

# Different Glances at EU Trade Policy

Patricia Garcia-Duran and Montserrat Millet (coords.)

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## INTRODUCTION

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Since the creation of the World Trade Organization (WTO) in 1995, European trade policy objectives have in practice remained very much the same, while the strategy of achieving them has varied. Regarding the objectives, economic as well as neighbourhood and development interests should be pursued. Access to third-country markets should be provided so as to foster economic growth and jobs in the European Union (EU). To that end, third-country tariff and non-tariff barriers should be reduced including obstacles to foreign investment, fair competition and public procurement. This trade liberalisation should moreover meet the legitimate concerns of European citizens in the sense that EU regulations as well as labour and environmental norms should be preserved when dealing with third countries.

As to the strategy, under the steering of Trade Commissioners Leon Brittan (1993-1999) and Pascal Lamy (1999-2004), EU trade policy favoured the multilateral approach as the best way to pursue economic interests and normative concerns while political and geostrategic interests were pursued through bilateral and/or regional agreements (economic partnership agreements (EPAs) with African, Caribbean and Pacific countries, neighbours' trade agreements with Mediterranean and eastern European countries). EU bilateral agreements justified purely by economic interests are a trademark of the 21<sup>st</sup> century.

The change was officially acknowledged in *Global Europe*, the 2006 communiqué outlining the trade strategy promoted by Commissioner Peter Mandelson, and sustained in the 2010 *Trade, Growth and World Affairs* strategy under Trade Commissioner Karel de Gucht. Both include an explicit recognition of the need for the EU to sign preferential agreements with key markets in order to promote its own trade interests. The difference between the two strategies is the target of the bilateral agreements. While the strategy outlined in *Global Europe* focused on major emerging economies, the 2010 *Trade,*

*Growth and World Affairs* communiqué advocated a stronger focus on agreements with developed countries. As a result, the EU has concentrated its attention on bilateral negotiations with its traditional trade partners – the US, Japan and Canada.

Despite enhancing its bilateral approach, the EU insists that it has not left its multilateral track. Both the 2006 and the 2010 trade strategies emphasise the need to complete multilateral agreements and claim that deep and comprehensive bilateral agreements could help reinforce the rules-based multilateral system and fuel multilateralism. Following this logic, the EU does not have to choose between bilateral and multilateral approaches as they can reinforce each other.

In October 2015, Cecilia Malmström, European Union Trade Commissioner, presented *Trade for All*, the trade strategy of the European Commission over the next years. While preserving the European social and regulatory model at home, bilateral and multilateral trade agreements will be pursued so as to improve market access in third countries and contribute to boosting jobs, growth and investment in the EU.

This monograph analyses and discusses *Trade for All* from different perspectives based on key current debates on international trade. The book is structured around these debates. The first part corresponds to the multilateralism versus bilateralism debate, the second to the debate about the limits of trade liberalisation and the last focuses on the EU's relations with developing and emerging economies.

## **Part 1: *Trade for All* and the multilateralism versus bilateralism debate**

Since the end of the Second World War the international community has aimed to build a multilateral trade system. The first step was the General Agreement on Trade and Tariffs (GATT) in which 23 countries agreed to reduce trade barriers between them following the principle of non-discrimination and on reciprocity bases. This emerging multilateral system coexisted from the beginning with the more traditional bilateral and regional trade agreements leading to international debate on whether they were compatible.

Nowadays, the multilateral system has been institutionalised under the WTO and engages more than 160 countries around the world. Multilateral negotiations no longer refer to goods and agriculture but also to services and intellectual property. Agreements on tariffs and quotas have been complemented by common rules on technical and sanitary and phytosanitary issues. Nevertheless, since the 1990s there has been an increasing surge in bilateral, regional and plurilateral trade agreements. Recently, so-called mega-regionals (trade agreements that include at least two of the four key trade players: the EU, the United States, Japan and China) are also being negotiated. In this context, the debate about the compatibility between the multilateral and the bilateral or regional approaches to trade has been stimulated.

In *Trade for All*, the European Commission argues that the two approaches are still compatible and presents an ambitious agenda

for both bilateral and multilateral agreements. But does *Trade for All* guarantee multilateralism? Is multilateralism to play second fiddle in EU trade policy?

In chapter one, Alejandro JARA, former Deputy Director-General of the WTO, identifies the main challenges for the international trade system and the position of the EU as a major player. The emergence of the so-called BRICS (Brazil, Russia, India, China and South Africa) as trade players has altered the balance of the Doha Development Round negotiations since a one-size-fits all special and differential treatment is no longer possible. Moreover, global value chains have blurred the distinction between trade in goods and services as well as creating the need for regulatory convergence and liberalisation of trade in services. As the Doha Round has faltered, the US strategy of competitive liberalisation through deep free trade agreements has led the EU to end its moratorium on new bilateral agreements that had been in place since 1999. Nevertheless, the author considers that the EU is playing an increasingly proactive role at the multilateral level thanks to its domestic reforms in the agricultural policy field.

In chapter two, Patricia GARCIA-DURAN, senior lecturer at the University of Barcelona, looks at EU trade strategy from a more critical perspective, claiming that the EU's new bilateralism may be endangering multilateralism. While acknowledging that bilateral and multilateral approaches may be compatible, the author argues that multilateralisation cannot be expected to automatically follow from bilateral agreements even in cases where such multilateralisation is technically achievable. Their complementarity may also be influenced by what is happening at the multilateral level. While new bilateral or regional agreements may be a strategy to force an accord at the multilateral level, they may also become a way to substitute for the multilateral agreement and ensure new market access when difficulties in the multilateral negotiations become too severe.

## **Part 2. *Trade for All* and the limits of trade liberalisation**

In the old world of trade, where the main issue was protection of producers, consumers tended to support trade liberalisation because it provided cheaper prices. The main resistance came from import competing companies. In the new world of trade, where cross-border value chains are being developed, the main issue becomes precaution for consumers. In such a world, producers are in favour of levelling the playing field in terms of standards, but consumers develop the "syndrome of precaution dumping" even if regulatory convergence tends to lead to higher standards (see chapter one).<sup>1</sup> The limits of trade liberalisation seem to be undergoing redefinition and, as the world's most ambitious trade agreement in terms of non-tariff barrier reduction, the Transatlantic Trade and Investment Partnership (TTIP) is paradigmatic of this debate. How should we interpret the debates that have arisen within the EU on the TTIP? Does *Trade for All* answer those concerns?

In chapter three, through an array of indicators (such as Google and YouTube web searches), Leif Johan ELIASSON, Professor at East

1. This expression was used by Pascal Lamy in 2015 in a conference on "The New Global Trade Agenda" at the Peterson Institute for International Economics (Washington DC).



Stroudsburg University (United States), shows how the changes in EU public opinion towards the TTIP can be correlated with anti-TTIP groups' activities. Acknowledging that TTIP negotiations have garnered significant and unexpected opposition from civil society organisations (CSOs), the author shows how these opposition groups have chosen certain issues and key words to raise salience. CSOs, helped by market tests done through private organisations such as Campact, have successfully tapped into European's socio-cultural relationship with food, arguing that accepting American standards threatens higher EU standards (think of chlorinated chicken or genetically modified organisms). The other main issue of contention has been the investor-state dispute settlement system because it can be linked to another precious European achievement: the welfare state.

In chapter four, Ricard BELLERA, Secretary for International Affairs of a large Spanish trade union, argues that *Trade for All* proves that CSOs' resistance to the TTIP has been successful. The European Commission's communication on trade learns from the TTIP debate and advocates transparency and public consultation as well as coherence with the European model and values. Moreover, it tries to tackle new and old economic realities such as tax avoidance strategies and the social consequences of market openings in both EU and third countries. Despite that, the author cannot preclude the suspicion that *Trade for All* may have at least a partially instrumental character because the change in perspective is too pronounced and has not yet affected the essence of current trade negotiations. In his view, the communication implies too complete a turnaround in relation to the previous positions of DG Trade.

Alvaro SCHWEINFURTH's contribution in chapter five reflects the views of the companies grouped in the Confederation of Employers and Industries of Spain and BusinessEurope on *Trade for All* in general and the TTIP in particular. The author states that companies are in favour of trade liberalisation in general and TTIP in particular for three reasons. First, they associate such agreements with growth in the EU both in terms of GDP and employment. Second, all trade agreements must respond to the new parameters of international trade (i.e. value chains) and address non-tariff barriers. Third, the EU should reach an agreement on the TTIP to remain a major player in international trade.

In chapter six, Javier PÉREZ's contribution focuses on one of the most contentious issues raised by the negotiation of the TTIP: the investor-state dispute settlement (ISDS) arbitration system included in most existing investment agreements in the world. The ISDS is used to resolve disputes between investors and host states when the former may be adversely affected by legislative changes that alter the preconditions for investment. In other words, such arbitration systems allow foreign corporations to sue governments over democratically adopted public policy and in doing so limit governments' autonomy to regulate in the public interest. To prevent that from happening the EU Commission proposed a reformed ISDS system in 2015. The author, the Director of the Madrid Centre for Research and Studies on Trade and Development, analyses the pros and cons of that proposal and acknowledges that is an important step in addressing the weaknesses of the old system.

### Part 3. *Trade for All* and emerging and developing countries

The EU provides developing countries with special and differential trade treatment through various instruments. Since the European Community's inception, the so-called ACP countries (former colonies from Africa, the Caribbean and the Pacific) have benefited from positive trade discrimination. Special tariff reductions have also been granted to other developing members of the GATT/WTO through the General System of Preferences (GSP) since 1971 and the EU offers tariff and quota-free access to almost all exports of the so-called least developed countries through the Everything But Arms (EBA) initiative introduced in 2001. But it is increasingly clear that developing countries are not a homogenous group. One of the key debates in international trade nowadays is whether the so-called emerging economies should still be treated as developing countries (see chapter one). China, in particular, is already among the four major trading powers in the world. What is EU trade policy towards emerging and developing countries? Does *Trade for All* have the potential to change anything (for better or worse)?

In chapter seven, Jan ORBIE and Deborah MARTENS from Ghent University identify three evolutions in the EU's trade relations with developing countries over the past decade. First, poorer developing countries have lost their central position in the EU's "pyramid of preferences". Second, EU trade policy towards developing countries has been embedded within a logic of liberalisation. Third, there has been a discursive evolution towards putting more emphasis on values, of which *Trade for All* is the culmination. The principle of differentiation between developing countries supports this apparently impossible triangle. The authors conclude with a note of caution that the ethical side of the triangle may not be able to counterbalance the neoliberal one.

The monograph closes with the contribution of Mario ESTEBAN, Analyst at the Real Instituto Elcano and Professor at the Autonomous University of Madrid. In chapter eight, he argues that *Trade for All* shows that the EU has rethought and restated its relations with China. The EU considers that China can no longer be treated as a developing country because of its strength as an economic and commercial power. Relations with the country should be based on reciprocal treatment in both commercial relations and investment. Achieving this goal would advance bilateral relations, allowing for the consideration of a China-EU free trade area. The author then identifies and analyses the problems that continue to inhibit the achievement of this goal: China's issues in operating as a market economy, the problems of overcapacity in the steel industry and its impact on the European market, and finally China's problems accepting European standards on labour and the environment to the extent necessary to deepen bilateral relations through a free trade agreement.

The eight chapters of this monograph improve our understanding of *Trade for All* and therefore of the EU's responses to complex debates in relation to international trade. *Trade for All* is cautious on China and explicit not only on promoting values through trade but also on the benefits of trade liberalisation and the need for differentiation between developing countries. *Trade for All* has (at least ostensibly) learned from the TTIP debates and is perhaps over-optimistic regarding the compatibility of EU bilateral and multilateral approaches to trade policy.



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### Introduction

In the context of the Doha Development Round (DDA) trade negotiations, in June 2008 ministers from some 70 WTO member countries met in Geneva in a so-called “mini-ministerial” format to seek an agreement on a set of key elements of a package of results on agricultural and non-agricultural market access (NAMA), among other areas. Ministers and senior officials knew by then what the main features should be of the potential political agreement necessary to enter the final phase of the DDA. To secure a substantial result in agriculture, trade-offs in other areas were required. Developing countries, especially the emerging economies, were in particular called to make concessions on NAMA. After nine days of mini-ministerial meetings, it became clear that an agreement was not possible. This was the last time a serious attempt was made to conclude the DDA. Many point to India and/or the US as bearing the main responsibility for this failure. What is truly remarkable is that even though the main controversy was, as usual, agriculture, the EU was not blamed, unlike in past multilateral rounds of trade negotiations (VanGrasstek, 2013: 447-456; Blustein, 2008).

At the WTO Ministerial Conference in Nairobi (December 2015), against the expectations of most actors and observers, a substantial result was achieved in the form of prohibiting agriculture export subsidies – though some forms of export assistance were allowed to remain in place in order to accommodate the US. By then very few countries were actually employing export subsidies,<sup>1</sup> which explains the apparent ease with which consensus was possible. This result was based on a joint proposal by Brazil and the EU, who for decades sat at opposite extremes as far as agricultural trade was concerned. The proposal was also co-sponsored by Argentina, the Republic of Moldova, New Zealand, Paraguay, Peru and Uruguay (WTO, 2015).

Both episodes illustrate dramatic changes over seven years in the position of the EU as well as in the perception of its contribution and role in the trading system. From being constantly on the defensive in the past, the EU had been thrust into a position of positive leadership.

1. Switzerland, Norway and Canada.

This is compounded by a very active engagement of the EU in trade negotiations outside the WTO. While declaring its firm support for the multilateral trading system as embodied in the WTO, the EU has engaged in numerous negotiations of free trade agreements (FTAs), including with developed countries such as the Republic of Korea, Canada, the US and Japan. This is a major departure from the position the EU took in the late 1990s when it proposed a new round of multilateral trade negotiations – the Millennium Round – and later at the turn of the century when it enforced a self-imposed moratorium on the initiation of new negotiations of FTAs in order to prioritise the Doha Round that lasted until 2006.

This paper attempts to explain the main reasons for these changes and thus the context within which the EU plays a role in the multilateral trading system, as well as the challenges it faces.

### **Internal changes**

The EU's expansion to 28 members and budgetary constraints have no doubt been at the root of the gradual reform undergone by the Common Agriculture Policy (CAP), since domestic support did not increase as much the headcount of farmers. Also, in some cases, less trade-distorting instruments began to be employed. Long gone are the days of mountains of butter and massive export subsidies for sugar and other products that heavily distorted world markets and depressed international prices. This helps to explain the change in the EU's position in trade negotiations from extremely defensive to proactive at the multilateral, regional and bilateral levels. To be sure, there still are many sensitivities in several agriculture sectors in the EU which probably make full liberalisation unfeasible, but the direction and trend of the reform have been positive.

### **Changes in WTO negotiations**

The Uruguay Round (1986-1994) re-established a consensus around the basic rules governing agricultural trade that had been lost since the early years of the GATT. However, it achieved little actual liberalisation and, in recognition of this, the Agreement on Agriculture provided for future negotiations to be initiated by the year 2000 (WTO Agreement on Agriculture, Art. 20). Similarly, the General Agreement on Trade in Services (GATS) envisaged negotiations to continue to liberalise trade beginning in 2000, since the initial specific commitments made by members were rather modest (WTO GATS, Art. XIX). Politically, agriculture and/or services could not be negotiated individually or jointly without trade-offs in other areas. Consequently, in 2001, the Doha Development Round (DDA) was launched with the central purpose of achieving substantial agricultural liberalisation by reducing or eliminating domestic support and export subsidies, along with ambitious objectives in other areas such as non-agriculture market access, antidumping measures, trade and environment, fisheries' subsidies, geographical indications and trade facilitation. Investment, competition policy and transparency in government procurement were taken off the agenda in 2004, thus reducing the

space for trade-offs. By 2008 massive changes had taken place in the world with a profound impact on the political economy of the negotiations. What follows is a brief consideration of some such changes.

The extent and speed of China's emergence as a major trading power, as well as the growth of other emerging economies such as Brazil, India, Indonesia, the Russian Federation and South Africa upset the traditional way of achieving a balance of results. The DDA had been organised on the basis of three levels of concessions, in decreasing order of magnitude, for developed, developing and least-developed countries (besides the special case of members that acceded after 1995). The growth in income, trade and investment of emerging economies made it politically impossible to achieve substantial results in the DDA without a greater contribution from them to the results relative to what was expected seven years earlier.

By the same token, one-size-fits-all special and differential treatment (SDT) was no longer feasible. SDT necessary for weaker economies – say, Honduras – was no longer acceptable if the benefits were also accorded to bigger countries such as Mexico and Brazil. As a consequence, the trend of fragmentation of developing countries continued with the creation of new groupings such as the small and vulnerable economies (SVEs), the recently-acceded members (RAMs), and the very recently-acceded members (VRAMs), among others. These coalitions, by limiting the extent of SDT sought by subgroups of developing countries, would presumably be more acceptable. This also led to the creation of a new kind of SDT as reflected in the mandate for the Trade Facilitation negotiation, according to which “The results of the negotiations shall take fully into account the principle of special and differential treatment for developing and least-developed countries [...] In particular, the extent and the timing of entering into commitments shall be related to the implementation capacities of developing and least-developed Members.” (WTO, 2004).

Growth and development, particularly in emerging economies, increased the demand for protein and food, driving prices of agricultural products upwards on a global scale. The priorities for many exporting countries shifted from seeking better access in foreign markets to developing the capacity to increase production to meet the demand. This reduced their willingness to make concessions on industrial goods and services as a trade-off for agriculture liberalisation.

In contrast with the agricultural reform in the EU, the farm policies in the US as expressed in the so-called “farm bills” did not exactly point in the same direction, making substantial results in the WTO even more difficult.

Also significant is the fact that US embarked on negotiations of bilateral FTAs with other countries under the strategy of competitive liberalisation explained in the 2005 Trade Policy Agenda, “...to pursue reinforcing trade initiatives globally, regionally, and bilaterally ... By pursuing multiple free trade initiatives, the United States has created a “competition for liberalization”, launching new global trade negotiations, providing leverage to spur new negotiations and

solve problems, and establishing models of success in areas such as intellectual property, e-commerce, environment and labour, and anti-corruption" (USTR, 2005). Most of these negotiations were with relatively small markets such as Chile, Singapore, Central America, Colombia and Peru. However, FTA negotiations with Australia and the Republic of Korea were announced in 2003 and 2006, respectively. The EU could not stand idle and be discriminated against in important markets, particularly Korea, and thus in 2006 it put an end to the moratorium on negotiation of new trade agreements that had been in place since 1999. Ironically, while the EU began negotiations with Korea a year later than the US, its FTA entered into force a year earlier (2011).

In the past 25 years the growing wave of liberalisation through FTAs has involved an increasing number of developing countries, both among themselves, and with industrialised economies such as Mexico, Central America, Colombia, Peru, Chile, Singapore, Brunei, Vietnam and China. I call these the "reciprocity countries" since such arrangements signify that they have chosen to conduct their trade relations under strict reciprocal arrangements. Indirectly, such countries indicate that SDT or other forms of dispensation are not needed. Consequently, they can be as – or more – ambitious than developed countries in the WTO or elsewhere. In addition, most agreements these countries have concluded or are negotiating are of a high-standard, cover "substantially all trade" and include cross-border trade services and investment under a negative listing, government procurement, trade facilitation and dispute settlement, among other areas.

In contrast, other countries such as India, Brazil, Argentina, Indonesia and South Africa have been unable to conclude any major trade agreement of similar standing.<sup>2</sup> The Russian Federation has spearheaded the establishment of the Eurasian Economic Union with Kazakhstan, Belarus, Armenia and Kyrgyzstan, but has not ventured outside its immediate neighbourhood. It is to be expected that over time more countries will join the "reciprocity countries", including economies such as Argentina and Brazil, following recent political changes in both countries.

## Economic and political changes

Global value chains describe the new forms of organisation of production across jurisdictions that have a strong regional presence but global implications (Jara and Escaith, 2012). The EU is one of the main hubs. Where should we say lightbulbs produced in China by a Chinese company (perhaps with European ownership) with European and Asian components and technology are made? To hit this product with trade remedies in Europe probably harms European interests. The logic of the distinction between foreign and domestic products or services is quickly blurring as is the distinction between trade in goods and services. The numbers are eloquent: approximately 50% of world trade is in intermediate goods. Protectionism starts to make less sense and instead liberalisation becomes more necessary. Europe, North America and East Asia are at the centre of this process (WTO,

2. South Africa concluded an FTA with the EU in 1999 that essentially covered only trade in goods and with important exceptions.

2016a). The full implications of this new way of organising production and consequently the perceptions of the political economy of trade and international relations are yet not fully known. The perceived need of an increasing number of developing countries to better integrate with other economies that are rich in technology and innovation probably fuels the appetite for more liberalisation and better rules.

## Protecting the consumer

We are witnessing a major shift away from systems designed to protect the producer towards systems that attach greater importance to protecting the consumer. Pascal Lamy calls this the transition from the “old to the new world of trade” (Lamy, 2014). Under the “old world”, policies designed to protect the producer include instruments such as tariffs, subsidies and other obstacles to trade. In the “new world”, the aim is to protect the consumer; hence the proliferation of regulations to ensure security of goods and services, safety and health.

Trade liberalisation levels the playing field, increases trade, growth and welfare. To level the playing field in the “old” world, negotiations are directed to eliminating tariff and other border measures as well as subsidies and other distortions that affect the competitive environment. In the “new” world, levelling the playing field becomes more complex since the objective is to reduce the differences in the levels and administration of consumer protection, such as technical standards and sanitary and phytosanitary measures, through a process of presumptive mutual recognition, voluntary asymmetric recognition, voluntary unilateral recognition of equivalence, regulatory co-operation, or a combination of these approaches (Bergkamp and Kogan, 2013: 493).

