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Commissariat général au développement durable

# International Trade and the Environment

Towards 3<sup>rd</sup> generation agreements?

NOVEMBER 2018

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# International Trade and the Environment Towards 3<sup>rd</sup> generation agreements?

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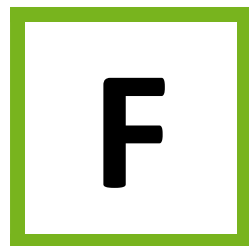
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## **foreword**

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Following the CETA controversy, France has expressed its ambition to deeply renew the European Union's (EU) trade policy, with an aim to better take health and sustainable development issues into consideration.

During the 73<sup>rd</sup> United Nations General Assembly in New York (25 September 2018), the President of the French Republic reaffirmed the need to integrate “our environmental and social constraints into our trade commitments”, calling for countries to stop signing agreements “with powers that do not comply with the Paris Agreement”.

The Commissariat Général au Développement Durable – or Department of the Commissioner General for Sustainable Development – thus proposes the concept of “third generation trade agreements”, which France could support at a European level as a way for trade policies to diffuse the EU's health and environmental standards among its trade partners.

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# Introduction

Globalisation has not kept the same promises for everyone, which has fed into a defiance of bilateral trade agreements within European civil society. The main criticisms of these agreements arise from the lack of transparency of their negotiations; the primacy of trade rules over health and environmental issues, which are not adequately taken into account; and the generation of distortions of competition. Finally, these criticisms denounce the type of trade that tends to be an end in itself, instead of a means used to promote the well-being of the populations.

The current crisis of multilateralism, with risks of WTO paralysis and trade wars, tends to support the relative importance of the bilateral system. It is therefore essential that bilateral trade agreements encompass the major issues of sustainable development.

Yet, some economic operators perceive the measures related to sustainable development within bilateral agreements as excessive trade constraints. Others deem them to be necessary for fair competition, and express fears and concerns against trade flows and short-term and economic interests that may not give sufficient consideration to health and environmental objectives and a more long-term general interest.

**Recent speeches by the President of the French Republic** express the ambition to **deeply renew the European Union's (EU) trade policy** in order to: 1/ make it consistent with France and Europe's environmental objectives; 2/ diffuse the norms and standards of sustainable development that are characteristic of the European model; and 3/ encourage the implementation of multilateral environmental agreements by intrinsically linking trade concessions to the achievement of their objectives.

The EU's current negotiation model is based on second generation trade agreements, as opposed to first generation agreements, which were limited to the reduction of customs duties. Despite having a much wider scope, which aims to remove non-tariff barriers (focusing on investment rules, public procurement, norms and standards, etc.), second generation agreements do not help to make this ambition effective.

A paradigm shift is necessary in order to reconcile trade and sustainable development, and to lend legitimacy to the dynamic of trade openness. France's leadership in terms of environmental ambition could thus lead the country to **propose a new concept of third generation agreements** to deal with these issues.

Drawing on lessons learned from the CETA (*Comprehensive Economic and Trade Agreement* - between the EU and Canada) controversy, this publication presents the limits of the current model of second generation agreements, and proposes a new concept of third generation agreements for which some exploratory dispositions are discussed.



Part 1

# Lessons from CETA

The CETA controversy and the difficult implementation of the “CETA action plan” reveals that the current model of second generation agreements does not support France's ambition for a deep renewal of European trade policy.



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## Part 1 - Lessons from CETA

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The CETA controversy and the difficult implementation of the “CETA action plan”, adopted by the government in response to the concerns of civil society, reveals that the current trade agreement model does not support France's ambition for a **“deep renewal of the European trade policy”** (see the French President's speech at the Sorbonne).

The trade agreements currently negotiated by the European Union are considered “second generation”, as opposed to the “first generation” agreements, which boiled down to a reduction or a complete dismantling of tariff barriers (customs duties). Since early 2010, second generation agreements have gone beyond this framework and lean towards the elimination of non-tariff and regulatory trade barriers,, which are difficult to negotiate within the context of multilateral agreements at the WTO, notably:

- through the alignment<sup>1</sup> of norms (technical, social and environmental) and regulations (intellectual property, etc.);
- through the removal of barriers to trade in services and to government procurement, investments, etc.

**However, the way in which environmental and health issues taken into account in these second generation trade agreements does not allow to “use trade as a lever for our ambitions with regards to sustainable development”** (letter from the President of the French Republic to Jean-Claude Juncker, President of the European Commission).

Indeed, there is a high risk that the alignment of social and environmental norms may cause a race to the bottom, which calls into question our collectively adopted preferences and commitments. In addition, the current trade system allows goods to enter countries within the European Union even if their production process is banned in the EU (quite often for health or environmental reasons). This unfair competition threatens our industries, as well as their commitment in the fight for sustainable development. Finally, to date, there is no provision in these agreements to link (further) trade openness to compliance with sustainability standards, or more broadly to the trade partner's environmental performance. The lack of such conditional linkages prevents trade to be used as a tool to reach our environmental objectives.

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<sup>1</sup> Mutual recognition or harmonisation.



### **Inset 1 - What does a free trade agreement (FTA) between the European Union and a third party consist of?**

In principle, a free trade agreement is intended to foster trade between two entities, aiming to lower the prices of traded goods and services, increase both parties' gross domestic product (GDP) and therefore their collective well-being. It generally consists in dismantling tariff (reduction or removal of customs duties) and non-tariff (alignment of norms, intellectual property, public procurement access rules, investments, etc.) barriers, with a view to increasing the exchange of goods and services between the two parties, allowing producers to expand their markets by enhancing exports to the other party. Several years of negotiation may be necessary to finalise this type of agreement, and its implementation can also be spread out over time.

