

EU ENFORCEMENT OF INTERNATIONAL TRADE RULES

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KEY POINTS

- The EU has adopted a new trade policy based upon a model of Open Strategic Autonomy.
- One aspect of the policy is to enhance enforcement powers where there is a breach of a Trade Agreement and also a proposal to enact a general anti-coercion instrument.
- The EU is committed to including sustainable development, environmental and labour protection goals in EU trade agreements.
- These new approaches to trade are found in the Trade and Co-operation Agreement (TCA) between the EU and the UK
- To enhance the enforcement of international trade agreements the EU has introduced the role of the Chief Trade Enforcement Officer.
- The Enforcement Regulation 654/2014 has been amended by Regulation 2021/167.
- A new Directorate in DG Trade for enforcement has been created to enhance market access and SME, with the establishment under the Access2Markets Programme of a single-entry point for complaints from EU stakeholders and businesses on trade barriers on foreign markets and violations of sustainable trade commitments in EU trade agreements.
- Until the WTO Appellate Structure is operational the EU is setting the pace for international trade dispute resolution.

INTRODUCTION

Trade disputes have become the means of conducting modern warfare, especially by the two economic Super Powers: China and the US. The EU and individual Member States, alongside business and consumers are affected when geo-political disputes are translated into geo-economic battles by threats of retaliatory trade measures.¹ In response to this threat on 18 February 2021 the European Commission published

its revised Trade Strategy.² The strategy reflects a move towards a more defensive trade policy, based around multilateralism reflecting assertiveness and autonomy:

Open strategic autonomy emphasises the EU's ability to make its own choices and shape the world around it through leadership and engagement,

¹ An example: Germany and Sweden were threatened by China for excluding Huawei from their 5G networks: <https://www.bloomberg.com/news/articles/2019-12-14/china-threatens-germany-with-retaliation-if-huawei-5g-is-banned>

² COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS Trade Policy Review - An Open, Sustainable and Assertive Trade Policy Brussels, 18.2.2021, COM(2021) 66 final: https://eur-lex.europa.eu/resource.html?uri=cellar:5bf4e9d0-71d2-11eb-9ac9-01aa75ed71a1.0001.02/DOC_1&format=PDF

reflecting its strategic interests and values.³

Two aspects of this strategy are discussed in this Briefing Paper: first, the commitment by the EU to defend itself against unfair trading practices, while acting in accordance with its international commitments, including a proposal for a new legal instrument to protect the EU from potential coercive actions by third countries; second, ensuring that there is an ambitious Sustainability Chapter in all EU bilateral trade and investment agreements. The latter have been highlighted recently by the difficulties of enforcing Trade, Sustainability and Development (TSD) Chapters and the resort to Arbitration Panels in complaints brought by the EU against Ukraine and South Korea.

Traditionally, the legal enforcement of obligations was the Achilles heel of bilateral and multilateral international agreements. The demise of the WTO Appellate body since 11 December 2019⁴ has focused the EU into using and bolstering its own Dispute Resolution mechanisms in international trade agreements. The EU signalling that it wants to conduct international trade and protect itself from coercive action based upon the rule of law.

The significance of this approach is seen in the Trade and Co-operation Agreement (TCA) between the EU and the UK 2020, containing innovative procedures for *rebalancing* the trade elements of the TCA (and ultimately cancelling them) if one side changes its standards in ways that materially affect trade. Such rebalancing can be triggered in several circumstances, including via periodic reviews of the whole trade relationship.⁵ Article 9.4 TCA, contained in Title XI: *Level Playing field for open and fair competition and sustainable development*, allows the EU or the UK to impose rebalancing measures when *significant divergences* occur in relation to policies and priorities for labour, social, environmental or climate protection, or relating to subsidy control, and cause material impacts on trade and investment between the EU and the UK.

Essentially a rebalancing measure is a sanction, in the form of say, a tariff, designed to compensate the aggrieved party for an unfair disadvantage. Swift procedures are in place to ameliorate the impact on trade. The party wanting to impose

rebalancing measures must notify the other party and consultations should begin to find a solution. If no agreement is reached, after five days from the end of the consultations, the party can adopt *necessary and proportionate rebalancing measures* to remedy the situation, providing that the other party has not requested the formation of an arbitration tribunal. If the case goes to arbitration the tribunal should deliver a final ruling quickly, because, once thirty days have elapsed, the aggrieved party is allowed to adopt rebalancing measures. But, the other party can also take *proportionate* counter-measures until the arbitration tribunal delivers its ruling.

This provision represents an improvement from the TSD chapters of the EU's existing trade agreements. While those chapters include different types of dispute settlement mechanisms, they do not include the possibility to impose rebalancing measures against non-compliant third countries. On the contrary, the EU-UK TCA provides, for the first time, a strong mechanism for parties to implement sustainable development obligations. However, it remains to be seen how enforcement of this chapter will work in practice, as the TCA does not provide a definition for "significant divergences," and neither does it specify examples of appropriate "rebalancing measures."

These new enforcement mechanisms build upon the EU experimentation of including enforcement procedures in trade agreements with third countries, but, also need to be understood in the context of the way in which the EU has sought to protect itself, not only for a breach of trade provisions (for example, misuse of emergency triggers, imposition of duties) but also going further to challenge breaches of sustainable development provisions which may impact upon the commitments the EU has made in its internal policies.

