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TREADING THE ENVIRONMENT- TRADE NEXUS: COHERENCE OF TRADE AGREEMENTS AND WTO LAW WITH THE EUROPEAN GREEN DEAL

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The views expressed in the report do not necessarily express those of BEUC
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EXECUTIVE SUMMARY

This Report analyses the coherence between the European Union's trade policy and the European Green Deal (EGD).

The European Union (EU) is faced with two fundamental developments. On the one hand, the impacts of consumption and production globally are exceeding the environmental carrying capacities of our planet on multiple fronts from climate change to biodiversity loss. On the other hand, the current paradigm of a global economy that increases economic prosperity through an open, liberal trading system is under pressure. International trade flows are increasingly intertwined with geopolitical tensions that are reflected in the partial paralysis of the World Trade Organisation (the WTO) and an increase in unilateral measures and outright protectionist policies.

The developments on the environment and trade are closely interconnected. Global value chains underpin a significant share of the environmental and social impacts that Western consumer societies cause. Addressing environmental concerns outside the EU's borders driven by EU consumption adds fuel to these tensions. The objective of this Report is to analyse the coherence of EU policies at the nexus between environment and trade. The Report was commissioned by BEUC - the European Consumer Organisation to assess specifically the coherence of the EU's bilateral trade agreements and key WTO Agreements with the European Green Deal (EGD), while excluding the reverse direction of the EGD's coherence with trade policy.

The EGD aims at addressing environmental problems, transforming the EU into a society that is prosperous, sustainable, inclusive, and climate neutral by 2050. The EGD requires all EU policy areas to contribute to its objectives. EU trade policy is one of the fields that implements the EGD externally. Environmental sustainability has indeed been acknowledged to different degrees in the EU's bilateral and multilateral trade instruments. The EU's 2021 trade policy review 'Open, Sustainable and Assertive Trade Policy' incorporates environmental sustainability as a key objective. Sustainable development is a central principle underlying the WTO agreements. But to what extent are the EU's trade instruments and the WTO law coherent with the EGD upon closer look? Coherent laws and policies positively support one another to realize a set of common principles or rationale.

The EGD covers a very wide range of policies. This Report focuses on three key environmental objectives advanced by the EGD as case studies: (1) Sustainable use of natural resources: reducing the environmental impacts of batteries through recycled-content requirements in the EU eco-design policy; (2) Public health: combatting resistance to antimicrobials in EU food policy; (3) Animal welfare: protecting the treatment of animals in EU food policy. The cases were selected using the following criteria: the relevance of the issue area for the EU consumers; the existence of recent or upcoming EGD-based legislation on the topic; a close link to EU trade agreements; and relevance from the viewpoint of WTO dispute settlement. The Report also excluded policy measures such as the EU's Carbon Border Adjustment Mechanism (CBAM) or the Deforestation Regulation, which are already researched extensively.

Coherence of the EU Trade Agreements with the EGD

Environmental sustainability is increasingly a part of the EU trade policy discourse. More and more environmental considerations have been integrated in the EU trade strategies between 1996 and 2021. Environmental objectives are reflected in trade instruments in the sustainability impact assessments and specific design elements of trade agreements, such as the chapters on Trade and Sustainable Development, or Sustainable Food Systems. These developments are to a large extent coherent with the objectives of the EGD.

The question is, however, whether these developments go far enough. Four main shortcomings on the coherence of trade agreements with the environmental objectives of the EGD were identified:

- Coherence is mostly weak. Environmental impact assessments are conducted before and during negotiations and evaluate their implementation, but the assessments are not applied consistently to all trade agreements. It remains unclear how their results are taken into account. The assessments' effectiveness and legitimacy therefore remain low. There is also much room for improvement in the trade agreements' design. Their level of ambition, precision, and obligatory nature are weak. The Trade Agreements do not increase, and may not even adopt, the EGD's level of ambition. Trade Agreement provisions that require the parties to follow international standards can also lead to incoherence on the EU side, because they can prevent the EU from following a more ambitious EGD requirement. This could be the case on the phase-out of antibiotics as growth promoters without a specific timeline, for example.
- As a so-called net importer of environmental impacts, it is particularly important for the EU to address its footprint beyond the EU's borders. The challenge is how to do this in a way that is coherent with the EGD's overall objective: the burden should not fall on other countries nor lead to unfair extraterritorial policies towards the EU's trading partners.
- Merely increasing the trade agreements' legal hardness, in particular enforceability and sanctions, may lead to an illusion that the agreements are effective in reaching the EGD's objectives. Harder Trade and Sustainable Development Chapters may namely erode the legitimacy and slow down the conclusion of trade agreements, leading to incoherence.
- If trade agreements are considered solely from the viewpoint of increasing trade, they could not include provisions that actually decrease or even ban the trade of certain goods. TSD chapters may in other words be structurally ill-suited for decreasing trade in environmentally damaging products. On the positive side, the adding of environmental considerations into trade agreements may shift the supply and demand towards more environmental products. This would make the agreements more coherent with the EGD. Further, TSD Chapters that allow both parties to maintain their chosen level of environmental protection are coherent with the aim of the EU to prohibit non-compliant imports. They are however incoherent from an extraterritorial viewpoint, because they create a tension with the parallel right of the partner country to maintain its lower level of protection.

Coherence between the EGD and the WTO Rules

The Report also analyses the coherence between the WTO law and the EGD measures. The primary objective of WTO law is to maintain open and non-discriminatory global trade, and in some cases also to promote access to markets. The analysed EGD measures seek to apply environmental requirements on both domestic and imported products. These requirements also concern environmental impacts in the product life cycle that take place outside the EU's boundaries. The Report analyses the extent to which WTO law is coherent with such EGD requirements that govern the EU's environmental footprint outside its jurisdiction.

- In most of the instances analysed in the case studies, the WTO law is coherent with the EGD. A general finding of coherence of the WTO law may be more unexpected than in the case of trade agreements, because WTO dispute settlement law is usually used to challenge environmental law. In each of the three case studies, there were instances of weak coherence or of incoherence.
- The case study on the recycled content requirements on batteries presented issues of incoherence typical to circular economy policies. These may combine legitimate regulatory objectives of environmental protection with illegitimate regulatory objectives, especially those on the promotion of industrial policy. WTO law would require the EU to distinguish and to substantiate its claimed environmental objectives. WTO law would therefore be likely incoherent with measures that are aimed at achieving a more 'circular economy' without being specific about the environmental contents of that objective. The EU would have the burden of providing the evidence that the proposed measure achieves its intended environmental objective.
- WTO law does not clearly define to what extent it delimits, and is therefore incoherent with, the extraterritorial dimensions of the EGD. Measures in the EGD that look inward into effects in the EU are strongly coherent with WTO law. However, for outward-looking measures that do not have any effect on the local environment of the EU, the interpretation of the WTO on the issue remains open. This poses a challenge for regulating the environmental footprint of the EU's consumption abroad. Stringent EU requirements affect particularly the smaller and less wealthy countries, charging them with the burden of compliance. The EU may thus be susceptible to being accused of violating the principles of common-but-differentiated responsibilities, i.e., Principle 7 of the United Nations Rio Declaration of 1992.
- The WTO law offers various opportunities for engaging consumers. The incorporation of consumer perspectives in a WTO analysis may hinder or strengthen coherence with EGD objectives. This will depend on whether consumer choices are coherent with the EGD's objectives; consumer behaviour may not always be rational nor environmentally sustainable. In the animal welfare example, it was visible how regulation and consumer preferences are interdependent. Environmental awareness among consumers is increasing, as is the availability of more reliable environmental information on products. It would be incoherent not to give consumer perceptions appropriate weight in the WTO law e.g., when defining if two products are 'like' and whether certain measures are 'necessary' to achieve a policy objective.