The political economy also changes. Liberalisation meets the resistance of the producer in the “old” world but is supported by the consumer. In the “new” world, the producer resists the increase in regulations while the consumer welcomes it. The protection of the consumer touches upon more sensitive issues than those merely associated with loss of benefits and/or jobs, and at times touches upon cultural and ideological questions. Consequently, the regulatory activity is not only a technical matter, purely based on scientific risk-assessment. This is well reflected in the EU’s new trade strategy *Trade for All*: “The third pillar of the strategy is about ensuring EU trade policy is not just about interests but also about values. The new approach will safeguard the European social and regulatory model at home. The Commission makes a clear pledge that no trade agreement will ever lower levels of regulatory protection; that any change to levels of protection can only be upward; and that the right regulation will always be protected. The strategy also points to the next steps for the new EU approach to investment protection” (Malmström, 2015).

These simplistic reflections on the protection of the consumer illustrate a trend that has increased in pace over the last 15 years or so. Interestingly, the impact on international cooperation including trade negotiations is dramatic for the world as we know it. For example, if the aim is to protect consumers, there is no room to have preferential or discriminatory instruments because the protection cannot be relative



to the origin of the good, service or investment. Consequently, there is no room for SDT and the distinction between bilateral and multilateral arrangements makes no sense as far as regulations are concerned. Reciprocity loses purpose, since one country should not protect more or less depending on the level of protection given by its partners.

Values, except in the broadest sense, differ among countries because of cultural, political and other reasons. A trade policy anchored in the protection and maintenance of a value-based regulatory model is bound to clash with the policies of other countries. For a recent example of this, see the “Seal” litigation in the WTO following complaints by Canada (WTO DS 400) and Norway (WTO DS 401) against EU measures prohibiting the importation and marketing of seal products. The EU defended its measures as necessary to protect public morals. Other cases involving EU measures based on values and not only on a science-based risk assessment are “Hormones” (WTO DS 26) and “GMOs” (WTO DS 291).

The Transatlantic Trade and Investment Partnership (TTIP) negotiations are important, since the two major economic players – the EU and the US – must confront the challenge of achieving closer integration and cooperation of two different regulatory cultures. Roughly, the EU’s “precautionary principle” is contrasted with the US’s science-based risk assessment, cost-benefit analysis, and cost-effectiveness regulatory process. According to Bergkamp and Logan (2013), “there are signs that both approaches tend to converge over time”. Be that as it may, they conclude: “The end game should be the establishment of a robust science-based procedure for mutual recognition of equivalent product-related standards, including standards that diverge in stringency without a basis in science”.

### **Challenges in the multilateral system: Rules matter – services liberalisation**

Trade in services is approximately 25 years old in the multilateral trading system and the rules as embodied in the GATS ensure non-discrimination. The North American Free Trade Agreement (NAFTA) was the first ever trade agreement with extensive coverage of services but produced little liberalisation while enhancing transparency and certainty since the signatories for the most part bound their status quo. Trade agreements following NAFTA produced little if any liberalisation with the notable exception of accession negotiations to the WTO (Jara and Dominguez, 2008: 105-107). The evidence points to the fact that trade negotiations are not a good vehicle for producing actual liberalisation, meaning the creation of new business opportunities (Roy, Marchetti and Lim, 2007: 180-183). Most services are subject to domestic regulations that in the absence of international co-operation might create unnecessary obstacles to trade and investment, increase transaction costs and reduce competitiveness. Accordingly, agreements that spell out what governments may or may not do to regulate markets of particular services, and effective disciplines on transparency and regulatory coherence become essential. Examples in the WTO are the Understanding on Commitments in Financial Services (WTO, 1999) and the protocol on

telecommunications approved in 1997. (WTO, 1997). The Trade in Services Agreement (TiSA) currently under negotiation between 23 countries, counting the EU as one, is another example of an agreement with numerous sectoral annexes spelling out particular disciplines that establish regulatory frameworks. The Trans-Pacific Partnership (TPP) and eventually the TTIP also reflect this approach to improving and protecting services markets. All this has strong and direct links with competition policy. The best example, by far, is the construction of the EU's single market.

## **Challenges in the multilateral system: Too much water**

Throughout the successive negotiations in the multilateral trading system, market access negotiations have resulted in bindings of tariffs, services commitments, agricultural subsidies and domestic support. In several cases, the applied rate is lower than the binding, a gap known as "water". This can result because: (i) a government wanted to have a margin of manoeuvre in case it needs to raise the tariff in the future; or (ii) a subsequent unilateral liberalisation resulted in a lower applied rate. Some developing countries in the Tokyo and Uruguay Rounds bound 100% of their tariffs, but several other countries maintain many unbound tariff lines.<sup>3</sup> With regards to services the "water" is probably greater since a great deal of autonomous liberalisation has taken place and many sectors or subsectors remain unbound. So much water in the system creates uncertainty. Future multilateral trade negotiations should as a minimum aim to bind: (i) all products and services at the applied rate; (ii) applied levels of domestic support on agriculture and any form of export assistance left untouched by the Nairobi decision; (iii) preferential margins under government procurement. On this basis the playing field would be levelled and further liberalisation could be pursued for the benefit of all. A fact to be noted is that countries that acceded to the WTO after 1995 have bound at least 99% of products at or very close to the applied rate and made extensive commitments on services.

## **Challenges in the multilateral system: New protectionism**

Much has been said on how, following the 2008-09 financial crisis, countries did not react with protectionist measures like in the 1930s, and the multilateral trading system has been credited as the main instrument that contained such pressures. However, what the world has witnessed is a steady rise in protectionist measures in forms other than tariffs, and despite all the promises – for example at the yearly meetings of the G20 – little rollback has taken place (Global Trade Alert, 2016; WTO, 2016b). According to some accounts, the stock of protectionism amounts to 5% of world trade (WTO, 2016c: par. 3.11). This reveals some weakness or loopholes in the rule-book. Future negotiations will have to address this reality and devote much energy to dismantling protectionism and establishing better rules to prevent backsliding. One important aspect in this regard is the use of subsidies, including bail-outs, and the widespread use of trade remedies.

3. Chile was the first country to bind all its tariffs (at 35%), in the Tokyo Round. Other Latin American countries followed the example in the Uruguay Round.

## Challenges in the multilateral system: Dispute settlement

The WTO's dispute settlement system (DSU), frequently referred to as the "jewel in the crown", works very well. However, some improvements are needed. Members have been engaged in a DSU review since 1997, but negotiations have yet to produce any result. Some of the improvements are clarifications of a technical nature, while others are more political in character. Some of the latter are: (i) the selection of panellists, including whether there should be a permanent roster of panellists or, at least, of panel chairs; (ii) the selection and re-appointment of Appellate Body members; (iii) how to encourage the use of alternative methods to settle disputes; and (iv) compliance with the rulings and recommendations adopted by the Dispute Settlement Body (DSB).

The last point is crucial since the only means of creating incentives for a member to comply is to adopt retaliatory measures, which makes little economic sense and leaves little margin for small economies to act in this manner. The cost of no or partial compliance should increase semi-automatically over time, and perhaps take the shape of losing rights such as being precluded from raising a complaint against other members. The experience of the EU with a rules-based system, control of legality, protection of rights and enforcement of obligations shows how much more is possible to facilitate increased co-operation and integration.

## Challenges in the multilateral system: Expanding the agenda – investment and competition policy

Investment and trade are two possible ways of doing business. The WTO already has discipline on investment insofar as it relates to services, as embodied in the text of the GATS.<sup>4</sup> Otherwise, foreign investment is regulated by hundreds of bilateral agreements some of which contain pre-establishment access obligations, not exactly the best model of global governance. Despite past failures to incorporate rules on investment in the OECD and the WTO, there is a renewed interest that now includes the new capital exporters such as China, as reflected for example in the communiqué of the 2016 G20 Summit held in Hangzhou, China (G20, 2016). Services and investment regulation are closely intertwined with competition policy, which also requires greater international co-operation. The same can be said of the challenges posed by the pervasiveness of the digital economy. In short, the multilateral trading system is faced with the need to respond to a wide ranging agenda of complex and politically sensitive issues. The EU embodies the best model of co-operation among nation-states that should become a reference point for the rest of the world. This indicates the challenges and opportunities if not outright responsibility of leadership for the EU

## Challenges in the multilateral system: Enhancing the analytical capacity

Weaker and poorer jurisdictions lack the capacity to undertake the analysis and impact- assessment of the present and future issues on the agenda of the multilateral trading system. Other countries with

4. Article I.1.b of GATS defines trade in services *inter alia* as the supply of a service "by a service supplier of one Member, through commercial presence in the territory of any other Member".

more resources will have limited capacity. To the extent that these governments are asked to take positions and contribute to increasing and deeper levels of international co-operation, prudence dictates that in the face of uncertainty a negative or suspicious attitude protects their interests better. Many past failures can be explained by this reality. Much is done already by different programmes in the WTO and other international agencies. However, it's still not nearly enough in light of the coming challenges. Better co-ordination between governments, agencies, NGOs and others is also required, and a central element is the organisation of and access to information. Once more, the long tradition of European countries and institutions providing assistance can be a key catalyst to greatly improving and enhancing the analytical capacity of other countries and the public at large.

## Conclusions

This paper has briefly described the main changes that have impacted international trade relations in the EU and worldwide. It can easily be said that it is no longer "business as usual". More and deeper international co-operation is needed, and some of it is of an urgent character. The negotiating processes take a long time to conclude. Reflection, analysis and exchanges need to accelerate in a transparent and inclusive manner.

The EU epitomises the evolution towards deep integration going beyond co-operation based on the Westphalian nation-state model. The European experience has not been without problems and hiccups, such as the recent Brexit referendum in the UK. But there is no denying the huge and formidable successes on peace, democracy, human rights, welfare, growth, development, innovation, etc.

It is in the interest of Europe as well as most countries to have a rules-based international system of trade and investment, and in other fields, to better harness increasing globalisation. This requires leadership in ideas and values, which is a central responsibility for the EU.

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The EU has signed a plethora of bilateral and regional agreements since its inception, as well as being a key player in the multilateral trade institutions. This binary trade strategy, combining multilateralism with bilateralism/regionalism has been characteristic of its external trade relations. Even during its attempt to “manage globalisation” through favouring the multilateral approach in the late 1990s and early 2000s, the EU continued to negotiate Preferential Trade Agreements (PTAs).

Yet, there are two major differences between the maelstrom of bilateral trade negotiations that the EU has launched since the mid-2000s and the agreements signed in the past. The first is that bilateral agreements up until 2006 served principally non-economic purposes. In the past, EU economic interests were served by multilateral agreements while neighbourhood and development objectives were pursued through bilateral or regional means. PTAs justified purely by economic interests are a trademark of the 21<sup>st</sup> century. The second difference is that the EU has sought to establish new-generation free trade areas (FTAs) with non-European developed countries. The agreement with South Korea entered into force in 2011 and, in 2013, the EU reached an agreement with both Canada and Singapore and started negotiations not only with the United States (US) but also with Japan. Is the EU's new bilateralism endangering multilateralism?

Just like previous European Commission trade strategy papers *Trade for All* argues that it is the other way round: EU bilateralism is designed to help multilateralism. This article shows that this outcome is not obvious. While EU bilateralism may promote multilateralism, it could also hinder it. On the other hand, for a bilateral EU approach to promote multilateralism, the multilateral system of governance must not be deadlocked. In the first section of this paper, the European Commission's perception that the EU bilateral approach does not run counter to its multilateral approach is reviewed in a critical manner. The second section is devoted to explaining the need to add a multilateral condition to that reasoning.



## The European Commission's reasoning

The EU's bilateral trade strategy since 2006, including the Transatlantic Trade and Investment Partnership (TTIP), has been justified by the European Commission on the basis that deep and comprehensive trade agreements are compatible with multilateralism. The Commission's argument is the following: preferential agreements that allow for progress on what has been achieved at multilateral level (WTO+ topics) and in areas not already covered by the World Trade Organization (WTO-X items) may be considered stepping stones rather than stumbling blocks for multilateral liberalisation because they allow both for more trade creation than diversion and prepare the ground for the multilateralisation of their provisions. In other words, the EU's recent bilateral negotiations and agreements should be seen, at worst, as complementary to multilateral negotiations in the Doha Round and at best as promoters of them.

On page 10 of its *Global Europe* strategy published in 2006, the European Commission specifically states that:

Free Trade Agreements (FTAs), if approached with care, can build on WTO and other international rules by going further and faster in promoting openness and integration, by tackling issues which are not ready for multilateral discussion and by preparing the ground for the next level of multilateral liberalisation ... To have a positive impact FTAs must be comprehensive in scope, provide for liberalisation of substantially all trade and go beyond WTO disciplines. The EU's priority will be to ensure that any new FTAs, including our own, serve as a stepping stone, not a stumbling block for multilateral liberalisation.

In its 2010 *Trade, Growth and World Affairs* strategy, the message remained the same: "the bilateral is not the enemy of the multilateral. The opposite may hold truer: liberalisation fuels liberalisation" (p. 5). In its 2015 *Trade for All* strategy, the message is even stronger: "The EU needs to pursue bilateral and regional agreements in a manner that supports returning the WTO to the centre of global trade negotiating" (p. 29).

This argumentation takes into account several decades of debate on the complementarity of bilateral and multilateral approaches to trade addressed from different perspectives by experts in international law and international economic policy. In line with Article XXIV of the General Agreement on Tariffs and Trade (GATT), it accepts that, while both approaches may reinforce each other, bilateralism may hinder multilateralism and hence such preferential agreements should only be allowed under certain conditions. Article XXIV allows for bilateral agreements establishing FTAs or customs unions if they ensure greater trade liberalisation. More specifically, these agreements must meet certain conditions to be accepted:<sup>1</sup>

1. Article XXIV takes into account the Understanding signed in the Uruguay Round intended to clarify and specify some aspects of the article that had led to controversies and different interpretations.

- 1) They must affect all commercial exchanges or an "essential" part of them.
- 2) In the case of customs unions, the common external tariff should not imply greater protection against third countries. If this is so, the union should compensate for the added protection with tariff reductions in other tariff headings.

3) Regional arrangements should be carried out within a maximum of 10 years.

The validity of these conditions has been endorsed by the analysis of the bilateralism-multilateralism rapport conducted from an economic policy perspective. Economists such as Baldwin (2006) have argued that bilateralism and multilateralism may feed back into each other and in fact have done so. This position is based largely on the effects of the trade creation that result from bilateral agreements and considers that these arrangements may be the building blocks of multilateralism in the medium to long term. Other authors such as Bhagwati (2008) argue instead that bilateralism can erode multilateralism mainly through trade diversion effects, that is, the inherent discrimination in market access these agreements entail. This view sustains that bilateral agreements are stumbling blocks to the multilateral system, as such a tangle of agreements – “spaghetti bowls” – hinders trade. As both positions are based on empirical evidence, one may conclude that the nature of PTAs can determine their compatibility with the multilateral system: the more an agreement favours trade creation over trade diversion the more likely it is to support the multilateral system.<sup>2</sup>

In tune with this conclusion, the European Commission argues that its bilateral approach is compatible with multilateralism because of its nature. As EU bilateral agreements – especially those with developed countries – cover WTO+ and WTO-X issues, they should only enable progress in trade liberalisation, never a pull-back from it. WTO+ issues involve progress on market access for both goods and services with provisions not only on discriminatory measures (such as tariffs in the case of goods) but also on regulatory convergence in the technical, sanitary and phytosanitary areas. WTO-X issues involve progress in rule convergence. Following the *World Trade Report 2011*, the main policy areas covered by WTO-X provisions are: competition policy, investment, movement of capital, and intellectual property rights not covered by TRIPS. The next largest group of policy areas are: environmental laws, labour market regulations, and measures on visa and asylum. The European Commission therefore assumes that the more ambitious the agreement in terms of regulatory and rule convergence, the more positive the net effect on trade creation and trade diversion.

This rationale cannot be accused of lacking analytical support. The WTO itself accepts that when PTAs focus primarily on reducing non-tariff barriers their results are expected to benefit third countries (less trade diversion effects), since: “By their very nature, some deep integration provisions are *de facto* extended to non-members because they are embedded in broader regulatory frameworks that apply to all trading partners” (World Trade Report 2011:168). Provisions regarding competition policy or state-owned firms, for example, would immediately benefit all foreign producers. Other deep integration provisions such as common standards are expected to have net trade creation effects with third countries after an adaptation period.

Preferential deep and comprehensive agreements can of course be designed to create new trade diversion effects, especially through different norm recognition schemes and a plurality of norms of origin. Blanchard (2015: 92) shows that “preferential agreements can allow

2. It should be noted that for some authors like Baldwin, trade diversion, that is, any bilateral or regional agreement containing inherent discrimination against third countries can trigger a domino effect by encouraging third countries to participate in the preferential agreement.

governments to harness the trade liberalizing potential of [vertical] international ownership” by creating potential trade-investment complementarity. De Ville and Siles-Brügge (2016) attest that the TTIP is unlikely to lead to global standards because the prevalent mode of regulatory cooperation will be neither harmonisation nor *erga omnes* mutual recognition as in the European Single Market but *bilateral* mutual recognition of regulations. In other words, these authors sustain that most regulatory equivalence will not be extended to suppliers from outside the TTIP. Such trade diversion, however, would not be the result of an increase in protection with regard to third countries but by discriminating when reducing barriers to trade. In other words, third countries would not be facing new barriers.

In any case, the Commission assumes that such agreements will not go against multilateralism due to their nature, that is, their capacity to generate a positive net effect of trade creation and diversion. In *Trade for All*, the EU’s bilateral approach has the power to support returning the WTO to the centre of global trade negotiating. Since *Global Europe*, it has been expected to prepare the ground for the next level of multilateral liberalisation. Such reasoning implies the potential technical feasibility of multilateralisation of bilateral or regional agreements. As these PTAs cover areas that have not yet been agreed upon in the WTO, their provisions should have the potential to become multilateral, especially if these provisions are similar in different bilateral or regional agreements.

Mega-regionals such as the TTIP could have the capacity to transform “spaghetti bowls” (chaos resulting from many different FTAs) into “lasagna dishes” (Estevadeordal et al., 2013). These would be separate processes from the WTO but complementary in their aim of reducing transaction costs inherent in the “spaghetti bowls”. As Abbott puts it: “The WTO might, in effect, ‘free-ride’ on all the PTA activity taking place” (2007: 582). In fact, one frequent example of how bilateral agreements can be regionalised and even become multilateral is the creation of the pan-European system of rules of origin in 1997 (Baldwin, 2013).<sup>3</sup> Sticking with the metaphor, creating lasagne would be a step towards the development of a multilateral super-pizza.<sup>4</sup>

In *Trade for All*, the European Commission explicitly commits itself for the first time to an open approach to bilateral and regional agreements so as to “develop contributions to address key challenges facing the WTO based on solutions achieved in bilateral and regional initiatives” (p.30). This open approach entails a readiness to enlarge its FTAs to third countries willing to join them (including the TTIP) and explore the possibility of extending “accumulation of origin”.

This is not, however, self-evident. As Bhagwati remarks: “Lasagna cannot be made from spaghetti: it needs flat pasta. And pizza cannot be made from lasagna either!” (2008: 94-95). Multilateralisation may not take place even if bilateral agreements are technically compliant. These agreements can divert multilateral negotiating capacity and create valid alternative market access for key economic actors (Conceição-Held, 2013). They can also provoke a negative reaction from third countries. Some economists argue that multilateralisation of TTIP rules may not occur because China and other large emerging markets are big enough

3. The system led to the homogenisation of the rules of origin the EU had agreed with eastern European countries through a system of diagonal accumulation creating a “customs union of rules of origin” in the words of Baldwin (2013: 6). The EU has extended this system of rules of origin to its Mediterranean partners and other bilateral agreements.
4. Another way to multilateralise bilateral agreements in the area of at-the-border barriers would be to make them irrelevant by binding “most favoured nation tariffs” or WTO tariffs to zero for a set of goods (as the Agreement on Information Technology did in 1996). If tariffs are zero for all imports, irrespective of origin, granting bilateral or regional preferences would no longer make sense (Baldwin, 2006). This is in fact the case for nearly 50% of world trade.

to reject an adaptation to TTIP rules – thus leading to global market fragmentation – even if they are not yet in a position to set up their own systems of deeper disciplines. While the exporters among the emerging trade powers will have to adapt to TTIP-based norms, their public authorities may reject them and “continue to attract offshored factories with a ‘my internal market for your factories and technology’ deal” (Baldwin, 2012: 20). On the other hand, such mega-regionals may set up overly forward-looking rules in areas that less developed economies would struggle to accommodate.<sup>5</sup> The countries that tend to lose most decision-making power in the context of bilateral negotiations are the least economically powerful (Bhagwati, 2008; Abbott, 2007).

To conclude, while the European Commission’s argument is plausible, the probability that its bilateral approach will feed its multilateral approach is not one hundred per cent. Multilateralisation cannot be expected to automatically follow its bilateral approach even in cases when such multilateralisation is technically achievable. So, when would multilateralisation take place? How can we ensure that it would take place?

## The multilateral condition

Baldwin and Evenett (2011) have argued that bilateralism can complement multilateralism when the multilateral system is active, and may be a substitute for it when the multilateral system is stagnant. In their words:

... regionalism per se was not the problem. Multilateralism and regionalism have gone hand in hand throughout the GATT/WTO’s history. Regional and bilateral arrangements were embedded in a vibrant and reactive multilateral system – a system that could and frequently did update its disciplines on preferential arrangements. Regionalism in a world where multilateralism was permanently deadlocked would be a very different proposition – regionalism would begin to act as a substitute to multilateralism rather than a complement (Baldwin and Evenett, 2011: 5-6).

The existence of a nexus between the multilateral context and bilateral agreements has also been underlined by other authors. In their preliminary evaluation of NAFTA, Bergsten and Schott argue that: “The startup of NAFTA negotiations in 1991 gave renewed impetus to the Uruguay Round in the GATT, which had stalled in 1990 because of US-Europe differences over agriculture, by reminding the Europeans that the United States could pursue alternative trade strategies” (1997: 3). The authors further argue that the congressional passage of NAFTA in November 1993 together with the launching of a new era of cooperation via the APEC summit in Seattle “played a critical role” in bringing the Uruguay Round to a successful conclusion in the following month.

