCTAD under the Program on Transnational Corporations. While the perfect balance of the state-investor relationship continues to remain a moving target, some of the most recent BITs (and the new Dutch Model BIT is one of the examples) are seeking to get closer to it by introducing principles of investor behaviour and including expectations related to responsible business conduct.

Dispute settlement

Investor to state dispute settlement (ISDS) goes back to 1970s when respective clauses were first included in agreements alongside state-to-state dispute settlement provisions.[357] Since the late 1980s, they gained practical significance, and strong and broad ISDS clauses have become widely used in investment treaties. There is no single or uniform compulsory ISDS mechanism: each of the over 3000 investment agreements[358] may contain their own dispute settlement mechanism that differs from the others. Certain international conventions seek to provide uniform rules. This is the case, for instance, of the New York Convention[359] providing for the recognition and enforcement of arbitration awards and the Washington Convention[360] providing for the International Centre for the Settlement of Investment Disputes (ICSID Convention), to both of which many countries are parties.

Nevertheless, all ISDS mechanisms possess similar features that can be summarised as follows. The foreign investor can initiate international arbitral proceedings (i.e. outside the statutory domestic court system) against the host state and challenge the host state's legislative, executive or judicial measures on the grounds that they are incompatible with the substantive standards laid down in the investment agreement. An ad-hoc arbitral tribunal is

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[355] Boase, Muin (2018). A genealogy of censurable conduct: Antecedents for an international minimum standard of investor conduct, in: Stephan W. Schill, Christian J. Tams and Rainer Hofmann (eds.). International Investment Law and History, pp. 321-366; Nowrot, Karsten (2015). Obligations of Investors, in: Marc Bungenberg, Jörn Griebel, Stephan Hobe and August Reinisch (eds), International investment law, Bloomsbury, pp.1154-1185.

[356] Singh, Kavaljit (2003). Multilateral Investment Agreement in the WTO: Issues and Illusions, p. 11: https://www.wto.org/english/forums_e/ngo_e/multi_invest_agree_july03_e.pdf ; Sauvant, Karl (2015). The Negotiations of the United Nations Code of Conduct on Transnational Corporations, in: The Journal of World Investment and Trade 16, pp. 17-19: http://ccsi.columbia.edu/files/2015/03/KPS-UN-Code-proof-2-Journal-of-World-Investment-and-Trade-March-2015.pdf .

[357] Hindelang, Steffen (2014). Study on investor-state dispute settlement ('ISDS') and alternatives of dispute resolution in international investment law. Study for the Policy Department DG External Policies of the European Parliament "Investor-State Dispute Settlement (ISDS) provisions in the EU's international investment agreements".

[358] See UNCTAD International Investment Agreements Navigator: https://investmentpolicy.unctad.org/international-investment-agreements .

[359] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958: http://www.newyorkconvention.org/english .

[360] Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965: https://icsid.worldbank.org/en/Pages/icsiddocs/ICSID-Convention.aspx .

then set up by the investor and the host state: they appoint one arbitrator each, and together they appoint the third arbitrator by consensus (or a third party appoints the third arbitrator if they fail to achieve consensus). The arbitral tribunal decides whether a violation of a substantive standard can be established and, in case of a positive finding, awards an enforceable remedy. This arbitral decision is binding and can be challenged only on exceptional grounds. Typically, there is no possibility of appeal.[361] Frequently, investment treaties do not contain detailed procedural rules, rules on the applicable law, remedies and allocation of costs. Instead, they often refer to arbitration rules of the ICSID Convention and UNCITRAL.[362]

However, many disadvantages of ISDS became more obvious and critical over time. Consequently, discussions on the reform of ISDS and/or introduction of a different dispute resolution mechanism started and are ongoing since then. The first practical steps in this direction were taken at the EU level as the European Commission proposed the so-called **investment court system (ICS)** in its new agreements with investment protection chapters. In 2015, the European Commission released the Concept Paper "Investment in TTIP and beyond — the path for reform"[363] that, among other things, proposed to create an investment court replacing ISDS. This proposal was ultimately transferred to the formal texts that were negotiated for the Transatlantic Trade and Investment Partnership Agreement (TTIP) with the USA and for the EU – Viet Nam Investment Protection Agreement (EUVIPA) in 2015.[364]

The ICS[365] will have a standing (or semi-permanent) adjudicatory body consisting of two instances: a first instance tribunal and an appellate tribunal. Both shall be staffed with independent judges, one third coming from the EU, one third – from the other contracting party and the last third – from a third country. The judges are selected ex ante by the contracting parties, not by the parties to the dispute. The proceedings shall adhere to the UNCITRAL Transparency Rules[366] that require that a broad range of documents relating to the case (e.g. statement of claim, statement of defence, rebuttals and rejoinders, award decision) are made public unless the tribunal makes an exception for confidential documents. The new investment agreements also fully preserve the right to regulate for legitimate public policy purposes, including public health and safety, environment, social or consumer norms, public morals, and the promotion of cultural diversity, which can be brought up and considered during the adjudication. All interested parties, including NGOs and other civil society organisations, shall be able to intervene in the investment dispute by way of submissions to the tribunal.

Investment facilitation in the WTO

Investment issues were brought up in the context of world trade negotiations at the Uruguay Round,[367] due to the possibility to make binding rules in the context of the General Agreement on Tariffs and Trade (GATT).[368] The

[361] Hindelang, Steffen (2014). Study on investor-state dispute settlement ('ISDS') and alternatives of dispute resolution in international investment law. Study for the Policy Department DG External Policies of the European Parliament "Investor-State Dispute Settlement (ISDS) provisions in the EU's international investment agreements", p. 48.
[362] 2013 UNCITRAL Arbitration Rules of: https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration
[363] European Commission (2015). Investment in TTIP and beyond – the path for reform. Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court.
[364] The ICS proposal has been included later in the EU-Canada Comprehensive and Trade Agreement (CETA) in 2016, EU-Singapore Investment Protection Agreement in 2018 and EU-Mexico Trade Agreement in 2018.
[365] For a concise overview, see the press release of the European Commission of 30 April 2019: https://ec.europa.eu/commission/presscorner/detail/en/IP_19_2334 . For a detailed regulation see, for example, Articles 8.18-8.45 CETA or Articles 9-30 of Chapter II TTIP. For a full critical overview of main features of ICS across different agreements see Charris Benedetti, Juan Pablo (2019). The proposed Investment Court System: does it really solve the problems? Revista Derecho del Estado 42, pp.83-115.
[366] UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration of 1 April 2014: https://uncitral.un.org/en/texts/arbitration/contractualtexts/transparency .
[367] As mentioned above, already the draft Havana Charter to establish an International Trade Organisation (which can be considered a precursor for the WTO) addressed FDI issues.
[368] For the short account of investment negotiations in the GATT and WTO, see Singh, Kavaljit (2003). Multilateral Investment Agreement in the WTO: Issues and Illusions:

negotiations can be considered ultimately successful as some of the relevant investment issues were incorporated in the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Investment Measures (TRIMs). However, as trade and investment were deemed complementary, the efforts to negotiate a multilateral agreement on investment (MAI) within the **WTO** have been ongoing ever since with mixed results. In 1996, a Working Group on Trade and Investment was established to carry out analytical and exploratory discussions. In 2001, investment was included in the Doha Round agenda but the decision on whether to negotiate it was postponed. As the WTO members were unable to reach consensus on the start of investment negotiations, in 2004 it was agreed to drop investment from the Doha Round agenda.

The topic of investment resurfaced in the WTO again in 2017 when the WTO group known as "Friends of Investment Facilitation for Development" proposed an **Informal Dialogue on Investment Facilitation for Development** open to all Members.[369] The WTO Members who participate in this group (which includes the EU) intend to discuss only one aspect of the investment regime that seems closely linked to trade, namely facilitation[370]. The overarching goal of the dialogue is to negotiate a plurilateral agreement in the WTO on minimal commitments on transparency of government investment decisions and efficiency of relevant administrative procedures in host states. Accordingly, countries currently discuss several key areas: regulatory transparency and predictability, streamlining and speeding up administrative procedures, international cooperation to advance the needs of developing countries and others.

Evolution of investment protection and investor duties

Over the last decade, international investment law has undergone significant developments, most of which have been widely publicised and discussed. Some of the investment agreements of the new generation contain many relevant progressive features, such as abolishing the existing ISDS as a dispute settlement instrument, introducing responsible investor conduct, emphasising the right to regulate by the contracting states to achieve legitimate policy objectives and including detailed definitions of key standards of treatment (e.g. expropriation, fair and equitable treatment). This section will discuss how the evolution from more conventional investment law to these progressive features occurs.

Evolution from ISDS to ICS

Throughout its existence, the ISDS has drawn a lot of criticism but also praise to itself. The **main advantage of the ISDS** from the perspective of the international investor is that it is very effective in promoting the international rule of law.[371] The traditional (state-driven) enforcement mechanisms in public international law are frequently too slow, lengthy and prone to blockage for political reasons, which diminishes the effectiveness of substantive rules and weakens legal certainty and protection of legitimate interests. The ISDS de-politicises investment disputes and enforces substantive commitments of international agreements, where other types of judicial relief would be

https://www.wto.org/english/forums_e/ngo_e/multi_invest_agree_july03_e.pdf and Baliño, Sofía, Martin Dietrich Brauch and Rashmi Jose (2020). Investment facilitation: History and the latest developments in the structured discussions, Published by the International Institute for Sustainable Development, pp. 4-5: https://www.iisd.org/sites/default/files/publications/investment-facilitation.pdf .

[369] See https://www.wto.org/english/thewto_e/minist_e/mc11_e/briefing_notes_e/bfinvestfac_e.htm

[370] Other components of the investment regime are liberalisation (market access and entry), protection, promotion and dispute settlement. They are not part of the Investment Dialogue discussions.

[371] Hindelang, Steffen (2014). Study on investor-state dispute settlement ('ISDS') and alternatives of dispute resolution in international investment law. Study for the Policy Department DG External Policies of the European Parliament "Investor-State Dispute Settlement (ISDS) provisions in the EU's international investment agreements", pp. 52-56; Pernice, Ingolf (2014). Study on international investment protection agreements and EU law. Study for the Policy Department DG External Policies of the European Parliament "Investor-State Dispute Settlement (ISDS) provisions in the EU's international investment agreements", p. 133.

unavailable (e.g. there may be restrictions on competence of domestic courts to hear claims by foreign investors) or ineffective (e.g. domestic courts may be biased or not independent from the host state).

The **disadvantages of the ISDS** are manifold and have been discussed and researched by academics for decades.[372] First, due to the fragmented universe of investment agreements and ISDS mechanisms, there is no consistency and predictability in terms of arbitral outputs. This means that there is a lack of guidance on substantive obligations of host states and investors and a lack of consistency in their interpretation. The lack of legal review (by an appellate body) exacerbates the problem as inaccurate or erroneous interpretation and/or application of law and errors of facts may occur and remain uncorrected.[373]

Second, the approach of investment arbitral tribunals to overcome this fragmentation leads to sidestepping rules of public international law on the interpretation of international treaties. One of the most criticised practices is "de fact precedent" – a frequent practice of arbitrators to cite and discuss prior decisions to support their arguments and their decisions in a new case.[374] By contrast, the rules of interpretation of public international law require to interpret an agreement according to the primary sense of the words used, considering their textual context and the agreement's purposes and objectives.[375]

Third, arbitral tribunals on investment disputes often must deal with highly sensitive political issues in host states because of the more intrusive nature of FDI and they must decide whether national legislative and judicial measures comply with the substantive standard of the international investment agreement. In this manner, arbitral tribunals interfere in domestic matters of host states and undermine the democratic legitimacy of policy and legal decisions. There is an inherent tension between the securing of public interests of the host state and the private interests of investors.

Fourth and linked to the above, arbitral tribunals are often composed of business lawyers who often neglect to take into account and balance non-economic public interests, such as environmental protection, financial stability, or public health, against the economic interests of investors.

In an attempt to rectify the flaws of the ISDS, the new generation of EU investment agreements as part of comprehensive bilateral trade and investment agreements introduced an **investment court system** (ICS). Despite the significant improvements upon the ISDS and the fact that no ICS has been established yet, the ICS has been widely criticised.[376] For example, experts fear that allowing contracting parties to select judges may become a political issue that will reverse the de-politicisation achieved by the ISDS and jeopardise the effectiveness of dispute resolution. The existence of an instant opportunity to appeal and the removal of restrictions on the appeal may also delay the proceedings and reduce their effectiveness because the losing party might always appeal in the hope of getting a more favourable judgement. Some of the disadvantages of the ISDS continue to apply to the ICS, most

[372] See a concise overview of the critique in Hindelang, Steffen (2014). Study on investor-state dispute settlement ('ISDS') and alternatives of dispute resolution in international investment law. Study for the Policy Department DG External Policies of the European Parliament "Investor-State Dispute Settlement (ISDS) provisions in the EU's international investment agreements".

[373] European Commission (2017). Multilateral reform of investment dispute resolution. Accompanying the document Recommendation for a Council Decision authorising the opening of negotiations for a Convention establishing a multilateral court for the settlement of investment disputes, SWD(2017) 302 of 13.09.2017, pp. 13-14.

[374] Reed, Lucy (2010). The De Facto Precedent Regime in Investment Arbitration: A Case for Proactive Case Management. ICSID Review, 25(1), 95–103; Chen, Richard C. (2019). Precedent and Dialogue in Investment Treaty Arbitration.

[375] According to Article 31 of the Vienna Convention on the Law of Treaties of 1969, entered into force 27 January 1980:
https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf .

[376] For a short overview of main critique, see Charris Benedetti, Juan Pablo (2019). The proposed Investment Court System: does it really solve the problems?

notably the problem of consistency and predictability of judgments and costs.[377] Across different agreements, a plethora of investment courts will have to be established, each of which needs to be resourced separately. While a permanent investment court will be guided by its own case law related to the investment agreement, according to which it is established, the difference in interpretation of same/ similar provisions from different agreements is likely to persist.

Interviewees from civil society argue that the ICS is akin to a multilateral ISDS, which means that the ICS does not rectify the failures of ISDS, but entrenches them. Other interviewees add that reforms of the ISDS focus only on procedural issues – which is an important first step but not a sufficient one to effectively resolve problems. Substantive provisions of investment treaties need to be reformed in order to address the root of the problem.

In this context, the new Dutch Model BIT can be considered a special case because it does not contain the classical ISDS but does introduce the ICS in the form described above.[378] First, claims may only be submitted under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) or under the UNCITRAL arbitration rules. Depending on which rules are applicable, all arbitrators for the adjudicating panel shall be appointed by the appointing authority, i.e. not the host state and the investor, but the Secretary-General of ICSID or the Permanent Court of Arbitration (PCA), respectively. This ISDS arrangement shall cease to apply once a multilateral investment court is set up, as foreseen in the Dutch Model BIT. Another innovative feature is that, when deciding on compensation, the panel may take into consideration an investor's non-compliance with responsible business conduct rules.

Evolution of investor duties

As mentioned above, because originally BITs treated investment promotion and protection as an end in itself, they contain obligations for the host states, not for foreign investors. With time, it has become apparent that investors may work to increase revenue from their investments at the expense of public interests of the host state and its population – and that investors often brought their claims of expropriation or protection of expectations in response to new domestic legislation addressing environmental, social or health issues. The inclusion of investor responsibility in BITs has been difficult and piecemeal at best, due to reasons ranging from the lack of political will to legal challenges to possible lobbying by the business community.[379] A variety of techniques has been used to frame investor "duties", which are linked to the type of duties that are being introduced.

One of the first techniques used is to frame investor responsibility through preambles of BITs.[380] Preambles[381] of international agreements are commonly used to interpret their substantive provisions. Thus, as preambles of BITs started expanding to include the goals of sustainable development or social and environmental values, they created a frame for investor's conduct. It is argued that investors are expected to either actively promote or refrain from acting against such goals of an international treaty.

Another technique used in some newer BITs is to introduce exception clauses or right to regulate clauses that exclude certain areas from the scope of investment claims.[382] In this way, the host state can pass new laws and regulations, with which foreign investors have to comply without the right to claim damages. For example, Article

[377] European Commission (2017). Multilateral reform of investment dispute resolution. Accompanying the document Recommendation for a Council Decision authorising the opening of negotiations for a Convention establishing a multilateral court for the settlement of investment disputes
[378] For a detailed discussion, see Duggal, Kabir A. N. and Laurens H. van de Ven (2019). The 2019 Netherlands Model BIT: riding the new investment treaty waves.
[379] See a short overview in Sattorova, Mavluda (2019). Investor responsibilities from a host state perspective: Qualitative data and proposals for treaty reform.
[380] Spears, Suzanne (2010). Quest for Policy Space in New-Generation International Investment Agreements.
[381] Preambles themselves do not create any obligations and are not enforceable.
[382] Beharry, Christina L. and Melinda E. Kuritzky (2015). Going Green: Managing the Environment Through International Investment Arbitration.

8.9 of CETA permits a host state to regulate if it helps to achieve the goals of public health, safety, environment, public morals, social or consumer protection or promotion and protection of cultural diversity.

Some recent BITs foresee the so-called indirect obligations of conduct.[383] Agreements require the contracting states to consider and adopt measures to regulate and guide the investor's behaviour. These types of provisions may also refer to the social, environmental and other objectives in the preambles or various international guidelines and standards of corporate behaviour, such as the OECD Guidelines for Multinational Enterprises[384] and the UN Principles for Responsible Investment[385]. The most straight-forward technique – the imposition of direct obligations on investors by the BIT – is more an exception than a rule.[386]

The responsibility that may be imposed on foreign investors in these ways refers to human rights protection, labour rights protection, protection of the environment, consumer protection, compliance with tax rules, transparency requirements to disclose information on certain issues (e.g. financial statements, ownership and governance structure), ensuring fair competition and prevention of corruption.

The Dutch Model BIT of 2018 does not introduce direct binding duties for Dutch foreign investors. It only contains a conventional requirement that Dutch investors and their investments abide by domestic laws and regulations of the host state. Other provisions only encourage investors to recognise and incorporate in their internal policy international corporate social responsibility standards and to conduct due diligence to consider wider environmental and social impacts of their investments. At the same time, an interesting innovation is a possibility for an arbitral tribunal that determines an award of compensation to consider investor's non-compliance with the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises.[387] This is, however, a very limited possibility to consider investor's behaviour, which *may* be employed only in the context of a dispute and only when deciding on compensation.

Developments related WTO investment facilitation agreement

The WTO discussions on an investment facilitation agreement have been progressing. Since the structured discussions started in December 2017, the participation has grown from 70 to 98 WTO Members[388], and they have held six meetings. As early as January 2018, Brazil submitted a draft of an investment facilitation agreement intended as a concrete basis for discussion.[389] During 2018, a "Checklist of Issues Raised by Members" was created containing possible elements of a framework for investment facilitation. This Checklist was further elaborated and discussed in 2019, opening a road to the preparation and submission of concrete first text proposals of a potential agreement.[390]

While the EU is actively participating in the work of the Friends of Investment Facilitation for Development, other countries are opposing the initiative. The common objections are that investment rules are beyond the WTO's

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[383] Nowrot, Karsten (2015). Obligations of Investors, in: Marc Bungenberg, Jörn Griebel, Stephan Hobe and August Reinisch (eds)

[384] Updated 2011 edition can be found at: http://www.oecd.org/daf/inv/mne/48004323.pdf .

[385] The text is available at: https://www.unpri.org/pri/an-introduction-to-responsible-investment/what-are-the-principles-for-responsible-investment .

[386] Academic research usually names only Common Market for Eastern and Southern Africa (COMESA) Investment Agreement, Pan-African Investment Code (PAIC) and model agreement of the Southern African Development Community (SADC) as relevant examples. See Nowrot, Karsten (2015). Obligations of Investors, in: Marc Bungenberg, Jörn Griebel, Stephan Hobe and August Reinisch (eds),

[387] Duggal, Kabir A. N. and Laurens H. van de Ven (2019). The 2019 Netherlands Model BIT: riding the new investment treaty waves.

[388] See https://trade.ec.europa.eu/civilsoc/meetdetails.cfm?meet=11560 .

[389] Communication from Brazil of 31 January 2018: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=241891&CurrentCatalogueIdIndex=0&FullTextHash=371857150&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True .

[390] See the planning for 2020: https://trade.ec.europa.eu/doclib/docs/2020/january/tradoc_158592.pdf .

mandate under the Doha Development Agenda and/or that binding rules on the treatment of foreign direct investment would restrict their ability to regulate investment, thus undermining their policy space.[391] By contrast, businesses and the World Economic Forum expressed strong support for an investment facilitation agreement.[392]

Some stakeholders and experts see the developments in the WTO critically. A clear delineation between investment facilitation, on the one hand, and market access and investor protection, on the other, can be difficult, in the opinion of some stakeholders. Some of the issues discussed by the WTO Members in this context, such as mandatory timeframes for government decisions on investment admission, go to the heart of market access regulation.[393] In their view these are issues best dealt with by domestic regulation, and countries would not want to make binding international commitments in this regard. Other stakeholders fear that the differentiation between domestic and foreign investments may lead to reverse discrimination where some protection available to foreign investors is withheld from domestic investors.[394] Also, there are a lot of soft law instruments and guidance[395] that countries use extensively.

It shall be noted that structured discussions are not formal negotiations. Their primary objective is to identify a set of relevant issues and elements within an area of interest. To launch a formal negotiation, a consensus of all WTO Members is necessary – and with 98 participating countries, the topic of investment facilitation is only about half-way through. This fact and the points of contention listed above indicate that an actual agreement may require much time to be realised as a part of a balanced package. Meanwhile, some developing countries and experts express concerns that energy spent on exploring and discussing investment facilitation is distracting from advancing negotiations on priority issues of the Doha Development Agenda.[396]

Key issues and factors

Several legal, political and socio-economic factors in the EU became ingredients of the investment policy reform to various degrees. It is difficult to say with certainty which one or several factors were decisive at what time. Yet it is clear that they all contributed to the environment where the long-standing criticism of BITs, ISDS mechanism and investment protection regime could finally be acted upon to effectuate change.

EU legal framework

The changes in the competences of the main decision-makers in the EU in the area of foreign direct investment were the necessary precondition for the evolution of investment protection and investor's duties. With the entry into force of the **Lisbon Treaty**, major competences were conferred on the EU in the area of foreign direct investment. Since 2009, the EU has been enjoying exclusive competences to negotiate and conclude investment agreements with third countries.[397] At the same time, the European Parliament received more powers in trade and investment policy, which opened up the road for a stronger consideration of non-economic values.

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[391] Grozoubinski, Dmitry (2020). WTO Investment Facilitation talks – what they are all about.
[392] WTO press release of 7 June 2018: https://www.wto.org/english/news_e/news18_e/trdia_07jun18_e.htm ; WEF press release of 24 January 2020: https://www.weforum.org/agenda/2020/01/talks-on-investment-for-development-move-ahead/ .
[393] Baliño, Sofía and Nathalie Bernasconi-Osterwalder (2019). Investment Facilitation at the WTO: An attempt to bring a controversial issue into an organization in crisis.
[394] Butler, Nicolette and Surya Subedi (2017). Investment Organisation?
[395] For instance, UNCTAD Global Action Menu for Investment Facilitation of 2017: https://investmentpolicy.unctad.org/uploaded-files/document/Action%20Menu%2023-05-2017_7pm_web.pdf .
[396] WTO (2017). Minutes of the Meeting of the General Council on 10 and 18 May 2017. Baliño, Sofía and Nathalie Bernasconi-Osterwalder (2019). Investment Facilitation at the WTO: An attempt to bring a controversial issue into an organization in crisis.
[397] Art. 3 (1) lit. e TFEU.