This Briefing Paper examines the Current Trade Disputes where the EU has commenced formal action under a FTA against Algeria, Ukraine, the Southern African Union and South Korea. It then discusses the recent amendments to the Enforcement Regulation 654/2014 and the role of the Chief Trade Enforcement Officer in the context of the creation of a new Directorate in DG Trade for enforcement, market access and SMEs and the establishment under the *Access2Markets Programme* of a single-entry point for complaints from EU stakeholders and businesses on trade barriers on foreign markets and violations of sustainable trade commitments in EU trade agreements. Finally, it addresses the new ideas of anti-coercive measures which are aimed at acting as a deterrent, and if this fails, swift action to redress the harm.

³ Ibid at p.4.

⁴ The WTO Appellate Body was reduced to just one member, after the term of the two other remaining members lapsed, as a result of the blocking by the US of the (re)-appointment process of Appellate Body members.

⁵ <https://blogs.sussex.ac.uk/uktpo/publications/taking-stock-of-the-uk-eu-trade-and-cooperation-agreement-governance-state-subsidies-and-the-level-playing-field/>; <https://commonslibrary.parliament.uk/research-briefings/cbp-9139/>

CURRENT TRADE DISPUTES

The EU has a number of ongoing bilateral trade disputes. Of the disputes where formal action has been initiated, two concern traditional trade restriction measures: Algeria (import restrictions) and the Southern African Customs Union (poultry standards). Two others concern issues involving non-economic goals and trade: Ukraine (environmental protection) and Korea (labour standards) and have resulted in Arbitration Panels being formed.

a. South Korea Labour Standards

The dispute on labour rights between the EU and South Korea was the first time that the EU initiated dispute settlement procedures under a trade agreement to challenge violations of a *Trade and Sustainable Development* Chapter which incorporates the fundamental labour rights included in the *ILO 1998 Declaration on the Fundamental Principles and Rights at Work*.

EU-South Korea Free Trade Agreement came into provisional operation from 2011 and was ratified in December 2015. It was a milestone for the EU: the first Agreement with an Asian country covering a wide range of areas. It eliminates duties for industrial and agricultural goods in a progressive, step-by-step manner, alongside addressing non-tariff barriers to trade, specifically in the automotive, pharmaceutical, medical devices and electronics sectors. The Agreement also addresses market access in services and investments, as well as competition policy, government procurement, intellectual property rights, transparency in regulation, and sustainable development.

The Agreement created specialised committees and working groups between the two parties to monitor implementation and these bodies provide an opportunity to seek resolutions to market access concerns and to engage in closer regulatory cooperation. An annual trade committee at ministerial level plays a supervisory role and is designed to ensure that the agreement operates properly. The trade agreement with South Korea was the first 'new generation' comprehensive trade agreement for the EU that included a TSD Chapter, with legally binding commitments on labour and environmental governance. Subsequent EU trade agreements have followed this precedent, for example, with Canada, Japan, Singapore and Vietnam, Mexico, Mercosur, the TCA with the UK and the investment Agreement with China.

The EU-South Korea FTA contains Chapters on labour and environmental standards linking them to sustainable development. Article 13.1.2 states:

The parties 'recognise that economic development, social development and environmental protection are interdependent and mutually reinforcing components of sustainable development.

They recognise that it is not their intention to harmonise the labour or environment standards of the Parties, but to strengthen their trade relations and cooperation in ways that promote sustainable development.

Article 13.2.2 states:

The Parties stress that environmental and labour standards should not be used for protectionist trade purposes. The Parties note that their comparative advantage should in no way be called into question.

The EU case can be divided into two main complaints. The first complaint was that several parts of Korea's labour law were inconsistent and did not give effect to the right to freedom of association.

Four aspects of the Korean labour law are identified as needing reform.

1. The narrow definition of a "worker" in the Korean Trade Union Act. The Act defined a "worker" as a person who lives on wages, salary, or other equivalent form of income earned in pursuit of any type of job. This definition, as interpreted by the Korean courts, excluded some categories of self-employed persons such as heavy goods vehicle drivers, as well as dismissed and unemployed persons from the scope of the Freedom of Association.
2. The exclusion of organisations from the definition of a trade union in where persons who do not fall under the definition of "worker" in Article 2.1 of the Act are allowed to join the organisation.
3. Article 23.1. of the Act limited the election of trade union officials from members of the trade union.
4. Article 12. 1-3 of the Act, in connection with Article 2.4 and Article 10 of the Act provided for a discretionary certification procedure for the establishment of trade unions.

The second concern of the EU related to Article 13.4.3 of the EU-Korea FTA which stipulates that Parties will make continued and sustained efforts towards ratifying the fundamental ILO Conventions. The EU argued that eight years after ratifying the EU-Korea Trade Agreement Korea had not taken adequate efforts that could be described as "qualified and sustained" towards ratifying the fundamental ILO Conventions:

- C87 Freedom of Association and Protection of the

- Right to Organise Convention, 1948;
- C98 Right to Organise and Collective Bargaining Convention, 1949;
- C29 Forced Labour Convention, 1930; and
- C105 Abolition of Forced Labour Convention, 1957.

The EU requested consultations with South Korea on 17 December 2018. The consultations failed and the EU requested an Arbitration Panel be formed on 5 July 2019. The Panel reached its Conclusions on 20 January 2021.

South Korea contested the jurisdiction of the Panel, arguing that the dispute was not concerned with trade matters, and, that by bringing the dispute, the EU was attempting to harmonise labour standards, in breach of the Agreement. The Panel did not accept that the EU was attempting to align or harmonise labour standards since States were able to ratify ILO Conventions and maintain disparate systems of industrial relations, with very different substantive outcomes in terms of levels of economic development. The Agreement specifically referred to a duty to uphold core labour standards.

The Panel found that when EU and South Korea included the principles of Freedom of Association in the trade treaty they had created new legally binding obligations to respect, promote and realise the principles relating to the fundamental rights to Freedom of Association in Article 13.4.3.

