Analysis of 'Trade for All'

Balancing environmental protection and trade promotion

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Introduction

EU Trade Commissioner Cecilia Malmström released her five-year 'Trade for All' strategy in October 2015, an ambitious title that acknowledges growing public concern over the EU's trade policies. The report focuses on three main pillars: (1) effectiveness, by delivering trades' benefits equitably; (2) transparency, through engagement with meaningfully informed stakeholders; and (3) values, to uphold the right to regulate.[i] In practice, the EU's trade policy can never be crafted for everyone's benefit; stakeholders from the business community to civil society hold directly opposing and non-reconcilable interests in the debate. This rules out the viability of 'Trade for All's' first pillar, equal benefits for all. If the benefits of trade cannot be distributed equally, then, its costs should be spread fairly. Accomplishing this will depend on an expansion of the remaining two pillars.

Commissioner Malmström assumed her current role with a pledge to make the EU's trade policy more transparent, and has undoubtedly made progress in this regard. However, this alone does not translate into greater responsiveness. 'Trade for All' makes no commitments to this point, failing to recognise that transparency is not an endgame, but only a necessary condition for accountable policymaking.

The 'Trade for All' strategy also commits to guidance by a set of vaguely European values. Difficult though it is to define what European values actually are, it's harder still to see how these can concretely secure objectives like the EU's regulatory sovereignty.

It seems, then, that by aiming for too much, the new strategy risks accomplishing very little. Commissioner Malmström's strategy is wide in coverage, but thin on substance. We identify the following five sections that still need revision or expansion in order to more equitably distribute the benefits and costs of the EU's trade policy:

1. Global Value Chains
2. Energy Imports
3. Sustainable Development
4. Regulatory Cooperation, Standards and Investment Protection
5. Transparency

1. Ships, planes and global value chains

The Commission portrays an expanding global marketplace, prioritising improved access to foreign markets for imports of raw materials and exports of services. The strategy does not acknowledgment the facilitators of trade: shipping, aviation, and freight services. The digital revolution might be "sweeping aside barriers of geography and distance with massive impacts," but most online transactions still lead to someone or something getting on a ship, plane, truck, or train.

Shipping and aviation each account for nearly 3% of annual global CO_2 emissions. Recent estimates have stated that business-as-usual emissions will increase by up to 250% for shipping and 270% for aviation by 2050. This does not take into account the EU's brand new and very ambitious trade strategy that will lead to increased global trade flows. Neither the United Nations bodies, IMO (International Maritime

Organisation) nor ICAO (International Civil Aviation Organisation), have acted appropriately to contain the increase in CO2 emissions. Since the publication of the Commission 'Trade for All' both the aviation and maritime sectors were dropped from the recent Paris Agreement on climate change.

As 'Trade for All' seeks to lower barriers to trade in goods and services, the Commission trade agenda must also work to improve transport efficiency of trades' vehicles and further mainstream sustainable modes.

2. Energy imports and renewable sourcing

The new strategy treats the EU's energy dependency as *fait accompli*. This lacks both strategic vision and ambition. Rather than "[understanding] that production in the EU is dependent on energy…imports," the Commission should outline targets for reducing inflows of volatile and polluting energy sources while increasing both deployment and exports of renewable generation equipment. If the EU's focus on cheap energy imports is one side of the coin, the other is that cheaper fossil energy means higher carbon emissions from increased consumption while crowding out renewable sources, all of which runs counter to the EU's '40/27/27' climate and energy targets for 2030.

DG Trade needs to expand its tariff schedule and trade defence platform to better reflect the negative externalities that accompany certain imports. The EU currently imports several types of fossil fuels at low- or zero-tariff rates that neither reflect their harmful impacts on Europe's environment, nor the levels of subsidisation towards their production and shipment. For example, imports of crude oil enter the EU duty-free, while imports of fuel oils are only subject to a 3.5% tariff regardless of sulphur content.[ii]

Global leadership is a key part of the EU trade strategy; as such a 'new style' energy chapter that not only promotes global decarbonisation while supporting the Paris Climate Agreement, and helps to deliver the EU's 2030 energy objectives. It should create a sustainable energy market that tackles energy security and diversification with renewable technologies and energy efficiency, while dismantling the greatest barrier to trade in energy – fossil fuel subsidies. Which would save governments a total of US$775 billion (€685 billion) annually around the world. T&E's recent report, *Trade and Energy – Beyond Hydrocarbons*, outlines a sustainable energy plan in trade.[iii]

3. Trading for sustainability

The Commission has pioneered the negotiation of sustainable development chapters in recent FTAs, but these texts still lack substantive effect — a fact made plainly clear by the EU's recent proposal to the US in TTIP.[iv] Despite the large feedback between trade and greenhouse gas emissions, 'Trade for All' still offers no concrete details on how it will "fight against climate change."[v]

The strategy fails to update the EU's sustainable development chapter template to include real ambition, effect, and enforceability. The point that, "The Commission will take into account sustainable development considerations in all relevant areas of FTAs (for example, energy and raw materials)…" betrays the continued obsolescence of its strategy — sustainable development is inherently relevant to *all* areas of FTAs and cannot be achieved by simply including a standalone chapter of unequal weight.