This marks a considerable change for Member States as it effectively takes away from them the possibility to have an independent investment policy and enter into BITs. Member States may renegotiate existing BITs or conclude BITs if authorised to do so by the European Union through secondary legislation (i.e. regulations, decisions).[398] The scope of the EU's competences in the area of foreign direct investment has been a subject of interpretation by the EU courts. In its Opinion 2/15 on the EU-Singapore Free Trade Agreement[399], the Court of Justice of the EU found that substantive standards of investment protection lie within EU's exclusive competence, while the ISDS and non-direct investments (i.e. financial investments without any intention to influence the management and control of a company) are part of shared competences.

The Regulation 1219/2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries (known as the Grandfathering Regulation)[400] sets out procedures and conditions for obtaining an authorisation from the European Commission. In essence, the Regulation aims to avoid unnecessary duplications of agreements, inconsistencies with EU law and future obstacles to concluding EU-led BITs with third countries.

In practice, to ensure compliance with EU law, Member States try to draft new agreements' texts in such a way that they are aligned with the texts of EU-led investment agreements. For example, the new Dutch Model BIT follows CETA investment provisions on the following issues: a closed list of breaches of the fair and equitable treatment standard; what constitutes indirect expropriation; and a future multilateral investment court.[401] Also, Member States frequently consult with the European Commission, formally and informally, while drafting and negotiating their BITs.

Interviewees and experts argue that, ultimately, this will lead to convergence of BITs concluded by EU Member States with third countries, on the one hand, and to establishing a new, more progressive standard for European bilateral investment agreements, on the other. The latter is likely to provide a better balance between investment protection and a state's right to regulate, to have better-defined, clearer substantive standards of treatment, and to optimise the dispute resolution mechanism.[402]

Evolving policy of foreign investment

Many interviewees and academic literature suggest that the changes were "brewing" in the international investment policy for many years. The growing fragmentation of investment law, the mounting criticism of conventional BITs and investment protection regime, mixed evidence of the effectiveness of the existing regime for attracting foreign investment[403] and emergence of a new generation of investment agreements – all indicated that the time was ripe

[398] For the analysis see Schicho, Luca (2012). Member State BITs after the Treaty of Lisbon: Solid Foundation or First Victims of EU Investment Policy?
[399] Opinion 2/15 of 16 May 2017, ECLI:EU:C:2017:376.
[400] OJ L 351 of 20.12.2012.
[401] See Lavranos, Nikos (2020). The changing ecosystem of Dutch BITs. Arbitration International (forthcoming); comparison of CETA and Dutch Model BIT with a new Czech Model BIT also shows similarities, see Svoboda, Ondřej (2018). The Same, only Different: The recent Czech and Dutch Model BITs: https://leidenlawblog.nl/articles/the-same-only-different-the-recent-czech-and-dutch-model-bits .
[402] Titi, Catharine (2015). International Investment Law and the European Union: Towards a New Generation of International Investment Agreements.
[403] Some studies found that BITs complement but do not replace good institutional quality and domestic protection of property rights, e.g. Hallward-Driemeier, Mary (2003). Do bilateral investment treaties attract foreign direct investment? Only a bit - and they could bite (English). Policy, Research working paper series no. WPS 3121. Washington, DC: World Bank: http://documents.worldbank.org/curated/en/113541468761706209/Do-bilateral-investment-treaties-attract-foreign-direct-investment-Only-a-bit-and-they-could-bite ; other studies see a positive correlation between stronger international dispute settlement provisions in BITs and FDI, e.g. Frenkel, Michael and Benedikt Walter (2017). Do Bilateral Investment Treaties Attract Foreign Direct Investment? The Role of International Dispute Settlement Provisions. WHU - Otto Beisheim School of Management 17/8: https://www.onlinelibrary.wiley.com/doi/abs/10.1111/twec.12743 ; yet other studies show that, while promoting

for a change. The rise of the sustainable development discourse and its adaptation to investment policy by international institutions may have provided a useful direction for the subsequent reforms.

The global financial crisis posed fundamental questions about the role of investments in the economy and society and gave a push to the acceptance of reform suggestions at various governance levels. For instance, the UNCTAD Investment Policy Framework for Sustainable Development, adopted in 2012, provides guidance for the future formulation of investment policies and a clause-by-clause options for treaty negotiations – with the aim to strengthen the sustainable development aspects of BITs.[404] The UN Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework was endorsed by the Human Right Council in 2011.[405] The UN Guiding Principles explain the standard of corporate conduct expected from businesses (also when acting as investors) in relation to human rights.[406] In 2011, the OECD updated its Guidelines for Multinational Enterprises[407] to align them with the UN Guiding Principles, to add due diligence and responsible supply chain management and to update chapters on employments, corruption, disclosure, consumer protection and other topics. The Guidelines are an integral part of the OECD Declaration on International Investment and Multinational Enterprises and can be used as a (non-binding) reference document providing recommendations from adhering governments to businesses about responsible business conduct.

At the EU level, similar political signals were sent. For instance, the European Commission adopted strategy papers "Towards a comprehensive European international investment policy" in 2010 and "Trade for all – Towards a more responsible trade and investment policy" in 2015 advocating more transparent, value-based foreign investment policy.[408] The European Parliament adopted several resolutions calling for investments for sustainable economic growth, environmental sustainability, and the promotion of human rights and labour rights.[409] The cross-party European Parliament's Responsible Business Conduct Working Group (RBC WG) was established in 2019 to promote responsible business conduct and due diligence by European businesses.[410] The RBC WG advocates for a EU-wide systematic and effective implementation of the UN Guiding Principles and the OECD Guidelines referred to above. A Shadow EU Action Plan on Business and Human Rights was adopted by the RBC WG to signal to the European Commission and the Council what steps can be taken to ensure that European businesses are accountable and responsible.[411] Recently, the European Commission published a report[412] that examined the need for a EU-level regulation of due diligence obligations related to human rights and environment. Discussing the study, EU Commissioner for Justice Didier Reynders indicated stakeholders' preference for mandatory due diligence

FDI to larger economies, BITs do not have this effect for small economies, e.g. Zubair Mumtaz, Muhammad and Zachary Alexander Smith (2018). Do Bilateral Investment Treaties Promote Foreign Direct Investment Inflows in Asian Countries? IPRI Journal XVIII:2, pp. 78-110.

[404] See analysis in Tuerk, Elisabeth and Diana Rosert (2016). The road towards reform of the international investment agreement regime: A perspective from UNCTAD, in: Marc Bungenberg, Christoph Herrmann, Markus Krajewski, Jörg Philipp Terhechte (eds.).

[405] See https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf .

[406] Ruggie, John G. and John F. Sherman III (2017). The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale.

[407] OECD (2011), OECD Guidelines for Multinational Enterprises, OECD Publishing: http://www.oecd.org/daf/inv/mne/48004323.pdf .

[408] COM(2010) 343 of 07.07.2010 and COM(2015) 497 of 14.10.2015, respectively.

[409] For example, European Parliament resolution of 5 July 2016 on a new forward-looking and innovative future strategy for trade and investment, 2015/2105(INI); European Parliament resolution of 12 September 2017 on the impact of international trade and the EU's trade policies on global value chains, 2016/2301(INI).

[410] See the official website of the working group: https://responsiblebusinessconduct.eu/wp/about-the-group/ .

[411] The Shadow EU Action Plan can be found at https://responsiblebusinessconduct.eu/wp/2019/03/19/shadow-eu-action-plan-on-business-and-human-rights/ .

[412] BIICL, Civic Consulting and LSE (2020). Study on due diligence requirements through the supply chain.

regulation as a legal duty of care and announced the European Commission has started preparing a public consultation to inform the respective legislative proposal.[413]

A number of EU Member States have recently adopted or are considering to adopt laws and regulations to address due diligence obligations of their companies active in other jurisdictions. While many of these national measures are sector- or issue-specific (with France being the only exception),[414] they point to a growing awareness of the problem and attempts to solve it by the governments.

All these policy documents discussed concrete suggestions on mechanisms to ensure the right to regulate, to include the responsibility of investors in investment treaties, possible reforms to the ISDS, increased transparency of investment systems and other pertinent questions. As one interviewee remarked, these developments signified the mindset transition "from freedom of investment to investment for sustainable development". At the same time, they demonstrate the emerging political consensus on the necessity of investment policy reforms at different governance levels and possible options for such reform.

The political willingness has then started taking legal shape in the form of new (model) investment agreements adopted across the world. The so-called new generation of investment agreements, to which the investment parts of the CETA, EU-Singapore IPA, Comprehensive and Progressive Agreement for Trans-Pacific Partnership as well as Dutch Model BIT of 2018 and many other BITs belong, usually have innovative dispute settlement procedures, promote greater transparency between contracting parties and clarify that investment protection should not be pursued at the expense of public policy goals.[415]

Socio-economic factors

The empowerment of new decision-makers (namely the European Parliament) that were more receptive to the ideas of value-based reforms in foreign investment policy coincided with socio-economic developments that prompted exactly this type of reforms. Some interviewees and academic research consider the **global financial crisis** of 2007-2008 as having a crucial role in driving the public discontent with globalisation and corporations. There was a perception by civil society that foreign investors profited from the crisis[416] and that the ISDS helped them to do

[413] RBC WG (2020). European Commission promises mandatory due diligence legislation in 2021: https://responsiblebusinessconduct.eu/wp/2020/04/30/european-commission-promises-mandatory-due-diligence-legislation-in-2021/ ; Feldman, Daniel, Cándido García Molyneux, Ian Redfearn, Sinéad Oryszczuk, Hannah Edmonds-Camara, Paul Mertenskötter and Katarzyna Lasinska (2020). European Union Justice Commissioner Commits to Regulation on Corporate Human Rights and Environmental Due Diligence. Global Policy Watch: https://www.globalpolicywatch.com/2020/05/european-union-justice-commissioner-commits-to-regulation-on-corporate-human-rights-and-environmental-due-diligence/ .

[414] An example of issue-specific laws is the Dutch Child Labour Due Diligence law (Wet zorgplicht kinderarbeid, Kamerstukken I, 2016/17, 34 506) adopted in May 2019. For an overview for the EU see Chapter 4 of BIICL, Civic Consulting and LSE (2020). Study on due diligence requirements through the supply chain. Study for DG JUST: https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en/format-PDF/source-search .

[415] Beechey, John and Antony Crockett (2008). New Generation of Bilateral Investment Treaties: Consensus Or Divergence? Arthur W Rovine (ed.). Contemporary Issues in International Arbitration and Mediation: The Fordham Papers. Brill/ Nijhoff, pp. 5-25; Titi, Catharine (2018). The evolution of substantive investment protections in recent trade and investment treaties: www.ictsd.org/opinion/the-evolution-of-substantive-investment-protections-in-recent-trade-and-investment .

[416] Olivet, Cecilia and Pia Eberhardt (2014). How corporations and lawyers are scavenging profits from Europe's crisis countries: http://s2bnetwork.org/profiting-crisis/ .

so.[417] The public feared that the trade and investment agreements that were being negotiated during this time (i.e. TTIP, CETA) would provide new instruments for corporate gain.

The **negotiations of TTIP** worked as a catalyser, and the agreements TTIP and CETA[418] themselves became the target of anti-globalist anti-corporate movement. The particular significance of TTIP may be in the fact that it was negotiated with the USA – the ultimate symbol of corporatism, neoliberalism and globalisation in the eyes of the civil society. In fact, while the same issues (e.g. investment protection) were negotiated with Canada during 2009-2014[419], they did not draw much media and public attention. It is the TTIP negotiations that were contentious from the start.[420] There was also a perception that American corporations are litigious and would challenge the high European standards of labour rights, environmental and social protection. In this context, both the strengthening of the right to regulate, imposing responsibility on foreign investors, protecting EU standards and dismantling the ISDS were considered important goals by the civil society, NGOs and politicians.

Geopolitical developments

Some interviewees and scholarly literature suggest that **global shifts in economic power** may have influenced the changing views on BITs and investment protection. In the past, BITs were mainly concluded by the capital-exporting developed states with capital-importing developing countries (i.e. North-South BITs). More recently, experts noticed an impressive rise of investment flows between transition economies and developing countries (i.e. South-South FDI) and even from transition economies to developed countries (i.e. South-North FDI). World Bank calculated that in 2015, outwards FDI from developing countries accounted for one-fifth of global FDI flows.[421]

This changed how certain transition economies and developing countries see the international investment protection regime: they also desire to achieve their offensive investment interests meaning that they need to ensure that their investors have access to foreign markets and their investments are facilitated and protected.[422] However, investment agreements that these countries are negotiating and signing are remarkably different from the BITs of developed countries. For example, China recognises the importance of maintaining health, safety and environmental measures while promoting and protecting investment. Brazilian and Moroccan BITs explicitly refer to the responsible business conduct of investors. Besides the conventional requirements to abide by domestic laws on transparency, tax and corruption, the Indian BIT also requires investors to adopt responsible business conduct principles to address issues of labour rights, human rights and environment.[423]

This power shift offers effective alternative approaches to the investment policy that are more sustainable and more balanced in terms of the state versus investor interests. A few interviewees indicated that the content of new BITs drafted by developing countries may be based on their experience of being on the receiving end of the investments and investment agreements – as well as investment disputes – from developed countries. Nevertheless, as developing countries are commonly in a greater need of foreign investments, they have to face a trade-off between what they have to offer and can demand, which is largely determined by their leverage and the confidence they inspire with companies that can always invest elsewhere.

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[417] Bernasconi-Osterwalder, Nathalie, Sarah Brewin and Nyaguthii Maina (2020). Protecting Against Investor–State Claims Amidst COVID-19: A call to action for governments, pp. 3-4: https://www.iisd.org/sites/default/files/publications/investor-state-claims-covid-19.pdf .

[418] A few interviewees indicated that CETA was collateral damage of the campaign against TTIP: public was not interested much in an agreement with Canada, but because it was negotiated at the same time as TTIP, it became an easy target.

[419] The negotiations with Canada started officially in May 2009: https://www.europarl.europa.eu/legislative-train/theme-a-balanced-and-progressive-trade-policy-to-harness-globalisation/file-ceta .

[420] The TTIP negotiations were launched in 2013.

[421] Perea, Jose Ramon and Matthew Stephenson (2018). Outward FDI from Developing Countries.

[422] Sauvant, Karl (2018). Emerging markets and the international investment law and policy regime,

[423] Singh, Kavaljit (2016). An Analysis of India's New Model Bilateral Investment Treaty

According to some interviewees, the developments described may have also influenced a greater consideration of defensive interests by developed countries who find themselves now on the receiving end of FDI and could be sued by foreign investors. These developed countries may be, therefore, more inclined to strengthen their own right to regulate, spell out investor responsibilities and even let their domestic courts (not international arbitration) handle investment cases.

Cases against developed countries

The perspective of a developed country to be sued by an investor is not a mere phantasy, but a very real possibility. There were several cases that, according to some interviewees, might have sent a strong signal to developed countries to re-think their foreign investment policies.

The case of Vattenfall against Germany[424] was mentioned particularly often and characterised by one interviewee as a wake-up call. The Swedish company Vattenfall sued the Hamburg Government under the Energy Charter Treaty (ECT) over the issuing of permits for construction works. As the ECT allowed a direct recourse to international arbitration, Vattenfall took the case to the ICSID. This move enraged civil society and politicians: while Germany signed tens of BITs and its companies have used them extensively to protect their interests abroad, it never expected to be sued. Even more outrageous in the eyes of civil society was that Vattenfall bypassed domestic courts, and there was a chance that, if the company won an arbitration award, it could enforce the decision against German commercial assets globally.[425]

The Vattenfall cases and many other disputes of investors against developed states[426] helped to render international investment arbitration controversial and fuelled the anti-ISDS protests during the TTIP negotiations by delivering a prime example of the corporatism the civil society fought.[427]

Key actors

Our research suggests that NGOs and other parts of civil society, supported by academics, played a decisive role in driving and shaping the reform of the EU and Dutch investment policy. Corporate stakeholders either did not succeed in bringing their impact to bear and/or were not noticeably active in this period. Actions of developing countries and emerging economies provided a push towards reforms and delivered examples of new generation of investment agreements.

The interviewees and the literature acknowledge the importance of the EU institutions (European Commission, European Parliament and the Council) and EU Member States as main (formal) decision-makers. They were listening to a variety of different stakeholders, formulating and adjusting their policies and decisions. However, we will not discuss them below because, within their formal roles, their positions were largely influenced and shaped by other stakeholders.

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[424] Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany (I) (ICSID Case No. ARB/09/6): https://www.italaw.com/cases/1148 .

[425] Ultimately, Vattenfall and Germany settled this case outside the arbitration.

[426] Other notable cases that had significant impact are (non-exhaustive list): Vattenfall AB and others v. Federal Republic of Germany (II) (ICSID Case No. ARB/12/12); Novenergia II – Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v The Kingdom of Spain, SCC Case No 2015/063; Charanne B.V. and Construction Investments S.a.r.l. v. Spain (SCC Case No. 062/2012); Greentech Energy Systems A/S, NovEnergia II Energy & Environment (SCA) SICAR, and NovEnergia II Italian Portfolio SA v. Italian Republic (SCC Case No. 2015/095); Philip Morris Asia Limited v. The Commonwealth of Australia (PCA Case No. 2012-12); Windstream Energy LLC v. The Government of Canada (PCA Case No. 2013-22).

[427] Bonnitcha, Jonathan, Lauge N. Skovgaard Poulsen, and Michael Waibel (2017). The Political Economy of the Investment Treaty Regime.

Civil society and NGOs

The majority of interviewees agreed that civil society and NGOs were the driving force behind the investment policy reforms throughout the first half of the 2010s, both at the EU level and in the Netherlands. Civil society groups got interested in BITs and started researching their perceived negative implications decades earlier. However, the aftermath of the global financial crisis, the changed legal landscape in the trade and investment in the EU and socialist politicians in key positions in the major EU Member States[428] created a fruitful soil for civil society efforts to influence policymaking. An important determinant of the success was that the general public became interested in the negotiations of TTIP and CETA, and NGOs were there to galvanise the public. The emergence of NGOs as actors in the field of investment law has been crucial as this new actor brought a countervailing power to that of corporate stakeholders, where previously there was none.[429]

NGOs ran a well-organised, well-funded and professional campaign that was widely publicised, used a variety of media and marketing research and transcended national borders: NGOs from the whole Europe and across the globe[430] coordinated their actions and mobilised supporters and concerned citizens. Another defining feature was that civil society groups committed to different interests (e.g. environmental, human rights, labour rights, children right, developmental) joined forces and used their platforms to campaign against investment protection.[431]

The strategy of NGOs was to target decision-makers at two levels: national and European.[432] Protests and campaigns were organised in the individual Member States to shape positions of individual governments. The campaign core seemed to be Germany and Austria, where NGOs activist groups (e.g. ATTAC, Rosa Luxemburg Foundation, Campact) first lobbied and assured support of influential national left-wing politicians. In parallel, they activated their networks into all European countries to do the same.[433]

Protests were also organised at the EU institutions, and citizens were encouraged to participate in EU-wide public consultations. The open public consultations on the TTIP resulted in the record 150,000 responses, of which 97% were "submitted collectively through various on-line platforms containing pre-defined answers which respondents adhered to".[434] In addition, there were 3,000 responses from individuals and civil society organisations. 96% of

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[428] At this time, the Netherlands had Minister for Foreign Trade and Development Cooperation Lilianne Ploumen from the Labour party. France had Laurent Fabius of the Socialist party in the same post. In Germany, Sigmar Gabriel was Minister for Economic Affairs and Frank Steinmeier was Minister of Foreign Affairs, both from the Socialist party.

[429] Sornarajah, Muthucumarawamay (2015). Resistance and change in the international law on foreign investment.

[430] For instance, see the Open letter by 100 international NGOs to US Trade Representative Michael Froman and EU Trade Commissioner Karel de Gucht calling for dismissing ISDS from TTIP (December 2013): http://www.s2bnetwork.org/wp-content/uploads/2014/11/CivilSociety_TTIP_Investment_Letter_Dec16-2013_Final.pdf ; Open letter of Japanese and European civil society groups call for transparency in the EU-Japan trade talks and removing the ISDS from the FTA (October 2014): https://www.tni.org/en/article/eu-japan-fta-open-letter-commissioner-karel-de-gucht ; Open letter by over 450 public interest groups from Europe and Canada urging legislators to vote against CETA with the ICS being one of the reasons (November 2016): https://corporateeurope.org/en/international-trade/2016/11/european-and-canadian-civil-society-groups-call-rejection-ceta .

[431] Sornarajah, Muthucumarawamay (2015). Resistance and change in the international law on foreign investment.

[432] Wróbel, Anna (n.d.). The role of non-governmental organizations in trade governance – case study of campaigns against TTIP and CETA in Germany, p. 15: https://ecpr.eu/Filestore/PaperProposal/b56f23e5-279d-4a69-803a-e496a6e46a3c.pdf ; Bauer, Matthias (2015). Campaign-triggered Mass Collaboration in the EU's Online Consultations: The ISDS-in-TTIP Case. European View Journal 14:1, pp. 121-129: https://journals.sagepub.com/doi/full/10.1007/s12290-015-0346-6 .

[433] See the detailed reconstruction of German and other NGOs in Bauer, Matthias (2016). Manufacturing Discontent: The Rise to Power of Anti-TTIP Groups. ECIPE Occasional Papers: https://ecipe.org/publications/manufacturing-discontent-the-rise-to-power-of-anti-ttip-groups/ .

[434] European Commission (2015). Report on the Online Public Consultation on Investment Protection and Investor-to-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP).

submissions came from just seven countries that were the centre of the campaign: Austria, Belgium, France, Germany, the Netherlands, Spain and the UK.

The sheer volume of these protests could not be ignored by national governments or EU institutions. It is reported that, as a result, key Member States changed their positions on ISDS. For instance, in 2014 Germany assumed a critical position on including ISDS in TTIP, deviating from its traditionally liberal approach.[435] The European Commission was forced to conduct special stakeholder dialogue on ISDS and to renegotiate the draft text as requested by Germany and France.[436]

The height of the EU-wide campaign was reached in 2015-2016, after which the voice of civil society in the area of investment got weaker. It seems that the focus of their attention moved to other topics, and there is less "cross-sectoral" cooperation and coordination of actions among NGOs. However, at the national level, issue-driven NGOs continue to be involved in and influence national investment policy. For instance, Dutch NGOs worked closely with the Ministry of Foreign Affairs and other stakeholders in specially established expert groups during the preparation of the new Model BIT. The discussions in the expert groups often went into details of the BIT provisions, with concrete suggestions and comments, some of which were incorporated in the final version. Currently, there are regular meetings of the structured dialogue on investment for different stakeholders, including NGOs and labour unions, with the Ministry.

Academics

Most interviewees agree that academics contributed to shaping the reforms of investment protection. As mentioned above, academic debates on the merits of BITs in general and their specific elements, including different dispute resolution mechanisms, substantive standards, rights and duties of investors and states, have been ongoing since the first investment agreements were concluded. While those debates were mainly limited to scholarly literature, younger generation of academics entered the public sphere and were instrumental to make complex investment protection issues understandable to the general public. At the same time, there were some academics and renowned lawyers who spoke out against the specific (elements of) reforms. It appears that the former group was more effective or persuasive due to its alliance with or endorsement by NGOs and civil society and media attention.

One interviewee pointed out that academics often present research, offer evidence and give advice on the development of investment law to all interested parties. In contrast to most interviewees, this interview also claimed that they are not very much different or more influential than other stakeholder groups. Decision-makers always listen to them when/ because academics provide relevant and useful information.

International organisations

The work of some international organisations (UNCTAD and UNCITRAL) had a significant impact on the content of the reforms in investment protection, while other international organisations were both less active and less relevant due to their mandate.

Many interviewees agree that UNCTAD's work in the investment protection area was highly influential. In the early 2010s, UNCTAD came up with an investment framework for sustainable development[437] that provides guidance to

[435] Wróbel, Anna (n.d.). The role of non-governmental organizations in trade governance – case study of campaigns against TTIP and CETA in Germany, p. 15: https://ecpr.eu/Filestore/PaperProposal/b56f23e5-279d-4a69-803a-e496a6e46a3c.pdf .

