

HOW EU'S COMMERCIAL POLICY PROMOTES SUSTAINABLE DEVELOPMENT AND ENVIRONMENTAL PROTECTION IN DEVELOPING COUNTRIES: A FOCUS ON THE CHAPTER ON TRADE AND SUSTAINABLE DEVELOPMENT OF THE EU-VIETNAM FREE TRADE AGREEMENT

Federica Iorio¹

INTRODUCTION

The purpose of the present paper is to draft a short but critical analysis of the text of the EU-Vietnam FTA Chapter on Trade and Sustainable Development ("TSD Chapter") proposed by the Commission at the beginning of 2016².

The 1987 Burtland Report defines sustainable development as: "development that meets the needs of the present without compromising the ability of future generations to meet their own needs."³ The notion of Sustainable Development was further elaborated in a three-fold concept that embraces⁴:

- Economic development;
- Environmental protection;
- Labour Protection.

After the entry into force of the Treaty of Lisbon, the promotion of Sustainable Development with the aim of eradicating poverty has become one of the objectives of EU's external policy⁵. Concerning the environmental protection pillar of the Sustainable Development, the EU is further required to take action to help the improvement of the quality of the environment and the sustainable use of natural resources⁶.

¹ L.L.M Candidate

² This is the latest proposal available. However, since negotiations are still ongoing there are no guarantees that the Chapter will not be amended.

³ World Commission on Environment and Development, *Report of the World Commission on Environment and Development: Our Common Future*, 4 August 1987, p. 16.

⁴ United Nations, General Assembly, *Resolution A/RES/60/1*, United Nations, New York, 25 October 2005, pp. 11 - 12. However, this definition was already provided by the general literature and official document well before.

⁵ Art. 21 (2) (d) and (f), Consolidated Version of the Treaty of the European Union (TEU), 2010, O.J.C 83/47, 30 March 2010. On the point see E. MORGERA, 2012 "Ambition, complexity and legitimacy or pursuing mutual supportiveness through the EU's external environmental action", *University of Edinburgh School of Law Research Paper*, available at www.research.ed.ac.uk/portal/files/16211429/Ambition_Complexity_and_Legitimacy_of_Pursuing_Mutual_Supportiveness_through_the_EU_s_External_Environmental_Action.pdf, retrieved on 31 March 2016.

⁶ Art. 21 (3) TUE, with reference to Art. 21 (2) (d) TEU, *supra* note 5.

In addition to the obligations under primary law, the EU and its Member States are also internationally committed to achieve the UN Sustainable Development Goals (“SDGs”)⁷.

The SDGs officially came into force on 1 January 2016, but the EU’s strategy to achieve the 2030 Agenda for Development is still unclear. In the context of development, it is widely accepted that trade is among the main drivers of growth. As such, the contribution that a more sustainable commerce can give to the achievement of the SDGs must not be underestimated. The WTO agreement, in primis, acknowledges the strong nexus between trade and Sustainable Development⁸.

Consistently with the WTO legal framework, since 2002, the promotion of the trade of environmental and social friendly products has become one of the priorities of EU’s commercial strategy to foster Sustainable Development in developing countries⁹.

In 2015, the Commission confirmed that the EU would continue “the systematic inclusion of sustainable development provisions, including labour and environmental aspects, in all its trade agreements, both with developed and developing partners.”¹⁰

The EU-Vietnam FTA is not innovative in this matter. Already in the Preamble, the Parties state their determination “to strengthen their economic, trade, and investment relations in accordance with the objective of sustainable development, in its economic, social and environmental dimensions”¹¹.

The EU-Vietnam FTA also features a specific Chapter entirely dedicated to Sustainable Development (“TSD Chapter”)¹². Although the inclusion of a TSD Chapter is common among the FTAs concluded by the EU, the Commission said that the EU-Vietnam FTA is “*the most*

⁷ United Nations, General Assembly, *Resolution A/RES/70/1*, United Nations, New York, 25 September 2015. UN Resolution of the General Assembly.