T&E and ClientEarth have jointly authored a review of the Commission's approach to sustainable development in trade agreements and make nine recommendations to seriously commit the EU's trade policy to sustainability[vi], beyond the shallow framework in 'Trade for All.' At a minimum the Commission must ensure, absolute protection of states' right to regulate via a 'clean hands' clause and an extension to the scope of the exceptions clause, while also removing provisions that allow challenges to current and future standards.

4. Regulatory cooperation, standards and investment protection

Public opposition to the Commission's trade agenda has come to focus on the nature of so-called 'new generation agreements' which blur boundaries in an area of trade negotiations and policymaking, in an attempt to remove 'behind the border' regulations that affect trade flows (these are sometimes called 'obstacles to trade'). However, one man's trade obstacle is another man's democratically enacted public policy.

Commissioner Malmström's new approach to regulatory cooperation might not lower domestic protections in absolute terms[vii], but could freeze them in time to reduce any trade flow disruption. Regulations are made in response to democratic processes, including social preferences, scientific discoveries, and even domestic crises. Binding regulations to outside factors dramatically reduces the ability of regulators to respond and adjust protections to appropriate levels.

Regulatory decisions must remain squarely within the realm of democratic decision-making. At the same time, the EU's confidence in its own regulatory supremacy is being shaken; for example, Japan and the United States — both current FTA negotiating partners of the EU — have demonstrated more stringent vehicle efficiency standards and enforcement mechanisms, respectively. Passenger vehicles in Japan averaged 20km per litre of fuel in 2013, whereas the EU average fell short at only 19.1km per litre.[viii] Similarly, the United States has demonstrated better enforcement capacity when regulations are not met — most recently illustrated by the Volkswagen scandal.[ix] Rather than exploring regulatory cooperation with international partners, the EU should first be shoring up its enforcement mechanism.

Environmental and social protections are further threatened by Commissioner Malmström's strategy for investment protection. 'Trade for All' acknowledges that, "the current debate [over BITs with ISDS] has cast light on the risk of the abuse of provisions common to many of those agreements, as well as lack of transparency and independence of the arbitrators." The report avoids any justification for why extrajudicial investment protection is necessary. In fact, the EU-RoK FTA – which 'Trade for All' champions as "the most ambitious trade deal ever implemented by the EU" – does not even contain an investment chapter, as the mandate was given before the Lisbon Treaty.[x] This undermines the argument regularly made by Commissioner Malmström that investment protection is a vital part of modern FTAs.[xi]

Even where discrimination against foreign investors is unlikely, there are a range of measures that property owners can already use to secure their property abroad:

1. State-to-State dispute settlement: there is already a good dispute-settlement architecture through the WTO, where national governments can pursue multilateral remedies on behalf of their investors;
2. Domestic legal remedies: most advanced economies with which the EU is currently negotiating trade and investment agreements already possess mature legal systems capable of hearing claims from foreign investors without prejudice to their nationality;
3. Political risk insurance: investors can privately ensure property abroad;
4. Market avoidance: risk is inherent to any investment, so governments have an incentive to behave as attractively to foreign capital as possible — capital flight and lost FDI are much steeper punishments than any expropriation gains.[xii]

5. Transparency

In sharp contrast to her predecessor, Commissioner Malmström has begun experimenting with transparency in a policy area that has historically been inaccessible to the public domain. Since 2010, the Commission has improved the transparency of trade negotiations (albeit from a very low baseline).

Going forward, the Commission must work even more closely with democratically accountable representatives and officials from the European Parliament, as well as civil society organisations and even

EU citizens themselves. This will require publication and circulation of the initial negotiating mandate as well as all proposed negotiating texts and materials. It will also require regular briefings and reporting on objectives and outcomes to stakeholders, especially before and after negotiating rounds.

Relative to its counterparts, the EU has led the way in bringing transparency to trade. It should not lose momentum, neither internally or with its bilateral and multilateral partners.

Further information

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Endnotes

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