In relation to the first claim by EU the Panel interpreted the first sentence of Article 13.4.3:

[t]he Parties, in accordance with the obligations deriving from membership of the ILO [...], commit to respecting, promoting and realising, in their laws and practices, the principles concerning the fundamental rights, namely: a. Freedom of association and the effective recognition of the right to collective bargaining [...]

The Panel found that the term ‘the obligations deriving from membership of the ILO’ in the context of the first sentence of Article 13.4.3 had the effect of creating a legally binding commitment on both Parties in relation to respecting, promoting and realising the principles of Freedom of Association in the context of the ILO Constitution. The Panel confirmed that the EU–Korea FTA reaffirms the existing obligations of the Parties under the ILO Constitution incorporated these obligations as separate and independent obligations under the TSD Chapter of the FTA.

Then, the Panel found that three of South Korea’s measures are inconsistent with the first sentence of Article 13.4.3, in which Korea is obliged to

respect, promote and realise the right to freedom of association. The measures found to be inconsistent are the definition of ‘workers’, the definition of ‘trade unions’ and the requirement that trade union officials may only be elected from among the members of the trade union under the Korea’s Trade Union Act. The Panel then recommended that South Korea bring the relevant provisions of its Trade Union Act into conformity with the principles concerning freedom of association. However, the Panel found that the EU failed to establish that a fourth measure, the discretionary certification procedure for the establishment of trade unions under South Korea’s Trade Union Act, is contrary to Korea’s obligations under Article 13.4.3.

The EU and South Korea had accepted that the terms of the ILO Declaration 1998 were not legally binding. But under the ILO Constitution members are required to respect the principles of Freedom of Association, even if they have not ratified Conventions 87 and 98. This conclusion is far-reaching: the EU is capable of creating legally binding obligations reinforced by Rulings of Arbitration Panels based upon non-binding international law which underpins the provisions in EU trade Treaties.

Given that many aspirations to create a set of global human rights are often hard to agree at the international level, resulting in soft law, this is a remarkable finding that the EU may be able to drive these preparatory ideas into legally binding obligations through its own external relations policy.

The Panel found that South Korea had failed to ratify four ILO Conventions: two on forced labour and two on trade unions. But, it had not broken the obligation to make an effort to ratify the Conventions. The Panel also noted that a change in the Penal Law was required to comply with the ILO Convention on prison labour, and this would take time to achieve. This finding means that if the EU wants a clear commitment towards abiding by ILO standards in future trade deals, a clear timetable of ratification must be introduced into the trade Treaty.

The EU has an uphill task implementing the Panel ruling. The Panel Report will be discussed in a meeting of the EU-Korea TSD Committee. The EU relies on voluntary cooperation from South Korea for the implementation of Panel recommendations on the violation of Trade Sustainability and Development obligations. The Dispute Settlement procedures under the TSD Chapter of the EU – Korea FTA are weak. The EU can only persuade South Korea to amend its labour law. The EU cannot, for example, unilaterally suspend tariff concessions under the TSD Chapter of the EU – Korea FTA, if Korea fails to implement

recommendations from the Panel.⁶

b. Ukraine

The dispute with Ukraine addresses the commitment of the EU to include a TSD Chapter in trade agreements, particularly in its Association Agreements.⁷ One aspect of the EU-Ukraine TSD is the sustainable management and use of natural resources, including forestry.

Since 2005, Ukraine has imposed a permanent ban on exports of timber and sawn wood of certain tree species.⁸ Pine trees have been included in the ban since January 2017. A total export ban can rarely be justified since it will fail to satisfy tests of proportionality and, in this case, it is “as trade restrictive as it can be, since it prohibits any export of timber and sawn wood of the listed wood species.”⁹

Ukraine was also considering imposing an export duty of 15% on the export value of wood with a fixed minimum duty per cubic meter applied to certain wood categories.

The export prohibition was extended in 2015 for a period of 10 years, to cover the export of all unprocessed wood. The EU regarded the export restrictions to be incompatible with Article 35 AA prohibiting export restrictions and measures having an equivalent effect. The restrictions on the export of wood enforced by Ukraine have led to a substantial reduction of trade in wood between the EU and Ukraine.

Ukraine’s justification of the measure was based upon its sovereignty to take measures to protect the environment, in particular to counteract extensive felling of forests and illegal logging. Ukraine argued that specific circumstances, the “emergency in international relations” within the meaning of Article XXI(b) GATT 1994 which began in 2014 between Ukraine and the Russian Federation, had led to the destruction of forests. While the EU recognised the difficult situation between Ukraine and Russia it argued that this argument was being used as an

ex-post rationalisation for the measures. The EU argued that it has been supporting Ukraine with various projects, including support to environmental protection, public administration and sustainable forest management as well as the development of value chains for non-timber forest products and a multi-purpose forest management.

Article 35 of the EU-Ukraine AA applies to import and export restrictions:

No Party shall adopt or maintain any prohibition or restriction or any measure having an equivalent effect on the import of any good of the other Party or on the export or sale for export of any good destined for the territory of the other

Party, except as otherwise provided in this Agreement or in accordance with Article XI of GATT 1994 and its interpretative notes. To this end, Article XI of GATT 1994 and its interpretative notes are incorporated into, and made an integral part of, this Agreement.

Ukraine insisted that the export ban was not intended for commercial reasons, but for environmental concerns and had argued that the measures were not inconsistent with Article 35 AA. Ukraine also argued that even if Article 35 AA was applicable, the 2005 export ban and the 2015 temporary export ban were justified in accordance with Article 36 AA which applies *General Exceptions*:

Nothing in this Agreement shall be construed in such a way as to prevent the adoption or enforcement by any Party of measures in accordance with Articles XX and XXI of GATT 1994 and its interpretative notes, which are hereby incorporated into and made an integral part of this Agreement.