#### **How are European free trade agreements negotiated?**

Trade policy is an exclusive EU competence. Before starting any negotiation, the European Commission needs the Council's consent to negotiate with the partner country in its name, through collectively adopted negotiating directives. The Commission regularly informs and consults the Member States and the European Parliament all along the negotiating process until an agreement on the text is reached. To be formally adopted, the agreement must be signed by the Council and then ratified by the European Parliament. In the particular case of a mixed agreement<sup>2</sup>, the agreement must be ratified by each of the national parliaments of the European Union before it is definitively and fully implemented.

#### **How are they structured?**

FTAs are made up of several chapters (around 30 for current second generation agreements) that govern the exchanges and trade concessions between the two parties. Certain chapters considered to be "structural" or "cross-cutting" therefore define the trade regulatory framework (rules of origin, dispute settlement, technical barriers to trade, subsidies, etc.). Others deal with tariff and non-tariff concessions for each sector covered by the agreement (market access for goods, trade in services, sanitary and phytosanitary measures, government procurement, investments, intellectual property, etc.).

Second generation agreements establish a close regulatory cooperation on norms and standards through numerous institutional mechanism (sectoral sub-committees, regulatory cooperation forums, etc.) whose operating principles are described in the text. They are also said to be "alive" as their content can be reviewed and supplemented dynamically through these mechanisms.

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<sup>2</sup> A trade agreement can be "mixed" if it concerns issues of both Community and member state competence – in particular investment – (e.g.: EU-Canada, EU-Mexico) or if it is part of a political agreement (e.g.: EU-Mercosur).

### What happens when there is a dispute?

In the case of a dispute between the two parties, a state-to-state dispute settlement (SSDS) mechanism is included in the text of the agreement. The way it operates is close to the WTO's dispute resolution procedure. In the case of a persistent dispute (when no agreement is reached after formal government consultations), it may give the injured party the option of applying retaliatory measures (trade sanctions). Certain chapters are nevertheless excluded from this general procedure. For instance, the "trade and sustainable development" chapter and the "investment" chapter (when the agreement includes a section related to investment) have their own dispute settlement mechanisms, which are only used when the dispute is related to these chapters.

The chapter on investment protection thus establishes a specific investor-to-state dispute settlement (ISDS) mechanism, which guarantees investors the option of seeking monetary compensation for any harm caused by the host State if the latter breaches the agreement. Furthermore, the dispute resolution mechanism set up in EU trade and sustainable development chapters is based on cooperation and mediation. It includes government-to-government consultations and the publication of a public report if the dispute persists, but does not provide for economic sanctions.

### How is sustainable development taken into account within these agreements?

Since the EU-South Korea agreement (2011), most of EU FTAs environmental and social provisions are included in a "trade and sustainable development" (TSD) chapter. This chapter whose standard content has significantly grown since 2011 – contains a bedrock of values and principles with which the parties have to comply: protection of the right to regulate, commitments to work towards high levels of environmental and labour protection; commitment to not lower social and environmental standards for commercial or investment purposes; commitments to comply with multilateral environmental agreements (MEA - including the Paris Agreement since the EU-Japan Agreement, 2018); and to ratify fundamental ILO (International Labour Organization) conventions of the . Depending on the EU trade partner, this chapter specifically encourages certain best practices and establishes cooperation on various topics (environmental labelling, fair trade, corporate social and environmental responsibility, sustainable management of forests, fishing and aquaculture, etc.). Finally, the chapter's implementation and enforcement mechanisms (cooperation, review, advisory bodies, joint dialogue with civil society, and dispute settlement mechanism) are detailed therein.

This chapter is currently one of the very few in EU FTAs that includes a specific dispute resolution mechanism, which does not provide for economic sanctions as an enforcement tool to ensure compliance.

### CIVIL SOCIETY PROTEST AND CONCLUSIONS OF THE SCHUBERT COMMISSION

During the CETA negotiations between the European Union and Canada, while CETA was presented by the European Commission as a “model agreement”, a section of civil society (NGOs, parliamentarians, experts, agricultural federations) spoke out against several environmental and health risks. Apart from the format of the negotiations, which were denounced as much for their governance as for their lack of transparency (being handled exclusively by EU’s trade institutions despite the very wide spectrum of issues), the core of the agreement was also at the heart of the criticism. These concerns particularly referred to the absence of binding elements related to sustainable development and to the fight against climate change (disregard of the increase in greenhouse gas emissions resulting from the increase in international transports freight traffic and the stimulation of economic activity; disregard of the Paris Agreement; disregard of environmental risks associated with importing non-conventional oil, etc.). Mention was also made of the capacity of the Member States to regulate on environmental matters (potentially strained by the implementation of the investor-state dispute settlement mechanism, the – ICS, or Investment Court System), and the risks of potential imports of unauthorised products within the European Union (e.g.: genetically modified organisms, hormone-treated beef, etc.) due to frauds or losses of traceability. Finally, some producer organisations have underlined economic and environmental risks related to the imports of goods from production methods prohibited in the European union (e.g.: crops for which farmers have resorted to using pesticides banned within the EU), which therefore generates a distortion of competition for European sectors.

The report submitted by the Schubert Commission’s independent experts (see Inset 2) to the Prime Minister on 8 September 2017 confirmed some of these risks and pointed out several “missed opportunities” (particularly the failure to consider climate-related issues in trade negotiations).