Mansfield and Reinhardt, following a systematic approach, claim that “developments at the heart of GATT/WTO encourage its members to form PTAs as devices to obtain bargaining leverage within the multilateral regime” (2003: 829). Reciprocal preferential arrangements

5. Business Desk of *The New Zealand Herald*, “TPP risk weaker world trade system –ex WTO boss”, 21 July 2014. Interview with Dr Supachai, former WTO Director-General (2002-2005).

would both furnish states with insurance against the emergence of conditions within GATT/WTO that could threaten their economic interests (such as a failure to reach agreement in multilateral talks) and give them a greater voice in multilateral trade talks by increasing their market power. Their econometrical analysis indicates that developments within the multilateral regime that can create incentives to preferential trade agreement creation include the periodic multilateral trade negotiations sponsored by GATT/WTO. This result has been vindicated by Baccini and Dür in a more recent quantitative analysis. These authors also find that “countries are more likely to sign an agreement in tandem with negotiations at the WTO level” (2012: 75).

Taken together, these studies highlight that the multilateral context may be favourable or unfavourable to the compatibility between bilateralism and multilateralism. In particular, they seem to indicate that the more difficulties multilateral negotiations face, the more likely it is that members will negotiate bilateral agreements as a strategy to get agreement at the multilateral level or at least as an insurance against the round stalling or failing to ensure certain market access results. However, if these difficulties are too severe, they may lead towards the bilateral agreements becoming substitutes to a multilateral accord. On the basis of this analytical understanding, EU bilateralism could only be a promoter of multilateralism in certain contexts and the European Commission should include the multilateral context in the equation. For the multilateralisation of PTAs to be possible, the multilateral system should not be in too severe difficulties. Table 1 summarises this analytical insight using the building and stumbling blocks terminology.

<b>Table 1. Relationship between bilateral and multilateral negotiations</b>		
Multilateral negotiations difficulties	Difficulties NOT too severe	Difficulties too severe
Incentive to bilateral agreements	Bilaterals as building blocks for multilateralism (facilitators)	Bilaterals as stumbling blocks to multilateralism (substitutes)

Source: author's own.

The literature does not provide a definition of what should be considered too severe multilateral negotiation difficulties. Nevertheless, one would expect these difficulties to be at least apparent, that is, to be recognised by observers as especially severe, which is to say, that they prevent any possibility of agreement in the short or even medium term. In the case of the Doha Development Round (DDR) we can find such a period after agreement was nearly achieved in both July and December 2008. Though the DDR had been declared dead by some analysts at different times, it became *vox populi* after 2008. In fact, according to *Bridges Weekly* of 11 January 2012, the WTO Ministerial Conference in December 2011 formally concluded that DDR was in a “stalemate”. Although the financial crisis that broke out in 2008 did not challenge the idea that trade should be as free as possible, the difficulty in reaching agreements at multilateral level put into question the ability of the WTO to be effective. It may even be argued that the difficulties enacting the mini-package agreement achieved in December 2013 at

the Bali Ministerial Conference did not do much good to rebuild the WTO's image. After the Nairobi agreement in December 2015, however, there is a new optimism in the air (see Jara in this monograph).

One could therefore interpret that while the bilateral negotiations that the EU started in the mid-2000s were not intended to substitute for a multilateral agreement, the new-generation FTAs the EU has sought to establish with non-European developed countries since 2009, including the TTIP, could be attempts to substitute rather than promote multilateralism. In a context of dynamic multilateral negotiations, these bilateral agreements may just be a way to have more negotiating power. In a context of severe difficulties in multilateral negotiations, however, such bilateral agreements have the potential to become substitutes for a multilateral approach, especially on WTO-X issues. From this perspective, the European Commission's reasoning based on the technical potential for the multilateralisation of EU bilateral trade agreements would not be good enough and EU trade policy would have been giving precedence to bilateralism over multilateralism from 2009 to 2015.

There is nevertheless an alternative vision: the exit tactic perspective. Observers agree that a break in the structure of multilateral trade governance took place at the WTO Ministerial Conference held in Cancun in 2003, confirming dissatisfaction among certain members that emerged in 2001 (Seattle WTO Ministerial Conference). Despite concessions to developing countries, consensus building in both the GATT and the WTO has largely been determined by the US, in later decades in collaboration with the EU, along with Japan and Canada – the so-called Quad. The post-World War II structure of international trade was referred to as “the club model” where small numbers of rich-country trade ministers controlled the agenda and made deals because the fundamentals of policy were cross-nationally consistent.

In Cancun, India and Brazil led a new coalition called the G20 that also included China (which became a WTO member in 2001) and rejected the agreement on agriculture proposed by the US and the EU, challenging the classic Western leadership on trade governance. From 2004 onwards, new consensus groups in various formations emerged: the so-called “new Quad” (EU, US, India and Brazil), the G5 (with Australia), G6 (with Japan) or G7 (with China). Analysts speak of a period of “structural power shifts”, as the old Quad hegemonic position dissipated, but without a new power formation able to provide effective leadership on concluding the DDR (Barbé et al., 2016).

It is in this new challenging environment that EU bilateralism has been revived. While the EU's first reaction to Cancun was to centre its bilateral attempts on the emerging economies, after the 2008 failure to reach an agreement in the DDR the EU shifted the focal point back to the members of the old trade “club” that had controlled the governance of the trade multilateral system up until Cancun. This new locus of EU bilateralism is much more dangerous for multilateralism. While bilateral agreements with emerging economies could not offer an alternative to a DDR agreement, PTAs with old Quad members could make the EU less dependent on a multilateral approach. Yet the potential creation of a preferential market among developed countries also increases the pressure upon the new trade veto players to lower their expectations

and facilitate a multilateral compromise. The threat of isolation may help break the WTO negotiating deadlock. This is what Steinberg has called an “exit tactic” (2002: 349).

There is contradictory empirical evidence at the time of writing. On the one hand, there is some evidence that China may be taking the path to start an FTA race. China is now actively pursuing the Regional Comprehensive Economic Partnership (RCEP)<sup>6</sup> and the China-Japan-South Korea FTA as well as a possible Asia-Pacific FTA and a network of FTAs with the countries located along the old Silk Road. Such a race would lower the probability of the multilateralisation of EU bilateral agreements because it would offer alternative BATNAs (Best Alternative to a Negotiated Agreement) as well as alternative possible global standards. On the other hand, the sectoral agreements reached at the Nairobi WTO Ministerial Conference of December 2015 confirmed that while the principle of single undertaking of the Doha Round is dead, PTAs have not been the death knells for any global agreement. It may indicate that the exit strategy is working and that the multilateral system is no longer deadlocked (although whether that means the EU and US have regained their position of strength in international trade governance remains to be seen).

## Conclusion

This article has argued that the EU’s new bilateralism may be endangering multilateralism. While the European Commission’s claim that the WTO+ and WTO-X nature of the agreements should be taken into account to establish the compatibility of bilateral and multilateral trade approaches is based on a solid body of research, it is not a sufficient condition. Their complementarity may also be influenced by what is happening at multilateral level. Difficulties in multilateral negotiations lead towards new bilateral agreements as a strategy to reach agreement at multilateral level, but when these difficulties become too severe bilateral agreements may be a substitute for multilateral agreements and ensure new market access.

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6. The RCEP includes the 10 ASEAN countries and six of its RTA partners: China, India, Japan, South Korea, Australia and New Zealand.

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# THE TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP: INTEREST GROUPS, PUBLIC OPINION AND POLICY

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The Transatlantic Trade and Investment Partnership (TTIP) constitutes an attempt to improve job creation and boost the economies on both sides of the Atlantic by eliminating tariffs and reducing other trade barriers, including many regulatory differences. Economic benefits and standard-setting impacts notwithstanding, politics and perceptions of acceptability, not economics, will determine the fate of the TTIP, thus making constituency support necessary for treaty ratification. This paper looks at the influence of civil society organisations on public opinion and mobilisation against the TTIP. It shows that opponents have made some inroads with the public. There are some correlations between anti-TTIP groups' activities, public opinion, and changes in the way the European Commission approaches the TTIP negotiations.

## Introduction

In 2013 the European Union (EU) and the United States (US) began negotiating the Transatlantic Trade and Investment Partnership (TTIP). The US and EU have similar policy objectives, recognised processes and standards, and tend to seek trade agreements with the same countries and regions. The stalemate in the WTO has led the US and EU to pursue bilateral and so-called mega-regional agreements in order to sustain the liberal international order they created, and to set high global standards. More expansive than normal trade agreements, the negotiations still include tariff reductions, but focus primarily on removing overlapping and divergent regulations and reducing technical barriers to trade (TBTs).<sup>1</sup> Aimed at narrowing or removing divergent standards across the Atlantic, this means solidifying transatlantic ties amidst growing international competition by agreeing to varying degrees of equivalent or common standards in the world's two largest markets.

As evidenced in the EU's communications on trade in 2010 (*Trade, Growth and World Affairs*) and 2015 (*Trade for All*), the EU's multilateral track focuses on making bilateral and mega-regional

1. This paper includes insight gained from several personal discussions with EU and US negotiators, stakeholders and public officials over a four year period: 2012-2016. All opinion poll data and attitude surveys are from the Eurobarometer (357, 389, 419, 82.2 and 83.3) and the Pew Research Center Global Attitudes Studies of November 2011, April and September 2014, and May 2016.

agreements the stepping stones and dispersion mechanisms for multilateralism, including sectoral plurilateral approaches in the WTO. In such a context the logic of transatlantic standards becoming globally dominant and reinforcing the norms of a rule-based system, while enabling the compatibility with, and over time integration of, other agreements of similar structure and content is compatible with a multilateral trade track.<sup>2</sup>

Deep transatlantic economic interpenetration and interdependence means most sectors on both sides of the Atlantic will be affected, with macro-economic gains projected for both sides. Yet trade agreements often face resistance from select groups and portions of the general population who believe they may experience immediate and focused costs – notwithstanding potential, but diffused, long-term benefits to the overall economy. While trade unions have traditionally been sceptical about trade agreements, TTIP negotiations have garnered significant and unexpected opposition from civil society organisations (CSOs).

This paper focuses on European opposition to the TTIP. It first explains how opposition groups chose certain key words and phrases to raise salience, before briefly explaining why certain issues – sanitary and phytosanitary measures (SPS), genetically modified organisms (GMOs) and the investor-state dispute settlement system (ISDS) – are key to their campaign. The discussion then turns to how European opposition groups' dominance of the debate correlates with scepticism and declining European public support for the TTIP, as well as textual and procedural changes proposed by the EU. The last section explains why it is important to address opposition strategies and public support.

## Opposition groups' choices

Unlike labour unions, European CSOs have not traditionally been very active on trade and investment issues. The campaign against the TTIP commenced in late 2013, and, despite its novelty and relatively limited resources, it has been remarkably successful. Groups like the European Consumer Organisation (BEUC), StopTTIP!, Friends of the Earth, and the Corporate Europe Observatory have succeeded in decreasing public support in the aggregate across the EU, turning public opinion against the TTIP in several member states, and convincing the Commission to significantly alter their proposal for investor protection. So how have they succeeded? And why were certain strategies and issues chosen?

No organisation is more sophisticated or provides more ammunition to anti-TTIP groups than Campact.<sup>3</sup> Founded in Aachen, Germany, from which the anti-globalisation, anti-capitalist Attac also stems, Campact first emerged as player when campaigning for green labelling on products, at which time it gathered 800,000 email addresses. When transatlantic negotiations over rules, regulations, investments and a host of other issues commenced, European CSOs began expressing concerns about possible threats to EU standards stemming from allegedly “weaker” American standards. Many areas

2. For example: the EU-Canada Comprehensive Economic and Trade Agreement (CETA), the EU-Korea Free Trade Agreement (KOREU), and sections of the Transpacific Partnership (TPP).

3. The following paragraphs on Campact stem from three different interviews conducted in Brussels in May 2016, and via telephone in June 2016.

previously addressed by consumer, health and environmental groups would later also become “hot topics”, as they were all potentially affected by the multi-faceted, regulations-dominated TTIP.

Opposition groups needed specific words and phrases to educate and rally citizens, and Campact could provide these. The organisation promotes and engages in campaigns based on ideas provided by CSOs, but most importantly serves as a source of pivotal data. A CSO approaches Campact, which, for a fee, conducts market tests on policies requested by the client by using phrases and words on the topic or issue. It takes a name or process, ties it to the policy, and sends a query to targeted email addresses drawn from its electronic mailing list. Building on the responses they modify the message, associate the product, action, or process with something negative (e.g. chicken and chemicals, or ISDS and circumventing democracy), and retest the issue. The client is then provided with the results – or campaign “fuel” – resulting from the targeted emails (e.g. which words, phrases or associations evoked certain desired reactions).

The average citizen cannot be expected to engage with obscure issues and opaque trade negotiations, so, as one CSO representative said, we “needed something to raise fears and capture attention”. In other words, raise the salience. Campaigns to raise salience cannot contradict, but should preferably tap into, some exciting beliefs and opinions when interpreting and conveying developments to the public. Such campaigns may include appealing to product or process associations, which in turn elicit a response. Thus, if chemicals (A) are associated with poison (B), associating a different product or issue (C) with A can elicit a negative response to C. CSOs acknowledge that specific issues such as food and investor rights were chosen not primarily because they represent issues on which groups have a better chance of influencing policy proposals, but rather because they help raise the salience of the TTIP generally, which in turn allows lobbying, protests and campaigns to also be made on specifics.

Groups like 38 Degrees and Campact worked on many issues related to or part of the TTIP before it was even announced, as Mattias Bauer of ECIPE noted, “... [for] these campaign “companies’ business models”, TTIP provides an ideal breeding ground to increase brand awareness and funding, respectively.” Leading reformist opposition groups (BEUC, Corporate Europe Observatory) have also hired trade specialists from government and academia, adding additional in-house expertise while providing an aura of professionalism and sincerity to their cause. They write research reports and conduct studies that are published on their websites, and help with media campaigns. A few legal experts toiling in obscurity on ISDS (some of whom had been told when submitting academic papers that “this is not important”) were suddenly coveted, as the concept of investors suing governments using secret arbitration panels tested well, and would become potent fodder for opponents of the TTIP. The farther negotiations proceed, the greater the demand from opponents; the greater the opposition to the TTIP the more people appear to donate and the more groups get involved (the “snowball effect”). The phrases and words shown to resonate with citizens are not just used in campaigns, they are also used when seeking funding from donors for specific campaigns.

Opposition groups are thus in many aspects as organised as the business lobbies they criticise.

## Food and ISDS in the TTIP

For most Europeans the significance of food extends far beyond its nutritional value: it is an essential part of life, where caution prevails and discussions of recognising others' standards raise concerns. CSOs such as BEUC have successfully tapped into Europeans' deeply rooted socio-cultural relationship with food, and thus food safety, arguing that accepting American standards threatens higher (safer) EU standards. The former are seen as "weak" and "less safe", as is reflected in surveys, position papers, social media posts, online videos, protests, and public statements that are often picked up by the media. Discussions on food products, processes, and standards in the TTIP were always, in the words of one US negotiator, "going to be very difficult", and they remain a stumbling block. American officials have long stressed that they "want Europe to follow the advice of its own food safety authority and to give European consumers a choice, rather than to persistently ignore science-based decision-making for political ends". The US specifically wants acceptance of its SPS standards and most GMOs.

While Europeans widely support science and technology as the bases for policy and progress, the exception is food, where less than half believe science can improve food (make it safer). The anti-TTIP campaign has appealed to this relationship with food. Furthermore, the precautionary principle guides EU food policy, and European groups incorrectly claim the principle is not applied in the US: studies reveal little difference in the number of policy areas guided by this principle in the EU and US, even if the latter does not apply it to food. BEUC declared "It is not without reason that chlorinated chicken has emerged as a symbol of the detriments European consumers might face if a TTIP deal is signed ... [t]he European approach to meat safety is more efficient in protecting public health", and that the American approach is "[t]he "easy fix" to make up for poor farming and slaughter hygiene". The European Food Safety Agency (EFSA) and domestic agencies have found numerous currently banned processes and products, many used in the US, to be safe; but, the necessary political approval is lacking. The prevailing norm of objection to GMOs is also deeply entrenched; the last Eurobarometer polls on GMOs, in 2010, showed that only 21% thought they were safe. Member states rejected a GM corn (MON810), which, like many other GMOs, was deemed safe by the EFSA. When the EU's chief science adviser urged more evidence-based decisions, she was forced out following political outcry over her views.

In a June 2014 open letter, which was either published or referenced by several news prominent European outlets, three leading civil society groups argued that, "Fair, sustainable and safe food could permanently be damaged by the transatlantic trade deal on the table." The WTO Sanitary and Phytosanitary Measures Agreement (SPS Agreement) has been disproportionately used by the US (on behalf of agribusiness) to challenge EU standards on a wide range

of food safety measures. “We cannot have confidence that the draft measures designed to expedite agricultural and food trade between Europe and America will uphold to the highest standards the food safety safeguards that protect consumers and animals.”

Promulgating that the TTIP will allow American standards and that this may harm Europeans appears to have impacted public opinion. Only 30% of Europeans expressed concerns about residues such as antibiotics or hormones in meat in 2010 – before any talk of a trade agreement – but in 2014 there was great resistance to accepting American standards or altering what are perceived to be higher European standards. 60% of Europeans also check the origin of their food, and for nearly half the origin influences their purchase. This is higher than for any other category of products, which indicates awareness of and concern with food and a likely higher receptivity to public campaigns regarding issues related to food.

The other key issue has been ISDS, a process meant to ensure foreign investors have access to depoliticised legal redress for compensation (not legislative changes) when a host country’s government violates the terms of the investment treaty.<sup>4</sup> The Europeans have longstanding experience with ISDS through bilateral investment treaties (BITs), which began in Europe after WWII as investors wanted assurances when investing in former colonies. EU states have signed 1,400 BITs, compared with fewer than 50 signed by the US.

In the autumn of 2013 CSOs and unions staged protests and published policy papers opposing ISDS. The opposition was so intense that in January 2014 a negotiating pause on the issue was announced, during which time the public was to be consulted, and yet opposition continued unabated. CSOs held protests and panel discussions, created YouTube videos, used Facebook, wrote position papers, presented reports, and issued press releases against ISDS, emphasising what had been shown to resonate with citizens: that ISDS prevents policy flexibility and thwarts the principles of legitimate decision-making by providing foreign companies with secret legal redress against democratic decisions through suits in private, international tribunals.

Opposition to ISDS also worked its way into governments, with France and Germany expressing desires to see a renegotiation of the ISDS clause in the CETA agreement. Throughout the year think tanks, academics, and law centres also issued policy papers, legal briefs, and held panel debates; hard data countering opposition claims was also available.<sup>5</sup> Of the 150,000 submissions received through the Commission’s 2014 public consultation, 97% were pre-formatted, anti-ISDS submissions from interest groups (96% from Austria, Germany, the UK, France, Belgium, Netherlands and Spain). Following the January 2015 press release of the results of the consultation, the Commission promised months of stakeholder dialogue and possible refinements to ISDS. This was met by CSOs with indignation. A September 2015 Commission proposal for a permanent Investment Court System (ICS) was rejected by CSOs as “too little”, and by US officials and transatlantic business groups as unnecessary and going too far. ISDS thus remains a key focus of the campaign.

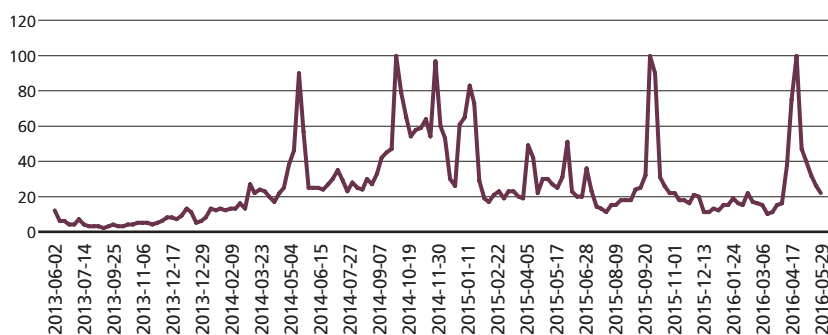
4. Cf. Franck, 2014.

5. Public citizens, TACD and Green MEPs have frequently cited *Vattenfall vs Germany (Vattenfall AB and others vs Federal Republic of Germany, ICSID Case no. ARB/12/12)* and *Philip Morris vs Australia (Philip Morris Asia Limited v. The Commonwealth of Australia, UNCITRAL, PCA Case no. 2012-12)* as examples.

## Public opinion

The frequency with which an issue is searched for on the internet often reflects its salience, and there was no discernible volume relating to TTIP prior to June 2013, when negotiations were launched and protests commenced. The following year Germany registered the most TTIP web searches, followed by Austria and Belgium, the three countries with the largest anti-TTIP movements and most CSO activity. Excluding the 31 pan-European organisations, the countries with the most groups are Germany (114), the UK (25), and Austria and France (15 each). Peak periods surrounded negotiations and protests in early and late 2014, January and October 2015, and April 2016.

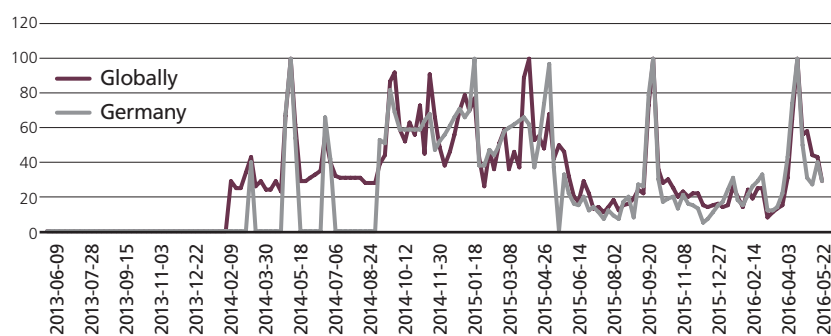
**Graph 1. Google Web searches for the TTIP June 2013-June 2016. Source: Google Trends.\***



\*All graphs from Google Trends reflect the number of searches for a term relative to the total number of searches over time. They don't represent absolute search volume numbers, because the data is normalised on a scale from 0-100. Each point on the graph is divided by the highest point and multiplied by 100. Google holds 90% of the European search engine market, and a 65% browser share. Source: Statista.com, 2016.