Ukraine relied on the underpinning specific instances in which WTO members may be exempted from GATT rules set out in Article XX (b) GATT 1994 and Article XX (g) GATT 1994. WTO members may adopt policy measures that are inconsistent with GATT disciplines, but necessary to protect human, animal or plant life or health (paragraph (b)), or relating to the conservation of exhaustible natural resources (paragraph (g)). But Article XX on General Exceptions consists of two cumulative requirements. For a GATT-inconsistent environmental measure to be justified under Article XX, a member must perform a two-tier analysis proving:

First, that its measure falls under at least one of the exceptions (paragraphs (b) to (g) and,

Second, that the measure satisfies the requirements of the introductory paragraph (the “chapeau” of Article XX), i.e. that it is not applied in a manner which would constitute “a means of

⁶ Yves Melin and Jin Woo Kim, Op-Ed: EU – Korea FTA panel ruling and a challenge for its effective implementation, 5 February 2021. <https://eulawlive.com/op-ed-eu-korea-fta-panel-ruling-and-a-challenge-for-its-effective-implementation-by-yves-melin-and-jin-woo-kim/>

⁷ Environmental Trade and External Relations https://ec.europa.eu/environment/integration/trade_en.htm#:~:text=Environment%20and%20Trade%20and%20External%20Relations.%20In%20an,balance%20between%20liberalized%20trade%20rules%20and%20multilateral

⁸ Acacias, checker trees, cherry trees, pear trees, walnut trees, chestnuts, common yews, black cherries, acers, and junipers.

⁹ Para 330, page 86 of The Panel Report: https://trade.ec.europa.eu/doclib/docs/2020/december/tradoc_159181.pdf

arbitrary or unjustifiable discrimination between countries where the same conditions prevail”, and is not “a disguised restriction on international trade”.

Ukraine argued that the measures were a mere exercise of [Ukraine’s] right to regulate its own level of environmental protection [as] recognized in Article 290 AA :

1. Recognising the right of the Parties to establish and regulate their own levels of domestic environmental and labour protection and sustainable development policies and priorities, in line with relevant internationally recognised principles and agreements, and to adopt or modify their legislation accordingly, the Parties shall ensure that their legislation provides for high levels of environmental and labour protection and shall strive to continue to improve that legislation.
2. As a way to achieve the objectives referred to in this Article, Ukraine shall approximate its laws, regulations and administrative practice to the EU acquis.

And should be read in conjunction with Articles 294 AA which addresses Trade in Forest Products:

In order to promote the sustainable management of forest resources, Parties commit to work together to improve forest law enforcement and governance and promote trade in legal and sustainable forest products

And Article 296(2) Chapter 13 of the AA (the *Trade and Sustainable Development Chapter*).

1. A Party shall not fail to effectively enforce its environmental and labour laws, through a sustained or recurring course of action or inaction, in a manner affecting trade or investment between the Parties.
2. A Party shall not weaken or reduce the environmental or labour protection afforded by its laws to encourage trade or investment, by waiving or otherwise derogating from, or offering to waive or otherwise derogate from, its laws, regulations or standards, in a manner affecting trade or investment between the Parties

The EU opened a request for consultations with Ukraine on 15 January 2019 because additional restrictions affecting exports of wood were being considered by the Ukrainian Parliament.¹⁰ The export restrictions proposed appeared to be incompatible

¹⁰ The possible introduction of an export duty of 15% on the export value with a fixed minimum duty per cubic meter applied to certain wood categories: https://trade.ec.europa.eu/doclib/docs/2019/january/tradoc_157625.pdf

with Articles 31 AA (customs duties on exports) and Article 35 AA (a prohibition of export duties and export restrictions including measures having an equivalent effect).

The consultations were not productive in resolving the alleged breach of Article 35 AA and the EU requested an arbitration panel to be formed under the dispute resolution provisions of the EU –Ukraine AA.¹¹

The 154-page Report of the Arbitration Panel was published on 11 December 2021.¹² The Panel found that the 2005 export ban was incompatible with Article 35 AA. But it could be justified under Article XX(b) GATT 1994,¹³ as a measure “necessary to protect...plant life”, taking also into account relevant provisions of Chapter 13 AA on *Trade and Sustainable Development*. Thus the 2005 export ban was not in breach of Article 35 AA.

The Panel found that the 2015 temporary export ban was incompatible with Article 35 AA and not justified under Article XX (g) GATT 1994 because the export ban does not relate:

... to the conservation of exhaustible resources... made effective in conjunction with restrictions on domestic production or consumption.

The Panel recommended that Ukraine should take “any measure necessary” to comply in good faith with the ruling, as prescribed by Article 311 AA. In implementing the ruling Ukraine should take due account all relevant provisions of the AA, including those of Chapter 13 on *Trade and Sustainable Development*, specifically Article 293 AA relating to *Trade in forest products*, which commits the Parties to “improve forest law enforcement and governance and promote trade in legal and sustainable forest products.”

The engagement with the EU-Ukraine DCFTA dispute mechanism in the *Ukrainian Wood* dispute was a steep learning curve in ensuring that budgets, procedures and mechanisms are in place to ensure a swift and smooth resolution of disputes.¹⁴ There were hurdles to overcome, as well as disputes leading to delays over the composition of the Panel of Arbitrators. On the EU-side there were no established contracts to appoint the arbitrators for the Panel and no budget, leading to discussion over the level of compensation

¹¹ https://trade.ec.europa.eu/doclib/docs/2019/june/tradoc_157943.pdf

¹² https://trade.ec.europa.eu/doclib/docs/2020/december/tradoc_159181.pdf

¹³ Made applicable to the EU-Ukraine AA by Article 36 of the AA (General Exceptions).