[436] Eliasson, Leif Johan (2019). Transatlantic Trade Negotiations, Civil society campaigns and public opinion. Doris Dialer and Margarethe Richter (eds.).

[437] The Investment Policy Framework for Sustainable Development was launched at the Financing for Development Conference in 2012. The current version was adopted in 2015: https://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=1437 .

policymakers on the new generation of investment policy. UNCTAD provides technical assistance to developing countries educating them on investment policy and their policy options. UNCTAD offers tangible support, advice and training to governments. For example, in the case of the new Dutch Model BIT, there was a lively exchange between UNCTAD and those responsible for the drafting. UNCTAD answered early questions of the Dutch parliament on the ISDS, commented on the early draft of the Model BIT, prepared a position paper for the Dutch government and parliament on investment regime and came to the parliamentary review meeting in The Hague.[438] Ministry and parliamentary staff, as well as civil society and business representatives, participated in UNCTAD seminars and discussions.

While UNCITRAL got involved in investment issues later than UNCTAD, it provided a very impactful framework with its Rules on Transparency. In 2017, UNCITRAL entrusted Working Group III[439] with the tasks to identify concerns regarding the ISDS, to consider whether reform and, if so, to develop solutions. The group's mandate is explicitly limited to procedural reforms. This forces UNCITRAL to adopt a narrow and technical approach: the members first agree what the problems or gaps are (currently six problems of the ISDS were identified) and then discuss possible solutions problem by problem. The group's strength is that they consider and may adopt very different, targeted approaches for each problem, from a multilateral convention to soft law measures.[440] Some interviewees think that, due to its focused and technical work, UNCITRAL is currently taking the lead from UNCTAD on the ISDS reform.

The OECD has been working on investment protection for many years and even discussed internationalisation of investment protection in the past. In recent years, the OECD did a lot of research and technical assistance to developing countries. While it also has many discussions about reforms with its Members and works on improving its service to them, we were not able to determine its specific role in the developments of investment law since 2015.

Some interviewees pointed out that ICSID, Permanent Court of Arbitration and International Chamber of Commerce are also influential players. Their specific role seems to be to endorse, apply and give effect to the rules promoted or adopted by other international organisations. In terms of influence, they need to stay neutral being providers of adjudicating services.

Interviewees were doubtful about the WTO asserting itself in the investment policy area. This is both due to the limitations of the WTO's mandate and its focus on trade as well as due to the lack of interest of WTO Members in negotiating binding solutions and internationalisation of investment protection.

The Energy Charter Treaty (ECT) and Energy Charter Conference[441] were not mentioned by interviewees as sources of influence on the evolutionary processes in investment protection. Nevertheless, we stipulate that the ECT – as the only international agreement containing provisions on investment protection and the traditional ISDS, - may have played a role. Research suggests that the number of lawsuits based on the ECT ballooned in 2013-2017 with

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[438] See UNCTAD (2017). Division on Investment and Enterprise: Results and Impact Report 2017, p. 78: https://unctad.org/en/PublicationsLibrary/diae2017d2_en.pdf ; UNCTAD (2019). 2018 Dutch Model Investment Agreement: A comparison with UNCTAD policy tools: https://www.tweedekamer.nl/downloads/document?id=5ea76171-e130-435b-b88c-e9c5dc1e941b&title=Position%20paper%20UNCTAD%20t.b.v.%20hoorzitting/rondetafelgesprek%20Modeltekst%20investeringsakkoorden%20d.d.%2028%20januari%202019.pdf ; Tweede Kamer der Staten-Generaal - Kamerstuk 34952-43 of 07.02.2019: https://zoek.officielebekendmakingen.nl/kst-34952-43.html .

[439] The work of the group can be found: https://uncitral.un.org/en/working_groups/3/investor-state .

[440] See an account on UNCITRAL's work in Langford, Malcolm, Michele Potestà, Gabrielle Kaufmann-Kohler and Daniel Behn (2020). UNCITRAL and Investment Arbitration Reform: Matching Concerns and Solutions. An introduction. The Journal of World Investment and Trade 21: 2-3, pp. 167-187.

[441] The Energy Charter Conference is an intergovernmental organisations and the governing and decision-making body consisting of all Members and Observers of the ECT: https://www.energycharter.org/who-we-are/institutions/ . For an analysis of the ECT see Sussman, Edna (2008). Energy Charter Treaty's Investor Protection Provisions: Potential to Foster Solutions to Global Warming and Promote Sustainable Development. ILSA Journal of International & Comparative Law 14: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1090261 .

most of them directed against the developed countries.[442] The ECT is also the most frequently invoked treaty in investment disputes accounting for 128 known cases.[443]

Businesses

The interviewees expressed mixed views on the role of businesses in the developments of investment policy over the last years. Some interviewees from the civil society and NGOs feel that corporate stakeholders have significantly increased their lobbying power since the mid-late 1990s and gained a big sway over governments.[444] According to these interviewees, corporate stakeholders are interested in smothering out burdensome regulations and challenging planned regulations, which is linked to creating and establishing the vague yet technical language of trade and investment with terms like "non-tariff barriers", "domestic regulation", "technical barriers to trade", "fair and equitable treatment". Furthermore, these interviewees see the continuing use of the ISDS and other provisions in new investment agreements as evidence of the influence by big businesses, lobbyists but also of the so-called arbitration industry that has gained significant financial benefits from their existence and application.

A variety of interviewees perceived the role of businesses as insignificant in the development of the new generation of investment treaties, reforms of ISDS and investment protection. The reasons for this seem to be manifold. Some interviewees think that (at least some of) businesses have changed their mind on the issues of sustainability, protection of human rights and environment and other public policy issues.[445] This may have happened due to the occurrence and publicising of horrifying events and conditions in different industries in the developing countries (e.g. blood diamonds, child labour, factory fires) and resulting reputational damage to involved companies and changing consumer attitudes.[446] There are also indications that businesses attend training and discussions with UNCTAD on investment for sustainable development. Some businesses may also see (some of) the reforms as beneficial: more transparent and efficient, providing more legal certainty due to clearer definitions of rights and duties, framing new ambitions for investors. These interviewees did not feel that the arbitration industry was

[442] Eberhardt, Pia, Cecilia Olivet and Lavinia Steinfort (2018). One treaty to rule them all: The ever-expanding Energy Charter Treaty and the power it gives corporations to halt the energy transition. TNI Report: https://www.tni.org/en/energy-charter-dirty-secrets ; Brauch, Martin Dietrich (2019). Modernizing the Energy Charter Treaty: A make-or-break moment for sustainable, climate-friendly energy policy. IISD Blog: https://www.iisd.org/articles/modernizing-energy-charter-treaty-make-or-break-moment-sustainable-climate-friendly-energy .

[443] For lawsuits based on the ECT see UNCTAD Investment Dispute Settlement Navigator: https://investmentpolicy.unctad.org/investment-dispute-settlement?id=35 .

[444] For The Netherlands see the research by Aizenberg, Ellis and Marcel Hanegraaff (2020). Is politics under increasing corporate sway? A longitudinal study on the drivers of corporate access. West European Politics 43:1, pp. 181-202. DOI: 10.1080/01402382.2019.1603849 ; for the EU see Ariès, Quentin, Laurens Cerulus and James Panichi (2015). The EU's lobbying Full Monty. Politico: https://www.politico.eu/article/eu-lobbyists-ngos-watch-transparency-lobbying-commission-meetings/ ; a more nuanced picture is given by Kluger Rasmussen, Maja (2014). The Battle for Influence: The Politics of Business Lobbying in the European Parliament. Jounral of Common Market Studies 53:2, pp. 365-382. The latest EU-wide lobbying survey by Burson-Marsteller of 2013 showed that the most effective lobbyists were trade unions, followed by professional organisations and NGOs and that this varied by countries. For instance, in Germany, NGOs were the most successful lobbyists: Burson-Marsteller (2013). European lobbying survey: https://issuu.com/burson-marsteller-emea/docs/european_lobbying_survey_2013 .

[445] On the changing investors' mindset see, for example, Eccles, Robert G. and Svetlana Klimenko (2019). The investor revolution. Harvard Business Review: https://hbr.org/2019/05/the-investor-revolution ; BNP Paribas (2019). Attitudes towards socially responsible investment in Europe: https://docfinder.bnpparibas-am.com/api/files/B0630682-45B8-4EC0-AABB-3A0DEF7ABDB3 .

[446] See, for instance, Bağlayan, Başak, Ingrid Landau, Marisa McVey & Kebene Wodajo (2018). Good business: The economic case for protecting human rights: https://corporatejustice.org/2018_good-business-report.pdf ; Feng, Penglan and Cindy Sing-bik Ngai (2020). Doing More on the Corporate Sustainability Front: A Longitudinal Analysis of CSR Reporting of Global Fashion Companies.

lobbying in any particular direction: many platforms/ service providers kept neutral as they would remain in demand whatever legal framework would be set up.

One interviewee noted that lobbying by corporate stakeholders and its results are difficult to observe and assess because there are many informal channels that they can use. In contrast, the activities of other stakeholders are more visible because they are more likely to use formally established cooperation or dialogue mechanisms.[447] In this context, it is worth considering that the whole investment policy and the system of investment protection have been created and continue to exist for the sake of private investor interests.

Developing countries and transition economies

Both academic literature and some interviewees point to developing countries and transition economies as stakeholders providing a sizable push for investment policy and law reform. Their influence may be two-fold. On the one hand, in recent years, several countries expressed their discontent with conventional BITs and either threatened to terminate them or have unilaterally done so. For example, Ecuador, India, Indonesia, South Africa, Uganda and Venezuela terminated many of their BITs, including those with the Netherlands. [448] Bolivia, Ecuador, and Venezuela withdrew from the ICSID Convention.[449] In 2014, Indonesia announced that it would terminate or review its 67 BITs, including those with its main investors.[450] In 2016, India decided to terminate or renew BITs with 58 countries.[451] The reasons for these actions are the growing disconcert about perceived excessive protection of corporate rights by arbitration tribunals and investment protection (including the ISDS) that are incompatible with national development goals and right to regulate. It is also reported that some developing countries likely did not understand the implications of the BITs they had been signing till they were sued by foreign investors.[452] These activities likely had sent a strong signal to the developed countries.

On the other hand, some countries (e.g. India, Brazil, South Africa, China) provide examples of alternative approaches to investment policy challenging the assumptions about the role of BITs, investor protection, ISDS and other elements of conventional investment regimes of developed countries.[453] Brazilian investment agreements use

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[447] Academic research also cautions that, while the activity of lobbying can be observed and analysed, the actual results or impacts of lobbying are more difficult to detect see Dellis, Konstantinos and David Sondermann (2017). Lobbying in Europe: new firm-level evidence. European Central Bank Working Papers Series No 2071: https://www.ecb.europa.eu/pub/pdf/scpwps/ecb.wp.2071.en.pdf .

[448] Verbeek, Bart-Jaap and Roeline Knottnerus (2018). The 2018 Draft Dutch Model BIT: A critical assessment.

[449] See the note to the list of the contracting states: https://icsid.worldbank.org/en/Documents/icsiddocs/List%20of%20Contracting%20States%20and%20Other%20Signatories%20of%20the%20Convention%20-%20Latest.pdf .

[450] See the analysis of this policy decision in Hamzah, Hamzah (2018). Bilateral investment treaties (BITs) in Indonesia: a paradigm shift, issues and challenges. Journal of Legal, Ethical and Regulatory Issues 21: 4, pp. 1-13: https://www.abacademies.org/articles/bilateral-investment-treaties-bits-in-indonesia-a-paradigm-shift-issues-and-challenges-7019.html ; Crockett, Antony (2018). The Termination of Indonesia's bits: Changing the Bathwater, but Keeping the Baby? International Investment Treaties and Arbitration Across Asia 9, pp. 159-179.

[451] BakerMcKenzie (2017). Withdrawal from Investment Treaties: An omen for waning investor protection in AP? : https://www.lexology.com/library/detail.aspx?g=4bdc087c-20f0-4729-9166-1d6de9b8d2de .

[452] See a story about Pakistan not even having a copy of its BIT with Switzerland when it was sued for the first time in Menon, Trishna and Gladwin Issac (2018). Developing Country Opposition to an Investment Court: Could State-State Dispute Settlement be an Alternative? Kluwer Arbitration Blog: http://arbitrationblog.kluwerarbitration.com/2018/02/17/developing-country-opposition-investment-court-state-state-dispute-settlement-alternative/?doing_wp_cron=1595323598.8012440204620361328125 .

[453] For an overview of different innovation that these and other countries developed in their investment agreements see Rolland, Sonia E. and David M. Trubek (2018). Legal innovation in investment law: Rhetoric and practice in emerging countries. University of Pennsylvania Journal of International Law 39:2, pp.356-343: https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1957&context=jil ; Morosini, Fabio and Michelle Ratton Sanchez Badin (2018). Reconceptualizing International Investment Law from the Global South:

a combination of dispute prevention mechanisms and state-to-state arbitration instead of the ISDS and establish institutions ensuring continued communication and cooperation.[454] India and China allow applying the ISDS only after domestic court remedies have been exhausted.[455] These and other examples come from countries that have been on the "receiving end" of arbitration panels on investments disputes and that seem to act on their own experience what works to attract and protect investments. These innovative approaches beg a critical examination of conventional BITs.

Summary & Conclusions

Probably more than any other issue discussed in this study, international investment policy and law and international arbitration are under political pressure. We observe some departure in the EU from the conventional understanding of the purpose and use of BITs, investment protection of private investors and direct access to binding international investment dispute settlement. However, these developments are slow, piecemeal, and far from becoming mainstream: the changes are often marginal, focused on procedures for arbitration pertinent to only few investment agreements, and many of them have not yet entered in force.

Nevertheless, the overall political, legal and socio-economic environment contributes to the investment policy reform to remain a prominent issue. And the direction of change seems to be clear along general lines: finding the balance between the investor's rights and public policy objectives; introducing the responsibility of investor towards the host state and establishing a more transparent and democratically legitimate dispute resolution mechanism. All new generation investment agreements offer solutions to this effect, but details and approaches vary.

The changes to investment law and policy can be considered evolutionary, but they are not self-evident, and a number of factors influenced their occurrence and their content. For one thing, there was a favourable entwinement of legal and political developments. The discourse around international investment policy expanded to include sustainable development topics that are more values- and principles-based. Developing countries and economies in transition have recently developed different approaches to investment policy (new generation of investment agreements), offering evidence that conventional investment protection and ISDS are not the only effective solution for attracting FDI, while they still have to consider trade-offs being in a greater need of foreign investments. At the same time, due to the changes introduced by the Lisbon Treaty, the decision-making on investment issues became not only more centralised, but also more open to value arguments (through the European Parliament's participation).

There was also the right moment to start trying out new solutions. Investment agreement negotiations suddenly moved into the limelight when the TTIP was put on the table. In the aftermath of the global financial crisis, there was a lot of public dissatisfaction with perceived neoliberal, corporatist treaties. The public demand for reform could be acted upon, and there were concrete solutions ready on the basis of preceding work by international organisations (UNCTAD, UNCITRAL). In addition, some countries may have had some self-interest in reforming the investor protection and ISDS, as they now stood a real chance to be sued by a foreign investor, potentially even from a developing country.

A plethora of stakeholders was significantly involved in the developments surrounding the reforms in investment policy. The formal decision-makers – the EU institutions and Member States – were of utmost importance, but their roles and efforts were quite traditional. Stakeholders tried to influence policies. The most influential of the stakeholders were civil society and NGOs. They ran an EU-wide (or even global) campaign that was well-funded, well-planned, well-coordinated and highly publicised in various media. The campaign united NGOs across all

https://sites.duke.edu/thefinregblog/2018/05/31/reconceptualizing-international-investment-law-from-the-global-south/ .

[454] For an analysis see Vidigal, Geraldo and Beatriz Stevens (2018). Brazil's New Model of Dispute Settlement for Investment: Return to the Past or Alternative for the Future?

[455] Rolland, Sonia E. and David M. Trubek (2018). Legal innovation in investment law: Rhetoric and practice in emerging countries.

sectors who aimed their efforts both at the national and EU levels. Academics helped make the cause of the reform understandable and, thus, rendered credibility to the campaign.

Corporate stakeholders either did not succeed in bringing their impact to bear and/or were not noticeably active in this period. Actions of developing countries and emerging economies provided a push towards reforms and delivered examples and evidence of effective alternative approaches to usual foreign investment policies.

Chapter 6: Trade Defence Instruments

Introduction

This case study reviews the development of the European Union's (EU) trade defence policy and specifics of its application against exporters from third countries between 2015 and 2019. Considering the large numbers of trade defence instruments (TDIs) applied by the European Commission (EC) every year, the focus is on two specific sectors are reviewed: electric bicycles and biodiesel. Identifying the Dutch positions in this process and how successful they were is outside the scope of this study.

The main purpose of this case study is to examine and understand key internal and external factors and actors that influenced policy development and application of trade defence policy and measures.

This case study starts with a short overview of the legal framework relevant to trade defence measures by the EU and a general outline of a procedure leading to the imposition of TDIs. The second section aims to provide only the minimum background information on the legal and procedural features of the EU trade defence that is necessary to understand and follow the subsequent discussion of the policy development and application. It discusses how the EU trade defence policy and law have changed over the last five years as a result of reforms. It also describes what factors and actors have influenced those changes and in what way. The following sections discuss the application of trade defence measures by the EU on the examples of, respectively, biodiesel from Argentina and Indonesia and electric bicycles from China. Each section starts with a summary of the case and continues discussing what role different factors and actors played for each case. The last section summarises the findings of the whole case study regarding factors and actors that have influenced the EU trade defence policy and its application in the recent past.

Legal and procedural background

This Section provides a short overview of the legal framework relevant to trade defence measures. It explains the continuing significance of the international trade rules building the basis for the EU-level rules, highlights the main EU legislation and briefly indicates the roles of EU institutions. It then outlines a course of typical anti-dumping and anti-subsidy procedures.

Legal framework

The EU's trade defence legislation goes back to 1968 when the first anti-dumping and anti-subsidy regulation was adopted.[456] This regulation as well as all its amendments and legislation that followed were based on rules adopted at the international level (van Bael, 1978: 523; Chandnani, 1990: 392), first under the aegis of the General Agreement on Tariffs and Trade (GATT) and later the World Trade Organization (WTO). The current WTO framework[457] permits WTO Members to adopt trade remedies (also known as TDIs) against certain exporters to protect domestic industries from their unfair trade practices (anti-dumping and anti-subsidy/ countervailing measures) or a sudden and unforeseen influx of foreign goods (safeguards). Yet an absolute majority of measures adopted are to counter

[456] Regulation (ECC) No 459/68 of the Council of 5 April 1968 on protection against dumping or the granting of bounties or subsidies by countries which are not members of the European Economic Community, OJ L 93 of 17.40.1968.
[457] The key rules in question are: Articles VI and XIX of the GATT; Agreement on Implementation of Article VI of the GATT; Agreement on Subsidies and Countervailing Measures; and Agreement on Safeguards.

dumping practices or unfair subsidies; safeguard measures are comparatively rare.[458] Therefore, this case study will further focus exclusively on anti-dumping and anti-subsidy measures.

The EU's legal framework was adopted by the Council and the European Parliament (EP) in the ordinary legislative procedure upon the proposal from the EC. This legal framework consists of four Regulations[459] that codify general rules on each of the TDIs that the EU is entitled to use to protect EU importers and the market. The EU can also help the EU exporters that have become targeted by unwarranted trade defence measures by third countries. The EU Enforcement Regulation[460] ensures that the EU is able to exercise and enforce its rights under international trade agreements by adopting various trade policy measures, including countermeasures. The EU can suspend or withdraw from its international commitments in response to violations of an agreement by its other participants or, if it is necessary, to rebalance its trade obligations under the agreement.

The EU trade defence policy is applied through Implementing Regulations adopted by the EC (more specifically applied by DG TRADE) with the participation of the Council, through the comitology procedure. Implementing Regulations contain decisions on the initiation of investigations, introduction, modification and termination of specific TDI in relation to individual trade defence cases. The affected businesses can challenge all these decisions taken by the EC in the General Court of the EU (EGC).

The WTO framework remains highly relevant for the application of TDIs by the EU and further developments of the EU trade defence policy and framework because any EU's actions need to comply with the respective WTO rules. The WTO dispute settlement mechanism (DSM) plays a significant role in the trade defence system as it adjudicates disputes between the WTO Members over the imposed trade defence measures and also EU's legislative and other actions. If the EU's actions are found to violate WTO rules when challenged by complaining WTO members, the EU would need to adjust or even remove such measures, policies or legislation.

Anti-dumping and anti-subsidy procedures

Typical anti-dumping and anti-subsidy procedures follow a very similar path (see Figure 11 below). The main differences between the two procedures are:

- provisional measures remain in force up to 6 months in anti-dumping cases and up to 4 months in anti-subsidy cases; and
- the full duration of an anti-dumping procedure is up to 14 months, while it is 13 months for an anti-subsidy procedure.

[458] This may be because the conditions to impose them are more stringent and the WTO Member generally must pay a compensation to the WTO Members whose trade is affected. In 2018, the Commission imposed 3 safeguard measures. This was the first time since 2002. See European Commission (2019a).

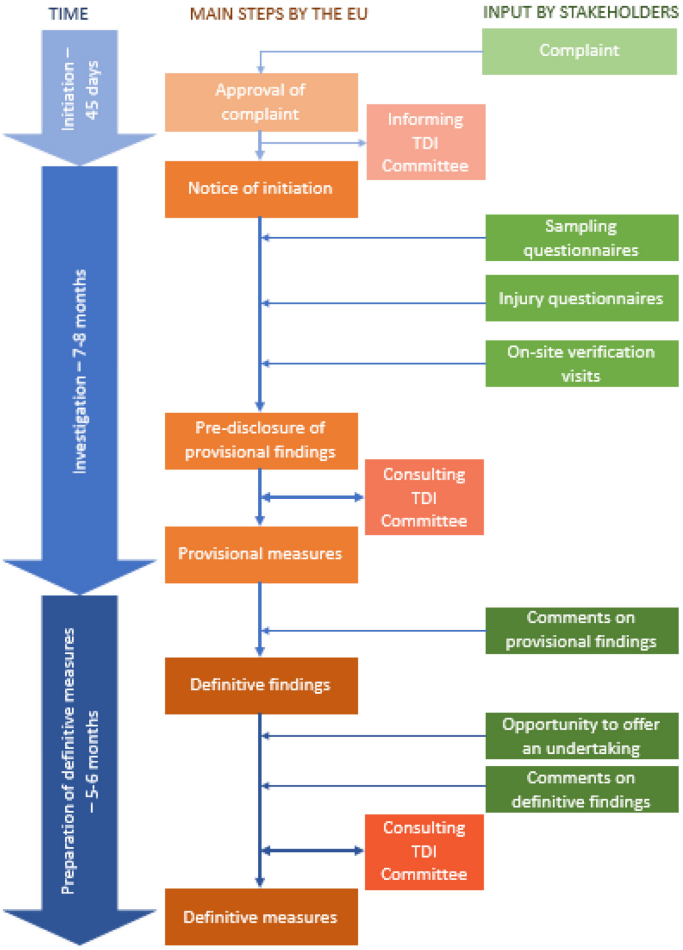
[459] Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union (Basic Anti-Dumping Regulation), OJ L 176 of 30.6.2016; Regulation (EU) 2016/1037 of the European Parliament and of the Council of 8 June 2016 on protection against subsidised imports from countries not members of the European Union (Basic Anti-Subsidy Regulation), OJ L 176 of 30.6.2016; Regulation (EU) 2015/478 of the European Parliament and of the Council of 11 March 2015 on common rules for imports, OJ L 83 of 27.3.2015; and Regulation (EU) 2015/755 of the European Parliament and of the Council of 29 April 2015 on common rules for imports from certain third countries, OJ L 123 of 19.5.2015.

[460] Regulation (EU) No 654/2014 of the European Parliament and of the Council of 15 May 2014 concerning the exercise of the Union's rights for the application and enforcement of international trade rules and amending Council Regulation (EC) No 3286/94 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization, OJ L 189 of 27.6.2014.