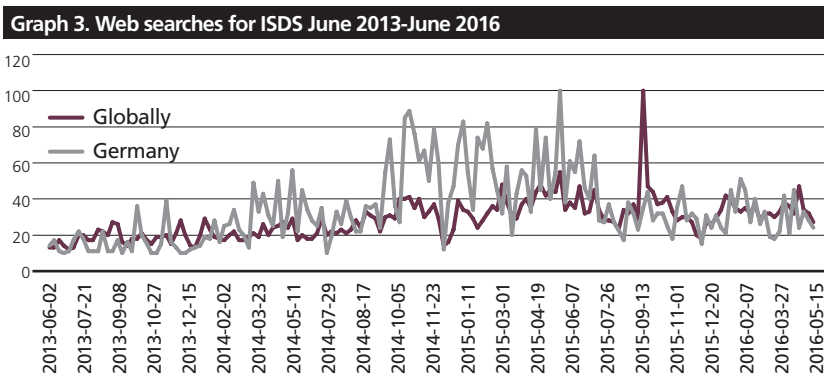
YouTube searches on the TTIP also peaked around the same dates. Anecdotally, my own December 2014 and May 2016 TTIP searches showed 16 and 19 of the 20 first results on YouTube were explicitly anti-TTIP.

**Graph 2. YouTube searches for the TTIP June 2013-June 2016**



Source: Google Trends

In July 2014 the European Citizens Initiative, supported by over 200 CSOs, presented the Commission with a list of more than one million European signatures petitioning it to alter negotiations (remove ISDS) and hold hearings in Parliament. While dismissed (because the petition process does not apply to preparatory decisions, only legal acts), it succeeded in generating further outcry from citizens' groups and enhanced media coverage across Europe. By mid-2015 the initiative had gathered two million signatures, while the US Congress in turn debated trade promotion authority legislation requiring ISDS in trade agreements, providing fuel for European opponents. The Google Trends for ISDS show a similar pattern to the TTIP, spiking around negotiations, protests and intense campaign activism.



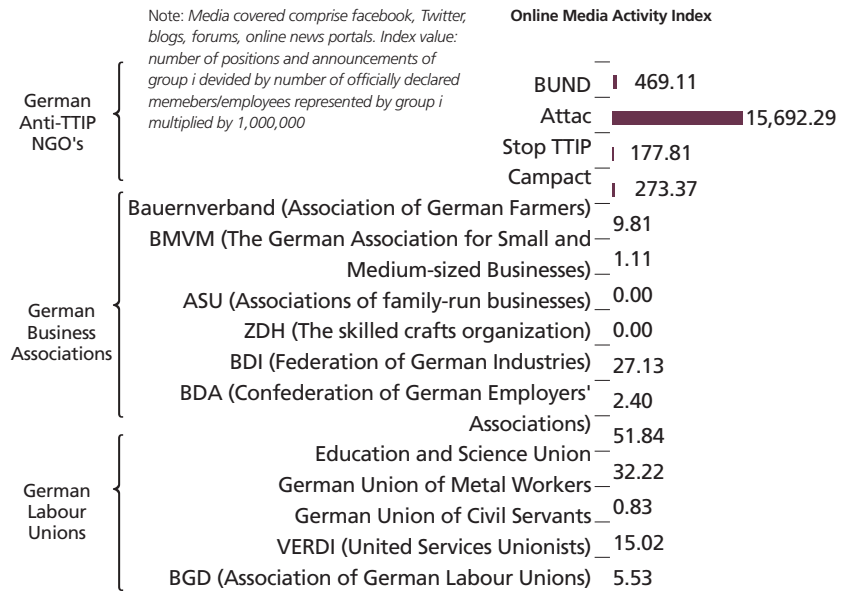
Source: Google Trends

In an online world, participation in petitions also serve as one form of public opinion, the results of which are covered by the media, which help convey the anti-TTIP message to larger audiences. While traditional media attention is crucial since TV remains the most popular source of information across the EU, and newspapers retain a significant share amongst those aged 55 and older, 60% of all EU citizens and 50% of the younger generation and those with a university degree get news from the web, including social media sources (of which Facebook, YouTube and Twitter are the most popular). As Ciofu and Stefanatu show, "Tweets that include hashtag words generally favourable to the agreement only make up roughly 1% of total tweets, whereas tweets advocating a clear no (through hashtags like #stopptip, #nottip, #noalttip and others) represent 99% of total TTIP related activity" on Twitter. Fact-checking on the web, including social media sites, occurs through exchanges (debate), where balanced views are not required, reinforcing negative messages. Furthermore, Bauer (2015) finds that

85 per cent of all TTIP-related positions in German online media are originally authored and spread by anti-TTIP groups. Similarly, for the July-December 2014 period, anti-TTIP groups' announcements in Germany amounted to 83 per cent of total online media reporting on average, going up to 93 per cent in peak times ... around the TTIP negotiations rounds, and it is obvious that there are coordinated multi-online-media campaigns with high success rates (cf. Graph 4).

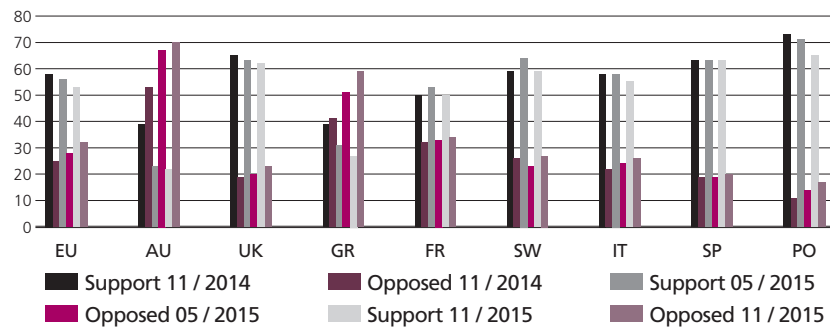


**Graph 4. Online Activity on the TTIP in Germany**



Source: Bauer, 2015: reproduced with permission.

**Graph 5. Public Opinion on the TTIP 2014-2015**



Source: Eurobarometer.

Europe's long, favourable and expansive history of trade agreements could be expected to mitigate at least some of the negative messaging of the TTIP; even in the depths of the financial crisis (2010), 65% of Europeans said the EU benefitted from international trade, and general support for free trade has remained at around 80%. Yet, support for the TTIP across the EU has fallen, and in some larger EU countries fairly dramatically. While the aspects of the TTIP debated in most business and EU circles are not those promoted on social networks, the goal for every party is to influence public opinion to its advantage and, in this way, to exert pressure on policymakers. Opposition groups have been very good at this. With little public knowledge of ISDS, and an early focus on the issue, CSOs and unions could shape opinion by stressing the negative cases and dangers of ISDS, in addition to the scaremongering on food issues. When people search for the TTIP or ISDS and the results show a crushing majority conveying – often well-scripted – negative messages it is unsurprising that people start believing this story. The effects are visible, with declining support for the TTIP (Graph 5).

In an April 2014 Pew survey 55% of Germans thought the TTIP was “a good thing”. While 88% of Germans said trade was generally a good thing, five months later only 39% supported the TTIP when asked by Eurobarometer, falling to 27% by November 2015, and only 19% in a [YouGov](#) poll in April 2016. Austria exhibited a similar decline. In no country did support increase between November 2014 and November 2015, though the largest group of respondents in five member states in April 2016 responded “don’t know”. There is also no correlation between general support for trade and specific support for the TTIP, another indication that anti-TTIP propaganda and protests have impacted public opinion.

Dismally low trust in government, with Eurobarometer surveys showing the EU average at 30%, helps the anti-TTIP campaigns, but the public appears to believe civil society groups: polls suggest their strategy works. Though the government continually assures the public that the National Health Service (NHS) will not be privatised through the TTIP, the percentage of British respondents who believed the government could protect the NHS dropped 24 percentage points from August 2013 to August 2014; 39% thought the TTIP would harm small business, and 54% did not trust the government to negotiate a deal in Britain’s best interests. Even the European Parliament, where pro-trade sentiments normally override ideological and Europhile-Eurosceptic divides, has responded to the campaign and the bombardment of anti-TTIP emails and constituency protests. In October 2012 the European Parliament voted 526-92 for a resolution calling for the commencement of negotiations on a TTIP, but the lead report by the Committee on International Trade in January 2015 was highly critical, and the June 2015 resolution of continued support had to be postponed a month, with further revisions, when the socialist groups threatened to oppose the resolution because of internal divisions over ISDS.

## Why this matters

Politics is about perceptions, and for agreements requiring European parliamentary and domestic legislative ratification constituency perceptions matter. The combination of professional testing, mass mobilisation, tech-savvy employees, and the proliferation of mobile, easy-to-use social media has enabled the growth of non-traditional actor participation, boosting public lobbying in ways unaccounted for by theories of interest group influence. Groups with limited resources have made effective use of selective data, simplifications, exaggerations and distortions, especially in social media disseminations, where participation and engagement by a vocal minority can play an outsized role in evoking opposition in the general public, while simultaneously attracting attention from the “traditional” media. Appealing to the public about the possibility, however remote, of having to accept GMOs, chlorinated chicken and companies suing governments has worked well. “Potentially”, “perhaps”, “maybe”, “could”, and other cautionary words implying threats have also been purposefully and successfully employed, dominating the opposition campaign. The recipient notices the action or threat (chlorine chicken, governments sued) rather than the modal verbs signalling a remote possibility. As Mattias Bauer comments “Unfortunately, anti-TTIP groups keep on spreading speculations and

risks that are completely irrelevant and frequently taken out of the blue ... Due to Campact's efforts, we have arrived at a stage where German citizens' interest in TTIP is 25 times higher than in the US and roughly 15 times higher than in France. The sad thing is, however, that most citizens are simply misinformed, e.g. by paid-for Google advertisements set up by anti-TTIP groups."

EU negotiators and Commission officials have generally been surprised by the extent and success of anti-TTIP groups, including their ability to organise across Europe. Perhaps they should not have been. The 2012 defeat of the Anti-Counterfeiting Trade Agreement (ACTA), to a large extent through CSO lobbying – forcing governments to cease ratification – challenged the correlation between resources spent lobbying and campaigning and policy change.<sup>6</sup>

EU officials have been forced to repeatedly and publicly guarantee that EU standards would not change, yet opponents' actions have led EU negotiators to alter their approach in ways that would have seemed impossible only a few years ago: affecting agenda setting, procedure (how), and policy (what). On SPS and GMOs this meant restatements and clarifications from the Commission, narrowing and reinventing the language on ISDS the Commission initially proposed (i.e. the CETA text), and a policy change to release all proposed texts and hold public stakeholder meetings, both of which will have lasting effects beyond the TTIP. The promise of "continued dialogue" with stakeholders and civil society groups was, as one Commission official admitted, an acknowledgement that CSOs' "push" and "opposition", along with altered public sentiments affected how they reviewed ISDS and how they decided to go forward with "the messaging" (though the Commission's January 2015 press release was strategically worded to balance recognition of opposition with a determination to find a compromise to ensure ISDS is included in a final agreement). All this may have a substantial impact on the outcome of the TTIP, especially since members of the US Congress have made clear that there will be no agreement on TTIP without poultry access; the latter being a requirement by the influential American agriculture-farming industry.

Like the Commission, proponents of the TTIP, such as industry representatives, were surprised by and unprepared for the strong anti-TTIP activism. Whereas the Transatlantic Business Council and chambers of commerce have actively promoted the TTIP through events, publications and social media, individual firms are reluctant to wade in against public opinion and counter interest groups' campaigns for fear of a bad public image and upsetting customers (as was the case in the Brexit referendum campaign until shortly before the vote). A representative of a transatlantic business organisation acknowledged, "[t]hey [the industry] realize now that civil society groups now have an advantage in the marketing of TTIP and TTIP issues, and that businesses have difficulties in getting across their concerns and issues and difficulty conveying the truth and countering misperceptions distributed by public interest groups. There are intense discussions now on how to counter misperceptions and promote TTIP."

One must acknowledge that opposition to the TTIP could be masking opposition to globalisation and neoliberalism generally. Globalisation

6. Dür and Mateo, 2014; Baumgartner et al., 2009.

is inherently tied to free trade and the spring 2015 Eurobarometer shows that people who reject the globalisation process and oppose the EU are particularly against the TTIP. Good knowledge of economics and more favourable views on the EU correlate with support for the TTIP, while having solely a national identity correlates with opposition to the TTIP. Furthermore, in regions where the economy is doing well and incomes are high, support is higher, and vice versa. However, these findings lend support to the inference that the framing by anti-TTIP campaigns has receptive audiences, especially among those with little prior knowledge of trade-related issues; support for trade generally has remained high even as support for the TTIP has fallen. Furthermore, except for opposition to CETA, which has ridden on the coattails of the asserted “democracy-killing” TTIP, there have been no protests against any other contemporary negotiations, or completed treaties since 2000. Thus the objections appear more closely tied to the content and partner in TTIP negotiations.

The TTIP, like CETA and KOREU addresses regulatory issues, and the public perception that the TTIP will lower standards, while previous agreements did not, indicates that such perceptions are premised on fears of the US. Hence, the anti-TTIP campaign has succeeded. Research indicates that when faced with conflicting opinions, those holding positive views tend to remain silent, allowing the more critical crowd to dominate the discussion. While alarmist, fear-filled messaging tends to have more impact than facts, supporters must find a better way of communicating the benefits of the TTIP in person and online in easy-to-understand and convincing fashion. This applies especially to member state governments, who appear to have abdicated responsibility for the content and progress of negotiations they authorised and must ultimately ratify, leaving Commission negotiators to simultaneously explain and defend the proposed content of a deal they have only been tasked with negotiating, not selling. While all EU nations still consider the US the most important nation or region for Europe, and fears of too much US global influence stand at only 25% in 2016, it appears that Europeans believe the US has low standards and/or doubt the EU can stand up to American pressure. The anti-TTIP campaign has sown mistrust of the US, a development which still needs further research.

An inability to agree on a comprehensive deal between the world's closest allies and largest economies would seriously impact both parties' international standing – especially the EU's – if the US ratifies TPP. The EU's goal of using bilateral agreements to expand the multilateral agenda in a step-by-step fashion will be seriously impeded should the two largest economic areas and closest allies fail to reach a precedent-setting agreement. The EU might succeed in reaching bilateral agreements with all TPP members (and additional Asian nations). Yet achieving coherence and consistency across all agreements, as well as compatibility with US agreements in order to ensure standards rise across the major trading areas, will be very challenging without transatlantic agreement. The United Kingdom's vote to leave the EU may complicate negotiations, yet the US administration has repeatedly insisted that no separate UK-US deal will be contemplated as long as TTIP negotiations proceed. Thus, the likelier scenario remains one where the UK accepts the TTIP through an association agreement, as a member of the European Economic Area, or negotiates a separate UK-US deal

subsequent to the TTIP's completion. Irrespective of the final path negotiated by the UK and the EU (the exit negotiations run parallel to the TTIP negotiations), one thing is clear: absent public support even a finalised TTIP agreement will face serious problems with ratification in many member states, and anti-TTIP civil society interest groups thus far appear more successful in garnering support.

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### **Introduction**

It seems clear that the Transatlantic Trade and Investment Partnership (TTIP), the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada, and the Trade in Services Agreement (TISA) have changed the perspective on the relevance of European trade policy. The debate about the legitimacy of the negotiating procedure and the resistance from a growing part of the population to accepting it have influenced the main actors and might influence the final results. After the 14<sup>th</sup> round of negotiation between US and EU officials last July – the third in six months – it looks as if there are serious difficulties concluding its signature, at least before the political deadline considered until now to be the main point of reference: President Obama’s mandate. Concerns expressed by leading European politicians, such as France’s president, François Hollande, last May, threatening to block the deal, or Germany’s economy minister, Sigmar Gabriel, declaring just a few weeks ago that the negotiations have failed, cast a shadow on the success of these negotiations. This break in the expectations is probably due not only to the alleged US reluctance to accept changes, but to a wider range of arguments, in which the increasing resistance to the TTIP can be considered a main factor, although not the only one.

There have been important changes in the political agenda over the last months. The victory of “leave” in the United Kingdom’s EU referendum has shown that the real problems of Europe are less related to trade (with a significant surplus in the EU current account balance with the rest of the world with or without UK), and more to do with the institutional architecture, economic governance, and democratic and social deficits of the European Union. The ballast of austerity policies, with a loss of social and territorial cohesion, the lack of political commitment in the management of the refugee emergency, and the rise of xenophobic and anti-European parties in an increasing number of countries, complete a scenario where the signature of any trade agreement is unlikely to top the list of priorities. Last but not least, the US presidential campaign, with Donald Trump’s extemporaneous statements, makes any agreement even less acceptable to a wide range of European

citizens, who would probably refuse any closer relationship with or dependence on a country headed by such a histrionic and unpredictable character. Both the challenging political agenda in Europe as well as the increasing opposition of citizens to the TTIP are elements that have surely changed the expectations of the main actors, including the European Commission.

In the introduction to the communication *Trade for All*, which this article will comment on in more detail, the institution mandated with the TTIP negotiations recognises that conclusions drawn from the TTIP debate should be “relevant for the EU’s wider trade policy” (European Commission: 7). However, considering future developments, especially the approval of CETA, it should be said that there are not enough elements to be confident about in the Commission’s commitment to translate the aspirations presented in *Trade for All* into reality. The statement of intentions given by President Juncker last June 28<sup>th</sup>, considering CETA to be an “EU-only” agreement and proposing a simple approval procedure, is in open contradiction with the transparency and respect for public scrutiny advocated by the Commission in the abovementioned communication. Surprisingly, resistance to the “one-tank of gas” philosophy that seems to continue to inspire Juncker’s team has been shown in this case not only by civil society but also by European states. The reaction of the German chancellor, Angela Merkel, defending the non-negotiable competence of the Bundestag on this issue, or that of French president, François Hollande, requiring the Commission to accept national parliaments giving their verdict should give Malmström and Juncker a clear sign of the importance of being “consistent with the principles of the European model” as stated in *Trade for All*. Diluting highly developed political positions held by the Commission itself (as in this case), may risk finally diluting and devaluing the Commission’s own institutional role and initiative.

### **A new civil perception of the relevance of trade policies?**

One of the main errors in the analysis of the increasing resistance to the TTIP has to do with paying less attention to the errors of the Commission than to the hypothetical success, technological skills or innovative use of social networks by the Stop-TTIP campaign. It is not about the demonisation of the agreement (Alemanno, 2016: 4) or about the supposed lies given out by the campaigners, but about the mistakes and affronts to democracy the Commission has stacked up over the last three years. The resistance to publishing the mandate, the regrettable procedures imposed on MEPs as legitimate citizens’ representatives that make it difficult to consult the negotiation documents, and the magniloquent rhetoric of Karel de Gucht, recently hired by a big transnational company, have been much more important for the disparagement of the TTIP negotiation than any subversive strategy developed by underground activists. It seems clear that when well-known politicians declare decisions taken by the Commission “unbelievably foolish” or that they “destroy any feeling of objectivity” (Vincentini, 2016), the problem lies less in the radical approach of organised civil society, than in the error and incoherence of those who

have the initiative. The problem might not be “the increasing political use of trade”, as defended in the recent CIDOB seminar by the EC representative,<sup>1</sup> but the new legal framework in which trade is handled by the Commission (Lisbon Treaty) together with the regulatory nature of trade and investment agreements such as the TTIP and CETA and the increasing political consciousness that, nowadays, trade policy is as politically neutral in Europe as monetary policy.

It is possible that the two first elements – the new competence of the Commission to negotiate international agreements without further democratic control and the normative character of the new generation of FTAs – have resulted in a rising sensitivity towards commercial policy. In any case, the seed was sown long ago if we recall the interest aroused by the campaigns for “fair trade” and the demand for responsible trade policies in the framework of international cooperation. But there are two further elements that should also be taken in account. As we shall see later, the perception of a strong connection between trade and employment has its own history, related to an increasing fear about the consequences of globalisation. In this sense, austerity policies and the progressive dismantling of social security systems in Europe over recent years, especially during the recession, have certainly fostered the lack of trust in European trade policy. On the other hand, even if it is not comparable with the extension and depth of the current debate, there has always been a critical view of the moral “quality” of European trade policy. The change introduced by the trade communication *Global Europe* in 2006, under the mandates of Peter Mandelson and especially by Karel de Gucht, represented a significant change in this sense. As the UN Special Rapporteur on the right to food from 2000 to 2008, Jean Ziegler, wrote: “The year 2007 saw a brutal change in European policy: the Union cancelled all the preceding agreements and attempted to impose on the ACP countries conventions called ‘Economic Partnership Agreements’ (EPAs) ... that impose unrestricted free trade, so liquidating all domestic market protection in the ACP countries” (Tandon, 2015: 4).

## **About the Commission’s *Trade for All* communication**

With this background, the new communication *Trade for All* can only be welcomed. It witnesses not only a change in the perspective, but also a deep reflection about the way to better position European trade policy not only in the eyes of European citizens, but also at international level. The assumption of global responsibility is of singular relevance considering that the EU is both the world’s largest exporter and importer of goods and services. For this reason the “All” in the communication becomes especially important because it explicitly includes not only workers, citizens and consumers, but also the poorest people in developing countries and “those who feel they are losing out from globalization” (European Commission: 7). The intention to be consistent with the principles of the European model and with European values overcomes the geographical approach. The communication expresses its firm will to infuse European trade policy with responsibility, transparency and openness to public scrutiny which can only be considered crucial with regard to the TTIP negotiation. *Trade for All* also tries to tackle new economic realities, concerning not only technological

1. Organised by CIDOB with the support of the Europe for Citizens programme, under the title “Different glances at EU trade policy”. June 27<sup>th</sup> 2016. Sala Jordi Maragall, CIDOB.



development (digital trade, innovation and so on) but also aggressive corporate profit and tax avoidance strategies. It also attempts to face the social consequences of market openings, ensuring active labour market policies and an enhanced consultation not only of the European Parliament and civil society, but also of social partners where possible impacts of trade and investment on jobs are concerned, which was not the case before now.