¹⁴ https://trade.ec.europa.eu/doclib/docs/2020/december/tradoc_159181.pdf

to be paid to the arbitrators. Ukraine was obliged to change its procurement procedures to appoint its own arbitrators. This led to further delays. Once established the Arbitration Panel found that, unlike the WTO mechanisms, there was no secretariat to serve the arbitration process and two assistants were appointed who made “substantial inputs, research, translation, and logistics support”.¹⁵ But this is a thin level of support to ensure the preparation of evidence and jurisprudence. There also seems to be no provision covering the remuneration of the Arbitration Panel and the Parties agreed that the arbitrators would be remunerated according to the WTO scale for a maximum of 44.5 days of work each, including assistant work, to be shared by each Party equally.¹⁶

c. Southern African Poultry Standards

This trade dispute is still at an early stage. The EU complaint is that extra duties of an extra tariff of 35.3% (subject to a progressive reduction over a period of three and a half years) is contrary to the EU-SADC agreement.¹⁷ In September 2018 were not compatible with the provisions of the Economic Partnership Agreement (EPA) between the EU and the Southern African Development Community (EU-SADC EPA) 2016 to which SACU Member States are signatories.¹⁸ The extra tariff of 35.3% (subject to a progressive reduction over a period of three and a half years) had the effect of replacing EU imports, worth €183 million a year, with the imports from other countries, such as from the US and Brazil. Under the Agreement, safeguard measures can be legally adopted only in exceptional circumstances to temporarily counter surging imports that threaten domestic industry.

A failure to respond to the complaints led to the EU requesting the opening of dispute settlement consultations on 14 June 2019. No solution was reached and the EU requested the establishment of an Arbitration Panel under Chapter III of the EU-SADC on 21 April 2020.

The complaint of the EU is based upon a number of arguments:

- that the assessment of the existence of a threat of disturbance and/or serious injury as a result of an increase in volume of imports was based on outdated import data;
- The measure was adopted by a different authority

from the one which opened the investigation, and on a different legal basis;

- The measure concerns a different geographic scope than the investigation, which did not take into account the import data relating to SACU but was based on data relating exclusively to the Republic of South Africa;
- Other factors such as the volatility of feed raw material prices, the increase in labour costs, diesel, electricity, plastic and cardboard boxes, duties imposed on the soya oilcake used in the production of feed and imports from other countries were not appropriately taken into account in the analysis of the existence and level of threat of disturbance and/or serious injury because of an increase in volume of imports.
- The measure did not take into consideration that the imports during the period December 2016 – September 2018 greatly decreased compared to the period covered by the investigation.

d. Algeria

The trade dispute with Algeria is also at an early stage. The EU-Algeria Association Agreement was signed in April 2002 and entered into force in September 2005. In 2017 the EU and Algeria adopted new Partnership Priorities in the framework of the renewed European Neighbourhood Policy. The Partnership Priorities focused on trade and access to the European single market, energy, the environment and sustainable development.

The 2005 EU-Algeria Agreement has never been popular in Algeria, with complaints that opening up the Algerian market to EU imports has had a negative effect on farming and the manufacturing industries in Algeria. As a response, Algeria had introduced import restrictions in 2016 to preserve foreign currency reserves and protect domestic industries. In 2018 the list of banned imports was increased to include 851 products, such as meat, cheese, vegetables, cell phones and household appliances. This has had a significant impact upon EU exports to Algeria, affecting in particular, France where exports to Algeria dropped by 10% in 2017, while Italian and Spanish exports to Algeria fell by 19.2% and 12.3%, respectively.

At the same time, China has emerged as Algeria’s main import market, exporting \$8.3 billion worth of goods to Algeria in 2017, with South Korean exports increasing by 53%.

The EU is Algeria’s largest trading partner, and Algeria is the EU’s third-largest supplier of natural gas after Russia and Norway. Algeria’s main imports from the EU are machinery, transport equipment and agricultural

¹⁵ Para 1.2, Page 15 of the Arbitration Report: https://trade.ec.europa.eu/doclib/docs/2020/december/tradoc_159181.pdf

¹⁶ Ibid fn 9.

¹⁷ South Africa, Namibia, Botswana, Eswatini and Lesotho.

¹⁸ <https://ec.europa.eu/trade/policy/countries-and-regions/regions/sadc/>

products.¹⁹ But against the backdrop of the current trade dispute is a wider agenda with Algeria wanting to renegotiate the 2005 Agreement. Algeria is arguing that the EU has failed to respect the parts of the Agreement relating to the transfer of technology, the movement of people and encouraging EU companies to invest in Algeria.

The EU opened consultations on 24 June 2020, after attempts at talks, led by Spain, did not get anywhere. But by focusing upon one aspect of the wider set of problems identified by Algeria the EU controls the narrative emphasising the binding effect of Agreements with third states.

Unless governance mechanisms under the FTA are brought into play to provide a forum for addressing a wider set of trade issues, the EU could find that states such as Algeria choose to break Agreements and that the use of counteractive measures by the EU where it is successful in arbitration could lead to the breakdown of Agreements, rather than enhancing their effectiveness.

REVIEW AND ENHANCEMENT OF EU TRADE DISPUTE MECHANISMS

The European Commission has committed to strengthening its legal tools through an *Open Strategic Autonomy* model of trade remedies.