#### **Inset 2 - The “Schubert Commission”**

On 6 July 2017, the President of the French Republic entrusted a commission of nine independent scientific and interdisciplinary experts (health, environment, economy, agriculture, and international law) with the task of evaluating the potential environmental and health effects of the CETA. Presided over by economist Katheline Schubert, this commission submitted its conclusions to the Prime Minister in the form of a report, accessible via the following link:

[https://www.gouvernement.fr/sites/default/files/document/document/2017/09/rapport\\_de\\_la\\_commission\\_devaluation\\_du\\_ceta\\_-\\_08.09.2017.pdf](https://www.gouvernement.fr/sites/default/files/document/document/2017/09/rapport_de_la_commission_devaluation_du_ceta_-_08.09.2017.pdf).

The report drew the government’s attention to the existence of points requiring special care in the application of the agreement, particularly in the area of regulatory cooperation forums and the efficient application of European health norms. On sustainable development, the Schubert Commission notably highlights “*a damaging lack [of ambition] for the future*” and regrets that “*the major element missing from the agreement [is] the climate*”.

### **THE GOVERNMENT'S CETA ACTION PLAN: DIFFICULTIES IN IMPLEMENTING ITS 3RD PILLAR (INTEGRATION OF EUROPEAN TRADE POLICY)**

Following the Schubert Commission's report, the government, in association with stakeholders, drew up and presented an action plan to the Council of Ministers on 25 October 2017, one month after the CETA provisionally came into force on 21 September 2017.

This plan of action hinges on three main pillars: i) an exemplary implementation of CETA in practice; ii) actions in addition to the CETA to strengthen bilateral and multilateral cooperation on climate issues; iii) proposals to improve the way in which health and sustainable development issues are taken into account in the European Union's trade agreements.

However, nearly a year after its publication, it is evident that the results of the action plan, and namely pillar 3, which aims to strengthen the consideration of sustainable development in the agreements under negotiation, are incomplete. The elements of the action plan:

- i) have only been partially integrated into the latest deals concluded with Japan and Mexico;
- ii) are only partially integrated at this stage in the agreements for which negotiations are drawing to a close (Mercosur);
- iii) struggle to be integrated into the negotiations that are just beginning (Australia/New Zealand, Indonesia, Chile).

### **COMMENDABLE BUT INSUFFICIENT AWARENESS AT THE EUROPEAN LEVEL**

In response to debates sparked within the EU, the European Commission launched a consultation with its Member States in July 2017 on the implementation of trade and sustainable development chapters of the European Union's free trade agreements, notably proposing two options for improvement:

- One option focused essentially on improvements which preserve the existing structure (procedures, implementation): improvement of coordination, of collaboration with the ILO and MEA secretariats, of the dispute settlement mechanism in the "trade and sustainable development" chapter, of cooperation with embassies on the issues of sustainable development, the simplification of complaint procedures, the amplification of the advisory role in civil society, etc.
- One option which considers the possibility of trade sanctions in the case of substantial and repeated violation of the chapter's sustainable development dispositions by one of the parties.

Given the EU's negotiation practices, these improvements would be part of all agreements thenceforth.

In a response formulated in January 2018 which leans heavily on pillar 3 of the CETA action plan, France supported both options, considering them not to be exclusive.

Following the responses of several Member States, the European Commission revealed a 15-point action plan in February 2018<sup>3</sup> (divided into four areas), and rejected the option including sanctions (which it considers to be ineffective and for which there is no consensus within the EU), focusing on improving the existing framework instead. Certain requests put forward by France are part of this action plan: reference to the Paris Agreement in all trade agreements; encouraging early ratification of core international agreements (ILO, MEA) ahead of trade negotiations; and measures to ensure greater transparency and civil society participation in negotiations.

This European Commission action plan is a first step towards improving the consideration afforded to sustainable development in trade agreements. However, the measures proposed only aim to modify the current practices, and still fall far short of the ambitions of the French Government.

### **SECOND GENERATION AGREEMENTS ARE LESS AND LESS LEGITIMATE**

The example of the CETA shows that the economic gains expected from these second generation agreements appear to be low for Europe (GDP gains of 0.01% to 0.03% in the long-term according to the 2011 sustainability impact assessment<sup>4</sup>, which are barely higher for Canada despite taking into account non-tariff barriers lifting on the exchanges of services), especially in view of the issues raised by the Schubert Commission that were not taken into consideration in these studies. In an already strongly globalised economy, these poor benefits can be explained by the fact that the economic gains arising from the liberalisation of trade are subject to the law of diminishing marginal returns. In other words, the more open the markets already are, the weaker the macroeconomic gains that can be expected from new agreements.

Faced with these analyses, it seems necessary to leave behind the current model of second generation trade agreements to reach France's ambition.

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<sup>3</sup> [http://trade.ec.europa.eu/doclib/docs/2018/february/tradoc\\_156618.pdf](http://trade.ec.europa.eu/doclib/docs/2018/february/tradoc_156618.pdf)

<sup>4</sup> [http://trade.ec.europa.eu/doclib/docs/2011/september/tradoc\\_148201.pdf](http://trade.ec.europa.eu/doclib/docs/2011/september/tradoc_148201.pdf)



**Part 1 - Lessons from CETA**

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## Part 2

# Towards a new type of “third generation” trade agreement?

In keeping with France's ambition to use trade openness as a lever to bring our trade partners up to the same levels of requirements that we impose on our internal market, especially regarding health and environmental aspects, it is necessary to deeply review the integration of these aspects, and to design a new type of agreement.



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## Part 2 – A new type of “third generation” trade agreement?

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In keeping with France's ambition to **“use trade openness as a lever to bring our trade partners up to the same levels of requirements that we impose on our internal market, especially regarding health and environmental aspects”**(letter from the President of the French Republic to the President of the European Commission of 15 November 2017), it is necessary to deeply review the integration of these aspects and to design a new type of agreement. The latter would rely on two principles.