In the current debate about trade and the TTIP the Commission acknowledges that the TTIP has been perceived as a threat to the EU's social and regulatory model. This recognition goes hand in hand with the awareness of the question raised by citizens, "with many asking whether it (the trade policy) is designed to support broad European interests and principles or the narrow objectives of large firms" (European Commission: 18). The reference to transnational companies in a debate where lobbying has been identified as one of the main disruptive elements to the legitimacy of the current negotiations is certainly a step in the right direction, as are the references to the increasing concerns of citizens about social and environmental conditions in the countries the EU trades with. In general terms the second part of *Trade for All* shows that the Commission has been attentive to the concerns expressed by citizens. The only problem is that the change in the strategic orientation of the Commission, now surprisingly centred on the promotion of high standards, social justice and inclusive growth, the explicit desire to respect the fundamental conventions of the ILO and the Decent Work Agenda and the conviction that the multilateral system should remain the cornerstone of EU Trade Policy, implies a complete turnabout in relation to previous positions, where this kind of sensitivity was certainly missing. Without discounting the fact that the debate about the TTIP and European trade policy has inspired a completely new approach, it is surely difficult to remove the shadow of suspicion about the even "partial" instrumental nature of the communication.

The European Trade Union Confederation (ETUC) has welcome the Commission's promises of a more responsible trade policy that will promote sustainable development, human rights and good governance in future trade agreements, but has not verified a real change in the negotiation of the TTIP (ETUC Communication, 2015). In a common declaration with the President of the American Federation of Labour and Congress of Industrial Organizations (AFL-CIO), the ETUC's general secretary, Luca Visentini, noted that "we do not see our negotiators moving towards the 21st century agreement that we have been promised, but rather more of the same old corporate-style trade deal. The transparency we have called for has not been achieved" (ETUC Communication, 2015). A coherent follow-up of the new trade communication would have completely changed the rules of the TTIP negotiation, which has not been the case. Even if in the conclusion of *Trade for All* the Commission declares that "trade is not an end in itself", Juncker's recent attempt to impose a simple approval procedure for CETA and the existence of die-hard negotiation frameworks suggest that the TTIP and CETA are in a certain way ends in themselves. The question is what will last in the medium and long term. The theoretical and balanced approach of *Trade for All*? Or the will to advance in the deregulation of Europe via the new trade competences of the

Commission, overcoming the resistance of an increasing part of the European civil society, therefore making the European political project in this sense murky and undemocratic?

## **The significant relationship between trade and employment**

The decision will be taken by the European Commission, by the European Council, and probably by not only the European Parliament, but also the national ones. In the meantime, the existing debate invites us to explore the importance of trade policy in relation to the European construction and the very special period the European project is currently going through. Pascal Lamy, the former WTO director-general, some years ago pointed out what could be considered a good reason for citizens' reluctance towards trade policy: "What lies behind concerns about macro-economic imbalances is in reality a concern about unsustainable and socially unacceptable unemployment levels. Whether it is the worker in Bangalore, in Ohio or in Guangdong, the real issue is jobs" (Lamy, 2010). The relationship between trade and employment was the subject of a wider publication edited by ILO, with the support of the European Commission. Its title: "Trade and Employment. From Myths to Facts", possibly later inspired a short guide published in 2015 by the Commission with the obvious intention of counterattacking the Stop-TTIP campaign under the premise: "The top 10 myths about the TTIP. Separating fact from fiction". In any case, the ILO publication was produced in 2011 when the debate about the transatlantic agreement had not yet started. In the introduction the authors remember how the majority of respondents to the underlying study believed that globalisation provides opportunities for economic growth but increases social inequalities, and also pondered whether globalisation is profitable only for large companies, and not for citizens (Jansen et al., 2011: 2).

Citizens' distrust of the effects of globalisation on daily life has grown despite the pressure of the neoliberal mantra that identifies trade with growth, and growth with jobs. The increasing delocalisation and displacement of entire links of the value chain at global level, performed by multinational companies in an ongoing strategy of profit maximisation, has gone hand in hand with a growing loss of the security offered by a shrinking welfare state. Income shortages due to decreasing tax incomes, privatisation of health, education and pension systems, and the decline of citizens' rights and guarantees, complete a scenario in which precariousness and incertitude undermine the willingness to adapt to change. As Margaret McMillan and Iñigo Verduzco point out in the abovementioned ILO publication, "governments should play a role in shaping the relationship between trade and employment" (McMillan et al., 2011: 25). This is especially true given the change in the theoretical paradigm to accept the dependence of allocative efficiency of trade liberalisation on the institutional setting, and the causal relation between exposure to international trade, aggregate employment and increased wage inequality "both in rich and poor countries" (McMillan et al., 2011: 25). In what seems to be a paradox, the weakened role of governments might be more and more crucial to support and root public acceptance of the new rules of trade and the uncontrolled operating mode of multinational companies.

There is an “emerging consensus that open economies should be characterised by strong social protection systems” (Jansen et al., 2011: 4). But the European Commission should understand that there is an unpleasant tension between European trade policy and the inspiring principles of European economic governance, with the latter being based on: a) cuts to the welfare state; b) job precariousness; and c) the ripping to pieces of collective bargaining models and weakening of workers’ bargaining power. The main conclusions of the ILO publication, edited with the support of the European Commission, could be used as an inspiring reference to overcome this tension in Europe and soothe existing, justified worries through a “coherent set of policies” (Jansen et al., 2011: 17). Firstly, there is a need for a real commitment, with macroeconomic policies and structural reforms, to guarantee better jobs avoiding precariousness and the current tendency to push more and more workers into low-productivity positions. Secondly, the diminishing level of workers’ protection through waning social welfare systems should be reversed to offer security through public investment, branch protection and the strategical improvement of existing resources for vocational training and professional development. Finally, as Jansen, Peters and Salazar-Xirinachs (2011) suggest, an appropriate distribution of trade gains to foster the recovery of social cohesion and social justice must be guaranteed; and this has to occur not only in Europe.

## **Trade and global development**

Despite the shocking effort performed over the last decades to install a hegemonic view and understanding of the unavoidable importance of competitiveness and ambition as engines of growth, it should be said that the message has not been completely absorbed by the population. This is also of central importance to European citizens’ perception of the role trade policy should play at global level. The trade perspective that some actors have tried to impose over the last decades is an inheritance of the Cold War (Tandon, 2015: 49) and corresponds to an architecture that “is a relic of the preoccupations of power relationships of the middle of the last century – out of sync with today’s world of rising powers and new challenges” (Wilkinson, 2014: 144). A long way from the emerging role of multilateralism and the creation of international institutions and organisations that characterised the post-Second World War period, trade has remained a domain of national interests that has neither deep international consensus nor a neutral and widely supported World Trade Organization. Though at a global level, trade used to be presented ideologically as an “engine” of growth, in the eyes of a significant part of the world – especially the global South – it became the tool through which some nations grew at the expense of others (Tandon, 2015: 9). Nevertheless, the narrative under which trade was and is presented today is substantially different.

At the opening of Geneva Graduate Institute’s academic year in 2012, the WTO director-general, Pascal Lamy, introduced Professor Amartya Sen, connecting his concept of “development” with the strategy of the World Trade Organization: “The WTO does not advocate open trade for its own sake, but as a means for ‘raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand’” (Lamy, 2012). But regardless of the words of its

director-general, the WTO has been less engaged in fostering standards and working and living conditions at global level than serving as a technical institution for the will of its member states, especially the strongest. In contrast to other intergovernmental organisations, such as the ILO, FAO or UNDP, the WTO has been concentrating on the rules governing trade at global level and on trade-opening as its ultimate goal, without any serious attempt to change the character of trade policy as global power policy. For this reason, there exists a longer debate about a reorientation of the WTO to treat social outcomes and to be more closely embedded in the UN institutional architecture. As Roger Wilkinson proposes in his critical approach on the future of the WTO, the world needs a form of trade governance “that serves a broader social purpose as its primary function and not one that sees an increase in the volume and value of trade as an end in itself, then crosses its fingers and hopes that all else will be well” (Wilkinson, 2014: 135).

When it comes to trade there is an evident disjuncture between the nature of real policies and that of discourse at global and European level, as we have seen regarding the Commission’s communication *Trade for All*. The demands of the European Trade Union Confederation, which represents 45 million European workers, to overcome this incongruity were clearly pointed out in the “Paris Manifesto”, approved one year ago during the ETUC congress in Paris:

To contribute to fair globalisation, EU international trade and investment agreements, notably TTIP, must aim at shared prosperity and centre on sustainable economic and social development. They must promote employment, respect democratic decision-making, public interests and cultural identity; protect public services and the environment; contain enforceable labour rights based on International Labour Organisation (ILO) Conventions; and include ambitious chapters aimed at promoting higher labour, environmental and technical standards set by democratically accountable representatives, notably in regard to any regulatory cooperation (ETUC, 2015: 6–7).

This is very close, if not the same, as the position fixed in the 2030 Agenda for Sustainable Development, which considers trade “an engine for inclusive economic growth and poverty reduction that contributes to the promotion of sustainable development” (United Nations, 2015: 29). Why should the demands or understandings of European citizens about the role trade should play at global level be so different? Why should they support in this regard the Commission’s role negotiating EPAs and FTAs that are in open contradiction with these demands?

## **The role of a “European” trade policy**

The increasing divorce between the trade policy executed by the European Commission and the expectancies and demands of European citizens has to do with the lack of identification, but also with a deficit in democratic transparency, closely related to the institutional architecture of the European Union that emerged from the Lisbon Treaty. The former judge of the German Constitutional Court, Gertrude Lübbecke-Wolff, a few months ago offered an impressive reflection on the nature and risks of the executive autonomy of the Commission negotiating international trade

agreements. She suggests that the principle inspiring this autonomy is that proposed by John Locke and later Montesquieu about the “separation of powers”, that is, a concept developed in the time of the stagecoach” (Lübbe-Wolff, 2016: 7). In this, the executive power – the prince or the monarch – had full autonomy to negotiate international treaties and to sign peace and war declarations without the approval of any Parliament. But in the last century important changes took place. As we see with FTAs, international agreements nowadays clearly influence what is supposed to be a legislative competence; technical developments allow a faster interaction between the executive and the legislative powers; and, last but not least, the absolutist monarch has been substituted for democracy. As “trade”, “international agreements” cannot be considered an end in themselves. Thus, the fact of sacrificing transparency and legitimacy in the negotiations for the sake of the result itself is hard-pressed to be considered democratic.

What Lübbe-Wolff defines as *Geheimniskrämerei* (secret-mongering) puts at risk not only the acceptance of the results of any trade negotiations, but the credibility of the system itself, i.e. a European Union that allows normative decisions to be imposed without a well-founded open and democratic debate at parliamentary and public level. For this reason the current procedure that sacrifices citizen sovereignty for the price of hypothetical access to a hegemonic trade position at global level can only be considered a further element of pressure on the viability of the European project. The argument that economic success is the main priority for Europeans – above democratic legitimacy and social fairness – can only be considered an ideological prejudice. However, even this distorted perspective has a serious pitfall. The TTIP and CETA are important distractions at a critical time in the European construction that can finally obstruct the path to the “mere possibility of a European globally competitive Economic Space” (Nair, 2014: 144). The consolidation of the European single market as a means to realise its economic potential demands urgent adjustments in the current economic governance to overcome its growing pains, as well as clear decisions concerning the scope and speed of social and political convergence. Any other priority will dangerously threaten any progress in the European construction. For this reason, concerning trade policy, “Europe’s prime vocation is to play social cohesion within Europe and inclusive multilateralism outside” (Defraigne, 2014: 17).

## Conclusion

As Pierre Defraigne points out, the definition of trade policy is crucial in both directions, internally and externally, because it is closely related to the individual identity either of a state or of a political project like the European Union. Due to this, it is frightening that the debate about the negotiations of the TTIP, CETA and TISA has been taken – and is often presented – as an aggression, whereas it is more about the effervescence of something that is inextricably linked to a rooted identity construction: the emergence of both a strong civil society and a pluralist dialogue “in which a diversity of kinds of pressure is able to flourish, so that we can compare and criticize” (Crouch, 2011: 241). In terms of trade policy, there has not been an open debate as such, and the dynamic has been rather an answer to the initiatives taken by the European Commission

with the TTIP, CETA and TISA after consulting mainly corporate actors and lobbies in something that can neither be considered an exercise of transparency nor open to public scrutiny. *Trade for All* shows the extent to which the Commission is conscious of the reasons for the resistance of an increasing part of civil society, and introduces a change in the narrative that, disappointingly, has not yet affected the current negotiations in their essence, which is especially regrettable concerning the agenda towards CETA approval. If the Commission continues advancing along this path, straying far from its own roadmap (*Trade for All*), the foreseeable discredit and incoherence will be a new ballast for the acceptance of the European Union as a whole.

The debate about European trade policy is of central importance to the European construction because it is closely linked to the sustainability and viability of the European social model in the global framework. There is a minimum of three interesting questions that might enrich, among others, this public debate:

1. Should a European trade policy protect European corporate interests or the European social model? It seems clear that what globalisation has removed is both the “national” character and belonging of multinational companies. In relation to neomercantilism, it should be said that protecting a social model is probably the only way to protect global interests on issues like climate change, peace or poverty. Faced with the corporate logic of economy of scale, trade policy should prioritise human scale as a guarantee of global progress.
2. Is the idea of global competitiveness as engine of growth the only way for safe human development? A critical glance at the last 30 years demonstrates that this is not necessarily the case. In a world where not everybody can earn trade surpluses at the same time, a balance between trade and internal demand is probably more sustainable. For this reason it should be discussed whether neutral current account balances at global scale should or should not be a central goal and whether European trade policy should or should not observe a certain degree of self-regulation in this sense.
3. As we have seen, the Commission accepts that trade is not an end in itself. Thus, it would probably not be complete sacrilege to ask what the “optimal” amount of trade would be, or rather what the elements would be that should set an “optimal” amount of trade. If we consider questions like the ecological footprint or the exhaustion of raw materials, perhaps international trade should concentrate more deeply on the exchange of intangible assets in the framework of an incipient knowledge society.

In any case, finding an answer to this and other questions in an open, public and grounded debate would undoubtedly reinforce the necessary construction of the European identity and its role, perhaps not in trade or the military, but as moral and political leadership.

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## **Introduction**

Last October the European Commission published *Trade for All*, a document which synthesises the EU's new position on trade. This document highlights the need to adopt an ambitious trade policy and explains the benefits foreign exchange of goods and services and foreign investments entail for the whole of society. The document also tries to respond to the demands of civil society by adopting a more comprehensive concept of trade that encompasses fundamental aspects such as sustainable development, corporate social responsibility, transparency and human rights.

The Confederation of Employers and Industries of Spain (CEOE) and BusinessEurope have followed the EU's new definition of trade policy with great interest since its inception. The CEOE has contributed to this process by stressing the key features that should constitute the core elements of trade policy in the 21<sup>st</sup> century. In this paper I will try to summarise what I consider should constitute the fundamental parts of a strong trade policy that is able to ensure the prosperity of Europe in a fast evolving globalised economy from whose opportunities and benefits we should not seclude ourselves.

## **The importance of Europe as a trade actor**

First I would like to highlight that the European Union is the international actor that has benefited most from the open international trade system, by far. The European Union is today the world's largest trading power in terms of goods and services, as well as the leading international investor. It is currently the largest trading partner of 80 countries and the second largest of another 40. As a consequence, more than 30 million jobs are linked to foreign trade and 7.2 million are related to European investment abroad.

If we look back over the last fifteen years, the European Union has performed very well in this period in terms of trade and investment. Over that period, the EU's weight in world trade slightly diminished from 16% to 15%. But this is a very good result if we consider that in the same



timeframe the United States of America has experienced a downward trend from 16% to 11% and that Japan has seen its presence in world trade shrink from 10% to 4.5%.

This figure is in stark contrast to the rise of China, which in the same period – and above all since joining the World Trade Organization (WTO) – saw its share rise from 5% to 10%. This shows that the performance of the European Union has been very good. However, it does not mean that our position in world trade and investments is guaranteed for the coming years. In this regard, the European Union faces a significant challenge if we bear in mind that 90% of future economic growth will take place outside its borders. The EU therefore needs to implement an ambitious trade policy able to ensure the access of European products, services and investments to third markets.

In the particular case of Spain, where trade represents 33% of GDP and the stock of foreign direct investment reached almost €408 billion in 2014, 1,300,00 jobs are linked to exports outside the European Union and another 294,000 are linked to exports from other countries outside the EU. But these outstanding results were not achieved through an open trade system, the main guiding principles of which were established in the Bretton Woods agreements, they were made possible by successive WTO trade rounds.

However, the existing international framework of trade and investment rules conceived after successive WTO trade rounds and numerous bilateral as well as plurilateral agreements have to adapt to the rapidly evolving nature of trade and investment resulting from the structural transformation of our economies and the industrial and logistical changes driven by technological innovation and new business models. It is therefore essential that the EU's trade policy has the vision and flexibility to cope with the new challenges European companies face in third markets today. While in the second half of the 20th century, tariffs represented the main hindrance to trade, today non-tariff barriers constitute the main obstacle to business expansion abroad. As a matter of fact, if we analyse the trade barriers introduced by the G20 countries since the 2008 crisis, most of them are non-tariff, which impede the trade of goods and services, as well as investment.

The growing role of the supply chains in international trade and the critical importance of services and public procurement for the activities of our companies abroad, require agreements which take into consideration a wide range of aspects such as non-tariff barriers, intellectual property rights, regulatory convergence and cooperation, across multiple economic sectors.

The entry into force of the trade agreement between the European Union and Korea several years ago constitutes a good example of how to overcome a series of obstacles, which was essential to boosting trade and investment. The case of Spain showcases the degree to which this agreement has propelled Spanish exports, which increased during the 2011-2015 period from €1.07 billion to €1.85 billion thanks to the healthy evolution of the export of industrial goods, such as car parts, to the Korean automobile industry, and meat products such as pork in the agribusiness sector.

Consequently, it is essential that the European Union continues with its multifaceted trade strategy at the multilateral, plurilateral and bilateral levels.

## **The EU's multifaceted trade strategy**

As far as multilateral trade systems go, we consider it absolutely critical to defend the ruling framework and dispute settlement mechanism of the World Trade Organization, which is unique in the world. However, it is no less important that the WTO continues to deliver new practical results to the international community, as it did on the occasion of the last inter-ministerial conference of the World Trade Organization held last December in Nairobi, with the conclusion of the second phase of the Information Technology Agreement (ITA) and the ban on agricultural subsidies.

The entry into force of the Trade Facilitation Agreement and the set up by the WTO's Director-General of a new work programme for making further progress in the multilateral negotiations are the two fundamental milestones to be accomplished by the WTO to deliver further concrete results in the near future.

As far as plurilateral negotiations are concerned, the progress and conclusion of the negotiations on the Trade in Services Agreement (TiSA), and the Environmental Goods Agreement (EGA) would give new impetus to world trade. In this regard, the initiation of new plurilateral agreements in new areas should be seriously envisaged in order to keep the trade rules system up-to-date and incorporated in the medium to long term into the multilateral trade system of trade rules.

As regards bilateral agreements, the European Union and its national governments must support an EU bilateral trade policy able to guarantee and improve the access of goods, services and investments to third markets. The renationalisation of trade policy, which looms behind the ratification of the Comprehensive Economic and Trade Agreement (CETA), is not a good sign and may threaten the effectiveness of one of the most important policies of the European Union. This recent evolution, due to the increasing social pressure being exerted on the Commission and on certain national governments by anti-trade movements, is putting into serious danger the effectiveness of the EU's trade and investment policy and undermining in the medium and long term the competitiveness of European business in third markets relative to non-European competitors.

The ratification of CETA and the conclusion of negotiations on the Transatlantic Trade and Investment Partnership (TTIP) and the Japan-EU free trade agreement (FTA) and economic partnership agreement (EPA), are key agreements that would help foster bilateral trade and investment and set a template on trade and investment rules for the rest of the world.

It is essential to recall that 90% of world trade growth will take place in the coming 15 years outside the European Union. Additionally, the European Union has been struggling to achieve high economic growth since the crisis of 2008. While the United States grew by more than 8% between 2008 and 2014, the EU's output dropped 0.2% below pre-crisis

levels. This poor figure is in stark contrast with growth of 64% and 48% obtained by India and China, respectively, since 2008. Furthermore, that EU's share in the world's investment flow dropped from 40% to 13% in the 2000-2013 period.

It is therefore of utmost importance that the European Union disposes of a strong trade policy aimed at improving market access conditions and creating an equal playing field for our companies in third countries in order to encourage higher economic growth regardless of the domestic economic cycle and create highly qualified jobs in Europe. Growth and jobs must therefore be underlined as the primary reasons to support and defend a strong trade policy aimed at obtaining equal treatment for our businesses in third markets.

### **The importance of *Trade for All* for Spanish business**

The new *Trade for All* strategy also mentions the importance of services, public procurement and investments as three fundamental pillars due to the growing interrelation of services, investments and goods, the high potential of trade in services, the elimination of barriers in the public procurement market and the need to guarantee to our investments free access to third markets and high levels of protection against discriminatory treatment.

For Spain, all these areas are of particular importance because of the significant role played by Spanish companies in public procurement in services. In fact, in 2014 Spain ranked as the eighth largest service provider, with an overall export volume of \$134 billion and potential for growth. In a respected study which analyses the impact of the Transatlantic Trade and Investment Partnership on the Spanish economy, many service sectors show significant potential for growth in a free trade area between the US and the EU.