Our goal is to produce a document that will help us lead from the front in shaping a strong post-Covid global trade and investment environment, with a fit-for-purpose international rulebook underpinning it.

What we are advocating is a model of “Open Strategic Autonomy”: this simply means a coherent set of policies that achieve the right balance between a Europe that is “open for business” and a Europe that protects its people and companies.

Sustainable value chains and due diligence will be an important part of this work. A truly resilient economy is one that protects workers, companies and supply chains, while at the same time safeguarding international trade, keeping our markets open and discouraging import and export restrictions. So rebuilding the economy in an even more sustainable way is not just a plus, it is a necessity.

Two aspects of this model discussed here are the appointment of Denis Redonnet as the Chief Trade Enforcement Officer in July 2020, and the amendments to the Enforcement Regulation

654/2014, which became operable in February 2021.

CHIEF TRADE ENFORCEMENT OFFICER

The role of a new Chief Trade Enforcement Officer was mooted by the President of the European Commission, Ursula von der Leyen, in July 2019 and the post was created in December 2019. This was at the same time the EU-South Korea labour standards dispute was starting to gain traction. The remit of the Officer was to monitor and enforce environmental and labour protection obligations of EU trade agreements with third countries. Explaining the proposed role, Phil Hogan, the then Commissioner for Trade, explained to a hearing before the European Parliament in September 2019, that the Chief Trade Enforcement Officer would be appointed at the level of Deputy Director-General of DG TRADE and would have authority to challenge countries found to be in breach of the WTO Agreement and EU FTA.²⁰

When the Chief Trade Enforcement Officer suggest imposing rebalancing duties, the European Commission could adopt retaliatory measures towards the non-compliant trade partners. However, it was a moot point as to whether third countries’ non-compliance with Sustainable Development commitments under EU trade agreements would entitle the European Commission, even after the recommendation from the Chief Trade Enforcement Officer, to impose rebalancing duties or to suspend tariff concessions using the FTA enforcement mechanisms. In *Opinion 2/15*, concerning the compatibility of the EU-Singapore Agreement with EU law, the CJEU held that a breach of sustainable development commitments under EU trade agreements authorizes the EU, in accordance with Article 60(1) of the Vienna Convention, to terminate or suspend liberalization of trade using its own internal legislation. But, the European Commission conceded that the EU-Singapore Agreement did not contain provisions allowing for the imposition of trade sanctions. The Opinion of the Advocate General Sharpston and the CJEU recognised that the Vienna Convention did not offer a sufficient legal basis for the European Commission to impose rebalancing duties as a result of the third countries’ violation of sustainable development obligations. The European Commission had to rely on EU legislation.

Accordingly, the EU’s imposition of rebalancing duties after a favourable ruling by an FTA Panel is likely to be based on the Enforcement Regulation, not the FTA. The Regulation specifically allows the EU to suspend tariff concessions and impose new customs duties

¹⁹ <https://ec.europa.eu/trade/policy/countries-and-regions/countries/algeria/>

²⁰ https://ec.europa.eu/commission/presscorner/detail/es/mex_20_1407

after dispute settlement procedures. For example, the EU adopted rebalancing duties in June 2018 against the US in response to its Section 232 measures on steel and aluminium on the basis of the Enforcement Regulation.

But, this could also potentially raise tensions with trade partners who may consider challenging the EU's rebalancing duties before the WTO as a unilateral measure, inconsistent with multilateral trade rules.

AMENDMENTS TO THE TRADE ENFORCEMENT REGULATION

In a move to counteract the ineffectiveness of the WTO Appellate Body, the EU Trade Enforcement Regulation, 654/2014 was revised in February 2021.²¹ The amendments to the Regulation, now found in Regulation 2021/167,²² allow the EU to adopt countermeasures when it obtains a favourable ruling from a dispute settlement panel of the WTO or in bilateral and regional agreements *and* when the other party fails to cooperate on the adjudication of the dispute.

The European Commission published proposals for an amendment to the 2014 Regulation in December 2019.²³ The initial proposal argued for the introduction of two provisions enabling the EU to retaliate in a situation where its counterparty fails to cooperate on the dispute settlement.

But the European Parliament introduced amendments that extend the scope of the Trade Enforcement Regulation to cover services and intellectual property rights and an amendment that applies the enforcement mechanism to the Trade and Sustainable Development chapters of EU international trade

agreements.²⁴

The amended Enforcement Regulation 2021 came into force on 13 February 2021.²⁵ It applies to the application and enforcement of international trade rules by enabling the EU to suspend or withdraw concessions or other obligations under international trade agreements in order to respond to breaches by third countries of international trade rules that affect the commercial interests of the EU. These actions may be initiated against breach of the WTO rules, as well as breach of bilateral trade agreements. The Enforcement Regulation allows the EU to take countermeasures when a third country prevents effective dispute settlement, (through a lack of co-operation or refusal to implement a Panel ruling, in the WTO or in bilateral agreements.²⁶ Significantly, it expands the scope of available measures to services and to Intellectual Property Rights, recognising their increased role in EU trade.²⁷ This expands the reach of EU powers beyond trade in goods, and could develop a pioneering jurisprudence that informs the development of international trade jurisprudence. But, this would be an area contested, not so much by states, but by private firms operating in global markets.

To enhance the effective enforcement of EU trade agreements the amended Trade Enforcement Regulation has two *Joint Declarations* by the European Commission, the Council and the European Parliament.