⁸ Preamble to the WTO Agreement: Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, the Parties commit to support “*the optimal use of the world's resources in accordance with the objective of sustainable development.*”

⁹ Communication from the Commission of the European Union of 21 February 2002, *towards a global partnership for sustainable development*, COM (2002) 82 final – Not published in the O. J. p. 7. Later on, the same strategy was renewed in 2005, in a Joint Statement by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission on European Union Development Policy [2006] OJ C46/1.

¹⁰ Communication from the Commission of the European Union of 5 February 2015, *A Global Partnership for Poverty Eradication and Sustainable Development after 2015*, COM(2015) 44 final – Not published in the O. J. p. 10.

¹¹ See Art. 2 (2) of the Chapter.

¹² The FTA is still under negotiations This is the latest version of the FTA available, although it is still not certain that the text will not be further amended.

*ambitious and comprehensive FTA that the EU has ever concluded with a developing country, with regard to sustainable development objectives*¹³.

It is therefore legitimate to wonder whether such an agreement is effectively capable of giving a significant contribution to the Sustainable Development of Vietnam. This study will try to give an answer to this query. Given the limited amount of space allowed, the analysis will exclusively target the environmental measures provided in the TSD Chapter, although the latter features also many provisions on labour. The paper will be divided into two parts. The first part will focus on the substantive provisions provided by TSD Chapter (Part I), while the second part will discuss the mechanism for the monitoring and enforcement (Part II). It will be argued that, although some of the clauses create clear and legally binding obligations, the lack of an effective enforcement mechanism undermines the capacity of the FTA to contribute to the sustainable development of Vietnam (Part III).

THE SUBSTANTIVE OBLIGATIONS PROVIDED BY THE TSD CHAPTER

The scrutiny of the EU-Vietnam FTA TSD Chapter will focus on the analysis of what we consider the most significant substantial provisions, namely:

- “standstill” clause, that prohibits the Parties to an agreement from changing the current legal framework in a manner that would undermine the accomplishments of the goals of the agreement (sub-section 1);
- *Renvoi* clauses (sub-section 0) requiring the Parties to implement their pre-existing commitments under multilateral environmental agreements (MEAs)¹⁴.

¹³ Staff Working Paper from the Commission of the European Union of 26 January 2016, SWD(2016), 21 final, *Human Rights and Sustainable Development in the EU-Vietnam Relations with specific regard to the EU-Vietnam Free Trade Agreement* – Not published in the O. J. p. 7.

¹⁴ These expressions are borrowed from. A. J. CROQUET, “The Climate Change Normes under the EU-Korea Free Trade Agreement: between soft and hard law”, in D. GERAETS, B. NATENS, J. WOUTERS (Eds.), *Global Governance Through Trade: EU Policies and Approaches*, Cheltenham, UK : Edward Elgar Publishing, 2015, pp. 124 ff.

THE STANDSTILL CLAUSE

Art. 10 of the TSD Chapter requires the Parties not to lower their standards of environmental protection to encourage trade or investment, as this would be “*detrimental to the objectives of the Chapter*”¹⁵.

Although the presence of such a provision may seem superfluous in the context of a Chapter which aims to increase the level of environmental protection, the unbalance between the Parties in terms of economic development makes it necessary to spell out this obligation. Indeed, in a context of a globalized economy, it is a common practice for developing countries to water down their domestic environmental regulations to lower production costs and thus attract foreign investors to settle in their territories¹⁶. To put an end to this tragic race to the bottom, the EU is using its significant economic influence¹⁷ to oblige Vietnam to commit to uphold its existing standards. Although this effort is certainly appreciated, it must be noticed that often times the environmental problems in developing countries do not stem from the absence of domestic regulations, but rather from the persistent failure of developing countries to ensure the compliance with their own laws. In this respect, it would have been desirable to impose a requirement of effective implementation of the environmental standards, rather than a simple obligation of upholding the current levels of protection.

THE RENVOI CLAUSES

In line with EU’s commercial practice post mid-2000s¹⁸, the TSD Chapter of the EU-Vietnam FTA opens by recognizing the Parties’ commitment to implement and respect MEAs¹⁹. There are, at the very least, two reasons that explain why the EU has adopted this strategy. First, the EU “*considers that the rules-based multilateral trading system plays an invaluable role in creating a*

¹⁵ Art. 10 (1) of the Chapter.