In relation to services which offer enormous potential for growth, the number of barriers in the emerging countries are still very high in a wide range of sectors according to the OECD's Service Trade Restrictiveness Index (STRI). In terms of public procurement, improved market access conditions are key for our companies and as far as investments are concerned, with an overall stock of direct investments which amounted in 2014 to more than €408 billion, Spanish companies need comprehensive provisions in terms of access and investment protection. Another no less important chapter relates to competition law, which is fundamental in order to guarantee an equal playing field for all actors and to impede disloyal competition by state-owned enterprises. Last but not least, I would like to highlight that the agreements do not interfere in the sovereignty space of the state when it comes to regulating public services, which are excluded by the provisions of GATS.

As the *Trade for All* strategy also mentions, foreign investments and imports play a fundamental role in boosting our exports. In Spain foreign companies contribute to more than 60% of the overall exports in the sectors of transport (cars, car parts) and plastics as well as significantly in other sectors such as metallurgy, electronics, paper and

pharmaceutical products. Not less significant for the competitiveness of our exporting companies is to enhance access to services, raw materials and intermediate products at competitive costs, which is fundamental for the manufacturing and delivery of final products.

According to the TiVA (Trade in Value Added) database published by the OECD, the average foreign value added in Spanish exported products was 26.88%. This figure, which was very similar to that of other trading partners such as Germany (25.54%), France (25.13%) and the United Kingdom (23.05%), shows the high level of integration of our economy in world trade and in global value chains.

## **The case of small and medium-sized companies**

Apart from the aspects mentioned before, I would also like to highlight the extreme importance of free trade agreements for enabling our small and medium-sized companies to export goods and invest in third markets. Should our trade policy fail to deliver concrete results in the coming years, our small and medium-sized companies would take the brunt of this failure rather than the bigger companies. As we have stressed several times, large enterprises do not need trade agreements to expand their businesses abroad. They dispose of sufficient capital, knowhow and structure to adapt their business models to different business environments, which is not the case for small and medium-sized companies, which are unable to take on the costs stemming from different regulatory environments. The non-conclusion of new trade agreements such as the TTIP and CETA would, ultimately, be very damaging for our small and medium-sized companies.

The new situation we are facing also represents a clear paradox if we consider that the Spanish trade promotion policy seeks to diminish our trade dependency on the rest of the European Union by increasing our trade share outside the European Union. Countries like the United States of America, Mexico, Brazil, China, India, Indonesia, Japan, Australia, South Africa and the Gulf states, are in fact our priority markets where we are attempting to increase and diversify the presence of our companies.

This contradiction is even stronger if we bear in mind that the second main target of our trade promotion policy is to increase the number of Spanish small and medium-sized companies involved in foreign trade and investment as a means to enhancing them with more sustainable business models, which makes them less dependent on the evolution of internal demand.

As for human rights and corporate social responsibility, sustainable development and corruption, we have defended the inclusion of all these aspects in the new trade strategy. However, it must also be clearly underlined that they should not dilute the main objectives of the EU's trade policy, which are growth and jobs.

Contrary to the general belief, an important aspect which must be underlined is that free trade agreements benefit small and medium-sized companies more than big companies. Indeed, as we have insisted

several times, big companies have the capacity and the resources to adapt to different business environments, which is not the case for the small and medium-sized companies. Big companies can overcome the additional costs caused by divergent or overlapping regulations without any significant impact on the final price. On the contrary, these same barriers are practically insurmountable for the majority of small and medium-sized companies. In this regard, one of the main objectives of agreements such as the TTIP and CETA is precisely to overcome redundancies, given that the standards are equivalent.

It is striking that cosmetic products manufactured in Spain, which have undergone a strict test and certification process, have to be submitted again to a second control before being commercialised in the United States. Therefore, it is key that 21<sup>st</sup> century trade agreements tackle such issues if we intend to involve small and medium-sized companies in world trade. These advantages do not only stem from the regulatory cooperation and the elimination of specific non-trade barriers, but also from a wide range of areas such as trade facilitation or specific provisions focused on small and medium-sized companies aimed at providing them, for example, with information.

Additionally, the lack of progress in trade negotiations and the rise of protectionism can also endanger a higher involvement of the small and medium-sized companies in world trade and international investment by disrupting global value chains. This last aspect contradicts the efforts made by the different trade and investment promotion agencies to insert the small and medium-sized companies into the global value chains. But beyond this important issue it basically imperils the efforts made for decades by the Spanish trade and investment promotion agencies and business organisations, which are committed to expanding and diversifying the export base and investments beyond the European Union in order to support growth and jobs, as well as to reduce our traditional overdependence on the rest of the European markets. A quick overview of the aforementioned aspects can give an idea of the important progress achieved so far in building up the resilience of our economy with regard to the evolution of the domestic economy and that of the European Union.

One of the main objectives is to widen our narrow export base as much as possible in order to increase the volume of our exports and to reduce one of the traditional imbalances of our economy, which is our trade deficit in goods. In less than ten years much has been achieved by increasing the total number of exporting companies from 97,000 to almost 150,000 in 2015, a significant rise that is also reflected in the growing number of regular export companies, which has risen from 39,125 to almost 47,782 companies. But as good as this evolution may seem, much remains to be done in order to broaden our export base. Especially as the average size of Spanish small and medium-sized companies is smaller by comparison than those of other trading partners such as Germany, whose higher number of medium-sized companies represent the backbone of German exports. Therefore today's strategy is not only focused on increasing the sheer number of companies but also on analysing the structural reasons underlying the smaller size of Spanish companies and identifying the necessary policies and tools to strengthen them in order to facilitate their involvement in international trade and investment.

This first objective runs parallel to the need to diversify our exports, which have been traditionally concentrated in the EU market. This overdependence, which is in part explainable by the fact that Europe is our natural destination market, can also represent a weakness if we bear in mind that 90% of global growth will be located outside the European Union in the coming years and that the evolution of our exports is very closely linked to the economic cycle of the European Union. Taking these circumstances into consideration, one of the key targets has been to increase the share of our exports outside the European Union. In fact this challenge led the Confederation of Employers and Industries of Spain and the Ministry of Industry, Trade and Tourism to sign an agreement in order to promote Spanish exports and investments in certain strategic markets, such as the United States of America, Brazil, Mexico, South Africa, Russia, Turkey, the Gulf states, India, China, Indonesia, Japan and Australia. As a result of this strategy conceived in the late nineties, we were able to reduce our dependency rate from 73.4% in 2000 to 64.8% in 2015. Although this is a quite satisfactory result, we still lag behind countries like the United Kingdom, Germany and France, the level of dependency of which are 53.6%, 57% and 59%, respectively.

This positive evolution has also taken place in regard to our strategic markets, where a significant portion of the world's GDP growth is confined. Today the percentage of trade with these markets is 21.25%, which is a good result. However, this figure is still too low if we really want to benefit from the economic dynamic of the emerging economies.

The strategy mentioned above not only requires the implementation of domestic policies to increase the competitiveness of our companies and a vigorous trade promotion policy, but also active trade liberalisation in order to enhance the access of our products, services and investments to third markets and guarantee our companies equal treatment relative to local companies.

## **On transparency, European values and regulatory convergence**

We welcome the efforts to bring more transparency to the definition and implementation of trade policy. The involvement from the beginning of all the stakeholders concerned is critical in order to streamline all the interests and concerns from the different parts of the society. However, trade policy cannot solve the European Union's governance problems by itself, which must be envisaged from a broader perspective far beyond the limits of trade. Furthermore, transparency cannot endanger the negotiations that must be necessarily held within the boundaries of confidentiality in order to allow the negotiators sufficient room to manoeuvre to broker a deal. On the other hand, the criticism of a lack of democracy in the process is not acceptable. First, the Commission negotiates within the limits of a mandate approved by the Council, which is formed largely of the representatives of democratically elected governments; second, once the Commission has reached an agreement it must submit it to the approval of the European Council and Parliament. The recent demand made by certain actors to request the approval of the twenty-eight parliaments would imply the end of an EU trade policy and a very serious setback to the credibility of the European Union in the world.

Trade policy is basically a tool to foster trade and investments with the final aim of driving growth and creating jobs. In this regard, trade policy is not the most appropriate way to transmit values, which must be considered at the level of the European Union's foreign trade policy. Moreover, trade can be a tool to promote human rights and business as long as the company does not take over the responsibility that corresponds to the national administrations and as long as the initiatives in this specific area are on a voluntary basis.

Trade agreements must enshrine an institutional framework able to facilitate the regulatory cooperation between counterparts. Trade agreements have to foresee an institutional framework which may adapt the text to the rapid evolution of the economy. In this context, regulatory cooperation plays a vital role in order to impede new barriers and to streamline common responses to new challenges. This is particularly the case when it comes to the application of new technologies. Such a framework would avoid divergences in the regulation of new technologies and business models. Regulatory cooperation by no means interferes in the sphere of decision-making of the countries which have the ultimate say on how to regulate on a particular issue. But an enhanced dialogue based on a pre-emptive mechanism that monitors and exchanges draft proposals would pave the way for the identification of common solutions, which is important for avoiding potential conflicts.

## Conclusion

Aware of the need to improve access to third markets, which is key for the prosperity of countries like Spain, the Confederation of Employers and Industries in Spain clearly supports further steps in the liberalisation of trade and investment at multilateral, plurilateral and bilateral levels.

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## USING THE TTIP MOMENTUM TO MODERNISE THE EU APPROACH TO THE GLOBAL INVESTMENT POLICY REGIME

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### **Introduction**

If there is one single issue in the international trade environment on which all relevant actors agree it is that the existing global investment policy regime is obsolete and in urgent need of revision and reform.

In recent years, the United Nations Conference on Trade and Development (UNCTAD) has probably been the most active international institution in promoting and leading this discussion and reflection. Since 2010 this issue has been a central piece of UNCTAD's World Investment Report series and the arguments and evidence provided there are massive. UNCTAD clearly explained its general view of this issue in 2015 with these words:

Sixty years of International Investment Agreements (IIA) rule making reveal a number of lessons on how IIAs work in practice and what can be learned for future IIA rule making. The expected key function of IIAs is to contribute to predictability, stability and transparency in investment relations, and to help to move investment disputes from the realm of State-to-State diplomatic action into the realm of law-based dispute settlement and adjudication. IIAs can help improve countries' regulatory and institutional frameworks [...]; can reduce risks for foreign investors [...] and become part of broader economic integration agendas, which, if managed properly, can help achieve sustainable development objectives. At the same time, experience has shown that IIAs "bite" (i.e. their protection provisions can and have been enforced by arbitral tribunals at sometimes huge costs to the State), and that they limit the regulatory space of the contracting parties. As a result, concerns have been raised that these limits on regulatory space go too far, were not properly understood at the point of entry into IIAs or are inadequately balanced by safeguards for governments or by obligations on multinational enterprises (UNCTAD, 2015: 125-126).

UNCTAD's main contribution to this discussion was the launch in 2012 of their Investment Policy Framework for Sustainable Development (IPFSD),



which is providing guidance on the reform of investment policies at national and international level.

Academia has keenly joined in this discussion. Outstanding in this sense was the joint declaration produced in 2010 by 76 academics from universities around the world. In the declaration, this group of international experts stated “a shared concern for the harm done to the public welfare by the international investment regime, as currently structured, especially its hampering of the ability of governments to act for their people in response to the concerns of human development and environmental sustainability”(Van Harten, 2010). They also affirmed that “investment treaty arbitration as currently constituted is not a fair, independent, and balanced method for the resolution of investment disputes”. And finally recommend that, “States should review their investment treaties with a view to withdrawing from or renegotiating them in light of the concerns expressed above; should take steps to replace or curtail the use of investment treaty arbitration; and should strengthen their domestic justice system for the benefit of all citizens and communities, including investors”.

Civil society organisations and the general public, who have traditionally been little interested and concerned about international trade policy matters, have recently joined this public conversation. The main reason is the international civil society campaign against the Transatlantic Trade and Investment Partnership (TTIP) and the Canada-EU Trade Agreement (CETA), which since October 2014 has managed to collect almost 3.5 million signatures for a European citizens’ initiative (ECI) against the TTIP and CETA. Besides this quantitative success, the greatest achievement of the Stop-TTIP movement has been to get the general public to know and be interested in concepts and institutions – such as the investor-state dispute settlement system (ISDS) – that until now belonged to the exclusive realm of negotiators and policymakers. The main messages and slogans of the campaign concerning investment policy are rather vague and maximalist: “We want to prevent TTIP and CETA because they include several critical issues such as investor-state dispute settlement and rules on regulatory cooperation that pose a threat to democracy and the rule of law” (Stop TTIP, 2014). However, in essence, their concerns are not too far from those raised by UNCTAD or academia. The text of the “anti-TTIP initiative” explains its opposition to these treaties by saying that “the beneficiaries of these agreements will be big corporations, not citizens, as Canadian and US companies would have the right to sue for damages if they believe that they have suffered losses because of government decisions (for instance new laws to protect the environment or consumer rights)” (Stop TTIP, 2014).

Finally, the European Union has opened a reflection on the global investment regime, including some profound criticisms than can be considered extraordinary, given that this regime has remained almost untouched for more than 30 years. The EU recognises that many of the traditional approaches of this policy have to be revised and that some of the system’s building blocks need to be renewed. The recent European Commission (EC) strategy *Trade for All: Towards a more responsible trade and investment policy* asserts that:

While boosting investment is at the heart of the Commission's economic priorities, investment protection and arbitration have triggered a heated debate about fairness and the need to preserve the right of public authorities to regulate both in the EU and in partner countries, in particular in the context of the TTIP negotiations [...]. The current debate has cast light on the risk of the abuse of provisions common to many of those agreements, as well as lack of transparency and independence of the arbitrators. The need for reform is now largely acknowledged globally and 'while practically every country is part of the global investment regime, and has a real stake in it, no one seems really satisfied with it' (UNCTAD). The question is not whether the system should be changed but how this should be done. While the status quo is not an option, the basic objective of investment protection remains valid since bias against foreign investors and violations of property rights are still an issue (European Commission, 2015).

In the *Trade for All* strategy, the EC recognises that the EU is best placed and has special responsibility in the reform of the global investment regime "as its founder and main actor". Out of the 3,200 bilateral investment treaties (BITs) that constitute the dense "spaghetti bowl" of the global investment regime, almost 1,400 BITs involve EU member states. Therefore, there is great expectancy to see what the EU's next steps are and how they develop.

## Revealed intentions: how far from expectations?

On two different occasions since the beginning of 2015 the EC has specified how it envisages the future global investment regime and what concrete and immediate steps it is willing to take. The first of them was in the *Trade for All* strategy. Here the Commission committed:

- To put stronger emphasis on the right of the state to regulate, by including modern provisions in bilateral agreements;
- To reform the old investor-state dispute settlement system by transforming it into a public Investment Court System, composed of a tribunal of first instance and an appeal tribunal, formed of independent judges with high legal and technical qualifications and including a clear code of conduct to avoid conflicts of interests;
- And, in the longer term, to engage with partners to build consensus for a permanent International Investment Court.

These commitments already tackle three of the five main challenges that, following UNCTAD, global investment reform should address:

(i) safeguarding the right to regulate in the public interest so as to ensure that IIAs' limits on the sovereignty of States do not unduly constrain public policymaking; (ii) reforming investment dispute settlement to address the legitimacy crisis of the current system; and (v) enhancing the systemic consistency of the IIA regime so as to overcome the gaps, overlaps and inconsistencies of the current system and establish coherence in investment relationships (UNCTAD, 2015: xi-xii).<sup>1</sup>

**1** The other two challenges refer to: "(iii) promoting and facilitating investment by effectively expanding this dimension in IIAs; (iv) ensuring responsible investment to maximize the positive impact of foreign investment and minimize its potential negative effects".

Sceptics might have thought “talk is cheap” and that the commitments included in the *Trade for All* strategy had little value until they were endorsed in the text of an agreement or at least defended by the EC in the course of a negotiation. That is precisely why the publication in November 2015 of the EU proposal for “Investment Protection and Resolution of Investment Disputes” in the context of the TTIP negotiations with the US is so relevant. It allows analysts to check the Commission’s real level of ambition and verify the credibility of its promises to lead the reform and improvement of the global investment regime.

In the opinion of this author, the content of the EU proposal for the TTIP’s investment chapter is even more ambitious than the commitments the Commission had made under the *Trade for All* strategy, both in terms of safeguarding states’ policy space and granting that investment dispute settlement operates at least under minimum standards of independence, fairness, openness and subsidiarity. Furthermore, if finally approved, the text of the TTIP’s investment chapter would become, in comparative terms, one of the most progressive investment agreements in the current global investment regime, much more advanced and balanced than the average content that can be found in the *catalogue* of more than 3,000 existing BITs.

### **What are the most outstanding features of the EU’s TTIP proposal regarding the safeguard of the states’ right to regulate in the public interest?**

First of all, the chapter begins with a clear statement in favour of policy space: “The provisions of this section shall not affect the right of the Parties to regulate (...) through measures necessary to achieve legitimate policy objectives, such as the protection of public health, safety, environment or public morals, social or consumer protection or promotion and protection of cultural diversity” (Art. 2.1). The text clarifies right afterwards that: “the provisions of this section shall not be interpreted as a commitment from a Party that it will not change the legal and regulatory framework, including in a manner that may negatively affect the operation of covered investments or the investor’s expectations of profits (Art. 2.2).

With this simple wording, the Commission is clearly positioning itself against one of the most controversial and challenging issues that has arisen through arbitral practices in recent years: the understanding that BITs protect foreign investors’ “legitimate expectations”, restricting countries’ ability to introduce or change investment-related policies (including those for the public good) if they could have a negative impact on individual foreign investors.

Secondly, the Commission’s proposal includes the traditional “fair and equitable” and “full protection and security” standards (Art. 3.1): “Each Party shall accord in its territory to covered investments of the other Party and investors (...) fair and equitable treatment and full protection and security”. Due to its largely undefined nature (what do “unfair”, “inequitable” and “full protection” mean exactly?) and the ambiguous way they have traditionally been drafted in BITs, these clauses have turned into all-encompassing provisions that investors have used to challenge

any type of governmental conduct that they deem unfair, leaving the task of determining the meaning to arbitral tribunals. At the end of the day, this has led to expansive, unexpected and inconsistent interpretations by arbitral tribunals, exposing host states to unforeseen legal and financial risks and helping investors challenge core domestic policy decisions, far beyond clear-cut infringements of private property.

On this issue, the European Commission has followed one of UNCTAD's suggestions, clarifying the commitments states make under these standards by indicating examples of what they cover through an open-ended list of obligations: the denial of justice; targeted discrimination on manifestly wrongful grounds such as gender or race; manifest arbitrariness, etc. Although a closed, exhaustive list of the assumed obligations would have been preferable in order to avoid the expansion of the meaning through subsequent arbitral interpretations, it already represents a meaningful improvement by comparison with the wording of most existing BITs.

Finally, the Commission's proposal also includes an expropriation provision, which is a key element of any BIT. This provision doesn't take away states' right to expropriate property, but makes the exercise of this right subject to certain conditions.

Here, the Commission, acknowledging that investors have used provisions on expropriation to challenge general non-discriminatory regulations that have had a negative effect on their investments, takes a step forward to establish a proper borderline between expropriation (for which compensation must be paid) and legitimate public policymaking (for which no compensation is due). In Annex 1 of the text, the Commission introduces clear definitions of what "direct and indirect" expropriation mean, establishes criteria to determine when a measure constitutes one or another and adds "for greater certainty" that "non-discriminatory measures of a Party that are designed and applied to protect legitimate policy objectives, such as the protection of public health, safety, environment or public morals, social or consumer protection or promotion and protection of cultural diversity do not constitute indirect expropriations" [and, consequently, no compensation needs to be paid].

In conclusion, it is fair to say that the Commission's proposal for the TTIP's investment chapter, tabled for discussion with US negotiators at the end of 2015, makes a true effort to find an equilibrium between ensuring that both parties retain their right to regulate for pursuing public policy interests while contributing to a favourable investment climate and protecting foreign investors from unjustified discrimination measures by the host state.

### **What are the most outstanding features of the EU's TTIP proposal regarding the reform of the investment dispute settlement system to address the legitimacy crisis in the current system?**

When describing the legitimacy crisis of the investor-state dispute settlement system, UNCTAD highlights the following features as the most common flaws in the system's substance, procedure and functioning (UNCTAD, 2015):

- It grants foreign investors greater rights than domestic investors and privileged status relative to anyone else in international law;
- In most of the cases, it allows for fully confidential arbitration and denies the right to intervene to all parties with a direct and existing interest in the outcome of the dispute;
- It lacks sufficient legitimacy (in terms of transparency, independence, impartiality or due process);
- It does not allow for correcting erroneous decisions;
- It is highly expensive for users;
- And, related to the protection of states' policy space discussed in the previous section, UNCTAD affirms that this system can: "create the risk of a *regulatory chill* on legitimate government policymaking; provoke expansive, unexpected and inconsistent interpretations by arbitral tribunals; expose host States to legal and financial risks unforeseen for the parties and beyond clear-cut infringements of private property, without bringing any clear additional benefits"; and "elevate property rights over the State's right to regulate and other human rights"(Van Harten, 2014).

How many of these concerns are tackled by the Commission's proposal? In the first place, by shifting from the old investor-state dispute settlement system to an Investment Court System formed of independent judges with high legal and technical qualifications and including a clear code of conduct to avoid conflict of interests, the Commission is partly giving a response to the concerns related to the system's independence, impartiality and due process. By establishing an appeal tribunal, it allows the correction of erroneous decisions and, somehow, stunts the privileged status granted to investors by making a new defence tool available to the defendant state.

Secondly, the text doesn't only imply adhesion to the UNCITRAL Transparency Rules – which is the most ambitious of the existing international standards on transparency in treaty-based investor-state arbitration – but adds a list of additional transparency obligations. It also includes the right of any natural or legal person that can establish a direct and present interest in the result of the dispute to intervene as a third party.

Thirdly, the EC's proposal requires the tribunal to dismiss any claim by an investor who has submitted a claim to another domestic or international court concerning the same issue, unless it withdraws such a claim and refuses to initiate any new claim concerning the same issues in the future. This provision tackles the traditional criticism of the privileged status the international investment regime gives foreign investors relative to anyone else in international law.