**1 - RENOUNCING NEITHER TRADE NOR OPENNESS TO TRADE, which remain essential to prosperity and peace, but making them a means of increasing well-being rather than an end in itself: a third generation of agreements is thus necessary to reconcile these objectives.**

Trade openness can only be relevant if it is a source of well-being for trading partners' population. Above all, trade should be a means and not an objective in itself. Yet, if the economic interest of this openness diminishes and there is a proven risk of adverse environmental and social effects, then this well-being can be called into question. Hence the issues being expressed with increasing concern by citizens, NGOs, and economic sectors.

In order for the European Union's trade policy to regain coherence (regarding environmental, social and health factors) and legitimacy in the eyes of its citizens, and to no longer be regarded with suspicion, **future trade agreements must invert the philosophy that we currently know them to possess. They must be a means of “circulating our rules responsible for sustainable development, and taking international norms and standards a notch higher”** (speech from the President of the French Republic of 22 March 2018).

The granting of trade preferences by the European Union and its basin of 500 million consumers can only be considered in exchange for a shared, reciprocal vision with its partners on sustainable development issues. The European Union is even more capable of negotiating this reciprocity as the size of the European market means that it is generally more advantageous for a country or a group of countries with a smaller market to negotiate a free trade agreement with the European Union than it is for the European Union to negotiate with them<sup>5</sup> (in terms of GDP proportions).

France could therefore propose and strategically promote “third generation” trade agreements to European authorities. These would help to truly raise the social and environmental norms of both parties to the agreement through trade by integrating strong and binding commitments on both sides. It is, however, important to keep in mind that the aim is not to restrict trade, but, on the contrary, to direct countries towards a system of trade that is sustainable and consistent with the environmental objectives of both France and the EU.

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5 A. Sapir, S. Jean, P. Martin, International trade under attack: what is Europe's next strategy?, p.8.



## 2 – ESTABLISHING A DEPENDENCY RELATIONSHIP BETWEEN TRADE POLICY AND ENVIRONMENTAL PERFORMANCE.

Though the level of ambition for the government’s CETA action plan is high compared to the current negotiation model for second generation agreements, **its content does not reflect the scope of possible ways to strengthen the consistency between trade policy and environmental objectives.** Creating a conditional linkage between the degree of trade openness (understood here as the agreed level of trade concessions on both tariff and non-tariff plans) and the environmental performance of commercial partners (both the European Union and the third party) could, for instance, be considered.

Including the ratification of the Paris agreement and compliance with its legally binding obligations as an essential element of trade agreements as anticipated in the CETA action plan would constitute a first step in this direction. To take things a step further, the following examples may also be of note:

- **Conditioning the reduction of tariffs and/or non-tariff measures, more or less automatically, upon compliance with the greenhouse gas emissions trajectory that is voluntarily recorded by countries in their nationally determined contributions (NDCs – submitted under the Paris Agreement);**
- **Conditioning access to the European market to the level of sustainability of traded goods and services.**

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## Part 2 – A new type of “third generation” trade agreement?

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## Part 3

# Examples of measures that could be included in a third generation agreement

Strengthening the relationship of dependency between trade and environmental policies, reducing the carbon footprint of these agreements, introducing new metrics, etc. This section presents a few illustrative ideas of standard measures that could be used in the new type of agreement.



## Part 3 - Examples of measures that could be included in a third generation agreement

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The purpose of this section is to propose some standard measures to strengthen the relationship of dependency between trade and environmental policies, reduce the carbon impact of agreements, and introduce new metrics to measure their interactions with the environment.

The examples detailed below must, however, be developed and completed before they can be discussed with our European partners.

Moreover, these measures cannot replace an approach based on institutional cooperation with third-countries, especially on issues related to sustainable development as is provided for today by the European Union.

### **MEASURE 1: INTRODUCING A RELATIONSHIP OF DEPENDENCY BETWEEN TRADE PREFERENCES AND ENVIRONMENTAL PERFORMANCE (OF THE EU AND) OF THE THIRD PARTY**

- **Measure 1A: From the start of negotiations, make access to market(s) conditional upon the level of sustainability of the imported goods and services**

In order to leverage our trade policies to achieve our sustainable development objectives, it seems necessary to identify, from the start of negotiations with another country, the goods and services likely to be exported by that country to European territory that are inadequate in terms of sustainability and/or any proven risks to the health of consumers.

Indeed, European trade policy can only provide this lever as long as it encourages these external countries or the European Union itself to improve the level of sustainability for products that may present issues. In a reciprocal manner, this type of mechanism must be actionable by the other country if it considers that the level of sustainability of certain European Union products falls short of its own standards.

Once these potentially sensitive goods and services have been identified, several operational mechanisms can be considered:

- **Measure 1A1:** Where customs duties are still applied to these goods or services before signing the free trade agreement (with a flexible tariff), these customs duties could be maintained on the lines concerned as long as “the level of sustainability” of the production of these goods and services is not deemed to be in compliance with the sustainable development or health standards in force within the European Union or within the other country (or would not reach a level agreed upon between the parties).

- **Measure 1A2:** The European Union could also take inspiration from existing trade-related mechanisms such as “phasing out” and safeguard measures. Used to protect European geographical indications (GI), phasing out helps to identify – within the agreement – a list of goods to be protected, and to set transitional periods with third-countries, beyond which the latter must cease to use the names corresponding to GI protected within the European Union.

### Part 3 - Examples of measures that could be included in a third generation agreement

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Safeguard measures allow the parties to **automatically cancel the trade concessions** (tariff and non-tariff), by mutual agreement, in the event of failure to comply with established commitments during the negotiation phase at the end of a period of time agreed beforehand.