The first *Joint Declaration* agreed by the Council and European Parliament is for the European Commission to quickly prepare a legislative proposal, contemplated already by the European Commission in 2020, for an instrument to dissuade or offset “coercive actions by third countries that would force policy choices on the EU” by allowing for “the expeditious adoption of

21 Mayer Brown Perspective “With Appellate Body (Re)-Appointment Process Blocked, European Commission Proposes Updates to Trade Enforcement Regulation” of December 13, 2019. <https://www.mayerbrown.com/en/perspectives-events/publications/2019/12/with-appellate-body-re-appointment-process-blocked-european-commission-proposes-updates-to-trade-enforcement-regulation>.

22 Regulation (EU) 2021/167 of the European Parliament and of the Council of 10 February 2021 amending Regulation (EU) No 654/2014 concerning the exercise of the Union's rights for the application and enforcement of international trade rules, OJ L 49, 12.2.2021, p. 1–5.

23 Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No. 654/2014 of the European Parliament and of the Council concerning the exercise of the Union's rights for the application and enforcement of international trade rules. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02014R0654-20151105>

24 Recital (10) of Regulation 2021/167. See: [https://www.europarl.europa.eu/RegData/seance_pleniere/textes_adoptes/provisoire/2021/01-19/0004/P9_TA-PROV\(2021\)0004_EN.pdf](https://www.europarl.europa.eu/RegData/seance_pleniere/textes_adoptes/provisoire/2021/01-19/0004/P9_TA-PROV(2021)0004_EN.pdf). See also: Hearing of Executive Vice-President Valdis Dombrovskis on trade portfolio, 2 October 2010: <https://www.europarl.europa.eu/news/en/press-room/20201001IPR88310/hearing-of-executive-vice-president-valdis-dombrovskis-on-trade-portfolio>

25 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AQJ.L_.2021.049.01.0001.01.ENG&toc=OJ%3AL%3A2021%3A049%3ATOC

26 https://trade.ec.europa.eu/doclib/docs/2021/february/tradoc_159426.pdf

27 Articles 1(2), 1(5)(a), 1(6) and 1(8)(a) of Regulation 2021/167.

countermeasures triggered by such actions.”²⁸

The aim of an Anti-Coercion Instrument is wide, to protect the EU from undue foreign influence over its domestic policy. The European Commission is committed to adopting an anti-coercion mechanism by the end of 2021. An inception impact assessment was published on 17 February 2021,²⁹ and a consultative document on 23 March 2021.³⁰ The consultation aims to collect evidence of the impact of coercive threats and measures taken by third countries, in order to understand the triggers, or the circumstances, in which the EU may act; the countermeasures the EU should employ to tackle coercion and; the likely impact of the various options. The primary aim of the proposed measure is of deterrence, but also the ability to act swiftly if necessary.³¹

The existing EU legislative framework does not provide for a single or comprehensive legal instrument with such an effect. Existing possibilities to address coercive practices include standard diplomatic means and the possibility, under certain conditions, for the European Parliament and the Council of the EU to act on the basis of Article 207 TFEU. But this seen as naïve and is inadequate in the context of the increased economic threats. It does not act as a deterrent or provide for prompt, coordinated trade, investment or other policy measures. By creating a general and wide-ranging measure the EU does not need to rely on specific Chapters in bilateral and multilateral trade agreements, and would have a remedy where there is no trade agreement.

But it may be that the EU is also creating too many different legal tools and a lack of coordination could lead to duplication of effort and a disagreement over the appropriate remedies.

28 Joint Declaration of the Commission, the Council and the European Parliament on an instrument to deter and counteract coercive actions by third countries: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.C_.2021.049.01.0001.01.EN&toc=OJ%3AC%3A2021%3A049%3ATOC. The legal basis for this initiative is Article 207 TFEU, falling under EU trade policy, where the EU has exclusive competence.

29 <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12803-Instrument-to-deter-and-counteract-coercive-actions-by-third-countries->

30 <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2257>

31 The initiative is distinct from measures announced in the Communication *The European economic and financial system: fostering openness, strength and resilience* where the European Commission announced its work on additional policy options to further deter and counteract the unlawful extra-territorial application of unilateral sanctions by non-EU countries to EU economic operators (for example, by amending Council Regulation (EC) No 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom, OJ 1996 L 309/1.

The second *Joint Declaration* reiterates the continued EU commitment to a “multilateral approach to international dispute settlement, rules-based trade, and international cooperation to achieve the Sustainable Development Goals of the United Nations” and the intention to cooperate to ensure the effective functioning of the WTO Appellate Body.³²

The European Commission adopted two separate Declarations and a Statement on issues related to the revised Trade Enforcement Regulation, relating to the hiatus or void left when the WTO ceased functioning.

The First *Declaration* is on compliance with international law. This reiterates the European Commission’s intention to have other WTO members agree to appeal proceedings under the interim appeal procedure as long as the Appellate Body is unable to resume its operations. In addition, the *Declaration* reiterates the European Commission’s intention to act in conformity with the International Law Commission’s Articles on the Responsibility of States for Internationally Wrongful Acts.⁹

In the Second *Declaration*, the European Commission confirms its intention to pay equal attention to alleged breaches of the TSD provisions of EU trade agreements as it will to alleged breaches of market access systems, prioritising cases which are particularly serious in terms of their effect on workers or the environment in a trade context, which have systemic importance and which are legally sound.³³

The initiatives recognise that not only goods, but services (especially Financial services) and IP rights are affected by third country activities. Private stakeholders affected by commercial policy measures against third countries will be consulted. This acknowledges the damage suffered by third parties in previous disputes by retaliatory measures taken by the US and the EU.³⁴

The European Commission must review the amended Regulation within a year of its coming into operation.³⁵

32 Joint Declaration of the European Parliament, the Council and the Commission: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.C_.2021.049.01.0002.01.ENG&toc=OJ%3AC%3A2021%3A049%3ATOC.