¹⁶ On the point, extensively B. DONG, J. GONG, X. ZHAO, 2012, “FDI and Environmental Standard: Pollution Haven or a Race to the Bottom?”, *Journal of Regulatory Economics*, 41(2), pp. 216-237 *contra* E. MANDERSON, R. KNELLER, , 2012, “Environmental Regulations, Outward FDI and Heterogeneous Firms: Are Countries Used as Pollution Havens?” *Environmental and Resource Economics*, 51(39), pp. 317-352.

¹⁷ Just to give an example, the EU has contributed with € 131 060 from May 2013 to December 2014 to the implementation of ODA 2014-2020 in Vietnam, source https://ec.europa.eu/europeaid/projects/support-programming-oda-2014-2020-vietnam-sector-studies-and-facilitation-consultation_en, retrieved on 6 April 2016.

¹⁸ S. JINNAH, E. MORGERA, 2013 “Environmental Provisions in American and EU Free Trade Agreements: A Preliminary Comparison and Research Agenda”, *Review of European Community and International Environmental Law*, 22 (3), p. 332.

¹⁹ Art. 1 (1) of the Chapter.

*level playing field for all countries, notably developing ones*²⁰. Second, certain environmental problems – such as the loss of biological diversity or the climate change – are better dealt within a multilateral rather than bilateral context²¹. The *renvoi* clauses may be in turn distinguished into two categories:

- The provisions that use a MAEs' clauses as benchmarks to indirectly oblige the Parties to implement multilateral agreements (Sub- section 0); and
- The provisions that explicitly require the Parties to comply and implement the MEAs to which they are party (Sub-section 0).

INDIRECT *RENVOI* TO THE IMPLEMENTATION OF MEAS

In line with the Parties general commitment to implement and respect MEAs²², the Parties' are free to set their own standards of environmental protection, as long as they act "*consistently with the principles of internationally recognised standards or the agreements referred to in Article 4*"²³.

This provision contains, at the same time, some positive and negative elements. On the one hand, the decision to use MEAs' provisions as benchmarks to assess the suitability of the Parties' domestic legislation to foster Sustainable Development and Environmental protection ensures coherence between EU's bilateral and multilateral efforts and, thus, multiplies the chances of success.

On the other hand, it is regrettable to notice that the benchmark is set only with reference to the fixed list of MEAs featured in Art. 4. Since it is foreseeable that, in a few years, the current MEAs will be replaced by more robust and comprehensive agreements, it would have been more appropriate to provide a mechanism allowing the TSD Chapter to keep pace with evolution of the MEAs.

²⁰ Communication, *supra note* 9, p. 9

²¹ For instance, the combat against climate change and loss of biological diversity. On the point see, more extensively, B. CHAYTOR, 2009, "Environmental Issues in Economic Partnership Agreements: Implications for Developing Countries", International Centre for Trade and Sustainable Development, Geneva, Switzerland Issues Papers, No 1, pp. 1-64.

²² Art. 1 (1) of the Chapter.

²³ Art. 2 (1).

In addition to the use of MEAs' provision as a general frame of reference for the Parties' right to regulate, each one the provisions concerning specific environmental issues promotes the compliance and application of the MEAs concluded in that specific field. Such is the case of the provision on Climate Change²⁴, on loss of Biological Diversity²⁵ and on Sustainable Management of Living Marine Resources and Aquaculture Products²⁶. These clauses, however, *de facto*, operate as a mere reminder to the Parties to live up to their multilateral obligations, but, unfortunately they hardly add any substantive value to the Parties pre-existing commitments.

The only merit they may have is that they bring these obligations under the scope of the (very ineffective) monitoring and enforcing instruments provided by the TSD Chapter²⁷ (see, *infra*, Part 0).

DIRECT *REVOI* TO THE IMPLEMENTATION OF MEAS

In addition to these indirect *renvoi* clauses, the TSD Chapter also provides for the obligation to “*effectively implement in their laws and practices the MEAs to which they are party*”²⁸. The language of this provision is extremely clear and prescriptive: the Parties are not only required to adopt and transpose in their domestic legislation international agreements, but they are under an obligation to ensure the ‘effective implementation’ of their multilateral commitments.