Anti-dumping and anti-subsidy procedures are often "demand-driven" in the sense that they mainly start with a complaint by the affected industry. Rarely, the EC initiates a procedure *ex officio*.[461] The complaint must be supported by a major proportion of the EU industry (i.e. the requirement of "standing"). In practice, this means that the complainant needs to represent at least 25 percent of the total EU production. For this reason, an individual company cannot lodge a complaint but needs the cooperation of other producers and/or industry associations.

If the EC decides that the complaint presents sufficient *prima facie* evidence of dumping/ subsidisation, and that injury suffered by the EU industry was caused by the dumped/ subsidised imports, it will start an official investigation by publishing a notice of initiation in the Official Journal of the EU. The notice of initiation commences an investigation phase into the alleged dumped/subsidised imports.

Figure 9 Overview of anti-dumping/anti-subsidy procedures



During the investigation, the EC collects data and information directly from the affected industry (through questionnaires and on-site visits)[462] and consultations with experts and specialised authorities (e.g. in the biodiesel case DG Energy was consulted; DG GROW, DG TAXUD and national customs authorities are consulted in most cases).

Transparency is an important principle of the EU functioning. Therefore, all documents presented by the affected parties and stakeholders during the anti-dumping/ anti-subsidy proceedings are available to all interested parties[463] in the investigation. This ensures that all parties affected by the investigation (i.e. that have a specific stake in the affected interest and can prove it) see all evidence and can respond to it.[464] To ensure due process for the exporting parties, the EC approaches the government of the country, from where the allegedly dumped/ subsidised imports originated (e.g. in the biodiesel case – Argentina and Indonesia) and asks to send questionnaires to the respective exporters.

On the basis of the data provided and collected, the EC seeks to establish whether there is an injury to the EU industry and whether there is a causal relationship between this injury and the

[461] Ex officio means that the EC can start a trade defence investigation on its own initiative without an official complaint by the EU industry.
[462] The EC sends out questionnaires to the EU industry (i.e. producers, importers and the users of the products concerned). Should the number of producers/ importers for the product in question be too high, the EC will analyse the data provided by a sample of such companies. To supplement and verify the data provided by the industry, the EC may carry out on-site visits.
[463] Interested parties can make themselves known to the EC, via an electronic mechanism known as TRON (from "TRade ONline").
[464] Furthermore, the EC requests from the complainants to include in their complaint the name, address and contact details of all known exporters of the product concerned, to enable the EC to directly contact them and send them the questionnaires.

alleged dumped/ subsidised imports. The injury to the EU industry may be in the form of declined production and sales, reduced market shares and profits, decreased productivity and capacity (utilisation).

Before deciding on the use of trade defence measures, the EC must determine whether such intervention is in the Union's interest, using the "union interest test". The Union interest is defined as "*an appreciation of all the various interests taken as a whole, including the interests of the domestic industry and users and consumers*".[465] This means that the EC needs to consider all information and interests made known to it, including non-economic ones (e.g. social and environmental).

Where the injury to the EU industry, caused by dumped/ subsidised imports, is established and where the Union interest in the imposition of trade defence measure is determined, the EC may impose provisional measures. This step must be followed by a disclosure measure which makes officially known the details of all the facts of the investigation and the detailed calculations of anti-dumping/ countervailing duties for the companies concerned. Companies can comment on the provisional findings by the EC.

If the investigation ultimately confirms the complaints by EU industry and it is in the Union's interest, definitive trade defence measures are imposed. Before that, the definitive disclosure of information takes place.

The definitive measures remain in force usually for five years, during which the EC monitors their effectiveness and compliance. During this time, on request from the industry or at the EC's own initiative, the EC may review the TDIs in place:

- when exporters implement new pricing – a review of the pricing or re-opening of the investigation if export prices are reduced to absorb some or all of the duties;
- when exporters try to circumvent the TDIs, for example, by transporting affected products through another country (i.e. anti-circumvention review);
- if it is assumed that the TDIs is insufficient or no longer needed (i.e. interim review);
- As a result of such reviews, the imposed TDIs can be changed or removed.

By the expiry of the trade defence measures, EU stakeholders may request an expiry review, which may result in the prolongation of trade defence measures.

All trade defence measures by the EU are notified to the WTO. If the affected countries feel that the EU trade defence measures violate WTO rules, they can start a case through the WTO DSM. The companies that are directly affected by EU trade defence measures can also challenge them in the EU courts – to examine whether the measures violate EU law.

Evolution of trade defence policy and legal framework

This Section looks into the main changes that have occurred in the EU trade policy and legal framework over the last five years and into the key factors that defined the shape and pace of these changes. The Section describes how EU trade defence rules and policy have been reformed to become more efficient in the face of the new geopolitical situation. Two geopolitical actors in particular have influenced the trade policy developments: China due to its continuous economic growth and the expiry of its non-market economy status and the United States due to its aggressive "America first" policy.

Trade defence reforms of recent years

Attempts to modernise the EU trade defence system date back to 2008, but only in 2018, the reform was successfully implemented. One of the main reasons for the trade defence reform was that the EU's system had not been updated since 1995 when the results of the Uruguay Round (1986 – 1994) and the creation of the WTO (1995) were

[465] Article 21 of the Basic Anti-Dumping Regulation; Article 31 of the Basic Anti-Subsidy Regulation.

implemented in EU (then the European Communities) legislation (European Commission, 2013b: 2). The next revision should have been made after the completion of the Doha Round (2001 – ongoing). Yet, as the Doha Round has stalled, so did the EU trade defence reform (European Commission, 2013a).[466]

The EC's proposal for reform of trade defence (April 2013) only slowly progressed through the legislative process. The European Parliament (EP) adopted its position in April 2014, but the Council was divided on the key aspects of the reform, especially on the adjustment of the important "Lesser Duty Rule" (LDR),[467] that would allow higher tariffs to be imposed on dumped products (Barbière, 2016). The question of reform became more pressing in 2015, especially due to global overcapacities in sectors such as aluminium, cement, steel and other raw material industries, that accumulated in China. By 2016, the question of how to deal with the Chinese market economy status (MES) and (potentially) unfair competition of state companies propelled the trade defence reform to the top of the political agenda, because the respective article in China's Protocol of Accession to the WTO was expiring in December 2016 (Barbière, 2016; EPRS, 2018: 2).

In December 2016, the negotiations in the Council reached a successful break-through regarding the application of LDR to countries like China. Following the compromise proposal by the Slovak Presidency, EU countries agreed to keep the LDR in general, but refrain from it in some justified cases, like state-induced distortions in raw materials and energy (Zalan, 2016a). By December 2017, the trilogue[468] procedure followed culminating in a provisional interinstitutional agreement. The agreed text was subsequently adopted by the Council in the first reading (April 2018) and Parliament (May 2018) (EPRS, 2018: 2).

Key factors and actors that determined the path and pace of the reform are described in the sections further below.

Modernisation of TDIs

The **reform of the EU trade defence mechanism** of 2018 brought about many changes, of which the following can be considered most important (European Commission, 2018a; 2018b; INTA Committee of the European Parliament, 2019: 10-11).

First, the distinction between market economies and non-market economies was eliminated when calculating the normal value[469] of the price, except in cases of non-WTO Members. For non-WTO Member that are non-market economies, the normal value is determined based on similar products in comparable markets. For WTO Members, it is calculated based on production costs. Actual costs, including raw materials, investment and R&D costs must be used in the calculation to the extent they are not distorted by government action. Should costs of production be distorted, corresponding costs of production and sale in a corresponding country with a similar level of economic development as the exporting country must be used. If there is more than one such country, preference must be given to countries with an adequate level of social and environmental protection (European Commission, 2017a).[470]

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[466] There have been some amendments to the previous Regulations following WTO case law regarding China (for example, Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community), but no major reform.

[467] The LDR prescribed to compare the dumping margin and the injury margin and to calculate the anti-dumping tax based on whichever is lower – as the lower value was considered sufficient to remove the injury suffered by the industry. Dumping margin is the difference between normal value in the country of origin and the export price. Injury margin is the level of anti-dumping or anti-subsidy duty required to remove the injury to the industry.

[468] Trilogue is an informal tripartite meeting on a legislative proposal between the EC, the EP and the Council. Its aim is to reach a provisional agreement on the text of the proposal that is acceptable to both the EP and the Council and, thus, to speed up the legislative procedure. Trilogue meetings can be organised at any stage of the legislative procedure. For more information see: https://www.europarl.europa.eu/ordinary-legislative-procedure/en/interinstitutional-negotiations.html , last visited 12.10.2020.

[469] Normal value is the standard price which is used as a benchmark price to compare export prices.

[470] Regulation (EU) 2017/2321 of the European Parliament and of the Council of 12 December 2017 amending Regulation (EU) 2016/1036 on protection against dumped imports from countries not members of the European

Second, according to the compromise suggested by the Slovak Presidency, the application of LDR has been modified. The EC will no longer apply the LDR in two situations: 1) in case of systemic raw materials distortions in the exporting country and 2) in case that the countervailable subsidies granted by third countries are distortive to trade. The EC may decide not to apply the LDR if this is in the Union interest and if it can waive it for companies considered to be non-cooperating.

Both the elimination of the distinction between market and non-market economies for the calculation of the normal value as well as the possibility not to apply the LDR have been a direct reaction to the expiry of China's non-market economy status and growing overcapacities in Chinese steel and aluminium production.

Third, timeframes for the introduction of the EC's provisional trade defence measures have been shortened. While previously the EC had nine months, now it can impose provisional measures not later than seven months from the start of the proceedings.[471] While this allows for faster relief from unfair competition for companies, the new deadlines will put more pressure on the EC and interested parties submitting evidence (for instance, the extension of deadlines for evidence and comments will be unlikely).

Fourth, transparency and predictability of the procedure have been increased. A pre-warning mechanism was introduced to inform all interested parties three weeks in advance about the imposition of provisional trade defence measures. This allows companies, especially SMEs, to prepare for changes in the market. To prevent importers from abusing the advance warning and stockpiling to avoid the impact of provisional duties, a system of compulsory registration has been introduced (Hoffmeister, 2020: 220). Together with the advance warning, the EC shall request national customs to register imports. The recorded information will be later used to determine the injury margin. Another measure to increase transparency and predictability obliges the EC to publish its own assessments of country-level or sectoral market distortions (European Commission, 2017b).[472] This should help companies, particularly SMEs, initiate trade defence procedures and prove unfair competition.

Fifth, the reform introduced several measures to facilitate SMEs' access to TDIs. A special SME Trade Defence Helpdesk was created to provide more and better information and practical help and advice.[473] Questionnaires for companies will be simplified. For sectors consisting mainly of SMEs, investigation periods shall coincide with the financial year, if possible. This last measure would be more practical for SMEs whose auditing and other documents typically cover the full financial year (and not, for example, individual quarters) (Hoffmeister, 2020: 225-226). All this should encourage SMEs to submit evidence to the EC and maybe even initiate investigations.

The changes around transparency and predictability of TDI procedures and measures to facilitate SMEs' access to TDIs have been brooding for almost ten years. As early as 2010, a study by Gide Loyrette Nouel (2010) on behalf of the EC identified great many difficulties European and third-country SMEs experience in this regard at all stages of the procedure.

Sixth, environmental and social interests have been anchored into trade defence procedures. As mentioned above, environmental and social costs need to be considered when the normal value is calculated. Trade unions can now either submit a complaint to the EC and, thus, initiate investigation or support complaints by industry associations. It remains to be seen how often and in what manner trade unions will use these new powers, but they are likely to increase the visibility of social and labour concerns.

Union and Regulation (EU) 2016/1037 on protection against subsidised imports from countries not members of the European Union, OJ L 338 of 19.12.2017.

[471] This timeframe can be extended but provisional measures cannot be imposed later than eight months from the start of the proceedings.

[472] A similar report on Russia is being prepared by the consortium CASE, NUPI and LSE Consulting: https://www.nupi.no/nupi_eng/About-NUPI/Projects-centers/Report-on-significant-distortions-in-the-economy-of-the-Russian-Federation-for-the-purpose-of-trade-defence-investigations , last visited 12.10.2020.

[473] See DG Trade – Help for SMEs: https://ec.europa.eu/trade/policy/accessing-markets/trade-defence/actions-against-imports-into-the-eu/help-for-smes/ , last visited 12.10.2020.

Protection of EU interests

To ensure EU interests are protected even if the WTO system and the DSM in particular are paralysed, the EC initiated three measures. First, it prepared a proposal for the amendment of the EU Enforcement Regulation (European Commission, 2019c; 2019d). The current Regulation requires that a dispute passes all stages of the WTO dispute settlement process (including the Appellate Body) and obtains a binding adjudication before the EU can take these countermeasures. A non-functioning WTO Appellate Body blocks the possibility of EU countermeasures. The amendments suggested by the EC extend the scope of the Enforcement Regulation to allow for action if dispute settlement procedures are blocked.

Second, in response to the recent DSM crisis and awaiting a more permanent solution, the EU created a temporary trade dispute appeal system with several WTO Members, including Australia, Brazil, Canada, China, Mexico and Singapore (European Commission, 2020a). The multi-party interim appeal arbitration arrangement (MPIA) became effective on 30 April 2020 (European Commission, 2020b), and on 31 July 2020, a pool of ten arbitrators was appointed making the mechanism fully operational (European Commission, 2020c). The MPIA is based on the arbitration procedures under Article 25 DSU and allows to maintain a two-tiered dispute settlement system and achieve binding resolution of cases for the parties to the Arrangement.[474] The MPIA incorporated many innovative ideas to make trade litigation faster and more representative (e.g. effectuating the 90-day deadline for issuing the awards, mandates of arbitrators) (Dreyer, 2020a). While the MPIA secures the right to appeal for the signatories, it remains to be seen how effective it will be and what impact it will have on trade defence policy.

Third, the EC has appointed a Chief Trade Enforcement Officer (CTEO) (European Commission, 2020d). The CTEO should ensure better monitoring and enforcement of the implementation of the EU trade agreements, focusing on the trade partners' commitments to climate, environmental and labour standards (i.e. Trade and Sustainable Development chapters in EU's agreements) (Hogan, 2020; IEEO, 2020). However, at the moment, it is unclear whether the CTEO will have the mandate to take action and what kind of action (e.g. bring complaints, consult with trade partners who appear to be in violation, suggest rebalancing duties) if trade partners do not meet their commitments (Kim, 2020). Considering that the mandate of the CTEO has not yet been fleshed out, it is currently difficult to speculate about the effectiveness of this measure.

Key factors

Geopolitical factors

Many experts cite two **geopolitical factors** as a decisive influence on the speed and the character of the reform of the EU's trade defence policy in the last years: **China** (specifically, **its overcapacities in steel and aluminium production and the question of its MES**) and the **U-turn in US trade policy** (Koeth, 2019: 7; de Laroussilhe, 2019).

China has always been a special case in international trade. China is not the worst offender of the WTO rules. In fact, it is very much aware of the benefits of the world trade system for its economic model and, therefore, committed to WTO rules (Weiß, 2020: 26-27). Yet, China is a frequent target of EU's TDI. This is due to a combination of factors: the sheer size of China's economy, its key role in global supply chains, reliance on state-owned companies and its system of state capitalism (Weiß, 2020: 26; Koeth, 2019: 9).

The question of China's MES had been a concern since China joined the WTO in 2001 – and this question resurfaced with new urgency and significance in 2016 when China's non-market economy status under Article 15 (d) of the Chinese WTO accession protocol expired (see the box above for details).[475] The treatment of China as a non-market

[474] The full text of the Multi-party interim appeal arbitration arrangement pursuant to Article 25 of the DSU of 27.03.2020 is available at: https://trade.ec.europa.eu/doclib/docs/2020/march/tradoc_158685.pdf , last visited 12.10.2020.

[475] China's accession to the WTO, the Accession Protocol and specifically Article 15 have been subject to vigorous academic and political debate and also resulted in legal proceedings. For further information see, for instance,

economy makes it easier to prove dumping and to impose anti-dumping measures on goods imported from China (Koeth, 2019: 9; EPRS, 2015: 3).

China and the WTO

China acceded the WTO on 10 November 2001 based on the Accession Protocol that contained an unprecedented long list of specific conditions and commitments. The Accession Protocol includes a large number of obligations concerning many aspects of China's economy and trade that aimed to ensure that China aligns itself with the basic principles of the international trade system over the transitional period of five years and acts as a market economy. At the same time, these obligations were to provide transitory protection for other WTO Members from negative consequences of China's accession.

Of special importance for this case study is Article 15 (d) of the Accession Protocol, under which China agreed to be treated as non-market economy for the period of 15 years, unless a WTO Member explicitly recognises the market economy status in its domestic law earlier. Many WTO Members recognised China's market economy status, after which China has traded with these Members as a market economy. The EU, USA, Japan, Canada and some others that frequently use anti-dumping measures against Chinese exports did not recognise the market status as this allowed them to utilise a special methodology for calculating the dumping margin in anti-dumping measures. Under this methodology, to establish dumping, the normal value of exports is calculated using costs and profit margins existing in a surrogate third country and not in China itself. Using this methodology, dumping by Chinese exporters can be established easier and higher anti-dumping duties can be imposed on Chinese exports.

The large overcapacities in steel production that China had accumulated over the years exacerbated concerns over its MES. While the capital-intensive steel industry is prone to overcapacities and many countries develop them, China's excess capacities were enormous and growing steadily since 2000. Chinese attempts to remove them were judged as insufficient by experts (Ernst&Young, 2016: 13-14; Price et al., 2016). The overcapacities amounted to more than double of EU's annual steel production and led to a price collapse on global markets and ten new trade defence procedures in 2015-2016 (European Commission, 2016a). Considering that the EU is the second-largest steel producer after China, leading in technology and has 1.3 percent of the EU's GDP and 328,000 direct jobs depending on the steel industry, the EU had to find a political solution. Changing the treatment of China as a non-market economy in this situation could have been detrimental to the EU industry that would not be able to compete with China's low-priced steel. Similar concerns arose in the aluminium sector (OECD, 2019; European Commission, 2017b).

Import-competing industrial stakeholders see China as a highly problematic trade partner and market participant and are largely supportive of the EU's trade defence policy towards China. They consider TDIs imposed against Chinese imports as having different qualities and being in a completely different league than other trade defence measures because they are trying to level or even create a level playing field for companies coming from completely different systems. Such TDIs need to account for a much broader non-market element of the Chinese economy in the situation of considerable market distortions, lack of transparency on cost structures and prices as well as very fast and large-scale economic development.

As noted above, both the growing overcapacities in Chinese steel production and the MES question shaped the reform of the EU's trade defence policy (Curran and Eckhardt, 2020: 156; Weiß, 2020: 32; Koeth, 2019: 11-12), specifically getting rid of the LDR and the elimination of the distinction between market and non-market economies.

The **"America first" policy in foreign trade and the crisis of the WTO DSM** induced by the Trump administration are important factors that continue influencing the EU's trade defence policy.

Under the Trump administration, the US has focused more on the national interests and returned to power-based trade policy. Experts (for example, Mildner, 2020; Woolcock, 2019: 6) observe that the US sees trade as a zero-sum game (e.g. exports are good, but imports are bad). This mercantilist – or binary – view guides many of the trade policy decisions and actions. Accordingly, the use of TDIs (anti-dumping and countervailing duties) and threats to

WTO (2001) and (2016a); Gao (2007); de Marcilly and Garde (2016); Zhou and Peng (2018); Mavroidis and Sapir (2019).

use them have intensified dramatically.[476] Many of the TDIs are aimed at EU imports into the US, for example, aircraft, coffee, machinery and tools, cheeses, butter, yoghurt, olive oil, frozen meat and others.[477]

Another significant but very controversial trade measure was the permanent increase of customs duties on almost all imports of steel (25 percent duty) and aluminium (10 percent duty). This was based on Section 232 of the US Trade Expansion Act that allows an "adjustment" of imports by an executive order if these imports were identified as a threat to "national security" which was described in this case as the need to ensure profitability and viability of the industry (Allard, 2018). The use of Section 232 is a novelty for US trade policy. A similar "national security" assessment was made in relation to imports of cars and car parts, but Trump administration decided not to impose any immediate tariffs and ordered a review on the decision on tariffs up to 25 percent (Euractiv, 2020).[478] The EU regards the steel and aluminium tariffs unjustified, being safeguard measures in disguise and, therefore, inconsistent with the GATT security exceptions. The EU, therefore, introduced rebalancing measures and launched legal proceedings at the WTO on 1 June 2018 (European Commission, 2018c).

Furthermore, since 2017, the US has been blocking the appointment of new members to the Appellate Body of the WTO, due to several concerns over the functioning of this adjudicator (US Trade Representative, 2020). The criticism of the WTO DSM has been expressed by many (for example, van Damme, 2010; Lang, 2015; Kawase et al., 2019). However, experts found that TDIs may be the main reason for US criticism and actions. Under the WTO, nearly two-thirds of disputes brought against the US concerned TDIs (Bown and Keynes, 2020: 12), and the US typically lost these cases.[479] This may have added to the lack of popularity that the Appellate Body suffered among some US stakeholders from the start(Bown and Keynes, 2020: 13-14). Also, the US criticises the Appellate Body for limiting the ability of the US to use TDIs and for being hostile to TDIs its jurisprudence (Fabry and Tate, 2018: 10-12).

The US blockade of the appointments to the Appellate Body rendered this mechanism non-operational in December 2019 (Borderlex, 2019). In addition, under the threat of a veto, the US forced other WTO Members to reduce funding for Appellate Body members significantly (Baschuk, 2019). With the Appellate Body not able to guarantee the right to appellate review of WTO panel decisions and to deliver binding resolutions of trade disputes (many of which relate to trade defence measures), WTO Members are likely to stop using the WTO DSM in the near future (Payosova, Hufbauer and Schott, 2018: 9). Experts (for example, Erken, 2019; Hestermeyer, 2020) also suspect a strategic intention behind the US actions towards the Appellate Body. If the WTO DSM collapses, the countries will have to go back to the GATT rules of dispute settlement, which had a diplomatic and therefore more power-oriented regime.

Impact of other EU policies

In interviews with stakeholders, the question was raised whether other EU policies (i.e. environmental, competitiveness and innovation, social policy) had any impact on EU trade defence policy and trade defence measures. The perceptions of interviewees have been mixed. Some of them observe that, just like with TSD in free trade agreements, considerations stemming from EU climate change policies,[480] social policies[481] and innovation policy do receive attention, especially when they relate to the economic injury suffered by the industry. Other interviewees note that, while such considerations are indeed raised in trade defence procedures, they are not properly investigated or considered. The reason for this is likely that the WTO does not recognise social or environmental dumping as a valid basis for trade defence, which is not going to change soon. Yet other

[476] The scholars Chase, Sparding and Mukai (2018) calculated that in the first 20 months of the Trump administration the use of anti-dumping and countervailing measures grew 221 percent.
[477] See the lists of affected products and applicable tariffs at: http://prime-policy.com/tracking-tariffs-and-trade/ , last visited 12.10.2020.
[478] The Panel report in the case United States — Certain Measures on Steel and Aluminium Products, WT/DS548 is expected in autumn 2020: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds548_e.htm , last visited 12.10.2020.
[479] The USA won only 2 out of 29 disputes on appeal, see the research by Fabry and Tate (2018).
[480] For example, CO^2 emissions reduction targets and green economy.
[481] For example, the types of jobs are created as a result.

stakeholders do not perceive any noteworthy influence of the EU environmental, social or innovation/ competitiveness policies in the trade defence area at all. This perception can be explained by the nature of TDIs and the procedure of their application (i.e. both are driven by the demands of the industry).

Key actors/ players

Trade defence policy is a demand-driven domain, especially in terms of the use its instruments and procedures. Our research has not identified any noticeable impact from the academia in the context of the trade defence reform.