A mechanism inspired by these two measures could grant trade partners time (from a few months to a few years) to adopt production methods that comply with European standards (or that are recognised as equivalent thereto between the parties), by means of cooperation measures and the provision of technical assistance to help and support this transition. In the case of failure to comply at the end of this period, it can also be agreed bilaterally in the agreement to choose:

- to automatically suspend potential preferential trade concessions granted for these goods or services within the agreement;
- to apply tariffs;
- to suspend imports of goods or services that do not comply with the sustainability criteria.

- **Measure 1A3**: Making access to the market conditional upon environmental performances can also mean signing bilateral agreements on certain goods or services, much like the Voluntary Partnership Agreements (VPAs) that are part of the FLEGT regulation (*Forest Law Enforcement, Governance and Trade*). This regulation aims to fight against illegal timber trading on European soil (see Inset 3) while improving forest governance in countries that export timber to the EU. FLEGT is a concrete example of a mechanism that leverages trade to achieve its environmental objective: the trade of timber is made easier on the condition that external countries adopt environmental standards that are sufficiently high, especially with regard to traceability and forest management. Regulatory reforms within the timber-exporting countries are enabled by bilateral cooperation between these countries and the EU. The expansion of this type of bilateral agreement to other goods or services considered “sensitive” for the environment could constitute an appropriate tool for establishing a relationship of dependency between trade and the environment.

This type of measure may help, via the introduction of conditional linkages relating to the conditions of competition, to ensure a degree of environmental stringency and consumer protection regardless of the origin of the products. Moreover, it may avoid economic distortions for European operators, and produce a genuine leverage effect via trade policy.

## Part 3 - Examples of measures that could be included in a third generation agreement

### **Inset 3 - FLEGT regulation** (*Forest Law Enforcement, Governance and Trade*)

The European FLEGT regulation, which came into force in 2005<sup>6</sup>, is based on bilateral Voluntary Partnership Agreements (VPAs) signed between the European Union and timber-exporting countries. The aim of the VPAs is to improve forest governance in third-countries and to ensure that timber imported into the EU meets all the regulatory requirements of these countries. Once completed, the agreement legally commits the two parties to trade only timber and timber products that are verified as legal. Under these agreements, exporting countries develop a tool to verify the legality of timber harvesting and processing in close collaboration with the European Union.

VPAs thus clarify the terms of legality in the judicial system of the EU partner country. Additionally, in exporting developing countries, it promotes a national process of consultation and negotiation between governments to establish a sustainable forest policy, in close partnership with the private sector and civil society. This revision of the regulatory framework within these other countries is supported by a reform assistance programme funded by the European Union. With the support of the EU, partner countries have implemented legality assurance systems to establish the traceability of timber, from the issuance of logging permits in forest management plans, up to the export shipping port.

The authorities of the producing country can therefore issue “FLEGT licenses” for exported timber under the coordination of an independent observer and under the supervision of a joint implementation committee with the local EU delegation. Once the license has been issued, the duty of care applied to all timber entering the EU under the EUTR (European Union Timber Regulation) is lifted, facilitating exports from countries that have signed a VPA.

To date, the European Union has signed VPAs with Cameroon, the Central African Republic, Liberia, Ghana, the Republic of Congo, and Indonesia. These VPAs have all come into force, but only Indonesia has currently been authorised to issue FLEGT licenses (other countries still need to show that their governance system satisfies the requirements of the regulation). In the 12 months following this authorisation (which occurred on 15 November 2016), Indonesia issued around 39,000 export licenses for over a billion euros<sup>7</sup> worth of exports to the EU. Nine other VPAs are currently being negotiated (see <http://agriculture.gouv.fr/les-accords-de-partenariat-volontaires-dans-le-monde-et-leur-avancee>).

6 Council Regulation (EC) No. 2173/2005 of 20 December 2005 establishing a FLEGT licensing scheme for imports of timber into the European Community. This regulation, which came into force in January 2006, has been modified to allow the introduction of implementing powers and powers delegated to the Commission through the new regulation (EU) No. 657/2014 of the European Parliament and the Council of 15 May 2014. The Regulation (EC) No. 1024/2008 of the Commission of 17 October 2008 sets methods for the implementation of Regulation (EC) No. 2173/2005 and came into force on 6 November 2008.

7 See <http://www.euflegt.efi.int/indonesia>, site visited 02/07/2018

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### Part 3 - Examples of measures that could be included in a third generation agreement

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- **Measure 1B: Establish a relationship of dependency between the parties' environmental performance and tariff preferences**

An automatic dependency relationship between tariff dismantling and the environmental performance of the parties to a trade agreement can also be introduced by using one or several variables that reflect this “environmental performance”. Compliance with nationally determined contributions (NDCs) submitted under the Paris Agreement could be a conceivable example of a variable that enables performance monitoring. NDCs indeed propose future trajectories for greenhouse gas emissions, which are measurable and measured as part of the national communications required by the UNFCCC (United Nations Framework Convention on Climate Change).

This dependency relationship could therefore be introduced with the following standard clause: if, a certain number of years after the trade agreement comes into force, the greenhouse gas emissions inventory (which has been reported to the UNFCCC) exceeds the trajectory (NDC) by more than a given level (previously agreed between the parties), this could result in (more or less) automatic suspension or restructuring of tariff dismantling.