It is noteworthy that such obligation does not provide exceptions. Although it is appreciable to find such a serious commitment, the hard law normativity of this clause is somehow in contrast with the ‘cooperative nature’ of the TSD Chapter, which supposedly “takes into account the differences in [the Parties’] level of development”²⁹. This hardness is, in part, counterbalanced by the fact that the dispute-solving process concerning the application/interpretation of the TSD

²⁴ Art. 5 of the Chapter recalling the UNFCCC and its Kyoto Protocol.

²⁵ Art. 6 of the Chapter referring to the Convention on Biological Diversity and the Convention on International Trade in Endangered Species of Wild Fauna and Flora.

²⁶ Art. 8 of the Chapter referring to the UN Convention on the Law of Sea of 1982, the UN Agreement for the Implementation of its Provisions relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, the FAO Agreements i) to Promote Compliance with the International Conservation and Management Measures by Fishing Vessels on the High Sea and ii) on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated fishing; as well as iii) the FAO Code of Conduct for Responsible Fisheries of 1995.

²⁷ N. A. J. CROQUET, *Ibidem*, *supra* note 14, p. 132.

²⁸ Art. 4 (2) of the Chapter.

²⁹ Art. 1 (4) of the Chapter.

Chapter must give “*special attention the particular problems of the developing country Party*”³⁰ (see, *infra*, section 0).

THE MECHANISM OF MONITORING AND ENFORCEMENT PROVIDED BY THE CHAPTER

Although the general instrument for Dispute Settlement of the FTA is not accessible for disputes arising from the application of the TSD Chapter³¹, the latter provides for a three-stage institutional set-up aimed at ensuring the Parties’ compliance with their sustainable development commitments.

The Chapter, in fact, calls for:

- The creation of an Overseeing Mechanism to monitor the implementation of the TSD Chapter (Section 0);
- Government Consultations to find a solution in case of disagreement on the implementation/interpretation of the Chapter (Section 0);
- The appointment of a Panel of Experts if the Government Consultations do not reach a satisfactory outcome (Section 0).

Each one of these stages will be analysed in the following sub-sections.

THE OVERSEEING MECHANISM

The TSD Chapter requires the Parties to set-up an overseeing mechanism to screen the implementation of the Sustainable Development provisions³². To ensure a capillary control, each Party shall establish a Contact Point within its domestic administration for the purposes of implementing this Chapter³³. The monitoring process, however, is not administrated domestically but through a “Specialised Committee on Sustainable Development and Trade” (“the Committee”) composed of senior-level civil servants of both Parties. The Committee has the only obligation to meet once within the first year after the entry into force of the FTA, and “*thereafter*

³⁰ Art. 16 (3) of the Chapter.

³¹ Art. 16 (1) of the Chapter.

³² Art. 15 of the Chapter.

³³ Art. 15 (1) of the Chapter.

as necessary”³⁴, which is disappointing since it should be necessary to provide for continuous monitoring. In addition to the creation of the Committee, the TSD Chapter calls for the creation of domestic Advisory Groups³⁵ - composed of representative of economic, social and environmental stakeholders - to share their views on the implementation of the environmental provisions of the TSD Chapter. The Advisory Groups from each Party shall meet and exchange views to issue a joint report to submit to the Committee. The legal value of such report, however, is very weak, since the TSD Chapter does not even mention whether the Committee has to take it into account³⁶. Nevertheless, the joint report is released to the public³⁷ to facilitate an active participation of the civil society and environmental NGOs. The effort to enhance the involvement of civil society is certainly more than welcome, but it is not enough.

In fact, NGOs and civil society groups are not entitled to make claims against their governments, even if the report proves a systematic failure of implementation of the environmental rules by one of the Parties (and this is often the case of the developing country party).