International institutions

Except for the WTO, international institutions seem to have had a limited impact on the EU trade defence policy. As explained previously, the WTO system has provided a framework shaping the development of the EU trade defence policy and law, and the WTO DSM plays a pivotal role in the application of TDIs by the EU. However, due to the ongoing DSM crisis described, the importance of the WTO and its DSM has been in decline. At the same time, the crisis of the WTO DSM has triggered the EU's actions towards strengthening its trade defence enforcement, and Article 25 DSU provided a legal basis for the newly created MPIA.

EU institutions and Member States

EU institutions are key actors in the development of trade defence policy and its application and implementation, although the Lisbon Treaty has modified their roles.

The **Lisbon Treaty elevated the EP's role in trade policy** in general,[482] which has implications for trade defence policy. According to Article 207(2) TFEU, the EP participates on an equal footing with the Council in "defining the framework for implementing the common commercial policy", meaning that the EP co-decides on general legislation regarding trade defence (e.g. adoption of basic trade defence regulations as opposed to specific trade defence measures) (Eeckhout, 2011: 458-459). The EP demonstrated the newly acquired power when it passed – with an overwhelming majority – a resolution on not granting the MES to China.[483] The resolution, while not a binding document, sent a strong signal that the granting of the MES to China would not be acceptable. This was one of the factors that forced the EC to draft a new proposal that would circumvent dealing with the MES of China directly (Politico, 2017). The EC's new proposal contained a country-neutral approach as it eliminated the distinction between market economies and non-market economies for the choice of the calculation methodology. Instead, the new methodology captures "substantial market distortions" and differentiates between WTO members and non-WTO members (European Commission, 2016b; Grieger, 2017).

With the application of the comitology procedure to trade defence (specifically to the TDI Committee consisting of MS),[484] the EP obtained a right of scrutiny of anti-dumping or countervailing measures imposed by the EC. While this is only a limited involvement, it is an important step towards democratic overseeing the EC's implementation of trade policy and legal framework.

The Lisbon Treaty **enhanced the role of the EC in the application and implementation of specific anti-dumping and anti-subsidy measures, while the influence of the Council (and therefore MS) has reduced**. The EC now takes the final decision on trade defence measures and not the Council. MS (through the TDI Committee) can oppose measures suggested by the EC only by a qualified majority, which makes it harder to block decisions. The *Eurocoton* case[485] further clarified and limited the possibilities for MS to refute the trade defence measures proposed by the EC. The MS need to issue a "statement of reasons" that draws on the Basic Anti-Dumping Regulation and

[482] For detailed analysis see van den Putte, de Ville and Orbie (2014).
[483] European Parliament resolution of 12 May 2016 on China's market economy status, 2016/2667(RSP).
[484] Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, OJ L 55 of 28.2.2011.
[485] Case C-76/01 P, ECLI:EU:C:2003:511.

legally refutes the EC's reasoning in at least one of the three fundamental tests. The changed role of the TDI Committee in combination with these requirements render trade defence procedures less politicised as MS cannot object to the EC's measures on purely political grounds (FreudIsperger, 2014: 9-10). Trade defence measures are likely to be driven more by the joint Union interest, which is a compound of interests of different groups. Many stakeholders see the EC as an arbiter. However, some stakeholders do not share the view that the EC remains impartial but argue that it is rather protective of the interest of established EU industries.

Some experts and stakeholders observe that the reduction of the space for the political process in the anti-dumping and anti-subsidy procedures in the EU may have some negative consequences (Dreyer, 2020b). On the one hand, the lack of possibility to argue out the difference of views may lead to more entrenched national positions and division lines. On the other hand, MS may seem to agree with trade defence measures suggested by the EC in order to open the road for challenging them in EU courts. Instead of political negotiations on optimal trade defence measures in the TDI Committee, the solutions are found in the course of litigation. This has **increased the importance of EU courts for trade defence policy**. EU courts have always played an important role in examining the compliance of trade defence measures with EU law. Yet, since 2012, the General Court of the EU has been handling a seriously increased workload, dealing with trade defence measures challenged by affected exporters/ importers (see Table 3). At the same time, the number of new trade defence investigations launched by the EC has been the same or lower than before the Lisbon Treaty.

Table 3 Trade defence cases in the General Court of the EU and launched by the European Commission

	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018
New cases at the General Court of the EU (challenging the measures by the EC)	19	10	16	17	13	16	23	33	37	20	34	20	15
New trade defence cases initiated by the EC	36	9	20	21	18	21	19	9	16	14	15	11	10

Source: European Commission, based on the annual TDI reports 2007-2019.

Still, industry, trade unions and NGOs perceive the **Council and MS as very powerful actors**. Groups of MS, with different traditions and philosophies of foreign trade were directly responsible for the blockade of the negotiations of the EU trade defence reform package. The United Kingdom and the Nordic countries were against changing the LDR rule, while Germany, France and Italy demanded more protection for their businesses. Experts and insiders at the time explained this as a "historic disagreement between Europeans on the question of lesser duty"(Barbière, 2016). The advocates of free trade (the UK, The Netherlands) were ideologically opposed to any change to the LDR scope because they saw any kind of protectionism as harmful for the economy. Countries with large automotive industry (Germany, France, Italy) that relied on cheap steel imports (Zalan, 2016b) wanted to change the LDR to strengthen they industries. Other experts (Felbermayr, 2016) pointed out that many MS (specifically Germany, The Netherlands, Austria and Scandinavian countries) benefitted significantly from Chinese imports. But most Southern European MS, including France, were strongly hit by Chinese imports. Yet, Scandinavian countries and The Netherlands were against the new LDR legislation, while France and Italy supported it. At the same time, individual MS (i.e. Slovakia) played an essential role in resolving this gridlock.

Business stakeholders and civil society

In the formulation and development of trade defence policy, MS and EU institutions orient themselves primarily at the import-competing industry concerns, but also listen to **civil society**. An example of the influence by the latter is the occasional **inclusion of environmental and social aspects** in the calculation of normal value as a result of

the trade defence reform.[486] The demands of **trade unions concerning the LDR were also considered** (Curran and Eckhardt, 2020: 156).[487] Trade unions wanted the LDR abolished completely, yet a compromise solution was found with a full dumping margin applicable to duty rates for imports produced with raw materials and energy that were provided at "artificially low" prices.[488] Trade lawyers advocated for the increase in the transparency of trade defence procedures.

Interviews and desk-based research show that **industrial stakeholders** were **instrumental** in influencing the EU's decision **not to grant the MES** to China – contrary to the agreed rule in China's Accession Protocol to the WTO. Early in the process (in 2015), AEGIS Europe developed a very strong position advocating robust TDI and opposing any lighter treatment of Chinese producers. AEGIS was very vocal and took the lead, with BusinessEurope and ETUC bringing the weight of all industry and trade unions, respectively, a little bit later. In 2017, 92 European industry associations were mobilised and expressed their support for the position formulated by AEGIS, BusinessEurope and ETUC.[489] EU institutions took their cue from these actions.

Business stakeholders still play a **significant role in all trade defence procedures (i.e. implementation and application of trade defence measures)**. All interviewees agree that import-competing sectoral/ industrial interest is the utmost importance to drive the complaint – both to lodge it and to bring it to successful completion. Even where the case is started by the EC ex officio, active support by the industry (e.g. provision of evidence of injury to the business) is indispensable. This is linked to the requirement of the WTO rules that application for anti-dumping measures must be brought "by or on behalf of the domestic industry", which would demonstrate sufficient support of the measure by domestic producers.[490]

Interviewees noted that **some business actors are more heavy users of the trade defence system** than others. Based on the number and frequency of complaints and the activity during the procedures, metals and steel, ceramics and bicycles manufacturing industries stand out, whereas other industries (e.g. chemical) seem not to be interested. Interviewees pointed out that the difference in demand for trade defence measures by different industries can be explained by various factors, such as low price sensitivity of a given product, low strategic interests concerning exporting/ importing, lack of knowledge about potential benefits of using TDI strategically or having other means and ways to deal with trade-related problems (for example, having an ear of a ministry that can engage diplomatic channels to help advance a solution; having enough economic power such that some competitive market pressure can be put on the importers; employing public relations and marketing tools).

Biodiesel case

Case summary

Early 2010, Argentina and Indonesia emerged the first and second largest biodiesel suppliers to the EU market (USDA Foreign Agricultural Service, 2019: 33). Anti-dumping proceedings concerning imports of biodiesel originating in Argentina and Indonesia were initiated in 2012 based on the complaint filed by the European Biodiesel Board (EBB) on behalf of the EU biodiesel producers (European Commission, 2012).

The investigation by the EC found that imports of biodiesel originating in Argentina and Indonesia were dumped, causing injury to the EU industry. Therefore, in May 2013, the EC adopted Regulation No 490/2013 imposing a

[486] For the explanation on how environmental and social standards will be considered see European Commission (2018a).
[487] See the trade unions' position formulated by IndustriAll (2017).
[488] See Recital 4 of European Commission (2016b).
[489] See industry statements and declarations related to China's non-market economy status on the AEGIS website: http://www.aegiseurope.eu/resources , last visited 12.10.2020.
[490] See Article 5 of the WTO Anti-Dumping Agreement.

provisional anti-dumping duty on these imports.[491] In November 2013, the EC finalised its investigation and imposed definitive anti-dumping duties.[492]

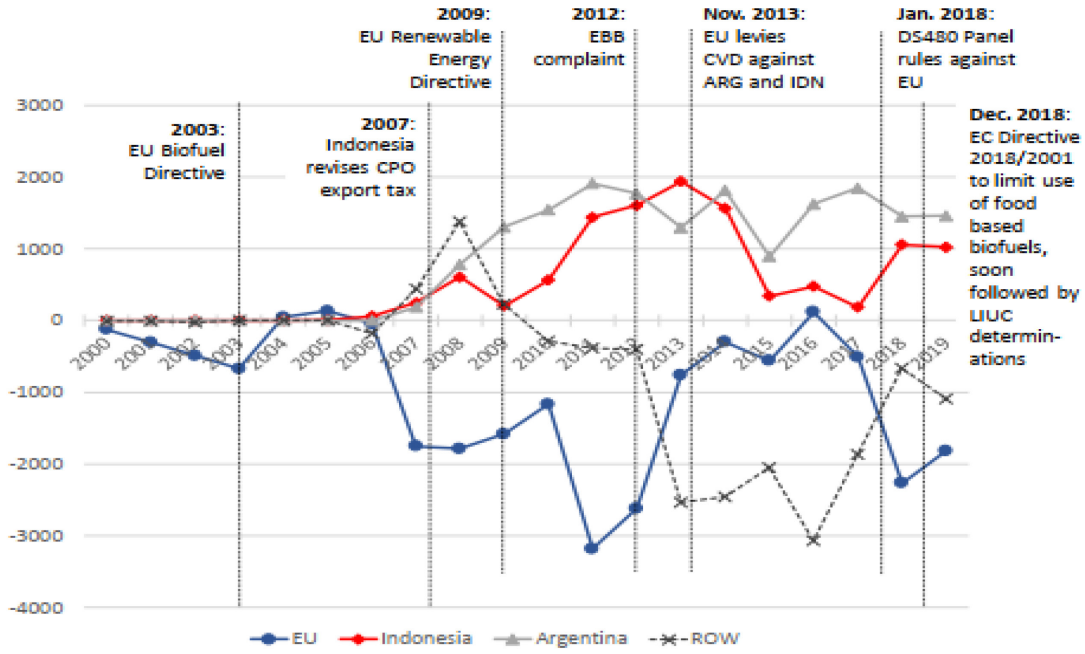
These measures were challenged by the affected Indonesian companies in the EU courts and by the Indonesian and Argentinian governments in the WTO Dispute Settlement Body. Both the General Court of the EU,[493] two panel reports of the WTO DSB[494] and an Appellate Body report[495] regarding the anti-dumping measures found fault with EC's calculation of the cost of production of the producers under the investigation. Specifically, the EC failed to make the calculation based on the records kept by the producers and did not use the cost of production in the country of origin when constructing the normal value. The DSB additionally found that the EC failed to establish the existence of significant price undercutting (i.e. biodiesel imports harming the price of the EU domestic biodiesel) and imposed anti-dumping duties in excess of the actual margins of dumping. The General Court of the EU also pointed out that the EC did not establish a sufficient causal link between the dumped imports and the injury suffered by the EU industry.

Following the court rulings and DSB reports, the EC re-investigated both cases and re-assessed the anti-dumping measures. The EC found that, while imported biodiesel was sold at dumped prices and in exponentially increasing quantities in the EU, the European biodiesel industry was itself working at overcapacity. This meant that the EU biodiesel industry had inflicted some injuries on itself, and the EC could not establish that there was a genuine and substantial causal relationship between the dumped imports and the material injury to the Union industry. In autumn 2018, the anti-dumping duties against Argentina and Indonesia were lifted and the proceedings terminated.[496] Argentina and Indonesia re-emerged as the major biodiesel suppliers to the EU (Bioenergy International, 2019). Figure 10 below illustrates the progress of the case and its impact on the biodiesel imports.

However, in October 2018, the EBB filed new complaints regarding Indonesia's subsidy schemes and regarding Argentina's subsidies to biodiesel producers. This time, the investigation period covered the time from 1 October 2017 to 30 September 2018 for Indonesia and the year 2017 for Argentina. After an investigation, the EC imposed definitive countervailing duties on imports of Argentinian biodiesel on 11 February 2019 and on Indonesian biodiesel on 28 November 2019.[497] For Argentinian biodiesel, the EC also established price and volume limits, not disclosed publicly.[498] Affected Indonesian companies filed complaints against the EC decision with the General Court in 2020, the proceedings are pending.[499]

[491] OJ L 141 of 28.05.2013.
[492] Council Implementing Regulation (EU) No 1194/2013 a definitive anti-dumping duty on imports of biodiesel originating in Argentina and Indonesia, OJ L 315, 26.11.2013.
[493] Case T-80/14 ECLI:EU:T:2016:504, Case T-111/14 ECLI:EU:T:2016:505, Case T-120/14 ECLI:EU:T:2016:501, Case T-121/14 ECLI:EU:T:2016:500 and Case 139/14 ECLI:EU:T:2016:499.
[494] WTO (2018). European Union – Anti-Dumping Measures on Biodiesel from Indonesia, Panel Report WT/DS480/R and Add.1; WTO (2016b). European Union – Anti-Dumping Measures on Biodiesel from Argentina, Panel Report WT/DS473/R and Add.1, as modified by Appellate Body Report WT/DS473/AB/R.
[495] WTO (2016c). European Union – Anti-Dumping Measures on Biodiesel from Argentina, Appellate Body Report WT/DS473/AB/R and Add.1.
[496] Commission Implementing Regulation (EU) 2018/1570 of 18 October 2018 terminating the proceedings concerning imports of biodiesel originating in Argentina and Indonesia, OJ L 262, 19.10.2018.
[497] Commission Implementing Regulation (EU) 2019/244 of 11 February 2019 imposing a definitive countervailing duty on imports of biodiesel originating in Argentina, OJ L 40 of 12.02.2019; Commission Implementing Regulation (EU) 2019/2092 of 28 November 2019 imposing a definitive countervailing duty on imports of biodiesel originating in Indonesia, OJ L 317, 9.12.2019.
[498] Commission Implementing Decision (EU) 2019/245 of 11 February 2019 accepting undertaking offers following the imposition of definitive countervailing duties on imports of biodiesel originating in Argentina, OJ L 40, 12.2.2019.
[499] Case T-143/20, Case T-138/20 and Case T-111/20.

Figure 10 Trade balance by country and timeline of EU's policy interventions



Source: Fischer and Meyer, 2019: 8, based on OECD data.

Key factors

Economic factors were extremely important driving the biodiesel case.

The EU has been the world's largest producer and consumer of biodiesel.[500] The term "biodiesel" refers to two types of biofuels: fatty acid methyl ester (FAME) and hydrogenated vegetable oil (HVO).[501] EU consumption of biodiesel has been driven mainly by MS' biofuel use mandates (see Textbox below) and, to a lesser extent, tax incentives (TNO, 2010: 10; USDA Foreign Agricultural Service, 2019: 26). In the EU, biodiesel is mainly consumed by transport. In this context, the preference of Europeans (especially in certain MS) for diesel cars is an important factor because FAME biodiesel is not used as a separate biofuel but blended with conventional diesel.

EU Policy on Renewables

The EU Energy and Climate Change Package, including the Renewable Energy Directive, adopted in 2009 set out a 10 percent minimum target for the share of renewable energy sources in the transport sector in 2020. This target was increased to 14 percent by the successive Renewable Energy Directive II (in 2018). It has been recognised that significant share of these renewable energy sources can be brought to the market by encouraging the use of biodiesel in diesel and bioethanol in petrol.

To operationalise this target, most EU MS adopted **minimum biofuel use mandates** at the national level. These mandates oblige fuel suppliers to put a percentage of total fuels that they sale for consumption as biofuels. In this way, mandates ensure the consumption of a large part of needed biofuel volumes in individual MS. The mandates vary from country to country and per year.

The policies of demand stimulation for biodiesel in the EU have been matched by measures for supply stimulation, in particular by the obligatory programmes to set aside agricultural land for non-food oilseeds under the EU

[500] See the relevant data in UFOP (2019).
[501] FAME and HVO differ in their production and cost: among other things, HVO is more complex and therefore expensive in production. At the same time, FAME and HVO have different physical properties: HVO can be used at lower outside temperatures and is therefore more widespread in the Northern Europe.

Common Agricultural Policy (CAP) that were used mainly for biodiesel production. After the adoption of the EU Energy and Climate Change Package[502], the production was further fostered by MS' biofuel use mandates and the resulting increased demand (European Commission, 2007; USDA Foreign Agricultural Service, 2019: 25-26; Bockey, 2019). In addition, high oil prices encouraged the use of blended biodiesel.

From the start, demand for biodiesel in the EU exceeded supply, and EU consumers had to rely on imported biodiesel. Despite the incentives for biodiesel production, the EU industry failed to benefit fully from the increased demand. The reason for this was perceived by the EU industry to be the imports from Argentina and Indonesia. Both countries are large producers of raw materials at low prices (palm oil for Indonesia and soybeans for Argentina), which translated into competitive prices of their biodiesel on the global markets. The low domestic prices for raw materials were largely construed by the governments through heavy regulation. Both countries also supported their biodiesel industry with differentiated export tax (DET) systems (Fischer and Meyer, 2019: 5-7).

In response to the complaint by the EBB, the EC's anti-dumping investigation found that the DET on biodiesel was lower than DET on raw materials. This artificially limited exports of raw materials and led to distortion of the cost of production of biodiesel producers domestically. The domestic prices on raw materials were depressed by comparison to international reference prices. At the same time, as mentioned above, these low prices for input materials in combination with the DET system guaranteed the low prices of Argentinian and Indonesian biodiesel.[503]

The DET could be considered a de facto subsidy to the biodiesel industry of Argentina and Indonesia: the high DET on raw materials kept the associated costs artificially low for biodiesel producers and, thus, helped offset the corresponding EU tariffs. However, such measures might have been covered by the subsidy definition of the WTO Subsidies and Countervailing Measures Agreement[504] because it was not provided by the governments directly to biodiesel producers. Instead, the DET redistributed from the producers of raw materials to biodiesel producers. The governments then regulated and supported the soy and palm oil producers, outside of the DET system.[505]

Whether the DET system can be considered a subsidy within the meaning of the WTO Subsidies and Countervailing Measures Agreement may be decided in the wake of the countervailing duties, recently imposed by the EC. Also in this case, the complaint by the EU biodiesel industry highlighted the threat from soaring biodiesel imports. The EU industry claimed that it has been lacking marketing opportunities, and its "production capacities have not been fully used for many years" (Bioenergy International, 2019).

The EC found that both Argentinian and Indonesian imports were subsidised. In the case of Argentina, the EC concluded that, due to very high DET, soy farmers were discouraged from exporting raw materials and directed instead to sell them to domestic biodiesel producers below market price. In this manner, the high export tax for soy farmers translated into a subsidy (in the form of guaranteed low prices) for biodiesel producers. In the case of Indonesia, the EC established four subsidy schemes, two of which are similar to the Argentinian scheme and others are direct financial contributions and government revenue forgone or not collected.[506]

[502] For the summary of the policy and relevant documentation, consult the EC website on the 2020 climate and energy package: https://ec.europa.eu/clima/policies/strategies/2020_en#tab-0-0 , last visited 12.10.2020.
[503] For detailed investigation into the pricing of biodiesel in Argentina and Indonesia and impacts on the EU industry, see Fischer and Meyer (2019).
[504] See Article 1 of the WTO Subsidies and Countervailing Measures Agreement for the definition of subsidy, which requires the government or a public body to provide a contribution to the benefitting companies.
[505] See the detailed explanation of the scheme in Crowley and Hillman (2018).
[506] For descriptions of these schemes see Commission Implementing Regulation (EU) 2019/2092 of 28 November 2019 imposing a definitive countervailing duty on imports of biodiesel originating in Indonesia, OJ L 317, 9.12.2019.

Key actors

Business stakeholders and civil society

The **biodiesel industry** represented by the EBB initiated the trade defence procedure and supplied evidence of injury to the EC. The EU's biodiesel and other biofuels producers were strongly supported by the EU vegetable oil and protein meal industry association (FEDIOL) and European Oilseed Alliance representing EU **suppliers of raw materials**. FEDIOL noted that cheap biodiesel imports from Argentina and Indonesia reduced the demand for rapeseed oil in the EU. FEDIOL expected a positive effect for its members if TDIs were imposed. According to interviewees, only some farmers opposed the TDIs fearing higher prices, but their arguments were not considered strong enough. Another supporter of the complaint brought by the EBB were trade unions, according to interviewees.

Environmental and consumer NGOs were not active in this case.

Users of biodiesel showed very limited interest in this case. Only a very few responded to the EC's questionnaire, indicating that they were obliged to buy biodiesel, and if the TDIs would increase the price of biodiesel, they would pass the increase to their customers.

EU institutions and Member States

During the trade defence procedure in the biodiesel case, the claimant (EBB) sought meetings both with the MS that accommodated large biodiesel industry and with MS with liberal trade philosophies (Nordic countries, The Netherlands) that are generally sceptical about using trade defence measures.

The positions of various MS on specific trade defence measures are not always clear-cut (in the sense that there is **not always a case of exporter countries versus importer countries**). For example, in the biodiesel case, the biggest supporters were France, Spain and Italy, which are some of the biggest consumers of biodiesel in the EU.

Germany, which is Europe's largest producer and one of the largest consumers of biodiesel, was slow to support TDIs for biodiesel. This is because of the coalition government that needed some time to formulate its position and consult with many internal stakeholders. The Netherlands that has a large biodiesel industry was not very supportive of TDIs for biodiesel, likely not only due to its liberal trade philosophy. The port of Rotterdam is the EU's most important import/ export hub, and the Netherlands (but also Spain) was the largest importer of biodiesel from Malaysia and Indonesia most of which were then re-exported to other MS. The Netherlands needed time to find ways of balancing interests among many internal stakeholders, given the relative size of its industry and the number of different stakeholders involved.

E-bikes case

Case summary

In 2017, the European Bicycle Manufacturers Association (EBMA) – a representative body of the European industry – filed two complaints[507] calling for an investigation into the dumping and subsidising of imports of electric bicycles

[507] See Executive summary of the Anti-Dumping Complaint under Article 5 of Regulation 2016/1036 concerning electric bicycles from China: https://trade.ec.europa.eu/tdi/case_history.cfm?id=2463&init=2292&publication=2294&action=readfile ; Executive summary of the Anti-Subsidy Complaint under Article 10 of Regulation 2016/1037 concerning electric bicycles from China: https://trade.ec.europa.eu/tdi/case_history.cfm?id=&init=2314&publication=2344&action=readfile , both last visited 12.10.2020.