Contrary to what is sometimes claimed by critics of such measures, doing this would not be a matter of “making the Paris Agreement binding” (compliance with NDCs is not legally binding in the Paris Agreement). Above all, it would be about establishing a reciprocal commitment (binding for both the EU and its trade partner) with a specific trading partner during negotiations (and therefore outside of the UNFCCC framework), which aims to make tariff dismantling conditional upon compliance with the NDC, involving only those two parties (the EU and this same partner). This commitment would therefore only oblige the trading parties to and its scope would be limited to the measures set out in the trade agreement.

- **Measure 1C: Design an enforcement system: the example of yellow and red cards used by the EU for the import of seafood products**

Measures 1A and 1B provide for the creation of an enforcement system likely to activate this trade-environmental performance relationship for the duration of the agreement. At a European level, IUU Regulation No. 1005/2008 on unreported, unregulated, illegal fishing allows, following a process of dialogue, to sanction with a “yellow card” third countries that refuse to cooperate in the fight against illegal fishing. On receipt of this yellow card, the country targeted has six months to undertake the necessary reforms, failing which it will receive a “red card”, synonymous with a provisional ban on imports of its fishery products covered by the Regulation.. A similar mechanism could be considered in order to implement measures 1A or 1B.

### MEASURE 2: PROGRESS TOWARDS CARBON NEUTRAL TRADE AGREEMENTS

In accordance with France's objective of carbon neutrality by 2050 (climate plan), which concerns the entire economy, and the EU's future roadmap for achieving carbon neutrality, it seems coherent for trade policy to "do its part" in the effort to reduce greenhouse gas emissions. At the very least, it must not make the task more difficult. Signing "carbon neutral" or even better trade agreements, helping to reduce greenhouse gas emissions for all parties concerned (negative or zero carbon footprint) would considerably strengthen the legitimacy and interest of pursuing the momentum of trade openness in the context of implementing the Paris Agreement. However, measuring the carbon footprint of a trade agreement remains a very complex exercise given the many cascading effects likely to occur in a globalised economy.

With this in mind, this effort could, as a first step, aim to offset the rise in greenhouse gas emissions resulting from the increase in freight transport flows (road, sea, air) between the two parties. Consideration could therefore be given to accurately measuring said emissions and implementing measures to avoid, reduce or simply offset this increase in emissions.

### MEASURE 3: INTRODUCING BINDING ENVIRONMENTAL MEASURES

In order to introduce effectively binding environmental measures into free trade agreements, two main avenues can be explored simultaneously:

- ***Measure 3A: Make the trade and sustainable development chapter binding***

The second generation agreements currently negotiated by the European Union systematically include a chapter on trade and sustainable development. However, it is currently one of the only ones among all of the chapters of European free trade agreements, not to be subject to a dispute settlement mechanism that could lead to trade sanctions. It is therefore not binding.

France has been in favour of subjecting this chapter to the agreement's generic dispute settlement mechanism for several years. This would open up the possibility to impose sanctions, as a last resort, in case of non-compliance with measures related to sustainable development.

Unfortunately, at the European level, France still remains alone on this subject, and there is a great risk that the trade and sustainable development chapter will never become binding. This measure presents the two following drawbacks:

- Some of the measures in this chapter (see Inset 1), as currently written in the European Union's FTAs, are very broad. This poses a question of technical feasibility to show that one of the countries is not compliant. It is not easy, for example, to legally demonstrate that a state refuses to cooperate with the European Union on climate change, or that a state has not implemented effective measures to combat trade in endangered species.

- Making this chapter binding would also require consideration of the conditions for the admissibility of complaints reporting a breach of sustainable development dispositions. Today, the



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### Part 3 - Examples of measures that could be included in a third generation agreement

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North American agreement model incorporates a chapter on trade and sustainable development that is subject to the agreement's general dispute settlement mechanism. However, for a complaint to be admissible by the dispute resolution panel, it must be proven that failure to comply with measures related to this chapter undermines the conditions for balanced competition and causes quantifiable commercial prejudice to the producers of one of the parties to the agreement. The demonstration and quantification of this relationship is complex, if not impossible, which prevents this mechanism from being effective. Such is the well-known case filed by the United States (the complainants) against Guatemala<sup>8</sup> (2014 - 2017). The United States, unable to demonstrate this relationship, were dismissed, although a breach of the social measures of the CAFTA-DR agreement was recorded by the dispute resolution panel. However, a proven breach of these measures should, be subject to trade sanctions, whether it causes commercial prejudice or not.

- ***Measure 3B: Include clauses related to sustainable development beyond the chapters exclusively dedicated to this topic***

The inclusion of clauses related to sustainable development in the other chapters of the agreement (government procurement, energy, investment, non-tariff barriers, regulatory cooperation, etc.) may help to strengthen the relationship between trade agreements and sustainable development. In other chapters of the agreement, these measures may indeed be subject to the agreement's general dispute settlement mechanism and would therefore offer the advantage of being better targeted than the current measures.

#### **MEASURE 4: MAKING REGULATORY COOPERATION A TOOL FOR TIGHT ENVIRONMENTAL STRINGENCY**

As a controversial component of second generation agreements, regulatory cooperation can, however, be a useful tool for exporting European environmental and health norms and standards. With this in mind, third generation trade agreements should require that such cooperation may only be achieved on the basis of the best environmental offer, when its identification is unambiguous. Such an approach would contribute to the elimination of non-tariff barriers while ensuring a high level of protection for European consumers.

This would additionally require ensuring:

- Good collaboration between the relevant environmental institutions throughout the cooperation process;
- Transparency of the regulatory cooperation forum;
- A good balance in the civil society stakeholders consulted within the framework of regulatory cooperation (private sector, local and regional governments, NGOs, etc.).