33 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.C_.2021.049.01.0005.01.ENG&toc=OJ%3AC%3A2021%3A049%3ATOC.

34 Tom Bruce-Gardyne, Collateral Damage: Scotch Whisky, Tariffs and the EU-US trade war, 31 January 2019. <https://www.whiskyinvestdirect.com/about-whisky/scotch-whisky-us-tariffs-WTO-20200131a>. On 4 March the US suspended the tariffs on UK (Scotch) single malt whisky, cheese, cashmere and machinery: <https://www.bbc.co.uk/news/business-56279525>

35 Article 1(9) of Regulation 2021/167.

CONCLUSION

The appointment of a new Director-General of the WTO, alongside a new President of the United States, has re-invigorated, the need for reform of the international trade dispute resolution mechanisms. Both have a long agenda to work through. Until this achieved, the EU has significantly strengthened its legal rules and toolkit, and these may become the preferred mode of conduct for settling trade disputes in the future.³⁶ In particular the role of the Chief Trade Enforcement Officer may expand significantly to suggest and implement the use of rebalancing duties, under the Enforcement Regulation, as a form of coercion to ensure compliance with EU Trade Agreements and also to ensure EU commitments to external relations are in line with its own internal policies and goals. The modernisation of the EU tool kit reflects a move towards “economic statecraft,” addressing the developing situation of trade being manipulated, particularly by the US and China, as a new global tool of economic war craft.³⁷ In this respect the UK may find it has a lot of work to do in order to match the enforcement powers of the EU; this is an area where leaving the EU system places the UK at a disadvantage.³⁸

This Briefing Paper focuses upon conventional trade disputes and reveals some positive aspects of the initial operation of EU Trade Dispute mechanisms. The EU-South Korea Panel ruling is remarkable in showing how the EU may need to secure clear timetables to ensure third states adhere to ratification of international Treaties, but also the EU is capable of creating legal binding obligations within its own Trade Treaties. This could pave the way for the EU to lead the way in developing legally binding documents incorporating a high level of sustainable development, human rights and labour standards. In May 2020 France and The Netherlands issued a joint *Non-Paper* urging the European Commission and the Member States to adopt more stringent TSD Chapters into trade agreements:

Trade policy instruments can provide additional leverage to the implementation of international environmental and labor standards. The EU has since 2006 aimed to leverage sustainable development and inclusive growth by including Trade and Sustainable Development (TSD) Chapters in trade agreements. Currently these chapters commit both parties to implement multilateral environmental agreements to which they are party and ratify and implement fundamental ILO-conventions. They provide an additional bilateral forum for dialogue and facilitate cooperation and the exchange of knowledge and best practices. Given the lack of progress in compliance with TSD commitments in some partner countries multiple years after trade agreements were concluded, the EU should raise the ambition and improve the implementation of TSD Chapters.³⁹

The experience of the two trade disputes with Ukraine and Korea serve as an example of how governance mechanisms may need to be enhanced and utilised fully to allow for pre-arbitration mechanisms to resolve trade disputes quickly. The Ukrainian Wood arbitration reveals the need for the EU and trade partner states to invest in a proper and permanent infrastructure to ensure the swift resolution of trade disputes.

The more complicated and sophisticated dispute resolution provisions of the EU-UK TCA suggest that a new era of enforcement mechanisms may be high on the EU agenda when negotiating or renegotiating, FTA in the future. In *Opinion 2/15* the CJEU held that reliance on international law commitments would not be sufficient to give the European Commission the power to suspend trade concessions found in an Agreement between the EU and a third state, or to introduce rebalancing mechanisms to trade. That power would be based upon internal EU legislation, which is the amended Enforcement Regulation. But the EU is also planning for tougher anti-coercive measures too. Interestingly the EU bases its new trade measures on public international law, of which the WTO is a part of. The EU approach is to use counter measures to rebalance the trade equilibrium under international law. It is possible that the EU retaliation action could be subject to review under WTO law, but until an effective Appellate Body starts to operate, the EU would seem to have the upper hand in ensuring trade commitments are adhered to, alongside setting the pace for the development of international trade jurisprudence.

³⁶ In the new Trade strategy document (supra fn 2), the European Commission devotes a 17 page Annex to how the WTO should be reformed.

³⁷ Jonathan Hackenbroich With Janka Oertel Philipp Sandner Pawel Zerka *Defending Europe's Economic Sovereignty: new ways to resist economic coercion*, ECFR Policy Brief 20 October 2020: https://ecfr.eu/publication/defending_europe_economic_sovereignty_new_ways_to_resist_economic_coercion/?amp%3Bqid=9084882

³⁸ See the concerns by the International Trade Committee Report, *UK Trade Remedies Policy*, 22 March 2021: <https://publications.parliament.uk/pa/cm5801/cmselect/cminttrade/701/70102.htm>

³⁹ *Non-paper from the Netherlands and France on trade, social economic effects and sustainable development* <file:///C:/Users/Richard/Downloads/Non-paper+FR-NL+trade+vfinal.pdf>

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FURTHER INFORMATION

The UK Trade Policy Observatory (UKTPO), a partnership between the University of Sussex and Chatham House, is an independent expert group that:

- 1) initiates, comments on and analyses trade policy proposals for the UK; and
- 2) trains British policy makers, negotiators and other interested parties through tailored training packages.

The UKTPO is committed to engaging with a wide variety of stakeholders to ensure that the UK's international trading environment is reconstructed in a manner that benefits all in Britain and is fair to Britain, the EU and the world. The Observatory offers a wide range of expertise and services to help support government departments, international organisations and businesses to strategise and develop new trade policies in the post-Brexit era.

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