In this respect, the Parties should have taken inspiration from some of the FTAs that the US has concluded with developing countries, which entitle citizens to make a claim against their governments if they persistently fail to implement environmental laws³⁸. Although there are criticisms about their effectiveness³⁹, these instruments may be a very efficient tool to put pressure on the national governments to ensure compliance with environmental legislations.

THE GOVERNMENT CONSULTATIONS

As already mentioned, in case of disagreement on the implementation of the TSD Chapter, the Parties cannot subject their dispute to the general mechanism for dispute settlement, but they may nevertheless have recourse to Government Consultations⁴⁰.

³⁴ Art. 15 (3) of the Chapter.

³⁵ Art. 15 (3) and (4) of the Chapter.

³⁶ Art. 15 (5) of the Chapter.

³⁷ On the linkage between the involvement of civil society and Sustainable Development, see N. BERNASCONI-OSTERWALDER, “Transparency, Participation and Accountability in International Economic Dispute Settlement”, in H. C. BUGGE, C. VOIGT (Eds.), *supra note 53*, p. 325.

³⁸ See, for example, US-Peru TPA Art. 18(8), US-Panama TPA Art. 17.8 and US-Colombia FTA Art. 18(8).

³⁹ D. COYLER “Environmental Provisions in Free Trade Agreements”, available at <http://ageconsearch.umn.edu/bitstream/123723/2/ENVIRONMENTAL%20PROVISIONS%20IN%20FREE%20TRADE%20AGREEMENTS.pdf>, accessed 5 April 2016.

⁴⁰ Art. 16 (1) of the Chapter.

To trigger this mechanism, a Party must first address a request of clarification to the Contact Point of the counterparty, explaining the nature of the problem and how it is affecting the achievement of the sustainable development objectives⁴¹. Once the consultations have started, the Parties “*shall make every attempt to arrive at a mutually satisfactory resolution of the matter*”, while giving “*special attention*” to the difficulties and interests of the developing Vietnam⁴².

This provision is of great importance as it translates into a procedural requirement the general principle of ‘common but differentiated responsibility’, according to which the States have to protect the environment on differentiated standards, set on the basis of, *inter alia*, economic development and historic contributions to pollution⁴³.

In this respect, it is disappointing to note that although it is acknowledged that Vietnam may have more difficulties to implement high environmental standards, there is no mechanism requiring the EU to help and support its developing trade partner to accomplish these goals.

On a final note, we have to remark that, although the Parties have made an effort to ensure a certain level of involvement of the civil society, the whole process still lacks transparency. While it is positive to note that Advisory Groups may be involved in the Consultations if the Parties decide to convene the Committee⁴⁴, it is unfortunate that Parties are not required to make available to the public the findings of their Consultations⁴⁵. Civil society, in fact, should be made aware if the environmental standards and regulations are not sufficiently well implemented so to make political pressure on their governments.

PANEL OF EXPERTS

Should the Government Consultations fail to reach any tangible results, the Parties may seek for the assistance of a Panel of Experts to solve their dispute. The members of the Panel are chosen from a list established by the Committee, which features experts with a consolidated experience

⁴¹ Art. 16(2) of the Chapter.

⁴² Art. 16 (3) of the Chapter.

⁴³ N. MUSTAPHER, 2008 “Rethinking the Application of the Principle of ‘Common but Differentiated Responsibilities’ in the International Climate Legal Framework, available at <http://ssrn.com/abstract=1312282>, accessed 10 April 2016.

⁴⁴ Art. 16 (4) and (5) of the Chapter.

⁴⁵ Art. 16 (6) of the Chapter.

in the field of environmental law or trade dispute settlement and give sufficient guarantees of impartiality and independency⁴⁶. In order to ensure greater impartiality, each Panel must feature nationals from both Parties and from third states⁴⁷. The Panel analyses the positions expressed by the Parties and delivers a report, which may subsequently be amended after the Parties have submitted their comments⁴⁸.

Although the system, broadly speaking, follows the model of international arbitration, the Panel's final report is completely deprived of any binding value. The Parties have to 'take into account' the Panel's final report in the future implementation of the Agreement⁴⁹, but they are not required to comply with it. Furthermore, even if the Parties fail to 'take into account' the Panel's report, the TSD Chapter does not envisage any sanctions. The issue on whether TSD Chapters should include a truly binding instrument for dispute settlement is controversial. It has been argued, for example, that the inclusion of a binding enforcing mechanism could be counterproductive and enhance the opposition to environmental obligations in developing countries⁵⁰.