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8 Report from the sample group accessible via the following link: [https://www.trade.gov/industry/tas/Guatemala%20%20%E2%80%93%20Obligations%20Under%20Article%2016-2-1\(a\)%20of%20the%20CAFTA-DR%20%20June%2014%202017.pdf](https://www.trade.gov/industry/tas/Guatemala%20%20%E2%80%93%20Obligations%20Under%20Article%2016-2-1(a)%20of%20the%20CAFTA-DR%20%20June%2014%202017.pdf)

### **MEASURE 5: TRANSPARENCY AND GOVERNANCE OF THE DRAWING UP OF NEGOTIATING DIRECTIVES AND THE NEGOTIATIONS THEMSELVES**

The drawing up of negotiating directives and the negotiation of current trade deals are discussed exclusively in the “trade sector” (committee of trade policies, foreign affairs council) at the European level. Yet, in view of all the economic sectors affected, it seems essential to establish closer collaboration between the environmental and sectoral components of the European Union institutions (the various Council formations and the European Parliament’s Committees) and the various ministries of the Member States for future negotiations.

### **MEASURE 6: INTRODUCING MEASURES AIMING TO BAN FOSSIL FUEL SUBSIDIES**

As trade-distorting sources and significant obstacles to energy transition, fossil fuel subsidies should be subject to common definitions between parties to a trade agreement, along with binding measures to phase them out.

### **MEASURE 7: INTRODUCTION OF NEW METRICS TO HELP MEASURE THE ENVIRONMENTAL IMPACT OF A FREE TRADE AGREEMENT**

In addition to the carbon footprint, setting sustainability objectives expressed with other metrics such as the material footprint, water footprint or ecological footprint could help to minimise the impact of increased trade on the environment. Before introducing them, the international methodological norms and standards should be consolidated.

For the past 20 years or so, the idea that the environmental impact of a good or a service should be attributed to final consumers (and by extension to consumers from the same territory) and not to producers has been promoted, initially through the development of the Ecological Footprint (EF). One of the main characteristics of the EF is to help combine different types of environmental effects into a single metric (global hectare) and to facilitate communication via this general approach. Nevertheless, it seems much more fair and relevant to approach major environmental issues (climate, energy, resources, biodiversity, water) separately via dedicated consumption related footprint indicators.

The carbon footprint methodology relies on National Accounts input-output tables combined with physical flow accounts, and helps to allocate the environmental impact (in this instance, greenhouse gas emissions) of different goods and services (including imported goods) between different final consumption sectors. A national carbon footprint is thus calculated each year to complement the territorial approach. The same approach helps to calculate a “material” footprint by calculating the impact of a country final consumption on resource consumption, as well as

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those extracted from the country and those indirectly mobilised outside its borders to produce and transport imported products.

The use of environmental footprints has therefore become widespread (see water footprint, at the instigation of the Water Footprint Network; biodiversity footprint, currently promoted by CDC-Biodiversité) and addresses other ecological issues by integrating the specific impact of imports in measuring consumption and degradation of certain resources by the goods and services consumed in France.

The evaluation of international agreements according to their footprints must necessarily be carried out through modelling (prospective scenarios), which makes it possible to vary trade economic data (imports, exports) and data on the economic structures of the country concerned, while using environmental data in relation to these footprints.

### **MEASURE 8: CONSOLIDATING THE STANDARD FRAMEWORK FOR CARRYING OUT STUDIES ON THE IMPACT OF TRADE AGREEMENTS**

The development of new metrics as detailed above would help to enrich the studies on the environmental consequences of these trade deals, conducted both:

- Ahead of the end of the negotiations (*ex ante*);
- Once they come into force (provisionally or definitively) to ensure that their implementation is monitored (*ex post*).

## **Conclusion**

Called into question by a section of civil society, disrupted by protectionist temptations and threats of trade wars, the entire European trade system is now at a crossroads, facing multiple challenges.

This moment could be considered by the European Union as a unique opportunity to modernise its trade policy in order to make it consistent with its environmental objectives and, even better, to promote their achievement. At stake is the legitimacy of European free trade and its *raison d'être*: the well-being of the populations.

However, there is still a long way to go to achieve this ambitious objective. Experience shows that France will not be able to succeed on its own. It will need the full support of its European counterparts to move in this direction and to succeed in negotiating third generation trade agreements.

# Appendix

Extracts from recent speeches and statements made by the President  
of the French Republic



- **Speech on Europe at the Sorbonne on 26 September 2017**

“Simple, efficient, protective: the single market must once again become a space of convergence rather than competition. The same goes for trade policy, which is its external mirror. I hear the ambitions put forward by some, but I say to them: 'Take heed – I am willing to follow you, but on the condition that this trade policy be deeply renewed, deeply changed. I don't want new trade discussions with yesterday's rules, those that have driven us to the absurd situations that we have today in the agreement between Europe and Canada". We need transparency in the negotiation and implementation of trade agreements. We need social and environmental stringency in our trade debates.”

- **Speech at the États Généraux de l'Alimentation (French National Food Conference) in Rungis on 11 October 2017**

“I also wish to strengthen the requirements on production methods more widely in trade agreements. [...] I am in favour of fair and free trade, which helps to preserve everyone's interests, and which corresponds to our own objectives and our own equilibrium. I am in favour of trade rules being made more transparent and more democratic, for that matter. I have made clear commitments to this end, and have specified as such when presenting the French initiative for Europe.”

- **Speech at COP23 on 15 November 2017**

“The third avenue in which we need to move forward on a European level is the integration of environmental objectives into our trade policy. If we want to advance in a credible way, we must strengthen our investments, strengthen the transformation of our industrial sectors to be more compliant with these environmental objectives, but it is also necessary for us, when negotiating, to integrate this duly noted environmental counterpart and refrain from negotiating agreements with countries that do not play by the rules or that are less ambitious than we are, as this will lower our collective ambitions.”