(e-bikes) originating in China. The specific imports concerned are of cycles with pedal assistance that have an auxiliary electric motor (Combined Nomenclature codes 87116010 and ex 87116090). The EC conducted an anti-dumping and then an anti-subsidy investigation for the period from 1 October 2016 to 30 September 2017 and found that Chinese e-bike exporters benefitted from a subsidy scheme. In 2019, the EC imposed definitive anti-dumping duties and countervailing duties on several Chinese companies.[508]

These trade defence measures should be considered in the context and as a continuation of the anti-dumping measures applicable to conventional bicycles from China. Applied since 1993, they are the longest trade defence measures of the EU still in place against China. The EC considers them an outstanding example of effectiveness because without them "today the EU bicycle industry would not have existed" as well as the EU bicycle parts industry (European Commission, 2019b: 5). The EC also links the anti-dumping measures against conventional bicycles to e-bikes stating that, without them, a new electric bicycle industry would not have developed (European Commission, 2019b: 5).

The two EC's Regulations imposing anti-dumping and countervailing duties were challenged in the General Court of the EU in 2019.[509] The proceedings are currently pending.

Key factors

The economic factors played an important role in the case of e-bikes trade defence measures. The **EU market for e-bikes** is the second largest in the world (after China), and it has been growing significantly (CONEBI, 2017: 29). The trend continued in 2018 when in some countries (e.g. the Netherlands) there was a surge in e-bike sales with the highest turnover ever, representing ⅔ of overall turnover from bicycle sales (Bike-EU, 2019a). In major EU countries (e.g. Germany, France, the Netherlands), e-bikes now represent over 30 percent of the complete bicycle market, and prices per unit continue to grow (ABM, 2019: 32ff).

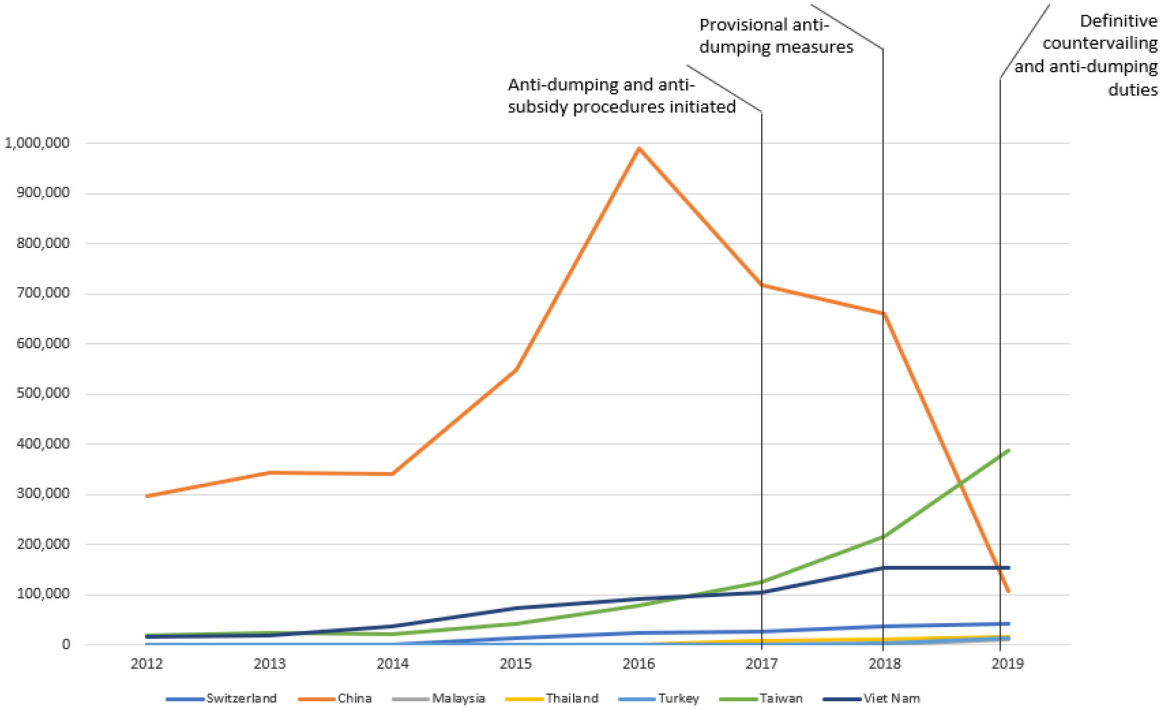
The EU bicycle and e-bike industry consists mainly of SMEs: there are 397 manufacturers in EU-27 employing 29,695 staff (EBMA, 2019: 5). Countries with the largest number of producers are Italy (111), Poland (69), Germany (44), Portugal (25) and the Netherlands (23). The Confederation of the European Bicycle Industries (CONEBI) reports that in 2015 and 2016, the EU industry produced 1,030,000 and 1,164,000 e-bikes, respectively (CONEBI, 2018: 17). Most e-bikes produced in the EU are also sold in the EU.

However, the surging demand for e-bikes had to be met through imported products, which were offered at lower prices than the EU products. Most imports in the EU were coming from China (see Figure 11 below). At its height in 2016, Chinese imports reached almost 1 million e-bikes accounting for around 60 percent sales in the EU. The EU industry – and industry in third countries – was struggling to compete with highly competitive Chinese imports.

The adoption of anti-dumping and countervailing duties against Chinese producers has been extremely beneficial for the EU production and internal trade that have developed rapidly to close the gap in supply left by Chinese producers. The e-bike industry in third countries and their imports to the EU have been growing as well (Bike-EU, 2019b).

[508] Commission Implementing Regulation (EU) 2019/73 of 17 January 2019 imposing a definitive anti-dumping duty and definitively collecting the provisional duty imposed on imports of electric bicycles originating in the People's Republic of China, OJ L 16, 18.01.2019; Commission Implementing Regulation EU 2019/72 of 17 January 2019 imposing a definitive countervailing duty on imports of electric bicycles originating in the People's Republic of China, OJ L 16, 18.01.2019.
[509] See Cases T-242/19 and 243/19.

Figure 11 Main sources of imports of e-bikes to the EU 2012-2019 (numbers of imported e-bikes)



Source: Eurostat Comext.

Key actors

Business stakeholders and civil society

The evolution of stakeholder positions in the trade defence cases in relation to conventional bicycles and e-bikes is remarkable. When the first anti-dumping case against Chinese and Taiwanese manufacturers of conventional bicycles was initiated in 1991, the European importers opposed the TDIs. However, with the anti-dumping measures being reviewed and extended for decades[510], the importers adjusted their supply chains and rely more on imports from other third countries and not China, according to interviewees. The EBMA has no opposition when requesting expiry reviews of the trade defence measures at the EC, and there was only a small opposition from European importers of Chinese e-bikes during the trade defence procedures (see further below). Some interviewees argued that the long-standing support for the TDIs on conventional bicycles was leveraged during the e-bikes case. Indeed, CONEBI supplied the EC with a lot of evidence and market research during the investigation that supported the complaint by EBMA. The Association of the European Two-Wheeler Parts and Accessories Industry (COLIPED) that represents national associations of parts suppliers for conventional bicycles and e-bikes also supported the imposition of TDIs.

In addition to the e-bike industry, the trade unions association industriAll and industry association AEGIS Europe were also supportive of the TDIs. The TDIs were further supported by national consumer associations (e.g. in Sweden, the Netherlands) and specialised consumer associations (i.e. European Cyclists' Federation – ECF). Environmental NGOs and green political parties and politicians see the bicycle industry as an important ally in reducing CO^2 emissions and therefore also support the industry's cause. While the question of the price increase that was likely to follow the introduction of TDIs was discussed, evidence was presented that the popularity of bicycles and e-bikes depend not on their costs but on national cycling culture and other factors. Consumer representatives maintained that quality and innovation are more important competitive factors for European

[510] The TDI on conventional bicycles are the lengthiest trade defence measures in the history. See the case history: http://trade.ec.europa.eu/tdi/case_history.cfm?init=1532 , last visited 12.10.2020.

consumers than price. The market research even showed that the countries with the fastest rates of e-bike adoption are those where e-bikes cost more.

Small opposition was offered by a small group called Collective of European Importers of Electric Bicycles (CEIEB) that represented 21 importers from seven MS. In the EC's documents they were often referred as "unrelated importers" meaning that they did not belong to CONEBI. The evidence from these importers suggested that their supply chains would be disrupted, and the increased costs related to the duties could not be passed to their customers. However, the EC did not consider this evidence strong enough, pointing out that supply chains could be adjusted, the number of exporting countries would be, in fact, expanded (just like it happened with conventional bicycles) and the prices would be fairer.

Interviewees indicated that the dividing line here was not between importers and EU manufacturers as at the start of the case of the conventional bicycle. Rather, it was a clash between the conventional bicycle manufacturers, who moved or intended to move into producing e-bikes, and a new (sector of) industry consisting of manufacturers that produce only electric bicycles, electric kick scooters and similar vehicles. This new industry has developed a different business model, different supply and distribution chains and also did not benefit from the existing trade defence measures for conventional bicycles.

Third countries

In the e-bike case, third countries were a noteworthy actor – also in a somewhat unexpected role. Naturally, third countries whose exporting and manufacturing industry may be negatively impacted by intended anti-dumping or anti-subsidy duties make a great effort to encourage their industry to participate in the EC's investigation by providing evidence and participating in hearings. In the e-bike case, some third countries sent letters supporting the intended imposition of TDI. The reason for this is that while anti-dumping or anti-subsidy duties cause a decrease in imports from the specific targeted country, they often lead to increased imports from other countries. In the case of conventional bicycles, countries like Sri Lanka, Bangladesh, Cambodia, Tunisia and the Philippines benefitted of the anti-dumping measures against Chinese companies and developed own bicycle manufacturing industry that is currently exporting to the EU. According to interviewees, during the e-bikes investigation, these countries sent letters to the EC expressing their support for trade defence measures.

Summary and conclusions

Over the last five years, the EU trade defence policy has undergone significant reforms. The speed, the direction and the concrete contents of the reform were strongly influenced by geopolitical factors as well as by the new allocation of powers among the EU institutions effectuated by the Treaty of Lisbon.

Strong geopolitical influence is linked to the continuous rise of China as an economic power, culminating in the critical overcapacities in steel and aluminium production and the question of China's market economy status. These two issues forced EU legislators both to act fast after years of dragging their feet on the reform and to make certain choices in with regard to the contents of the reform (for example, changing the LDR and the methodology for the calculation of the normal value).

Another geopolitical factor – the rise of nationalism in the US ("America first" policy) and more aggressive use of TDIs by the Trump administration – continues to unfold, and its implications are still in the making. Yet one of the implications – the WTO DSM crisis induced by the US – has already led to the decline in the importance of the WTO for trade defence. The actions by the US prompted the EU to look for new solutions and new alliances to uphold the global dispute resolution possibilities (i.e. establishment of the Multi-Party Interim Appeal Arrangement). They also forced the EU to strengthen its trade defence system, especially its enforcement aspect.

While the latest reforms and amendments to the EU trade defence framework seem to indicate a more protectionist turn, it remains to be seen how exactly they will be used. Most mechanisms have been enacted very recently (not earlier than 2018) or are in the process of being designed and set up (e.g. Chief Trade Enforcement Officer). Their

application and use should be monitored and evaluated in due course, with the view of the development of the global trade system.

The political negotiations on trade defence reforms at the EU level were affected by the predictable division between more protectionist MS and the proponents of free trade. The strong commitment of MS to compromise and find solutions in the face of inevitable geopolitical developments helped to break the gridlock. The principled position of such stakeholders as the EP on the market economy status of China or trade unions on social considerations in trade helped to shape the contents of the reform, compelling the EC to out-of-the-box thinking and formulating new proposals, specifically on how to address the question of China's market economy status.

The dynamics in trade defence cases do not always follow the simple exporters/ manufacturers versus importers dialectics. Often, stakeholders ally or clash over (potential) trade defence measures in unforeseen fashion, which may be linked to previous collaborations or breadth of representation, influence and activism of individual stakeholders. While the history of the trade defence cases related to conventional bicycles and e-bikes point to the power and finesse of certain business stakeholders, we would be cautious to draw such a conclusion with certainty. Equally important could be the coinciding interests of the different stakeholders or the strength of the legal case itself. We also note that even in situations of seemingly overwhelming support by the industry and other stakeholders, dissenting voices emerge: interests of established industries appeared to be different from those of emerging industries (e-bike case); a few farmers feared negative consequences where the high-tech industry sees benefits (biodiesel case).

Some stakeholders continue to play an important and respected role in the application of trade defence measures (e.g. the EC as an arbiter, the EU courts as a rule of law guardian). MS likely experience a game change with their decisive role challenged following the adoption of the Lisbon Treaty. In the policy development area, MS and the Council now need to share their power with the EP. In the implementation area, the decision power of MS has diminished: they can now only block with a qualified majority the proposals put forward by the EC. This means that liberally-minded MS (to which The Netherlands belong) have lost their blocking minority power.

By contrast to other areas of trade policy, the civil society, NGOs and academia do not seem to play a noticeable role in the formulation of the EU trade defence policy. At the application level, consumer organisations and trade unions are frequently active in submitting their comments to the EC to be examined as a part of the Union interest test. The trade defence reform provided for broader opportunities for trade unions' participation in trade defence procedures (e.g. they could lodge a complaint), and it remains to be seen how their role develops in the future.

Chapter 7: Outlook: 2020 and the Years Ahead

Bookending the time period of this evaluation study, the year 2020 was a historic one. Many of the factors and developments highlighted in the introduction and the case studies will continue to exert their influence. However, the COVID-19 pandemic and other events in 2020 will very likely also have a transformational impact on globalisation, value chains and mobility and hence on trade and investment patterns. If anything, a lesson from 2020 is that any forecast of the future is bound to be wrong. While a global pandemic was expected[511], no one would have been able to foresee what would unfold in 2020. Consequently, this section will abstain from forecasting the future, and will instead focus on current developments, developments that provide a glimpse of the future.

COVID-19 pandemic

With more than 130 million cases and almost three million deaths as of April 2021[512], the COVID 19 pandemic affected almost every country in the world and profoundly changed the way of life for the vast majority of the world's population. With the pandemic still raging, but new vaccines also providing a light at the end of the tunnel, it is still too early to anticipate the long-term impact of COVID-19. It might be forgotten in a few years, as was the case with the Spanish flu, or might have a transformational impact for years to come.

Any list of impacts would be long, but some are particularly worth highlighting in the context of trade and investment policy. COVID-19 has led to a global recession, with the contraction in GDP worse than the Great Depression or the 2008 Global Financial Crisis.[513] As a silver-lining, the recovery might be swifter, following a V-shape, especially after vaccines are being more widely deployed. However, universal and affordable access will be a huge challenge, especially in developing countries.

The impact of COVID-19 is particularly felt in sectors such as aviation, tourism and entertainment, given these industries' exposure to lockdown and travel restrictions. In turn, these sectoral impacts, imply that some countries are particularly hard hit, for example, smaller, tourism dependent countries. Travel restrictions have also affected trade in services by natural persons, and indirectly affected trade in goods, by creating logistical challenges in global transport. Other impacts of travel restrictions are hard to assess at this point. Whether these restrictions will lead to a shortening of global value chains, a reshoring of industries, and overall less cross-border trade and investment remains to be seen.

The impact on trade and investment has been exceptionally strong. Global trade in goods is forecasted to fall by 9.2 per cent in 2020. While a recovery of 7.2 per cent is expected for 2021, global trade will remain below the levels seen before the pandemic.[514] Global trade in services has been affected unevenly, with tourism, transport and distribution services strongly affected by travel restrictions, while e-commerce, digital trade and other ICT services have benefited.[515] The impact on FDI is even more pronounced than for trade, with global FDI flows estimated to have fallen by 42 percent in 2020. The impact was uneven, with FDI to developed economies having fallen more sharply than FDI to developing economies.[516]

[511] Preparing for a potential pandemic, the WHO created a research blueprint for priority diseases, including coronaviral diseases already in 2018. See Simpson et al. (2020).
[512] See https://coronavirus.jhu.edu, last visited 15.02.2021.
[513] See De Grauwe and Ji (2020).
[514] See https://www.wto.org/english/news_e/pres20_e/pr862_e.htm, last visited 20.01.2021.
[515] See WTO (2020a).
[516] See UNCTAD (2020)

However, beyond these headline figures[517] the potentially more long-lasting impacts have been in how trade and investment policy has responded to the pandemic. Governments have introduced export restrictions and prohibitions on medical and other critical supplies and in some cases even foodstuff and other consumer products.[518] Some of these restrictions have already been lifted or might be lifted in the near future. However, we might expect that in the long-term more emphasis will be placed on the reliability of supply chains of critical and intermediate products, through reshoring or nearshoring or supplier diversification (ILO, 2020). Furthermore, domestic subsidies and support schemes aimed at smoothing the impact of COVID-19 restriction on the economy or specific industries have the potential to lead to long-lasting distortions of trade.[519]

Multilateral institutions such as the WTO as well as the European Union have responded to the crisis. The response of the WTO was focused on the monitoring of trade restrictions and disruptions. A group of developing countries have requested a temporary suspension of obligations under the TRIPs-Agreement in order to stimulate local production and affordable access to vaccines to their people. The European Union response was more substantial, including, for example, centralised procurement of vaccines and a recovery plan for its own population. However, there is also a widespread perception that these institutions failed in their initial response to the unfolding crisis, unable to coordinate national responses and to rein in measures such as export restrictions, travel bans and potentially trade distorting subsidy programmes in countries that can afford them. The long-term impact of all of this is unclear, as it could range from a swift return to normal to a long-run loss in trust and goodwill in these institutions.

Lastly, COVID-19 also has geopolitical implications. For example, the competent and successful COVID-19 response of Taiwan has enhanced the countries' international standing and soft power.[520] Conversely, other countries' soft power might be negatively affected by a bungled COVID-19 response. Particularly interesting might be the implications for China, which on one hand could benefit from an ultimately successful response and an economic recovery that started earlier than in other countries. On the other hand, China as the country in which COVID-19 broke out first and perceptions of an inadequate initial response might negatively affect China's soft power.[521]

Other developments

While COVID-19 dominated 2020, other developments with implications for the future are also noteworthy. Geopolitically, the election of Biden promises change and a return to multilateralism, even if a full return to the policies before Trump seems unlikely. For example, while there might be more cooperation between the European Union and the US in areas of shared interest, issues such as the taxation of consumer-oriented or digital multinational enterprises or the regulation of technology companies remain sticking points.[522]

Expected, but transformational for the EU, is Brexit. With the transition period having ended on 31 December 2020, the Trade and Cooperation Agreement between the EU[523] and the UK is provisionally applying since then. The agreement provides for zero duties on all goods; however, rules of origin apply. Coverage of trade in services goes beyond GATS, but remains below the market access that would be implied by EU membership. The agreements foresees an independent arbitration tribunal instead of the European Court of Justice.[524] Reports in early 2021

[517] While current figures are dramatic, trade and investment is ultimately recover, with some indications that this recovery will be swift (Meijerink, Hendriks and van Bergeijk, 2020).
[518] See WTO (2020b).
[519] See http://www.oecd.org/coronavirus/policy-responses/government-support-and-the-covid-19-pandemic-cb8ca170
[520] See Aspinwall (2020).
[521] See Gill (2020, page 103).
[522] See https://www.tradetalkspodcast.com/podcast/142-can-biden-make-trade-boring-again, last visited 20.01.2021.
[523] Technically the EU and Euratom.
[524] See https://ec.europa.eu/info/sites/info/files/eu-uk_trade_and_cooperation_agreement-a_new_relationship_with_big_changes-brochure.pdf, last visited 20.01.2021.

suggest that border delays and frictions are one of the early impacts of Brexit. In Asia, China seems to have recovered from the COVID-19 recession more rapidly than other countries, potentially foreboding an even stronger economic and geopolitical role of China in the years to come. On the other side, there has been a geopolitical backlash, on Hong Kong, China's initial COVID-19 response, border clashes with India, or the looming debt crisis in countries China has heavily lent to.[525] A potentially transformational development in the Middle East has been the rapprochement between Israel, several Gulf countries and Morocco.

Beyond COVID-19 the WTO continues to face crises of its own, from the Appellate Body crisis to the larger issue of WTO reforms. However, the long search for a new Director-General (that was initially blocked by the Trump administration) came to an end in early 2021, with the election of Ngozi Okonjo-Iweala. This election might thus signal that other WTO issues might be resolved under the Biden administration, with potential WTO reforms particularly benefiting from a renewed cooperation between the European Union and the US.

Several preferential trade agreements have been concluded or came into force in 2020. This includes first and foremost the Regional Comprehensive Economic Partnership (RCEP), as a mega-trade agreement between ASEAN, China, South Korea, Japan, Australia and New Zealand. Similarly, the African Continental Free Trade Area has been signed by the majority of African countries and with ratification by more than 22 countries has come into force in 2020. With both trade agreements it remains to be seen how strongly and ambitiously they will be implemented. And yet, they might also herald a new era of mega-trade agreements covering large regions, if not continents. This development could cement regional bloc formation at the cost of multilateral liberalisation and rule-making, adversely affecting the poorest countries which need the multilateral system most.

Less visibly, we can also note the rise in digital trade agreements, mainly in Asia, heralding a new era in which digital trade is of increasing importance. These agreements cover a range of issues, such as privacy rights, digital identities or spam protection, and foresee a dialogue on emerging issues and technologies such as artificial intelligence or fintech.[526]

Lastly, climate change has continued to be an existential global issue, as also highlighted by the Australian bushfires dominating the news cycle in early 2020, before COVID-19 became the dominant and defining topic of the year. Climate change of course has and will continue to be important, at a deeply fundamental level, also with consequences for the international trade and investment system. With regards to trade and investment, an important discussion was and continues to be on the need and compatibility of carbon border tax adjustments. In some countries that tax greenhouse gas emissions domestically, these levies aim to re-establish competitiveness between domestic and foreign industries by levying a similar carbon tax on imports. However, it may have intended or unintended trade distorting consequences, especially if it is done unilaterally. These discussions have particularly concerned the EU legislative proposal on a carbon border adjustment mechanism.[527] These developments reinforce the need to better align the Paris climate agreement and the WTO agreements.

While 2020 is unlikely to be remembered fondly, there have also been breakthroughs in science and innovation that should give hope for a brighter future. Among these are mRNA vaccines against SARS-CoV-2. A new and revolutionary type of vaccine, these also hold promise against cancer and various viral diseases.[528] Major advances have been made in biology, for example, in the development of C4 rice, a genetically modified rice that promises a new green revolution.[529] Artificial intelligence has made breakthroughs in 2020, such as advancements in protein

[525] On the latter note the recent collapse in overseas lending by state-owned banks, see https://www.ft.com/content/1cb3e33b-e2c2-4743-ae41-d3fffffa4259, last visited 20.01.2021.
[526] See https://www.eastasiaforum.org/2020/07/10/building-on-the-modular-design-of-depa, last visited 20.01.2021.
[527] See https://www.europarl.europa.eu/legislative-train/theme-a-european-green-deal/file-carbon-border-adjustment-mechanism, last visited 20.01.2021.
[528] See Pardi, Hogan, Porter, and Weissman (2018)
[529] See https://phys.org/news/2020-11-c4-rice-reality.html, last visited 20.01.2021.

structure prediction by the AI program AlphaFold.[530] And lastly, with Crew Dragon Demo-2, the first crewed space flight by a private company took place in 2020, promising a new area in space exploration.

Conclusions

There is little doubt that 2020 was a historic year. COVID-19 in all its facets, impacting every country and almost any area, from politics over society to trade and investment, dominated the year. And yet, as highlighted above, several other developments were important and in some cases transformational. Whether the future will remember 2020 as a historic year or not, is not yet clear. In a few years COVID-19 might be forgotten in the same way the Spanish flu has been largely forgotten. Or, as seems more likely at the time of writing, COVID-19 will have a strong and forceful impact in the years to come.

What this impact will be is as uncertain as ever. While this final outlook sketched the most recent developments, the ultimate implications are not yet clear. With regards to trade and investment, we can be certain that it will remain an important policy arena, with manifold interfaces with other trade-or investment-related policy domains. We can also be reasonably certain to see a certain recovery in international trade and investment, once vaccines have been widely deployed and COVID-19 has run its course.