Finally, the text establishes that upon an international agreement providing for a multilateral investment tribunal the articles of the TTIP related to the Investment Court System and the appeal tribunal shall cease to apply. This has to be understood as supporting UNCTAD's call for "enhancing the systemic consistency of the IIA regime" (UNCTAD, 2015).

However, the Commission's proposal doesn't yet give a direct answer to the problem caused by the exorbitant costs that these procedures

usually involve for the disputing parties. Neither does it adequately deal with the privileged status granted to foreign investors, as it doesn't include provisions on the investors responsibilities (actionable in the same way as foreign investors' rights) or recognise third parties' "right to standing" (which is one step further than the "right to intervene", as it recognises third party rights to participate in the proceedings alongside the claimant and the respondent: access to all documents, submitting evidence or proposing and questioning witnesses).

## Pending issues

In this author's opinion, the European Commission's proposal to revise and reform its investment protection and arbitration policy has to be considered, overall, to be a meaningful improvement – compared with the status quo – and a sincere stand for the right to regulate and for an independent, fair and open investor-state dispute settlement system. Still, this reform process is far from being complete and there are some important pending elements to be dealt with that threaten to cast doubts on the EU's political will to lead the reform of the global investment regime.

The first of these concerns is whether the present EU "reform momentum" is a passing fashion or if it is here to stay. In this sense, it is fair to remember that the EC didn't make a move on the most controversial issues until the social pressure against the TTIP was so great that it didn't really have an option. What will happen with the reform process if the TTIP negotiations fail and the public interest on trade policy comes back to its usual below-freezing temperature levels? There are reasons to be optimistic. The negotiations on the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada (concluded in 2014) have recently been re-opened to reformulate the agreement's investor-state dispute settlement (ISDS) clause in line with the EU's new proposal. This same clause has also been included in the recent EU-Vietnam Free Trade Agreement.

The second concern has to do with the time lag before these reforms soak through the stock of almost 1,400 existing BITs involving EU member states. Since the Lisbon Treaty (2009), foreign direct investment has fallen within the common commercial policy of the EU and, as such, investment protection and dispute settlement became part of the sphere of the EU's exclusive competence. Since 2012 an EU regulation has addressed the status under EU law of EU member states' BITs that existed before the entry into force of the Lisbon Treaty:

- Those BITs signed before 1 December 2009 – none of which contain any of the improvements the EU is proposing these days – may be maintained in force until a BIT between the EU and the same third country enters into force. This means that unless the EU negotiates a new agreement with any of those countries, the old, obsolete BITs could still be in force for decades.
- For those BITs signed after December 2009 the Commission must decide the maintenance or entry into force of each agreement based on several grounds, one of which refers to the need for negotiations to be consistent with the European Union's principles and objectives

for external action – promotion of democracy, the rule of law, human rights and fundamental freedoms, or sustainable economic, social and environmental development. The same rules apply to those member states that seek to enter into new BIT negotiations with a third country.

Although this last provision potentially provides the EC with considerable political discretion when deciding on a BIT authorisation, it is hard to imagine that the Commission will deny the authorisation to an agreement based on its insufficient respect for the “right to regulate” or the “opacity and unfairness” of its dispute settlement system. In fact, since 2012 the Commission has denied none of the authorisations of pre-existing BITs, despite most of them not including the recognition of the state’s “right to regulate” and none of them including the innovations the EC is proposing on investor-state dispute settlement. Furthermore, by mid-2016 the Commission had given these same countries 93 authorisations to open new negotiations, 41 to open renegotiations, 16 authorisations to conclude new agreements and 21 authorisations to conclude protocols for existing BITs with third countries (Schacherer, 2016).

In conclusion, if the EU is serious in its analysis and diagnosis about the pressing need to reform the international investment regime and about making EU trade policy “promote and defend not only European interests but also European values”, it cannot look exclusively outward. The EC should present member states with the necessity of a gradual renegotiation of all their BITs to bring them up to the EU’s 2016 principles and values.

Last but not least, in the context of the TTIP negotiations there still is an “elephant in the room” that none of the negotiating parties have been able to explain and clarify properly. Public opinion doesn’t understand why a special, extrajudicial and private dispute settlement system is necessary in a trade agreement between two partners that have, probably, the strongest, most capable and most independent judiciary systems in the world. While the recourse to international arbitration courts might have seemed understandable to the general public opinion until now in the case of investment agreements between developed and developing countries – based on the need to provide a safe and stable environment for investors that is favourable for foreign investment – these become unacceptable reasons in the case of the TTIP.

Despite the fact that the reforms introduced by the EU in the TTIP and CETA negotiations already give an answer to most of the weaknesses attributed to the old-fashioned BITs (which are the reasons behind the BITs’ unpopularity and bad name), the failure of public authorities to properly explain why this system is still needed is fanning the flames of those who see the TTIP’s protection of investors as a matter of special and privileged treatment for corporations against the public interest of European citizens. The EC shouldn’t underestimate this fact. With it more than likely that the TTIP and CETA will be considered “mixed agreements” – requiring therefore the signature and ratification by each of the EU member states – the fate of these agreements will be as dependent on what happens in the negotiation rooms as on the hearts and minds of European citizens.

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## EU TRADE POLICY AND DEVELOPING COUNTRIES: TOWARDS A MORE ETHICAL AGENDA?

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This chapter aims to provide a concise overview of evolutions in European Union (EU) trade policy towards developing countries. In line with the general purpose of this volume, it also considers the importance of Commissioner Cecilia Malmström's *Trade for All* (2015) strategy in this regard. Ever since the early years of European integration, an ethical agenda towards the Global South has been proclaimed. The Schuman Declaration of May 9<sup>th</sup> 1950 declared "the development of the African continent" to be "one of its [Europe's] essential tasks" and part four of the Treaty of Rome of 1957 was dedicated to privileged trade and aid relations with "the Overseas Countries and Territories". Subsequent the Yaoundé (1963, 1969) and Lomé conventions (1975, 1980, 1985, 1990) and the Cotonou (2000) Agreement continued the special trade-and-aid relationship with member states' former colonies assembled in the African, Caribbean and Pacific (ACP) group, larded with an ethical development discourse. Since the 1960s and 1970s, Europe has also established preferential trade agreements with countries in eastern Europe and in the southern Mediterranean. In a practical application of wider calls by developing countries for a New International Economic Order (NIEO), the European Community was the first to create a Generalised System of Preferences (GSP) in 1971, thereby enhancing Asian and Latin American countries' access to its market. Throughout the 1990s and 2000s, the EU's growing market size and political profile further substantiated the conception of its role as a leading and "normative" power. This resulted in a number of highly symbolic trade-related initiatives towards the developing world: the "Everything but Arms" (EBA) initiatives providing duty-free and quota-free access for the least-developed countries (LDCs) (2001), the calls led by the EU for a Development Round of the World Trade Organization (WTO) in the lead-up to Doha Conference (2001), the elaboration of the GSP+ system with sustainable development and governance trade conditionality (2005), and the EU Aid for

Trade Strategy (2007) all seemed to underpin this image of an ethical actor towards the Global South. One decade later, however, it remains unclear how successful the EU has been. A number of internal and international evolutions have challenged both the EU's "normative" and "power" profiles.

While a thorough evaluation of the EU's trade relations with developing countries is beyond the scope of this chapter, we aim to take a bird's eye view by discerning three ostensibly incompatible evolutions that have taken place over the past decade. First, trade relations with developing countries have become a lesser priority for the EU. Second, the EU has forcefully continued its liberalisation agenda towards these countries. Third, it has also pursued ethical values through trade. We will outline each of these evolutions and consider how they might be interlinked. In conclusion, we will reflect on how this triangle may not be impossible after all.

### **A lesser priority**

Poorer developing countries, including many ACP countries, have lost their central position in the EU's external orbit. While the former colonies long stood at the top of the EU's "pyramid of preferences", their position has been eroded. This has been a gradual evolution that came clearly to the surface when negotiating the follow-up to the Lomé system. In a Green Paper on the EU's relations with the ACP countries in the 21<sup>st</sup> century published in 1996, the European Commission clearly signalled that trade relations with these countries should be revamped. For a number of political, legal, normative and economic reasons, the EU was no longer willing to negotiate a "waiver" justifying the special trade system with these countries in the WTO. This "normalisation", or according to some, "banalisation", of the ACP group became clear in the Cotonou Agreement (2000), which set the stage for Economic Partnership Agreements (EPA) between the EU and ACP regions. The EPAs would replace the non-reciprocal trade liberalisation of the Lomé system by reciprocal (yet still asymmetrical) free trade. The EPAs would be negotiated between the EU and six sub-regions of the ACP group and go beyond merely tariffs to also include behind-the-border issues. Moreover, trade-and-aid schemes echoing the NIEO ideology of the 1960s and 1970s, such as Stabex, Sysmin, and commodity protocols providing fixed quota and prices for bananas, sugar and rum, were gradually abandoned. At the same time, the EBA initiative did enhance market access for the poorest countries in the world. Cynically, however, EBA contributed to undermining the position of the ACP group and dismantling the commodity protocols, while its impact in terms of growth and welfare remains doubtful.

This trend manifested itself even more clearly in 2006 when the then Trade Commissioner Peter Mandelson launched the *Global Europe – Competing in the World* trade strategy for the EU. Henceforth, the growing and emerging economies clearly became the focal point of EU trade policy. The rationale underlying this strategy was explicitly framed in terms of economic interests. *Global Europe* states that while the EU's trade agreements serve development objectives well, "our main trade interests, including in Asia, are less well served",

adding that “for trade policy to help create jobs and drive growth, economic factors must play a primary role in the choice of future FTAs”. Concretely, *Global Europe* instigated trade negotiations with South Korea, India, ASEAN, Central America, and the Andean Community. While EPA negotiations continued to muddle on, and the Doha Development Round also found itself in an impasse, the EU started to play the game of “competitive liberalisation”, as a result of which the ACP countries as well as the LDCs witness even more preference erosion.

Interestingly, the drive for free trade agreements with emerging economies was further strengthened by the EU’s reaction to the economic and financial crisis, based on the belief that more trade and investment is an important dimension of Europe’s recovery strategy. Furthermore, the crisis served to legitimate new bilateral agreements with industrialised countries such as Canada, Japan and, most importantly, the United States. While industrialised countries had historically figured at the bottom of Europe’s “pyramid of preferences”, these countries were catapulted to become core trading partners, engaging in a hitherto unseen degree of liberalisation through tariff reductions and regulatory arrangements. The negotiations on a Transatlantic Trade and Investment Partnership (TTIP) with the US is particularly noteworthy in this regard. Against the backdrop of the economic recession, the then European Commission President José Manuel Barroso argued that the agreement would be “a boost to our economies that doesn’t cost a cent”.

These dynamics have led to the trade agreements signed with Korea (2010), with Central America (2012), and with Peru and Colombia (also 2012; with Ecuador joining in 2016). Trade negotiations with Canada were finished in 2014. In the same year, the EU signed trade agreements with Ukraine, Georgia and Moldova. While bi-regional negotiations with ASEAN turned out to be complicated, the EU concluded separate agreements with Singapore (2014) and Vietnam (2016). Negotiations with Malaysia, Indonesia, Thailand and the Philippines are ongoing, which is also the case for India and Japan. Negotiations with Mercosur have been relaunched, whereas the trade agreement with Mexico is being renegotiated. Trade negotiations with New Zealand and Australia have also been announced.

The principle of “differentiation” between developing countries had gradually established itself in EU trade and development discourse by the end of the first decade of the 2000s. It has justified a far-reaching reform of the GSP, which entailed the graduation of more than 80 high- and middle-income countries since 2014. This also pushed a number of middle-income countries, such as Ecuador, which would otherwise lose their preferential access to the European market, to negotiate a bilateral trade agreement. Although the EU has continued the EPA negotiations, it is clear that the member states’ former colonies, and the world’s poorest countries more broadly, no longer occupy an important place in this trade agenda. If they ever were the EU’s most preferential trading partners, this is certainly no longer the case today. Apart from tariff erosion and attentive diversion, the new agreements also entail risks of trade diversion for the ACP countries and LDCs.

## Continuing liberalisation

Notwithstanding the declining relevance of developing countries in Europe's trade policy, the liberalisation agenda of Cotonou has been forcefully applied and even reinforced. EU-ACP relations over the past decade have been dominated by the discussions on EPAs. Many commentators have discussed and criticised the EPA negotiations, focusing on issues such as the impact of trade liberalisation on domestic economies in Africa, the EU's missionary zeal for reciprocal free trade, the uncertainties about what "WTO compatibility" means in this regard, the pros and cons of the bi-regional frameworks, the dynamics within ACP regions, the impact of European business interests, the near-absence of compensating development aid, the divide-and-rule negotiation tactics of European negotiators, the rhetorical negotiation strategies by their ACP counterparts, the role of political and economic elites in the ACP, the perceived image damage to the EU, the successful lobby campaigns by transnational non-governmental organisations, etc. The picture that emerges from more than a decade of intense EPA negotiations is one of a complex hotchpotch of trade arrangements. While only one – the Caribbean region – signed a full EPA by the original deadline, several others signed "light" EPAs and continued to negotiate, while still others decided to revert to the GSP or the EBA arrangement.

There is however a clear and successful (according to EU standards) liberalisation logic behind these evolutions. First, the number of ACP countries signing an EPA has increased in recent years. In 2014 the southern African (SADC), west African (ECOWAS) and east African (EAC) groups decided to sign an EPA with the EU. Although negotiations have been lengthy and tough, and the EPAs are not yet ratified (let alone implemented), it seems that with some delay the EU will eventually have managed to finalise its EPA agenda. The prospect of falling back to the less generous GSP system, which has been used as a threat by the EU, has most likely affected the eventual effectiveness of its approach. In addition, the EU did make concessions on asymmetrical liberalisation, development aid funding, and the scope of the agreement. Nevertheless, it is important to notice that the EU has largely realised its liberalisation agenda as it was already suggested – long before the *Global Europe* strategy – in the 1996 Green Paper.

Second, the non-signatories of EPAs also eventually comply with the EU's wider agenda to pursue WTO-compatible trade arrangements. Since the countries that do not take part in EPA schemes fall back to EBA or GSP, they are fully consistent with the WTO philosophy. Indeed, over the past decade they have shifted from "waived" non-reciprocal market access towards "WTO-compatible" non-reciprocal market access as allowed under the "Enabling Clause" of the General Agreement on Tariffs and Trade (GATT, the predecessor of the WTO). In other words, the African countries' trade relations with the EU have been radically restructured in order to streamline them in line with WTO requirements. "WTO compatibility" – the EU's leitmotif in the Cotonou negotiations – has been achieved. Even if questions on the legality of the EPAs may remain, this is unlikely to be challenged. Also, countries that are not members of the WTO signed bilateral trade agreements. This successful

political outcome of the so-called “failed” EPAs – at least by European standards – has often been overlooked. While the picture of African trade arrangements with the EU looks complex, the end result of a long decade of negotiations displays a distinct liberalisation logic.

Third, an increasing number of non-ACP developing countries that previously benefited from the GSP has been negotiating bilateral free trade agreements with the EU. This means that these countries have also given up non-reciprocal market access in exchange for (more far-reaching) mutual trade liberalisation. As emphasised above, the EU used “hard power” tactics in this regard, not least through the GSP graduation of higher and middle-income countries (see above). The number of GSP+ beneficiaries may also decrease as more countries engage in bilateral trade negotiations. For instance, Colombia and Peru, the Central American countries, and Georgia have shifted from GSP+ to free trade agreements. The Philippines became a new GSP+ beneficiary in 2015, but later that year free trade negotiations were also started.

In conclusion, the EU’s trade agenda towards developing countries has been characterised by a drive for liberalisation and WTO compatibility which, despite the less aesthetic overall results, has largely been achieved. Without delving into the discussion on the drivers behind this agenda, it is clear that interest-related, ideological and institutional factors have played a role. A deeply rooted belief among European policymakers, especially in the European Commission, of the benefits of deep regional integration according to the “EU model”, has certainly been a key factor. At the same time, the EU has put increased emphasis on ethical values in its trade arrangements with developing countries, as will be discussed in the next section.

## **A more ethical agenda**

Over the past decade, EU trade policy discourse has put more and more emphasis on values such as democracy, governance, human and labour rights, and environmental sustainability, all of which are closely linked to broad conceptualisation of “development”. Although the ideological centre of gravity has shifted towards the centre-right and an economic crisis has affected most European countries, which has contributed to a radicalisation of the liberalisation agenda as discussed in the previous section, ethical values seem to stand out more than ever. The provisional culmination of this discursive evolution is the *Trade for All* document of 2015. Commissioner Malmström’s trade strategy calls for “more responsible trade” as early as the subtitle and dedicates an entire chapter to “A trade and investment policy based on values”. Interestingly, the ethical trade agenda not only reveals itself in the “traditional” unilateral GSP and bilateral trade agreements, but also in more innovative arrangements that only indirectly relate to traditional trade instruments.

First, the EU’s GSP has created a separate “Special Incentive Arrangement for Sustainable Development and Good Governance” (GSP+) system since 2005. While the previous GSP already included a number of labour and environmental principles, this GSP+ has extended

and elaborated the system. In order to benefit from more generous market access, developing countries had to ratify and effectively implement core international conventions on human and labour rights, environmental protection, and good governance. The most recent GSP reform, which came into force in 2014, further strengthens the conditionality scheme, in the sense that applications for GSP+ become more stringent and violations are more closely monitored. The European Commission conducts an annual analysis (“scorecard”) of the extent to which the conventions have been applied, based on the reports of relevant monitoring bodies (e.g. the expert committees of the International Labour Organization (ILO)). This evaluation is then sent to the third-country governments, who are required to respond within three months. Wherever it is deemed appropriate, the issues raised in the report are subsequently discussed with the partner government. The follow-up process can also involve a monitoring visit.

Second, the new free trade agreements have consistently included a dedicated chapter on “sustainable development”. While EU bilateral agreements have included an “essential elements” clause on human rights since the 1990s, and some ad hoc provisions on labour-related cooperation since the 1970s, the sustainable development chapter is a novelty. Compared to previous agreements, the new generation of EU trade agreements extends the content, governance, and enforceability of provisions on sustainable development. In terms of content, the parties typically commit to comply with a number of international social (the ILO’s Core Conventions and Decent Work Agenda) and environmental commitments (such as the Convention on Biological Diversity or Convention on International Trade in Endangered Species of Wild Fauna and Flora). In terms of governance, the chapters establish civil society meetings, both within and between the parties, which are tasked with monitoring and discussing the implementation of the sustainable development principles. There is also an intergovernmental meeting to address these issues, which can engage in a dialogue with the civil society mechanism. In the case of a conflict, government consultations can be established, followed, if necessary, by a Panel of Experts. However, in the case of non-compliance no sanctions are provided. The EU’s approach is indeed based on persuasion, dialogue and cooperation.

Third, the EU has undertaken various initiatives in the realm of corporate social responsibility (CSR) and fair trade. CSR and fair trade are briefly mentioned in the sustainable development chapter of some trade agreements. More interestingly, beyond the scope of trade instruments the EU has engaged in some activities linking trade and ethical values. Three examples are worth mentioning. The first example concerns the possibility for national and local authorities in the EU to include fair trade criteria in their public tenders. Even though the Commission issued *Buying Social*, a guide to taking into account social considerations in public procurement in 2010, it is only since the reform of the EU public procurement rules in 2014 that these authorities are legally enabled to include such criteria in their tenders (such as fair trade origin, or the requirement to pay a minimum price). This new dynamic in procurement rules stems from a number of EU member states that proved to be more ambitious in including fair trade criteria in public tenders, resulting in a number of cases before the European Court of

Justice since the mid-2000s. Most famously, in 2012 the court supported the decision of the province of North Holland to include fair trade criteria in its public tendering for coffee machines. The more restrictive interpretation of the European Commission was challenged by the court, which has been hailed by the fair trade organisations as an important victory. Nevertheless, it remains to be seen to what extent these new regulations could entail an Europeanisation of fair trade provisions in public procurement practices. In this context the use of organic certification criteria in the EU green public procurement toolkit could be seen as an inspiring example.

A second example concerns regulations that focus on trade in specific products. Measures are being taken to fight wildlife trafficking and trade in tools for torture and executions. The most elaborated initiatives however are the regulations on (illegal) timber and conflict minerals. These are based on a mix of policies (trade, development, internal market, and environment) and approaches (trade conditionality, reporting obligations, multi-stakeholder dialogue) and aim at improving social, environmental and human rights causes. The FLEGT (Forest Law Enforcement, Governance and Trade) Action Plan adopted in 2003 comprises development cooperation, trade agreements between the EU and timber-producing countries, public procurement, private sector and civil society involvement and more, in order to combat illegal logging and strengthen forest governance. Concrete progress has been slow, as most interested timber-producing countries are still in the negotiation phase. So far only Indonesia, Cameroon, Central Africa, Ghana, Liberia and the Republic of Congo are implementing the trade agreements enabling the FLEGT Action Plan. The Conflict Minerals regulation aims (when approved) at breaking the vicious cycle between trade in minerals (more specifically tin, tantalum, tungsten and gold) and the financing of conflicts. At the time of writing dialogue consultations have been concluded in order to find a balance between the positions of the European Commission and European Council (voluntary guidelines) and the Parliament (binding rules). The draft regulation contains a mixed approach with binding requirements for upstream companies (mines, processors, traders, smelters and refiners) and recommendations for downstream companies (EU manufacturers).

A third example of EU fair trade policies that go beyond traditional trade instruments concerns the Sustainability Compact. This initiative brings together the EU, Bangladesh, the US and Canada, as well as the ILO. Its distinct, multi-stakeholder approach might become exemplary in a context where more and more attention is given to the need for sustainable supply chains. The Rana Plaza collapse in Bangladesh in 2013 triggered a wave of awareness and demands for transparency and just working conditions in the garment industry in developing countries from consumers and activists. The European Commission responded to this drama by launching the Sustainability Compact to improve respect for labour rights, factory safety and responsible business conduct in the ready-made garment industry in Bangladesh. Since its creation in 2013, there have been several follow-up meetings and a technical report taking stock of what has been done to implement these objectives. So far, tangible results are little and critical voices have highlighted the failure of Bangladesh to comply with the compact and the absence of changes on the ground.