- **Letter to Jean-Claude Juncker, President of the European Commission, on the subject of Mercosur on 15 November 2017**

“I have highlighted our desire to strengthen our trade policy in order for it to raise international standards, especially socially and environmentally, and so that trade is beneficial to everyone. Trade agreements constitute an opportunity to reach these objectives. [...] In addition, the trade negotiations with Mercosur must pay particular attention to environmental and health requirements. The EU's recent trade agreements suffer from ambitions that are too low in these areas; although they are supposed to raise international standards, it is suspected that they lower the bar for domestic regulations. I would like for trade agreements to no longer be considered as a threat to environmental or ecological policies, so that we can instead leverage trade openness to bring our trade partners up to the same level of requirement that we impose on our internal market.”

- **Speech at the World Economic Forum in Davos on 24 January 2018**

“Even in my country, if I do not restore meaning to globalisation, if I cannot explain to the people that it is good for them and that it can help with everyday problems, and that they have a place in it, in five years, in 10 years, in 15 years, these people will be nationalists, extremists, and those who suggest leaving this system behind will win, and this is true for each country! [...] We must not enter into trade agreements when they do not comply with our common climate, health, fiscal, and social standards. We should no longer have discussions on certain subjects with powers if they do not meet our criteria. We must have a consistent agenda in terms of public assets. This will not happen overnight, but we must make all our inconsistencies transparent, which is what we are progressively doing rather than continuing to diverge and strengthen them.”

- **Speech at the Promoting Sustainable Finance conference in Brussels on 22 March 2018**

“The second major choice we will have to make, and which must be consistent with our discussion for the day, is on our trade policy. In times when our collective trade policy is threatened by tendencies towards unilateralism, we must first of all constantly reaffirm that we want to follow the rules that we have set for ourselves and that this is the basis of multilateralism and the rule of law.

[...] But in the agreements that we have negotiated, in the trade policy that we are developing, we cannot continue to pursue objectives that are sometimes contrary to our own policy, within our own borders, because by doing so, we discourage the economic stakeholders and investors who we are asking to make an effort.

[...] This makes sense! We have made rules for ourselves, we even go beyond them at times, we request this of our stakeholders. So, why would we go and sign trade agreements that deepen the multilateral framework and that go beyond what the WTO stipulates with powers who declare that they do not want to implement the Paris Agreement? We would be foolish to do so! First of all, I would not be able to explain this to these territories, to whom we would have to explain that it will be necessary to close a coal-fired power station because it is not good and doesn't comply with our climate agreements if, on the other hand, I authorise access to certain goods coming from a country that has said that within its borders, this isn't such a big issue.

[...] Common goods are made to be shared willingly and within the given constraints. So, let's not have this policy of weakness, which, for the European Union, consists of always considering itself to be subject to rules but that it is somehow too marginal on a worldwide scale to be able to put them forward. We must take on climate leadership, through our trade policy. I'm in favour if it, I am for having an ambitious trade policy, but it must be consistent with our climate objectives, and with our social objectives, for that matter. And it must be a means, not of progressively becoming outsiders in a world that is breaking apart, where the authoritarian powers – with the fragmentation of multilateralism – are regaining their strength, but once again of becoming those

who help to convey the rules, to share the European model that we have progressively constructed decade after decade, and that is the model that, today, most clearly integrates the union of our interests and the planet's common good. And therefore, on this point, I think that our declarations would be in vain if at the same time we were not fully consistent on our budget and our trade policy.”

- **Opening speech at the OECD Ministerial Council Meeting on 30 May 2018**

“We must use trade policy as a lever to move forward with our environmental objectives, otherwise we will always be subject to practices that are once again not cooperative. We will always collectively be drawn into commitments that we make for ourselves, our industries, our sectors and then trade discussions with partners that would not want to make the same efforts regardless of additional commitments they make internationally, because many of them have signed and ratified the Paris Agreement. This is why I would especially like us to adopt standards for production methods that are environmentally friendly and that guarantee sustainable development. I would like the European Union to set an example by including compliance with the Paris Agreement in all of its trade agreements and by guaranteeing compliance with environmental standards through sanctioning mechanisms. This is the only way to be fully consistent, it's the only way to collectively accelerate in what we must do for ourselves and our children. And again, this isn't a luxury to be put off for tomorrow precisely because we are already experiencing, in several parts of the world, the serious consequences of global warming, which we are tackling too slowly or hesitantly.”

- **Speech at the 73<sup>rd</sup> United Nations General Assembly on 25 September 2018**

“Let us comply with the commitments we have made. Let us no longer sign trade agreements with powers that do not comply with the Paris Agreement. Let us ensure that our trade commitments integrate our environmental and social constraints. [...] France will continue to exercise leadership in this fight along with all those who will join us.”



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The CETA controversy and the difficult implementation of the “CETA action plan” reveals that the current model of second generation agreements does not support France's ambition for a deep renewal of the European trade policy. Consequently, France could propose a new concept of “third generation” agreements to help reconcile environmental and trade policies and to leverage trade to reach environmental objectives.

To do so, trade must be thought of as a means of improving the well-being of populations and not as an end in itself.

The issue is at least threefold: (1) making trade policy consistent with major environmental objectives (climate, biodiversity, air quality, etc.); (2) reconciling citizens with European trade policy; and (3) encouraging the implementation of multilateral environmental agreements by intrinsically linking trade concessions with the achievement of their objectives.



**International Trade and the Environment - Towards 3<sup>rd</sup> generation trade agreements?**



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