However, this is not our opinion. Especially in the Vietnamese context, where the economy is steadily growing⁵¹, there is a strong risk that the industrialization process will come at the expenses of the environment. This risk can be avoided only by providing a binding mechanism of enforcement of environmental rules.

CONCLUSIONS

The purpose of the present study was to evaluate the capacity of the EU-Vietnam TSD Chapter to foster Sustainable Development and environmental protection in Vietnam. The analysis of the substantive provisions shows that the Parties' obligations are consistent with the international legal framework and that there are safeguards that Vietnam will not water down its domestic

⁴⁶ Art. 17 (4) of the Chapter.

⁴⁷ Art. 17 (3) of the Chapter.

⁴⁸ Art. 17 (8) of the Chapter.

⁴⁹ Art. 17 (9) of the Chapter.

⁵⁰ R. ZVELC, "Environmental Integration in EU Trade Policy: the General System of Preferences, Trade, Sustainability Impact Assessment and Free Trade Agreements", in E. MORGERA (Ed.) *The External Environmental Policy of the European Union*, Cambridge University Press: Cambridge, 2012, p. 201-202.

⁵¹ N. D. T. UYEN, "Vietnam's Economy Is an Emerging Market Standout", available at www.bloomberg.com/news/articles/2016-01-18/vietnam-growth-makes-it-emerging-market-goo-in-shaky-world, 28 January 2016, accessed 8 April 2016.

standards of protection to attract trade and investment from the EU. However, there is still much room for improvement.

First, in the absence of an instrument ensuring that the Parties' obligations will evolve *pari passu* with the development of MEAs, there is a serious risk that, in a few years, the commitments under the TSD Chapter will no longer be in line with the global environmental goals.

Second, although the Parties acknowledge their different levels of development, the Chapter does not provide for a transitional mechanism to allow Vietnam to bring its legislative framework in line with the international standards more gradually, nor obliges the EU to provide assistance in this transition. If the EU wants to be a leader in the promotion environmental protection it has to actively help its developing trade partners to achieve their sustainable goals.

Third, the environmental provisions tackling specific problems such as Climate Change and Loss of Biodiversity do not add anything to the international commitments of the Parties. There is nothing ambitious in an agreement that obsequiously reproduces already existing obligations!

Finally, the institutional set-up is manifestly unfit for its purpose. First, the role of the Advisory Groups, which represent the civil society and thus may ensure a capillary and impartial monitoring on how environmental rules are implemented, is still too limited. Second, the enforcement mechanism is not worth its name: if the Parties fail to take into due account the reports of the Panels of Experts in their policies and regulations, they face no consequences. The result is that even those few provisions that actually provide for truly legally binding commitments (such as the effective implementation of MEAs of the Parties) are not enforceable. This proves that, despite its commitments under international and primary law, the EU does not see the achievement of Sustainable Development as a “*concrete obligation*”⁵², but merely as an inspiring principle that should guide its action. Had the EU truly wanted an innovative and ambitious FTA in terms of Sustainable Development and Environmental protection, it would have made the obligations of the TSD Chapter enforceable under the general mechanism for dispute settlement or would have provided an *ad hoc* mechanism of sanctions in case of non-compliance.

⁵²L. BARTELS, 2013, “Human Rights and Sustainable Development Obligations in EU Free Trade Agreements”, *Legal Issues of Economic Integration*, 40(4), p. 306.

Instead, the EU has decided to propose a TSD Chapter “without teeth”⁵³, hence very unlikely to be effectively implemented.

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⁵³ This expression was borrowed from A. RONSON, “Any Steps Towards Sustainability Investment Agreements”, in H. C. BUGGE, C. VOIGT (Eds.), *Sustainable Development in International and National Law: what did the Brundtland Report do to legal thinking and legal development, and where can we go from here?*, 2008, Europa Law Publishing: Groningen, p. 310.