## Conclusion: solving the trilemma

The *Trade for All* strategy is remarkably explicit on promoting values through trade. While offering some space for action and advocacy, the ethical trade agenda should be put into perspective. First, the discourse is not entirely new. It goes back to the EU's emphasis on moral responsibility towards the former colonies of the member states. The Schuman Declaration, the Rome Treaty, the first Lomé Convention, and the Cotonou Agreement have all been presented as development-friendly initiatives witnessing a spirit of partnership between the EU and developing countries. More recently, Pascal Lamy's tenure as a trade commissioner (1999-2004) displayed a strong emphasis on value promotion through trade.

Second, enforceability of ethical principles in bilateral trade agreements and the unilateral GSP remains limited. While market-related issues such as tariffs, sanitary standards, investment provisions and intellectual property rights can be enforced, the EU's approach to sustainable development through trade remains largely cooperative and seems subordinate to what are considered "real" trade issues. Trade agreements have an "essential elements" clause on democracy and human rights, but sanctions have never involved trade flows. The new procurement rules offer possibilities, but again these are enabling for public authorities rather than forcing them to use fair trade criteria. New initiatives such as the timber and conflict minerals regulations and the Sustainability Compact may be promising, but have been criticised for lacking effectiveness in practice.

Third, these initiatives do not challenge the underlying neoliberal paradigm that has characterised EU trade policy since the mid-1990s. A number of interventionist measures "NIEO style" have been abolished, most prominently the Lomé system of unilateral preferences, export stabilisation schemes and commodity arrangements. More important than the practical deficiencies of the "old-fashioned" Lomé system are its ideological underpinnings, which have been fundamentally challenged. Within the neoliberal trade paradigm, different policy ideas are possible, putting more or less emphasis on values or interests. This depends on several factors, including the party political constellation in the Council of Ministers and the political profile of the trade commissioner. For instance, trade commissioners Peter Mandelson (2004-2008) and Karel De Gucht (2010-2014) stressed the economic interests behind free trade, whereas commissioners Pascal Lamy (1999-2004), Catherine Ashton (2008-2009) and now Cecilia Malmström (2014-) put more emphasis on values in trade policy.

In this regard, the distinction between underlying "paradigms" and concrete "policy ideas" is essential. It also helps to understand the interplay between the three trends that were identified in this chapter, thereby solving the impossible triangle. The increasing emphasis on ethical trade emphasis should be situated against the background of the paradigm shift towards neoliberal free trade, which has so far not been challenged by European policymakers. Limited enforceability and practical problems limit the effectiveness of these initiatives. This chapter has shown that while developing countries have not been at the centre of EU trade policies over the past decades, the liberalisation

agenda that was staged in the 1990s has been implemented. New ethical initiatives have not been able to compensate for this – perhaps they have even further legitimised the growing number of free trade agreements concluded by the EU. The limits of ethical trade initiatives within the neoliberal paradigm are likely to come to the surface in the coming years, as public protests against the TTIP and EU-Canada trade agreements already indicate.

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## RECIPROCITY: THE NEW MANTRA OF THE EU'S TRADE STRATEGY TOWARDS CHINA

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### **Introduction**

The European Union is at a critical juncture: besieged by Brexit, a poorly managed refugee crisis, the looming threat of Islamist terrorism, and the stagnation of living standards for European low and middle income classes. This last point is closely related with how useful the EU is in the eyes of its population for navigating an increasingly globalised world where the emerging countries, particularly China, play a bigger role in the international economy and global affairs.

China is a key economic partner for the European Union (EU). As EU Commissioner for Trade, Cecilia Malmström, has explained, the EU's commercial relationship with China has brought sizeable benefits for Europe, including over 3 million jobs that depend on sales to China, and increases in the competitive advantage of European companies with providers based in China (Malmström, 2016a: 1). China has communicated to the European Commission its desire to deepen this relationship through a free trade agreement (FTA), which would prevent protectionist movements in Europe and secure access to the common market.

A positive response by Brussels could have been expected, considering the above-mentioned beneficial effects of EU-China trade for the European economy, the boost in the purchasing capacity of European consumers, and the emphasis put on trade liberalisation by the European Commission. However, Brussels considers rebalancing the relationship to be a precondition for opening FTA negotiations.

The EU feels that the Chinese economy has reached a high enough level of development to make it unreasonable that Chinese companies enjoy much more beneficial terms in Europe than European companies do in China. Therefore, the new mantra in Brussels on EU-China relations is "reciprocity", assuring a more level playing field for European economic actors vis-à-vis their Chinese counterparts. Accordingly, the EU wants Beijing to implement further domestic reforms and to grant a more reciprocal treatment to European companies operating on its soil before exploring the possibility of negotiating an FTA. If Brexit is consummated,

the possibility of an EU-China FTA would move further away, since London has been one of the more vocal supporters among the EU member states for opening negotiations with Beijing on this issue.

This article is divided into five sections. First, the significance of EU-China trade relations is underlined. The second section presents the main obstacles hindering further liberalisation of EU-China trade. The guidelines of the new EU trade strategy are introduced in section three. Section four analyses the significance of the two most pressing issues for EU-China trade relations, the negotiation of a bilateral investment agreement (BIA) and the EU's decision on China's market economy status. Finally, some conclusions are offered.

## **EU-China trade relations matter**

According to the figures provided by the Directorate General for Trade of the European Commission, in 2015 the EU and China traded goods worth over €20 billion, making China the EU's second biggest trade partner (14.8% of the EU's total trade and 9.5% of its exports), after the United States (US). In addition, China has also become the EU's biggest source of imports (20.3%), enjoying a trade surplus with Europe of over €80 billion. This significant bilateral trade deficit in goods is only partially compensated by trade in services (€0.3 billion surplus in 2015). If we look at EU-China trade from the perspective of value added trade, the bilateral trade balance still tilts in Beijing's favour. According to the more recent data available at the Trade in Value Added Database, compiled by the Organization for Economic Cooperation and Development (OECD) and the World Trade Organization (WTO), China's (including Hong Kong) surplus of trade in value added with the EU is also quite significant, amounting to \$71.5 billion in 2011. The EU partly blames its huge trade deficit with China on remaining market access barriers imposed by Beijing. On the other side, Europe ranks as China's main supplier (13% of total Chinese imports) and the second biggest market for Chinese exports (15.6% of Chinese exports).

Besides, even if the EU does not want to pursue a geopolitically guided trade strategy towards Beijing, the signing of an EU-China FTA or BIA could have geostrategic repercussions in the context of growing US-China tensions. The Chinese authorities are quite aware of how those agreements could undermine Washington's further attempts at economic containment against China, such as were witnessed with the creation of the Trans-Pacific Partnership, a trade agreement in the Pacific which excludes China, or the lobby against the Asian Infrastructure Investment Bank (De Jonquières, 2016). This geostrategic rivalry between China and the US can give Europe some leverage in the ongoing negotiations for the Transatlantic Trade and Investment Partnership and the EU-China BIA.

## **EU trade strategy**

In October 2015 the European Commission released its new trade strategy *Trade for All: Towards a more responsible trade and investment policy*, which builds on the EU's track record to promote trade relations in order

to deliver real economic results for consumers, workers, and companies, to champion sustainable development and to protect human rights (European Commission, 2015). This strategy aims to overcome the traditional dilemma between interests and values, arguing that opening foreign markets does not require the EU to compromise on core principles – namely human rights – or on safety, quality, environmental and governance standards. Indeed, some of the standards that the EU hopes to ensure through free trade agreements, such as the abolition of child labour, non-discrimination in the workplace, high levels of occupational health and safety, decent working conditions, and far-reaching commitments on environmental protection, are in line with the Chinese government’s agenda of developing a more socially and ecologically sustainable path of economic development. However, it is far from clear how emphasising some other points, such as granting freedom of association and collective bargaining, ending forced prison labour, or putting into practice a stricter policy on export controls of dual use goods for preventing their misuse that results in human rights violations, will not hinder a prospective trade agreement with Beijing, since the Chinese authorities have given no sign of being willing to change their stance on some of those sensitive issues. In other words, the dilemma is still there and Brussels could be forced to compromise on some values and standards in order to sign an FTA with China at the expense of its reputation as a normative power.

In addition, the *Trade for All* strategy announces the EU’s expectation of conducting more balanced trade relations with its partners, with a particular mention of the countries that have recently graduated out of the Generalised Scheme of Preferences, as China did on January 1<sup>st</sup> 2015. Brussels intends to reach close to full reciprocity in its future bilateral agreements with those countries that have previously enjoyed preferential access to the European market in an attempt to favour their development. This implies the need to conduct some adjustments to the way the EU and those countries have traditionally traded. Consequently, even if the *Trade for All* strategy depicts the Pacific region as its second priority right after the negotiation of the Transatlantic Trade and Investment Partnership, there is not even a single reference to the convenience of negotiating an FTA with China at the moment, whereas the conclusion of the EU-Japan FTA is labelled “a strategic priority”. On the contrary, the strategy underlines the obstacles impeding the beginning of FTA negotiations with Beijing and asks China to carry out some domestic reforms in order to open up that possibility.

## **Obstacles to an EU-China FTA**

Some of the characteristics of the Chinese politico-economic system conflict with the way the EU runs its economy and the international standards for economic governance it has helped to establish, namely: a financial system geared to supporting state-owned enterprises (SOEs), which receive significant public support, for example, in the form of grants, preferential loans, subsidies, and low-priced land, obtaining in this process an unfair competitive advantage over foreign-invested companies; weak protection of intellectual property rights, due to the lack of effective enforcement of China’s laws and regulations by the responsible administration and courts; and widespread restrictions on foreign investment (Okano-Heijmans & Lanting, 2015). China’s restricted

foreign investment regime is reflected in the OECD Foreign Direct Investment Regulatory Restrictiveness Index. On a scale from 0 (open) to 1 (closed), China received the second highest value of all 58 countries included in 2015, 0.386, whereas the corresponding values for the EU member states ranged from 0.004 (Luxemburg) to 0.106 (Austria). All this translates into an uneven playing field for European companies operating in China.

In this context, European companies complain in different editions of the Position Paper published annually by the European Union Chamber of Commerce in China about discrimination in favour of local firms, especially Chinese SOEs, regarding public financial support, government procurement, and the targeted enforcement of Chinese laws and regulations, for example those supposed to protect intellectual property rights. These allegations of systematic discrimination and insufficient investment protection contrast with the official claim of the Chinese government to provide non-discriminatory post-entry treatment to foreign companies in China. The survey data conducted by the European Union Chamber of Commerce in China among Chinese investors in Europe and European companies in China, shows that Chinese companies face fewer market access obstacles and feel treated much more fairly in Europe than their European counterparts do in China (The European Union Chamber of Commerce in China, 2013). Chinese companies tend to praise the EU investment environment as open and welcoming, and the difficulties they report in operating on the ground are much more related with working in an unknown and highly regulated market than with discrimination or legal uncertainty. This is not to deny that Chinese companies have also raised concerns about a numbers of barriers they face when investing in Europe, including sectoral investment restrictions and different kinds of *ex ante* authorisation procedures, plus large difficulties and allegedly unfair treatment for obtaining visas and work permits for their Chinese staff.

Because of those difficulties, the EU argues that the conditions are not right for negotiating an FTA with China at the moment. The European Commission is only interested in negotiating an ambitious trade agreement, which could bring substantial improvements in terms of market access and regulatory certainty and protection for EU companies in China, but it is far from clear that the Chinese leaders are willing to implement the range of domestic economic reforms required to assure a much more balanced relationship in the regulations EU companies face in China and Chinese companies face in Europe. This argument was put forward on February 2016 by Commissioner for Trade Cecilia Malmström, during an event organised in London by the China Association, when she pointed out three internal reforms China would have to implement before opening negotiations on an EU-China FTA: the state would need to be a regulator not an economic operator; inefficient companies should be allowed to go bankrupt; and adjustments should be made to reduce overcapacity (Malmström, 2016b).

The most pressing issue for the European Commission is overcapacity, since European business associations are publicly denouncing how the use of unfair trade practices by Chinese companies to place their massive surpluses on the European market is damaging their interests.

The steel sector is the most notorious example of China's overcapacity and the EU is using its trade defence system quite actively to alleviate this situation, with 16 trade defence measures in place and several ongoing investigations against imports of Chinese steel products. The concerns of the European firms have been echoed by some members of the European Parliament, who have joined the demonstrations organised by steel industry organisations, and by the governments of some member states. Seven ministers from Germany, Italy, the UK, France, Poland, Belgium and Luxembourg sent a letter to the European Commission in early February underlining anxieties about the future of Europe's steel industry. The role of the European Parliament in influencing EU-China trade relations should not be neglected, since the concluded agreements on key issues such as the BIA, granting China market economy status, and a bilateral FTA must be approved by this chamber. This is not just a formality, but an additional political barrier, because the European Parliament is less enthusiastic about trade liberalisation than the European Commission, as demonstrated by the non-binding resolution it passed against market economy status for China on May 12<sup>th</sup> 2016.

In an effort to reinvigorate the abovementioned economic reforms in China, which could boost EU-China trade, last January Commissioner Malmström wrote a letter to the Chinese minister of commerce, Gao Hucheng. The domestic reforms in China favoured by the EU are actually in line with the Decision on Major Issues Concerning Comprehensively Deepening Reforms published by the Chinese authorities after the Third Plenum of the 18th Central Committee of the Chinese Communist Party, which pledged a decisive role for the market in the Chinese economy and the ensuing reform of the SOE system. However, even if there is consensus in Beijing and Brussels on the exhaustion of the growth model based on low labour costs and a high investment rate that has propelled the Chinese economy in the last decades, and on the benefits of adopting a development model more focused on the domestic market and higher value added activities, there are discrepancies on the pace of the reforms needed to achieve it.

Brussels would like the reforms to be implemented as soon as possible, but this is a controversial issue inside the Chinese regime. The main Chinese leaders are concerned about the political cost of a swift implementation of the announced reforms, due to the negative short-term effects on employment and the resistance of some quarters of the regime – such as local governments and SOEs – with vested interests in keeping the former economic model, which provides them with easy access to capital with lax supervision on its use. This is perhaps the reason why major economic reforms under the Xi Jinping leadership have yet to be seen. Among 118 initiatives presented after the Third Plenum in November 2013, only 12 have been fully implemented, whereas 78 have been partially implemented and 28 have experienced no improvement or even setbacks (The European Union Chamber of Commerce in China, 2015: 401-426). Actually, projects leading to a more open Chinese market – such as the free trade zones – have made limited progress or been completely abandoned. In addition, worrying steps backwards can be seen in the new law on national security, in the law on non-governmental organisations and in the field of cybersecurity. Leaving aside the impact of those measures on human rights, the



negative effects from those restrictive policies could also be felt in the field of trade. For example, those laws use a very vague and wide definition of national security, which creates uncertainty and could easily be used to restrict market access to foreign investment and to increase government interference in foreign companies, which could be forced to expose intellectual property further and to follow unjustified data localisation and data storage requirements.

This mixed record on economic reforms by the Xi Jinping-Li Keqiang leadership raises the following questions: will the Chinese government behave as it did in 2001, when it resorted to international commitments – China’s accession to the WTO – to move forward with contested domestic economic reforms? Or is Beijing actually attempting to preserve widespread protectionist and discriminatory measures and to normalise those standards in global economic governance? The EU wants to be sure we are dealing with the first scenario before seriously considering the negotiation of an FTA with China.

## Current negotiations

Today, there are two pending issues that might influence the probabilities of an eventual launching of FTA negotiations between Brussels and Beijing: the conclusion of the EU-China BIA and Brussels’ decision on whether granting China market economy status.

Since the publication of the EU-China 2020 Strategic Agenda for Cooperation (European Union External Action, 2013), the Commission has consistently argued that the successful conclusion of the ongoing BIA negotiations, launched at the 16th EU-China Summit in November 2013, is a prerequisite for conducting a feasibility study for a bilateral FTA.<sup>1</sup> From that perspective, the BIA is not just a way of reducing investment restrictions to each other’s market and for improving legal certainty and protection to investors of both sides, but also a signal of the commitment of the Chinese authorities to implementing the kind of significant domestic reforms required for establishing a more level playing field for European investors in China, particularly granting the market a bigger role in the economy at the expense of the state, with the ensuing reform of the SOEs system (Ewert, 2016).

The key point in this regard is the inclusion in the BIA of market access provisions in the form of effective non-discrimination for European investors. The EU is demanding China make a clearer commitment to the national treatment standard with respect to both the pre-entry and the post-entry phases (Bickenbach, Liu, and Li, 2015), a principle whereby a host country extends treatment to foreign investors that is at least as favourable as the treatment it accords to national investors in like circumstances. In order to reach a more balanced investment environment, Brussels expects China to follow a short negative list approach, granting pre-entry national treatment to foreign investments in all sectors not included in the list, since the EU is already much more open to Chinese investors than the other way around.

This requirement is clearly beyond the scope of the existing investment agreements between China and the EU member states, and of most

1. In the *Trade for All* strategy it is argued that the signing of an EU-China BIA would also facilitate Chinese participation in the Commission’s investment plan for Europe as well as European participation in China’s “One Belt, One Road” projects (European Commission, 2015: 31).

recent bilateral investment agreements signed by China with other partners such as Canada, Korea and Japan. In those agreements China has only so far committed not to increase discriminatory treatment and to progressively remove non-conforming measures, de facto allowing Beijing to keep laws and regulations towards foreign investors that are incompatible with national treatment. Conversely, although China seems to be willing to accept a negative list approach, it would rather follow a more protectionist approach with a long negative list. Anyway, it remains to be seen to what extent China is willing to liberalise its foreign investment regime in order to close a BIA with the EU, which would soften the EU's stance on Chinese FDI inflows and increase the prospects of a bilateral FTA negotiation.

The same way the EU insists on signing a BIA before negotiating an FTA, the Chinese authorities warn that they will not agree on a BIA until the EU grants China market economy status. Indeed, the EU's decision on granting China market economy status is the most pressing issue for EU-China trade relations, since it could trigger a trade war between Brussels and Beijing and is forcing Europe to update its trade defence instruments (Huotari, Gaspers, and Böhnke, 2016).

Treating China as a non-market economy allows the EU to resort to the analogue country system to calculate reference prices in anti-dumping cases, instead of using domestic prices in China. It is widely accepted that this methodology distorts the dumping margin upwards and thus, for China, being recognised as a market economy is not just a question of status. Referring to section 15 of China's Protocol of Accession to the WTO, Beijing considers that all countries that have not recognised China as a market economy yet will have to do so before December 11<sup>th</sup> 2016, when it will be 15 years since China joined the organisation. If the EU accepts the Chinese position, it would be easier to move on with the BIA negotiations; however, doing so without new anti-dumping measures would severely damage EU economic interests, particularly in the steel sector, and could fuel Euroscepticism at a very delicate juncture (Godement, 2016). On the contrary, not granting China market economy status would take a toll on bilateral relations, as well as undermining the EU's reputation as a normative power that abides by international law regardless of whether it is aligned with its short-term national interest.

The most likely option for the EU is to recognise China as a market economy as soon as it is able to pass new anti-dumping legislation to protect the legitimate interests of European companies against unfair trade practices. In order to do so the EU is designing a plan to introduce new trade defence mechanisms similar to US-style anti-dumping duties and push China to cut overcapacity. The recent announcement of an EU-China joint working group to monitor pricing and public subsidies given to steel mills in China is a positive step in that direction. Anyway, the EU will not be able to come up with a viable alternative before the mid-December 2016 deadline, opening up the possibility of a rocky period for EU-China relations. To avoid this scenario, in which China could decide to legally challenge the EU at the WTO or the European Court of Justice, or to fight a trade war, it is of great importance for Europe and China to reach a compromise on this issue.

## Conclusions

Both the EU and China want to be treated with reciprocity by the other side. The EU wants a level playing field for European companies operating in China, hence it asks the Chinese government to finish with the unfair advantages it provides to local companies, particularly for SOEs, and the multiple barriers it has erected against foreign investors. For China, being recognised as a market economy is both a question of status – not to be grouped with countries like North Korea and Belarus – and a way of reducing the set of anti-dumping measures available for Europe to use against Chinese imports.

For Europe, the key question is whether China really wants to move forward with the reforms of its economic system in order to play by the same rules as the OECD countries or just hopes to maintain unfair government backing of Chinese companies and to get those practices normalised in global economic governance. Indeed, the first scenario would be much more favourable for EU-China trade relations and could lead to the EU granting market economy status to China and implementing a trade defence system without discriminatory measures against Chinese products; as well as to the signing of a BIA and the conducting of a feasibility study for an EU-China FTA. Unfortunately, the development path the Chinese authorities will choose is far from clear. Meanwhile, China feels that the time has come to be taken more seriously by Europe. The EU must realise how relevant China is for the European economy, the fact that Chinese overcapacity is forcing Brussels to come out with a new trade defence system is a telling example of its importance, to avoid embarrassing and problematic situations like not having a position on China's market economy status before the deadline fixed by China's Protocol of Accession to the WTO.

EU-China trade relations are probably going to navigate turbulent waters in the following months, unless China shows more determination to establish a level playing field for European companies operating in China and to tackle overcapacity, and the EU agrees on a new trade strategy which does not discriminate against Chinese products.

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THE EUROPEAN UNION CHAMBER OF COMMERCE IN CHINA. *European Business in China Position Paper 2013/2014*. Shanghai: The European Union Chamber of Commerce in China, 2013.

In October 2015, Cecilia Malmström, European Union Trade Commissioner, presented *Trade for All*, the trade strategy of the European Commission over the next years. While preserving the European social and regulatory model at home, bilateral and multilateral trade agreements will be pursued so as to improve market access in third countries and contribute to boosting jobs, growth and investment in the EU. This monograph analyses and discusses *Trade for All* from different perspectives based on key current debates on international trade. The book is structured around these debates. The first part corresponds to the multilateralism versus bilateralism debate, the second to the debate about the limits of trade liberalisation and the last focuses on the EU's relations with developing and emerging economies.