And yet so many other questions are open and uncertain. Will the EU emerge stronger, as a trade bloc and political union? Will there be a decoupling of major economic blocs, in particular in the digital sphere? Will recent mega trade deals such as the African Continental Free Trade Area be strongly implemented or will they remain an ambition, mostly on paper? Will there be a return to multilateralism or not? Will the WTO reform and emerge stronger than ever? Or will it diminish in importance as a negotiating forum? At this point we do not and cannot know.

[530] See https://www.technologyreview.com/2020/11/30/1012712/deepmind-protein-folding-ai-solved-biology-science-drugs-disease, last visited 20.01.2021.

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Annex A List of Interview Partners

Organisation	Interviewee	Position	Case study
BEUC – European Consumer Organisation	Léa Auffret	Trade Team Leader	Trade in Services Agreement
Business Europe	Sofia Bournou	Senior Adviser, International Relations Department	Investment Protection and Investor Duties
Business Europe	Eleonora Catella	Deputy Director, International Relations Department	Sustainable Development Chapters
Business Europe	Maurice Fermont	Senior Adviser, International trade	Trade Defence Instruments
Client Earth	Amandine van den Berghe	Lawyer, Trade and Environment	Investment Protection and Investor Duties Sustainable Development Chapters
Coalition of Services Industries	Christine Bliss	former Assistant U.S. Trade Representative (USTR) for Services, Investment, Telecommunication, and E-Commerce	Trade in Services Agreement
Department of Foreign Affairs	Mary Barrett	Assistant Principal, Multilateral Section, Irish Aid	Economic Partnership Agreements
DG Employment (International Issues)	Lluís Prats	Head of Unit	Sustainable Development Chapters
DG Environment (International Relations)	Javier Arribas Quintana	Senior Expert	Sustainable Development Chapters

	Natalija Dolya	International Relations Officer	
DG Trade (Dispute Settlement and Legal Aspects of Trade Policy)	Andre von Walter	Team Leader, Investment Dispute Settlement	Investment Protection and Investor Duties
DG Trade (Investment)	Carlo Pettinato	Head of Unit	Investment Protection and Investor Duties
DG Trade (Services and Digital Trade)	Christophe Kiener	Head of Unit	Trade in Services Agreement
DG Trade (Services and Digital Trade)	Luigi Poli	Trade negotiator	Trade in Services Agreement
DG Trade (Trade Defence)	Leopoldo Rubinacci	Deputy Director General in charge of Directorates E, F, G and H	Trade Defence Instruments
DG Trade (Trade and Sustainable Development)	Madelaine Tuininga	Head of Unit	Sustainable Development Chapters
European Bicycle Manufacturers Association (EBMA)	Moreno Fioravanti	Secretary General	Trade Defence Instruments
European Biodiesel Board (EBB)	André Paula Santos	Public Affairs Director	Trade Defence Instruments
European Economic and Social Committee (External Relations)	Tanja Buzek	Member	Sustainable Development Chapters
European Environmental Bureau	Patrizia Heidegger	Director for Global Policies and Sustainability	Sustainable Development Chapters
European Service Forum (ESF)	Pascal Kerneis	Managing Director	Trade in Services Agreement
Fair Trade Advocacy Office	Sergi Corbalán	Executive Director	Sustainable Development Chapters

Free University Brussels – Brussels Diplomatic Academy European Federation for Investment Law and Arbitration (EFILA)	Nikos Lavranos	Guest Professor International Investment Law EFILA Secretary General	Investment Protection and Investor Duties
Friends of the Earth	Nicolas Roux	Member	Economic Partnership Agreements
German Federal Ministry for Economic Cooperation and Development	Evita Schmieg	Former Head of Division Trade, Globalisation and Investment	Economic Partnership Agreements
ICSID	Damon Vis Dunbar Martina Polasek	Communications Lead Deputy Secretary-General	Investment Protection and Investor Duties
International Centre for Trade and Sustainable Development	Ricardo Meléndez Ortiz	former Chief Executive Officer	Economic Partnership Agreements
International Trade Union Confederation (ITUC)	Yorgos Altintzis	Policy Officer	Investment Protection and Investor Duties
Light Electric Vehicle Association	Annick Roetynck	Founder and manager	Trade Defence Instruments
OECD (Environment)	Shunta Yamaguchi	Policy Analyst	Sustainable Development Chapters
OECD (Trade in Services)	John Drummond	Head of Division	Trade in Services Agreement
SOMO (Centre for Research on Multinational Corporations)	Bart-Jaap Verbeek	Researcher Trade and Investment Policy	Investment Protection and Investor Duties
Third World Network	Sylvester Bagooro	Programme Officer	Economic Partnership Agreements

UNCITRAL	Shane Spelliscy	Chair of UNCITRAL Working Group III (Investor-State Dispute Settlement Reform)	Investment Protection and Investor Duties
UNCTAD	James Zhan	Director, Investment and Enterprise Lead, World Investment Report	Investment Protection and Investor Duties
Vrijschrift Archives - European Digital Rights	Ante Wessels	Member	Trade in Services Agreement
World Trade Institute	Damian Raess	Professor	Sustainable Development Chapters

Annex B Key External Developments

	Global	Sustainability chapters	Investment protection	Trade in Services Agreement	Trade defence
Socio- economic developments	• Euro crisis • **Increasing inequality**[531] • Unemployment / disappearing jobs/ new types of jobs due to trade in services, digitisation[532] • Less specialisation and less comparative advantage in exports[533] • **Global value chains are playing an increasing role**	• Trade recognised as engine for poverty reduction and inclusive growth.[544] • **Inclusion of Trade and Sustainable Development (TSD) chapters in all new-generation trade agreements.**[545] • Growing consumer demand. • Transportation innovations[546]	• Participation in global value chains leads to competition for investment, including race to the bottom in regulation.[547] • Focus in negotiations on regulatory issues seen a threat to the EU's social and regulatory model.[548] • Developing countries interested in stimulating FDI in agriculture[549]	• Growth of service economy (in value-added terms, contributing to goods[551], as a share of GDP and employment) • Lack of progress on built-in service liberalisation under GATS • Changing demographics defines export/ import of services • Feminisation of the work force	• Successful tariff liberalization led countries to increasingly employ non-tariff barriers • Local Content Requirements as one of the fastest growing of measures favouring domestic industry.[552]

[531] WTO (2013, page 222ff.); OECD, Making Trade Work for All at https://www.oecd.org/trade/understanding-the-global-trading-system/making-trade-work-for-all, last visited 05.10.2020: "not only is income inequality rising in many economies, but inequality of opportunity is also increasing…".

532 WTO (2013). World Trade Report 2013: some jobs are destroyed due to trade, globalisation and technologies, new jobs requiring high/ specialised education and retraining are created. Adjustment to this differs among countries depending on their starting points (e.g. income distribution, education system).

533 WTO (2013). World Trade Report 2013: globalisation, trade openness, technological developments "resulted in higher levels of technological diffusion and increased mobility and accumulation of productive factors over time. As a result, countries have become less specialised in the export of particular products, and therefore more similar in terms of their export composition."

[544] WTO-World Bank joing publication (2015). The Role of Trade in Ending Poverty

[545] DG TRADE (2015). Trade for All: Towards a more responsible trade and investment policy; EESC (2019). The role of the EU's trade and investment policies in enhancing the EU's economic performance.

[546] WTO (2013). World Trade Report 2013: potentially to become more environmentally friendly, but also multi-modal.

[547] WTO (2014). World Trade Report 2014; EEB (2019). Race to the bottom: How Trade Deals are undermining standards that protect us all: "…executed through policies that are given purposefully benign names like 'Better Regulation' or 'regulatory cooperation'…"; New Economic Foundation (2018). Halt the EU's Deregulation Drive

[548] DG TRADE (2015). Trade for All: Towards a more responsible trade and investment policy.

[549] WTO (2014). World Trade Report 2014: to strengthen their position in exports and encourage technology transfer.

[551] WTO (2013). World Trade Report 2013.

[552] OECD: Local content requirements impact the global economy

	leading to more interdependence[534] • Participation in GVCs as an engine of job creation[535] • Increasing number of economies have resorted to regional trade agreements (RTAs)[536] • Impasse in Doha round • Move away from mercantilism[537] • Rising trade protectionism.[538] Also rising mercantilism/managed trade • Changing demographics in Europe and abroad[539] • Feminisation of the work force[540] • **Gender dimension of trade** • Migration[541] • Urbanisation[542]		• New restriction for foreign investors based on national security concerns about foreign ownership of critical infrastructures, core technologies, or other sensitive assets.[550]		

[534] WTO (2013). World Trade Report 2013; WTO (2014). World Trade Report 2014: risks include exposure to global business cycle and supply disruptions in faraway locations. Participation in GVC may require only a narrow skill-set increasing the risk of industry relocation/ loss of comparative advantage. GVC also may increase inequality due to higher pays for those with the right skills; OECD: Making Work Trade for All.
[535] OECD (2016). Using Foreign Factors to Enhance Domestic Export Performance
[536] OECD (2014). Deep Provisions in Regional Trade Agreements: How Multilateral-friendly?
[537] DG TRADE (2015). Trade for All: Towards a more responsible trade and investment policy: "GVCs mean trade policy can no longer be approached from a narrow mercantilist angle. Raising the cost of imports reduces companies' ability to sell on global markets..."
[538] World Bank (2019). Global Trade Watch 2018: Trade Amid Tensions.
[539] WTO (2013). World Trade Report 2013: demographics define the comparative advantage as well as demand for products and services.
[540] WTO (2013). World Trade Report 2013: will affect purchasing power of women and exports/ imports as well as productivity.
[541] WTO (2013). World Trade Report 2013: impact on demographics, labour force composition, trade flows, capital flows; Keuzes voor een beter Nederland. (n.d.). CDA Verkiezingsprogramma 2017-2021: trade dependent on the return of refugees to home countries.
[542] WTO (2013). World Trade Report 2013: potentially impacts productivity, demographics, trade patterns
[550] UNCTAD Investment Policy Hub (2019). Investment Policy Monitor 22.

	• **Changing nature of agriculture trade**[543] • **Deadlock in agricultural liberalisation** •				
Geopolitical developments	• **Rise of China**[553] • **Decreasing international leadership of US**[554] • **Increasing use of trade policy for political /protectionist purposes** • Ongoing conflicts in the Middle East exacerbating migration • **Growth of income, GDP, performance and overall**		• Increased use of investment protection • Debates about fairness in investment protection and arbitration and the need to preserve the right of public authorities to regulate.[556] • Emergence of developing countries as source of FDI outflows • Lack of transparency and independence of the arbitrators, calls for reform.	• Diverging interests in trade liberalisation of developed and developing countries • Controversy as to whether or not GATS rules apply to public services such as healthcare and education, and public utilities such as water, energy and public transport.[557]	• Continued dominance of SOEs in China • US trade policy under Trump [558] • Trade policy increasingly turning towards geopolitical considerations and looking for new avenues for protectionist measures, such as SPFs.[559] • "Tit-for-tat" tariffs diverting trade to developing

[543] WTO (2013). World Trade Report 2013; WTO (2014). World Trade Report 2014: growing demand for high-quality products (e.g. organics, meat), trade share of Asia and Africa increased, more trade between developing countries, more trade in fresh fruits and vegetables, more trade in processed foods, food standards spreading rapidly, more vertical coordination, higher levels of investment; Hehanussa & Ilge (2019). UPOV 91 and trade agreements. Both ENDS Discussion paper; Engel (2018). Aligning ARD and trade policies to improve sustainable development impact. Retrieved from https://ecdpm.org/publications/aligning-ard-trade-policies-improve-sustainable-development-impact, last visited 05.10.2020.

[553] Van der Putten (2018). Noord-Brabant and China; Okano-Heijmans (2019). Dutch China Strategy. Podcast retrieved from: https://www.clingendael.org/publication/podcast-maaike-okano-heijmans-dutch-china-strategy, last visited 05.10.2020; Van der Putten et al. (2016). Europe and China's New Silk Roads. Clingendael report; Van der Putten et al. (2018). Active approach of the Netherlands towards the Belt and Road needed. Retrieved from: https://www.clingendael.org/publication/active-approach-netherlands-towards-belt-and-road-needed, last visited 05.10.2020.

[554] Dekker, van der Meer & Okano-Heijmans (2019). The multilateral system under stress. Clingendael report; Van der Putten (20180. The growing relevance of Policy Brief geopolitics for European business. Clingendael report.

[556] DG TRADE (2015). Trade for All: Towards a more responsible trade and investment policy.

[557] Trade Justice Movement. Overview: How trade rules affect services. https://www.tjm.org.uk/trade-issues/services, last visited 05.10.2020.

[558] Dekker & Okano-Heijmans (2019). The US–China trade–tech stand-off and the need for EU action on export control. Clingendael report.

[559] ECIPE (2014). Sovereign Patent Funds (SPFs): Next-generation trade defence? : "SPFs is another example of these tendencies. State involvement in the patent system is gradually worsening the innovation climate where the problems are already acute…"

	importance of developing countries (esp. G-20)[555]				countries. Retaliatory tariffs between countries. [560] • State-owned or state-influenced enterprises are increasingly competing with private firms in global.[561] • Significantly larger number of smaller and unproblematic State aid measures exempted from prior notification in exchange for stronger control at MS level.[562]
Public opinion/Po	• Rising populism • rising demand for support of national champions and industrial policy • Brexit	• Increasing scrutiny of trade agreements by parliaments. • **Societal pressure for more (or less!) sustainable practices**[565]	• Fears related to risks associated with foreign influence in strategic sectors[568]	• Fears related to liberalisation of financial services[571]	

[555] WTO (2013). World Trade Report 2013; WTO (2014). World Trade Report 2014: linked to this are changes in education, demographics, gender equality, investment patterns and trade patterns (also substantial reduction of MFN tariffs).
[560] World Bank (2019). Global Trade Watch 2018: Trade Amid Tensions.
[561] OECD: Levelling the Playing Field.
[562] OECD (2017). Annual Report on Competition Policy Developments in the EU
[565] Hertanti et al. (2017). Human rights as a key issue in the Indonesia-EU Comprehensive Economic Partnership Agreement. SOMO: briefing paper; Singh et al. (2016). Rethinking bilateral investment treaties. Critical issues and policy choices. SOMO; PVV Verkiezingsprogrammma 2017-2021; Pak de macht. (n.d.). SP Verkiezingsprogramma 2017 – 2021; Jatkar (2012). Human Rights in the EU-India FTA: Is it a viable option? Retrieved from https://ecdpm.org/great-insights/trade-and-human-rights/human-rights-eu-india-fta-viable-option, last visited 05.10.2020; Bilal (2016). The EU trade policy approach to human rights and sustainability: The case of EPAs. Retrieved from https://ecdpm.org/great-insights/shifts-trade-development/eu-trade-policy-approach-human-rights-sustainability-case-epas, last visited 05.10.2020; Van Hove (2017). Sustainability and human rights in trade policy: EU trade strategy and the Sustainable Development Goals. Retrieved from https://ecdpm.org/events/sustainability-and-human-rights-in-trade-policy, last visited 05.10.2020; DG TRADE (2015). Trade for all; BEUC (2019). EU trade policy must enable sustainable consumer choice. "50% of Europeans think that one of the priorities of EU trade policy should be to ensure that EU environmental and health standards are respected…".
[568] Ferchen et al. (2019). Assessing China's Influence in Europe through Investments in Technology and Infrastructure. Four Cases. Leiden Asia Centre.
[571] Vander Stichele (2012). Free Trade Agreement EU – Colombia & Peru: Deregulation, illicit financial flows and money laundering. SOMO report; Vander Stichele & Verbeek (2019). The impact of the EU-Singapore Investment Protection Agreement on managing government bonds and capital flows. SOMO: briefing paper; Zeker Nederland. (2016).

	• **Changing attitudes to trade** • Increased scrutiny to trade an investment policy in EU by the public/ demand for transparency[563] • National environmental policies and incentive packages[564] and international Agreements (e.g. Paris)	• **Concerns of impact of FTAs on democracy/right to regulate**[566] • Lack of information about fair trade schemes for producers and consumers. • **Concerns about the lack of a level playing field due to social or environmental dumping**[567]	• Calls for EU trade and investment agreements to be negotiated in the public interest rather than in the interests of private investors.[569] • Calls for complaint mechanisms, which can guarantee the protection, respect and promotion of human rights.[570]		
Business& technologi	• I**ncreasing internationalization/connectivity**[572][573]	• Shifting consumer preferences and habits[580] • New business models[581]		• Servicification • Rise of services embedded in manufacturing.[584]	• Increasing international competition • Lesser duty seen as competitive disadvantage vis-a-vis trading partners

VVD Verkiezingsprogramma 2017-2021; Tijd voor verandering (2017). GroenLinks Verkiezingsprogramma 2017 – 2021; Pak de macht. (n.d.). SP Verkiezingsprogramma 2017 – 2021.

[563] DG TRADE (2015). Trade for All: Towards a more responsible trade and investment policy.

[564] WTO (2013). World Trade Report 2013: may present barriers to trade or become protectionist measures; when introduced in open economies impose pressure along the value chains. Patchwork of national and regional environmental policies creates more complexities to balance the intersection between trade and environment.

[566] OECD (2017). The balance between investor protection and the right to regulate in investment treaties

[567] Keuzes voor een beter Nederland. (n.d.). CDA Verkiezingsprogramma 2017-2021

[569] ETUC (2017). Resolution for an EU Progressive Trade and Investment Policy: "collective bargaining agreements, including those that have been made universally applicable by a governmental authority, must under no circumstances be challenged by referring to investment protection provisions.."

[570] International Federation for Human Rights: Trade and Investment Agreements. https://www.fidh.org/en/issues/globalisation-human-rights/trade-and-investment-agreements, last visited 05.10.2020.

[572] Okano-Heijmans (2019). How to strengthen Europe's Policy Brief agenda on digital connectivity. Clingendael report.

[573] Zeker Nederland. (2016). VVD Verkiezingsprogramma 2017-2021.

[580] WTO (2018). World Trade Report 2018: purchases are shifted online, and e-commerce and business-to-business transactions are growing fast.

[581] WTO (2018). World Trade Report 2018: technologies new types of and cheaper production, promotion and distribution of products.

[584] DG TRADE (2015). Trade for All: Towards a more responsible trade and investment policy: "manufacturing companies increasingly buy, produce and sell services that allow them to sell their products."

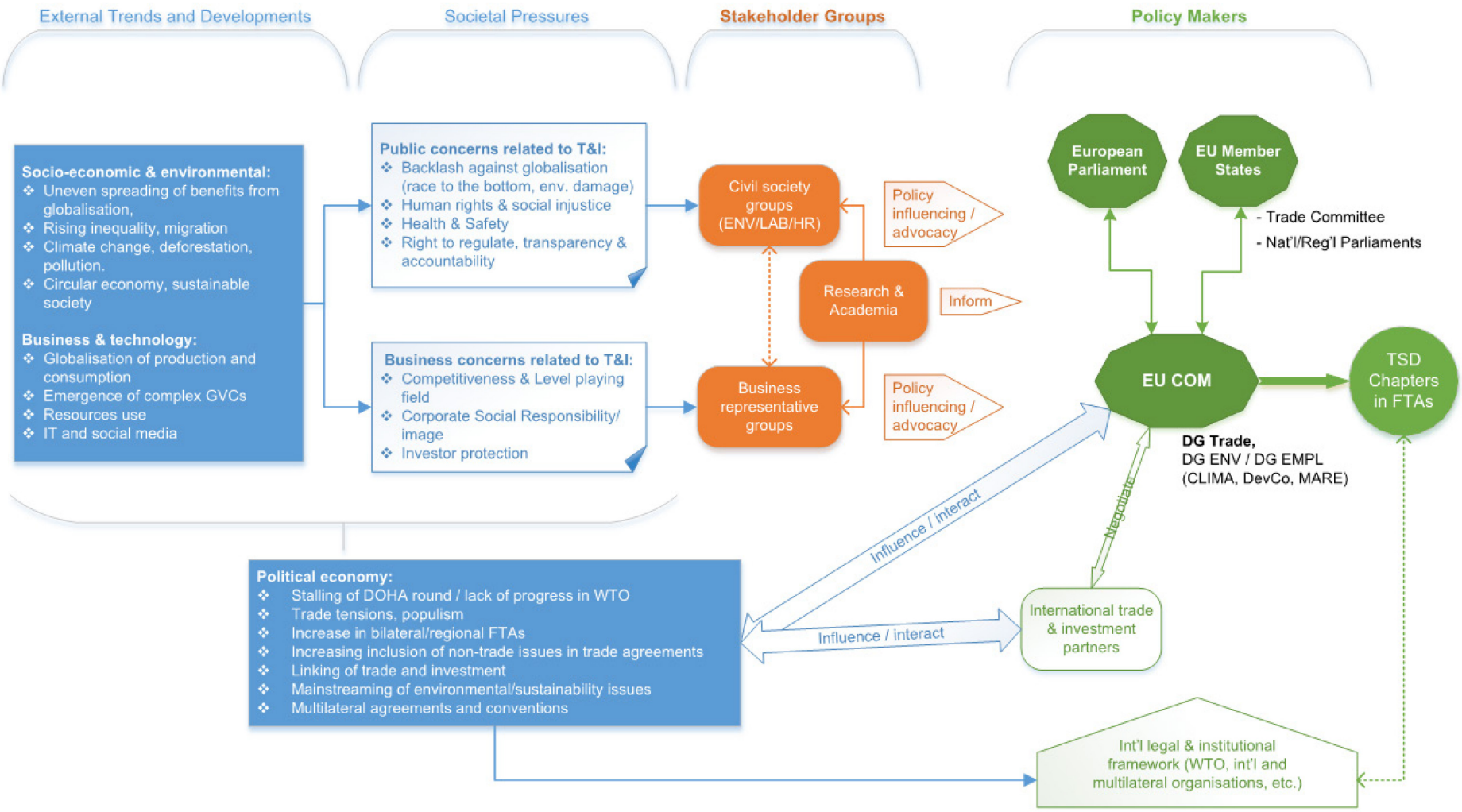
	• Short-lived SME export relations in Global value Chains.[574] • Infrastructure and public procurement in emerging as major driving forces of economic growth in coming years[575] • **Increasing digitalisation** • Need for a robust and socially protected framework in trade policy to allow for the evolution of artificial intelligence.[576] • New players of technological progress[577] • Redefinition of the role of intellectual property in trade due to digital technologies[578] • **Data protection, data flows and privacy as well as new**	• Public Procurement as a lever for sustainable development.[582] • EU Environmental Goods Agreement (EGA) with 16 other major WTO members to facilitate trade in vital green technologies.[583]		• Increased tradeability of services due to ICT-based activities/ digitisation[585] • More electronic commerce companies and crowd working platforms.[586] • Increased R&D in services[587] • Digital service taxes.[588] • Benefits derived from digitalisation risk being derailed by existing and emerging trade barriers.[589]	who do not apply it and may impose higher anti-dumping duties.[590]

[574] OECD: Global Value Chain
[575] DG TRADE. Trade for All: Towards a more responsible trade and investment policy 2015.
[576] EECS (2019). The role of the EU's trade and investment policies in enhancing the EU's economic performance.
[577] WTO (2013). World Trade Report 2013: technological progress and transfer have become more regional, and new actors (e.g. China) are more important.
[578] WTO (2018). World Trade Report 2018.
[582] ETUC: Resolution for an EU Progressive Trade and Investment Policy (2017)
[583] DG TRADE. Trade for All: Towards a more responsible trade and investment policy 2015.
[585] WTO (2018). World Trade Report 2018.
[586] ETUC (2017). Resolution for an EU Progressive Trade and Investment Policy: "need to take the necessary regulatory, monitoring and enforcement measures towards electronic commerce companies and crowd working platforms, like requiring a local presence…"
[587] WTO (2013). World Trade Report 2013.
[588] ECIPE (2019). Digital Service Taxes as Barriers to Trade
[589] OECD (2019). Barriers to trade in digitally enabled services in the G20
[590] ETUC (2017). Resolution for an EU Progressive Trade and Investment Policy

	IPRs, e-government, moratorium on customs duties on electronic transmissions – as topics for trade policies[579]				
Environmental issues	• Climate change • Notion of response measures has evolved and is now seen in the context of sustainable development and as a form of international cooperation.[591]	• Impact of trade in agricultural goods on deforestation[592] • Global warming/climate change[593] • Water scarcity in South Asia, China, Middle East and north Africa puts **new demands on agriculture and food trade (food security)**[594] • Substitutability of fossil fuels and technological progress towards renewables[595]	• Tension between the **right to regulate** and investor interests[596] • Political projects which basically want to make it easier for businesses to make profits by undermining of the protections and standards developed to protect our health, rights, and the environment.[597]		

[579] WTO (2018). World Trade Report 2018; DG TRADE (2015) Trade for All: Towards a more responsible trade and investment policy: "…new concerns about the protection of consumers and their personal data within the EU and internationally".
[591] UNCTAD: Climate Change and Trade, https://unctad.org/en/Pages/DITC/ClimateChange/Climate-Change.aspx, last visited 05.10.2020.
[592] Schmitz (2009). (Un)sustainable trade in the Amazon: Exploring Dutch foreign relations with Brazil. Both ENDS policy note.
[593] EECS Response to Trade for All: "…following COP 21, combating global warming should now also be included as an integral part of EU trade values."
[594] WTO (2013). World Trade Report 2013.
[595] WTO (2013). World Trade Report 2013.
[596] Verbeek & de Leeuw (2019). The Netherlands must ensure that human rights prevail over business. Retrieved from: https://www.somo.nl/the-netherlands-must-ensure-that-human-rights-prevail-over-business, last visited 05.10.2020; Knottnerus et al. (2015). Socialising losses, privatising gains. SOMO: briefing paper; SOMO (2019). Factsheet CETA: Sluiproute voor Amerikaanse multinationals; Eberhardt et al. (2016). Trading away democracy. Both ENDS Report; Zeker Nederland. (2016). VVD Verkiezingsprogramma 2017-2021; Tijd voor verandering (2017). GroenLinks Verkiezingsprogramma 2017 – 2021.
[597] EEB (2019). Race tot he bottom: how trade deals are undermining standards that protect us.