- The WTO law may create a chilling effect on the EGD in areas where the law's contents and interpretation remain uncertain. The uncertainty is mainly due to the very slow and piecemeal nature of the WTO dispute settlement process. Examples in the analysis included the uncertainties in defining a 'sufficient nexus' to the regulated environmental issue (such as conserving resources abroad), the scope of 'public morals' (such as sentiments about the caging of animals in the importing country), and the notion of 'conservation of natural resources' (as a self-standing objective or as a proxy for an environmental or some other policy objective).

Recommendations

The Report's recommendations to increase coherence can be divided into those on trade agreements, those on WTO law, and those on the structural aspects of them both.

Recommendations on the coherence of EU trade agreements with the EGD

The EU should consider improving the environmental sustainability of trade agreements on three accounts:

- (i) **Impact assessments.** The EU should ensure that all trade agreements are accompanied by impact assessments prior and during negotiations, and are evaluated after their implementation. There should be a mechanism to better integrate the insights of impact assessments into trade negotiations and a body responsible for periodically monitoring the mitigating measures and making their results public.
- (ii) **Design of sustainability provisions.** Increased ambition and precision as well as a systematic commitment of compliance with major International Environmental Agreements is to be considered. The principles of 'Do No Significant Harm' and "Common But Differentiated Responsibilities and Respective Capabilities", as well as the adaptation costs of the developing-country partners, are also to be considered. International standards are a premise, but science-based, non-discriminatory environmental grounds should justify surpassing them.
- (iii) **Reducing the environmental impacts of bilateral trade.** When establishing or updating tariff rates and quotas or liberalising trade, the EU should take the sustainability of traded products into account, encouraging trade in environmentally beneficial products and discouraging trade in the environmentally more harmful products.

Recommendations on the coherence of the WTO law with the EGD

WTO law could be improved for its coherence with environmental considerations in the below three respects via an interpretative note or protocol in the WTO Agreements, in the WTO revisions, or the current WTO dispute settlement body, including the "Multiparty Interim Appeal Arbitration Arrangement" (MPIA). The European Commission should pursue a bold and active litigation and negotiation agenda in the WTO. WTO law that is environmentally progressive while rigorous on protectionism would be coherent with the EGD.

- (i) **Legitimate regulatory objective.** The WTO should clarify how it addresses an issue typical to Circular Economy policies in the EGD: the pursuit of multiple objectives that

may also include non-legitimate objectives, and the notion of ‘conservation of natural resources’.

- (ii) **Consumer preferences.** The appropriate consideration of consumer preferences would make WTO decision-making procedures more coherent with the EGD. The scope of ‘public morality’ as a ground of justification also deserves clarification.
- (iii) **Extraterritoriality.** For the EU to fulfil its responsibility for the environmental impacts of its activities outside of EU borders, the WTO should clarify which types of outward extraterritorial impacts on the environment a country can legitimately address through unilateral measures.

Structural recommendations for coherence

- (i) **Consider ‘Sustainability and Trade Agreements’ (STAs).** The EU should review the structural limitations of its trade agreements in promoting a sustainability agenda. The EU thus should assess the option of shifting the design of its trade agreements towards STAs to reduce trade in unsustainable products and to promote environmentally more sustainable products without engaging in discriminatory or protectionist measures.
- (ii) **Persistent efforts for a multilateral dispute settlement.** The EU should continue to work towards a balanced, legitimate, and timely international resolution of disputes based on the rule of law. Supporting research projects and experiments such as the MPIA would contribute to that.
- (iii) **Collection and utilisation of comprehensive, up-to-date data on environmental impacts.** Such data is important for all three fields – trade agreements, WTO law and the EGD – and has potential for increasing coherence between the three fields. To have an impact, data must however also be actively integrated and used after its collection.

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