Annex C Trade and Investment Policymaking



Annex D EPA Negotiations Process

Stage of negotiation cycle Region / country	Comments (could not be concluded, moved to national.	Concluding agreement	Signing agreement	Ratifying agreement	Implementing agreement
SADC	South Africa initially did not join the negotiations, as it was covered by the Trade and Development Cooperation Agreement. It eventually joined the negotiations in 2007. Tanzania was initially included in this country group, but decided to move to the East African Community group in 2007.		10 June 2016 with the SADC EPA Group comprising Botswana, Lesotho, Mozambique, Namibia, South Africa and Eswatini. Angola has an option to join the agreement in future.		
West Africa ECOWAS-EU EPA (including 16 countries)	Concluded with all members of ECOWAS (incl. Mauretania) and WAEMU; except Cap Verde. Nigeria as the only country in West Africa has not signed the EPA.		All EU Member States and 13 West African Countries signed the EPA in December 2014, except Nigeria, Mauritania and The Gambia. The Gambia signed on 9 August 2018 and Mauritania on 21 September 2018. Nigeria is the only country which has not signed. Mauritania signed Association Agreement on		

			9 August 2017 with ECOWAS which included EPA.		
Nigeria	Has not signed an agreement.				
EPA with Cote d'Ivoire			26 November 2008	By Ivoirian National Assembly on 12 August 2016. By European Parliament on 25 March 2009.	Provisional application since 3 September 2016. Effective liberalisation started officially 6 December 2019.
EPA with Ghana			28 July 2016	3 August 2016 by the Ghanaian Parliament European Parliament on 1 December 2016	Provisional application on 15 December 2016. Ghana started tariff liberalisation in 2020
Central Africa - Interim Economic partnership with Cameroon	Cameroon only country which has signed EPA.	The EU and Cameroon concluded negotiations on Interim EPA in December 2007	The EU Parliament approved the agreement in June 2013. Cameroon signed 15 January 2009.	Ratified by Cameroon 2014	Tariff liberalisation started in 2016 and entered in its 4th phase in 2019.
Eastern and Southern Africa (Comoros Madagascar, Mauritius, the Seychelles, Zambia and Zimbabwe) ESA-EU EPA	No agreement with Zambia		In 2009 Mauritius, Seychelles, Zimbabwe and Madagascar signed an Economic Partnership Agreement (EPA). Comoros signed in 2017.	The European Parliament gave its consent on 17 January 2013	The Agreement is provisionally applied since 14 May 2012. Currently ongoing discussions for deepening of the agreement.
EAC (Burundi, Kenya, Rwanda, South Sudan,Tanzania Uganda.)	The EAC Summit of 20 May 2017 requested from the EU to provide clarifications on issues raised by certain EAC members. Pertinent issues remain. Uganda, South Sudan and Tanzania have not signed.	The negotiation concluded on 16 October 2014.	On 1 September 2016, Kenya and Rwanda signed the Economic Partnership Agreement.	Only Kenya has ratified it.	

Annex E Contentious EPA Negotiation Issues

Issue	EU position	ACP position
Substantially all trade and transition periods for tariff liberalisation	Interpreted by the EU as requiring that at least 90 percent of all trade is duty-free, in order for EPAs to conform to WTO Rules.	Several ACP countries were asking for a flexible interpretation of this requirement, given concerns about how tariff liberalisation could impact domestic industries, industrial development ambitions, tariff revenues, among others.
Standstill clause	The EU insisted on including a standstill clause, which would prohibit the reimposition or an increase in tariffs, after they had been liberalised. In the SADC EPA this clause only applied to tariff lines subject to liberalisation.	Several ACP countries asked for a more flexible arrangement, that would allow changes to tariff rates, even after they have been eliminated.
Free circulation of goods	In EPAs concerning regions and not individual countries, the EU insisted on clauses according to which duties and taxes are levied on EU imports into the region only once, after first crossing the border. The argument was not just one of efficiency, but also of supporting regional integration.	Some ACP countries argued that this would essentially force countries in the same region to choose the same liberalisation schedules and timetables
Regional preference	The EU asked for any preference provided to the EU also to be provided to other countries in the country group. This again was meant to support regional integration.	Not necessarily voiced by ACP countries itself, observers were concerned about the EPA essentially determining the depth and breadth of regional integration.
Infant industry provisions	The EU effectively merged safeguards and infant industry provisions into one issue, where safeguards also serve to temporarily protect infant industries. The EU also aimed for a relatively strict interpretation of safeguards, based on the EU's interpretation of what safeguard rules are WTO compatible.	Concerns of ACP countries centred around two issues. First, with safeguard rules being technical the imposition of safeguards is challenging for countries with limited technical expertise. And second, that safeguards can also be imposed by the EU on imports from ACP countries.
Most favoured nation	Probably most openly asserting EU interests, the EU demanded that ACP countries provide the EU with same market access conditions as its competitors.	The key issue for ACP countries was one of losing flexibility, flexibility that might be needed to pursue their own development. Another concern has been on the impact on South-South trade.
Non-execution clause	The EU insisted on a clause that allows the EU to suspend EPA commitments in the case of serious human rights breaches in the ACP partner country.	ACP countries have been concerned about the power of the EU to unilaterally withdraw preferences.
Issue	Description and comments	
National treatment principle in goods	National treatment requires that all foreign (imported) goods are not treated less favourably than domestically produced goods, with some exceptions. All EPAs, except the SADC EPA exclude government procurement, thereby allowing ACP countries to favour domestic producers and providers in procurement procedures. Up to interpretation is the question whether national treatment allows countries to subsidise or otherwise promote domestic industries, if this serves legitimate development objectives.	
Safeguards	While not a contentious issues, the EPAs also provide for safeguards. These are asymmetric, with ACP countries being allowed longer periods during which safeguards might be applied.	

Source: Bilal and Lui (2009)

Annex F New Generation EU FTAs with a TSD Chapter

Third country / region agreement	Date of conclusion / current status	Specifics/comments	EU DAG Membership
EU-Korea Free Trade Agreement (FTA)	Entered into force in July **2011**	First EU FTA with a dedicated TSD chapter including labour and environmental provisions, with reference to ILO and MEA agreements and institutional structures to be set up on both sides. (see annex B for full text of the TSD chapter)	- 6 Business / employers sub-group - 4 Trade unions sub-group - 4 NGO / Diverse interests sub-group
EU – Central America Association Agreement – Trade Pillar	**2013** - The new AA was signed in June 2012. The trade pillar has been provisionally applied since Aug. 2013 with Honduras, Nicaragua and Panama, since Oct. 2013 with Costa Rica & El Salvador, and since Dec. 2013 with Guatemala.	TSD chapter in structure similar to Korea, but in addition to reaffirming commitment to ILO core labour standards reference is also made to the Parties reaffirming their "commitment to effectively implement in their laws and practice the fundamental ILO Conventions contained in the ILO Declaration of Fundamental Principles and Rights at Work of 1998" (8 are listed). In addition more specific environmental agreements mentioned (Montreal Protocol; Basel Convention; Stockholm Convention; CITES; Convention on Biological Diversity; Cartagena Protocol, Kyoto Protocol). Also includes separate articles with provisions on trade in fish and forest products.	- 4 Trade unions sub-group - 6 Business / employers sub-group - 3 NGO / different interests sub-group
EU-Colombia, Peru & Ecuador Comprehensive Trade Agreement	Provisionally applied, with Peru and Colombia in **2013**. Ecuador joined 1 January **2017**.	Reference to only the core labour standards as in Korea agreement. As regards the environmental commitments, similar to the Central America Agreement reference is made to a number of specific International Conventions and a clause is added stipulating that "The Trade Committee may recommend the extension of the application of paragraph 2 [commitment to specific MEA] to other multilateral environmental agreements following a proposal by the Subcommittee on Trade and Sustainable Development." Articles on *Climate Change*, Biological Diversity, trade in fish and forest products as well as an article on *Migrant Workers* are included.	- 4 Trade unions sub-group - 6 Business / employers sub-group - 7 NGO / Different interests sub-group (incl. 2 HR groups and fair trade group)
EU-Moldova Association Agreement – Trade Pillar (DCFTA)	AA signed in June 2014, DCFTA provisionally applied since **Sept. 2014**; AA officially entered into force 1 July 2016.	Added provisions for (a) Sustainable management of forests and trade in forest products and (b) trade in fish product. Elaborate article on areas for cooperation on TSD. As this trade agreement if part of the broader Association Agreement cooperation and transposition of the EU acquis (hence adoption of EU standards) is already part and parcel of the EU-Moldova relationship. Many of the substantive standards in the TSD chapter had already been included in GSP+ and Autonomous Trade Preferences with the EU and therefore already part of Moldovan Law (Harrison et al, 2019).	- 4 Business - 4 Trade unions - 1 NGO/others (EESC, Chair of the EU DAG).

EU-Georgia Association Agreement – Trade Pillar (DCFTA)	AA signed in June 2014, DCFTA provisionally applied since **Sept. 2014**; AA officially entered into force 1 July 2016.	Similar to Moldova and Korea in terms of number of ILO Conventions and MEA referenced. Very similar to Moldova agreement. In comparison to Korea, more detailed, with e.g. added reference under "Trade and investment promoting sustainable development" Article to the *OECD Guidelines for Multinational Enterprises*. Separate clauses regarding "Biological Diversity (Art.232) "Sustainable management of forests and trade in forest products" (Art.233) and "Trade in fish products" (Art.234)	- 3 business - 3 trade unions / labour - 1 other Georgia DAG members include 5 business, 4 other (incl. 2 environmental) and 2 trade unions.
EU-Ukraine Deep and Comprehensive Free Trade Agreement (DCFTA)	DCFTA provisionally applied since 1 January **2016**.	The DCFTA is part of the broader Association Agreement (AA); the political and cooperation provisions of this AA have been provisionally applied since November 2014. Similar to Georgia & Moldova, but additional reference under Multilateral Environmental Agreements Article to "the precautionary principle" and to "the prudent and rational utilisation of natural resources." No reference to Kyoto protocol.	- 6 Business - 6 Trade Unions - 3 Various interests
Canada – EU Comprehensive Economic Trade Agreement, (CETA)	CETA entered into force provisionally on 21 September **2017**, meaning most of the agreement now applies.	CETA contains 3 separate chapters for trade & sustainable development: <u>Ch.(22) trade & sustainable development.</u> Outlines context and objectives, cooperation and promotion of SD, institutional mechanisms and CSM (Civil Society Forum) as well as including a separate article on Transparency. Labour and environment are treated in separate Chapters, but directly related to Ch22. <u>Ch.(23) trade & labour.</u> Given fact that both parties have ratified and implemented all core ILO conventions this chapter focuses more on promoting the *ILO Decent Work Agenda*. <u>Ch.(24) trade and environment</u>. This chapter is considerably more extensive and specific than any of the other agreements as regards the definition of environmental laws, regulatory aspects, access to remedies, and procedural guarantees. A *TSD Early Review* process has been ongoing since September 2018 between Canada and the EU "with a view to the effective enforceability of CETA provisions on trade and labour and trade and environment" as indicated in article 10 of the Joint Interpretative Instrument. For full text of agreement see annex B	- 14 business sub-group - 14 labour sub-group - 6 other organisations sub-group (incl. environment) 1st joint meeting of EU and Canada DAGs held in Nov. 2019.
EU-Mexico	On 21 April **2018**, the EU and Mexico concluded the modernisation of the "Global Agreement"	Includes references to green growth and the circular economy. Multilateral Labour Standards and Agreements Article (Art.3) extended to include broader range of ILO Conventions under the *Decent Work Agenda* (i.e. not only the core standards, which have all been ratified by both parties) and commitment to effective *implementation* of the core standards.	Not yet established

	they initially signed in 1997 All texts of the Agreement are published and the only missing element is the list of public procurement entities at sub-central level, where discussions with Mexico are ongoing.	Includes separate articles on "Trade & climate change", "Trade and Sustainable Management of Forests", "Trade and Sustainable Management of Marine Biological Resources and Aquaculture", and (for the first time) "*Trade and Responsible Management of Supply Chains*" with reference CSR and international guidelines related to this (OECD, ILO, UN). As regards institutional structure the Chapter includes a provision on the establishment of a *Contact Point* within each administration to facilitate communication and coordination between the Parties on any matter relating to the implementation of the TSD Chapter. Article included on the possible review of implementation and effectiveness of enforcement although no clear timeline indicated.	
Japan-EU Economic Partnership Agreement (JEEPA)	JEEPA entered into force on 1 February **2019**.	Article on labour standards and conventions much closer to the original TSD Chapter in the EU-Korea FTA and formulated in fairly non-specific way. Reiteration of the commitment of the Parties to the MEAs signed by them including, *for the first time*, the *Paris Agreement on Climate Change*.	- 7 Business group - 4 Workers' group - 3 Other organised NGOs Second call needed to include NGOs in the DAG (none expressed interest in first call). Two meetings held so far.
EU-Mercosur Association Agreement – Trade Part	An agreement in principle was reached on the trade part on 28 June 2019 between the EU and Mercosur countries Argentina, Brazil, Paraguay and Uruguay. Not expected to enter into force until late **2020** Venezuela is not covered by the	In addition to the fundamental ILO conventions the TSD Chapter includes provisions on the *ILO Decent Work Agenda*: "Each Party shall promote decent work as provided by the Declaration on Social Justice for a Fair Globalization of 2008 (….)." In particular with reference to occupational safety and health, decent working conditions for all, with regard to, inter alia, wages and earnings, working hours and other conditions of work; labour inspection; and non-discrimination in respect of working conditions, including for migrant workers. Whilst the MEA Article does not include reference to specific agreements and Conventions, the Chapter does include a separate article on Climate Change and the *Paris Agreement*. The Chapter includes reference to the precautionary principle.	No separate DAG for TSD chapter as existing structures for civil society engagement for entire AA used to monitor implementation of entire agreement (including TSD chapters).[598] A Contact Point in each Parties Administration has been set up to facilitate communication and coordination between the Parties on any matter relating to the implementation of the Chapter.

[598] This appears to have been at the request of the EESC, which in its opinion of 2018 on the Mercosur Agreement stated "The EESC considers it unnecessary and inefficient to include civil society representation twice – once in the general AA and again in the chapter on Trade and Sustainable Development. The Committee therefore considers the AA as a whole which applies to all countries of both parties. The EESC urges the negotiators to learn from the experience of other association agreements, which have set up domestic advisory groups (DAGs) for each party without including any possibility for recognised dialogue under the agreements. The clear limitations of this model show that it makes no sense for each Mercosur country to have a DAG involving civil society indirectly in the AA. This is particularly true since both parties have independent, balanced, representative advisory bodies that are capable of exercising their mandate under the AA." (www.eesc.europa.eu/en/our-work/opinions-information-reports/opinions/eu-mercosur-association-agreement-own-initiative-opinion)

	agreement but has the possibility to join later.		
EU-Singapore Trade Agreement	FTA entered into force 21 November **2019**, IPA still being requires ratification by all MS.	Chapter relates to Trade *and* Investment. Article on multilateral labour standards and agreements (Art.12.3) similar to that in the JEEPA but Chapter includes an additional article on "Labour Cooperation in the Context of Trade and Sustainable Development." Areas of cooperation suggested includes on "trade-related aspects of the *ILO Decent Work Agenda*, including on the interlinkages between trade and full and productive employment, labour market adjustment, core labour standards, labour statistics, human resources development and lifelong learning, social protection and social inclusion, social dialogue and gender equality." MEA article is short (includes Paris Agreement), but separate articles on trade in timber and timber products as well as fish product are included. There are also references to voluntary schemes and international guidelines for CSR. Set-up of the institutional structures seems less prescriptive, leaving this in part to the Parties as to how to organise this (e.g. "Each Party shall establish new consultative mechanisms or make use of existing consultative mechanisms to seek advice from relevant domestic stakeholders on the implementation of this Chapter, such as domestic advisory groups.")	Not yet established
EU-Vietnam Trade and Investment Agreement	Approved by European Parliament February **2020**	Chapter applies to both trade and investment. Reference is made to differing levels off development between the two parties. Key issues in the negotiations related to fact that Vietnam does not have / allow for truly independent labour unions. Since Vietnam has not yet ratified all core ILO conventions, the agreement explicitly states: "Each Party shall: a. make continued and sustained efforts towards ratifying, to the extent it has not yet done so, the fundamental ILO conventions; b. consider the ratification of other conventions that are classified as up to date by the ILO, taking into account its domestic circumstances; and c. exchange information with the other Party with regard to the ratifications mentioned in subparagraphs (a) and (b)." The environmental parts of the chapter contain separate articles on MEA (Art.13.5), Climate Change (13.6), Biological Diversity (Art.13.7), Sustainable Forest Management and Trade in Forest Products (Art.13.8), Trade and Sustainable Management of Living Marine Resources and Aquaculture Products (Art.13.9). There are also references to voluntary schemes and international guidelines for CSR.	Not yet established

Annex G Example of Labour & Environmental provisions (EU-Korea FTA)

Article 13.4 Multilateral labour standards and agreements

1. The Parties recognise the value of international cooperation and agreements on employment and labour affairs as a response of the international community to economic, employment and social challenges and opportunities resulting from globalisation. They commit to consulting and cooperating as appropriate on trade-related labour and employment issues of mutual interest.
2. The Parties reaffirm the commitment, under the 2006 Ministerial Declaration of the UN Economic and Social Council on Full Employment and Decent Work, to recognising full and productive employment and decent work for all as a key element of sustainable development for all countries and as a priority objective of international cooperation and to promoting the development of international trade in a way that is conducive to full and productive employment and decent work for all, including men, women and young people.
3. The Parties, in accordance with the obligations deriving from membership of the ILO and the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, adopted by the International Labour Conference at its 86th Session in 1998, commit to respecting, promoting and realising, in their laws and practices, the principles concerning the fundamental rights, namely:
    a. freedom of association and the effective recognition of the right to collective bargaining;
    b. the elimination of all forms of forced or compulsory labour;
    c. the effective abolition of child labour; and
    d. the elimination of discrimination in respect of employment and occupation.
4. The Parties reaffirm the commitment to effectively implementing the ILO Conventions that Korea and the Member States of the European Union have ratified respectively. The Parties will make continued and sustained efforts towards ratifying the fundamental ILO Conventions as well as the other Conventions that are classified as "up-to-date" by the ILO.

Article 13.5 Multilateral environmental agreements

5. The Parties recognise the value of international environmental governance and agreements as a response of the international community to global or regional environmental problems and they commit to consulting and cooperating as appropriate with respect to negotiations on trade-related environmental issues of mutual interest.
6. The Parties reaffirm their commitments to the effective implementation in their laws and practices of the multilateral environmental agreements to which they are party.
7. The Parties reaffirm their commitment to reaching the ultimate objective of the United Nations Framework Convention on Climate Change and its Kyoto Protocol. They commit to cooperating on the development of the future international climate change framework in accordance with the Bali Action Plan [85].

Article 13.7 Upholding levels of protection in the application and enforcement of laws, regulations or standards

1. A Party shall not fail to effectively enforce its environmental and labour laws, through a sustained or recurring course of action or inaction, in a manner affecting trade or investment between the Parties.
2. A Party shall not weaken or reduce the environmental or labour protections afforded in its laws to encourage trade or investment, by waiving or otherwise derogating from, or offering to waive or otherwise derogate from, its laws, regulations or standards, in a manner affecting trade or investment between the Parties.

Annex H Summary of 15 Point Action Plan

A. Working Together

1. Partnering with Member States and the European Parliament: Strengthen partnership with MS and EP and improve coordination between the institutions in Brussels, in FTA partner countries and with the relevant international bodies
2. Working with international organisations: Intensify work with the relevant bodies to strengthen relationship. Systematically coordinate with these bodies and ensure coherence with their activities in support of TSD implementation.

B. Enabling civil society including the Social Partners to play their role in implementation

1. Facilitate the monitoring role of civil society including the Social Partners: Support project for CS in EU and partner countries, sharing of best practices and developing of guidelines with EESC
2. Extend the scope for civil society, including the Social Partners, to the whole FTA: Broadening of substantive scope of competence of DAG's advice to cover implementation of whole agreement in future FTAs (not just TSD chapters
3. Take action regarding responsible business conduct: Reference to internationally agreed instrument (OECD guidelines) in agreements and translation into implementation activities, working together with relevant international organisations and stakeholders (e.g. ILO and the OECD with its National Contact Points).

C. Delivering

1. Country priorities: Identify, consider and address priorities for each partner country throughout whole cycle of FTA starting with content scoping phase of future agreements and including the development of TSD country priorities for implementation.
2. Assertive enforcement: Step up actions in monitoring phase; enable civil society and Social Partners to perform their monitoring roles; resort swiftly to panel proceedings; and ensure proper implementation of the panel recommendations.
3. Encourage early ratification of core international agreements: Identify at early stage the core labour and environmental agreements that are pending ratification and step up efforts to ensure early ratification in the course of the negotiations.
4. Reviewing the TSD implementation effectiveness: Regular review of the implementation of TSD chapters through annual reports of FTA implementation and in-depth ex-post evaluations. Propose review clauses to partners, presenting opportunities for changes to bilateral commitments of these become warranted
5. Handbook for implementation: To facilitate early implementation efforts for FTA partners (this was drafted by Sweden)
6. Step up resources: Through support for responsible supply chains project and capacity building of CS. Better connect with connection to existing support facilities (e.g. A4T).
7. Climate action: Inclusion of Paris Agreement
8. Trade and labour: Extension of labour provisions to include Decent Work agenda

D. Transparency and Communication

1. More transparency and better communication: Publishing of agendas, meetings and results of all meetings; improvement of TSD web pages.

2. Time-bound response to TSD submissions: Respond to written submissions from citizens on TSD in a time-bound and structured way in line with commitment to its Code of Good Administrative Conduct.