

IMPLEMENTING AND ENFORCING CONSUMER RIGHTS IN TRADE AGREEMENTS

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EXECUTIVE SUMMARY

Consumers benefit from larger and competitive markets. In the context of a growing internationalisation of trade – facilitated through a large number of trade agreements – consumers, however, also face problems when it comes to enforcing their rights in international markets such as in e-commerce. Also, consumer interests are not sufficiently represented in trade disputes where consumer-related rules and standards are often at stake.

Given the direct effect of trade liberalisation on consumers, their interests need to be taken into account. This could be achieved through a stronger implementation of international consumer standards in trade agreements. General consumer rights like the *UN Guidelines for Consumer Protection* need to be acknowledged as overarching objectives of trade agreements. A stand-alone chapter on “trade and consumers” could also strengthen the position of consumers in international trade.

To enable a better representation of consumer interests, public interest generally needs to have a binding character in trade agreements and its effective enforcement needs to be enhanced. To this end, the Federation of German Consumer Organisations proposes the following reforms:

- ❖ Consumer protection standards need to be embedded in trade agreements as objective and in exception clauses. Binding rules on labour rights and environmental protection in trade agreements are in the consumer interest as competition at the detriment of workers and the environment is not sustainable in the long term.
- ❖ Consumer protection standards as well as rules on labour rights and environmental protection, should be subject to binding dispute settlement procedures that can also lead to trade sanctions.
- ❖ In order to tackle violations against rules such as consumer protection that are in the public interest, civil society must play a more prominent role in the enforcement of trade agreements. Consumer and other civil society organisations should be able to bring forward complaints about breaches of those rights in a dedicated civil society complaint mechanism.
- ❖ The state-to-state dispute settlement procedure, as it is used today in the World Trade Organisation and in bilateral trade agreements, must to be reformed. Civil society must to play a more imminent role in the mechanism and its transparency must be improved.
- ❖ Civil society dialogues on the monitoring and implementation of trade agreements must be set-up more coherently. They need to enable a balanced participation of representative non-state actors.

I. INTRODUCTION

Consumer benefit from a globalised market place. They benefit through a larger choice of products, a competitive economic environment, more innovative products, and may also expect lower prices for goods and services. In principle, from a consumer perspective, a lowering of tariffs and a stronger cooperation between regulators are thus to be welcomed.¹ However, the advantages of trade liberalisation can only materialise in a rule-based environment that puts an emphasis on a high level of protection. It also needs to establish effective instruments to enforce consumer interests in trade in order to protect consumer interests in international markets.

But trade agreements do not only have advantages for consumers. Through globalised value chains and economic interdependencies enforcement problems of consumer rights arise and threaten national levels of consumer protection.

- ❖ When a **consumer buys goods** outside the EU he or she might not only face higher costs through unexpected customs duties. In many cases, consumers are not protected by EU consumer law if they shop abroad, for example if a trader does not actively target consumers in the European Union.² Many international traders, in their contract terms, force consumers to use private arbitration instead of public courts in case of disputes.

The German Consumer Advice Centres frequently receive consumer complaints regarding problems with the delivery or with defective goods where the trader concerned is located abroad.³

- ❖ The digital economy is international. Many actors thrive to further enhance this through rules on **data transfers** in trade agreements. But consumers nevertheless often have very little rights when their data is unrightfully used, transferred or even stolen.

For example, under the rules of the EU-US Privacy Shield, the consumer has the possibility to complain about breaches of his rights through national data protection agencies. However, if he or she wants to be compensated the consumer has to sue in front of US courts.

- ❖ Through trade agreements, national as well as EU rules can be challenged in disputes between the trading partners (the **state-to-state dispute settlement**). This often touches upon consumer-related standards such as product labelling, for in-

¹ See i.a.: vzbv: Fragen und Antworten zu TTIP, 2016, <http://www.vzbv.de/meldung/fragen-und-antworten-zu-ttip>, vzbv: Resolution „TTIP korrigieren“, 2014, <http://www.vzbv.de/presse-meldung/verbraucherorganisationen-fordern-ttip-korrigieren>.

² The rules of International Private Law (Rome I- und Brussels I-Regulations in the EU) regulate that the national law of the consumer should in principle be applicable to cross-border consumer contracts. However, this is not the case if a trade does not target the German market as the consumer places an unsolicited request to an international trader through e-commerce.

³ This is also underlined by the EU Commission's representative study on the main cross-border obstacles to the EU single market. See: http://ec.europa.eu/consumers/consumer_evidence/market_studies/obstacles_dsm/index_en.htm

stance the country-of-origin-labelling. Labelling rules represent specific and sometimes additional requirements for companies if they want to export their products.

They have often been challenged in front of the World Trade Organisation (WTO).⁴

These problems necessarily increase at the same pace with further trade liberalisation through comprehensive trade agreements. It is therefore important that trade negotiators are aware of the effects of trade liberalisation on consumers in order to address the increasing enforcement problems linked to trade agreements. Although not every issue has to be dealt with at the level of a trade agreement,⁵ those agreements enable a stronger cooperation on these issues and may strengthen consumer trust in the international market.

II. CONSUMER RIGHTS IN TRADE AGREEMENTS

1. WHY EMBEDDING CONSUMER RIGHTS AND -STANDARDS IN A TRADE AGREEMENT?

If a trade partner breaches rules of a trade agreement – for example if unjustified tariffs are imposed – the state affected is allowed to take action. Worst case, the trade agreement can be suspended until the trading partner abides by the agreed rules.⁶ A breach of trade rules can also lead to trade-related sanctions or link the respect of rules to the granting of trade preferences.⁷

These possible sanctions refer to commitments that have been taken by the parties under the agreement. They can therefore also refer to the respect of international standards or human rights if those have been anchored as “essential elements” of the agreement.

In that way, trade agreements offer the opportunity to formally embed international, mostly non-binding standards into a binding dispute settlement system. A breach of the objectives and rules laid down in the agreement can thus trigger tangible trade sanctions if those standards form part of the formal dispute settlement mechanism. Trade agreements can thus be a powerful weapon to obtain respect for international consumer rights.

Until now, however, the potential link between trade liberalisation, consumer welfare and public interest has not been used intensively.⁸ Especially consumer rights have not

⁴ In the US, rules on the country-of-origin labelling of beef products have been withdrawn after a Mexican WTO complaint against the United States has been successful (WTO Dispute Settlement No. 384).

⁵ On the division between trade agreements and regulatory dialogues see: Transatlantic Consumer Dialogue (2017): TACD Positive Consumer Agenda: New Rules for the Global Economy, <http://tacd.org/wp-content/uploads/2017/03/TACD-Vision-Paper-Pro-consumer-agenda-Final.pdf>.

⁶ I.e. the human rights clauses in bilateral trade agreements and Economic Partnership Agreements (EPAs) of the European Union.

⁷ Such as the use of “denial of benefits”-clauses in investment protection treaties that make the access to dispute settlement dependent on the abidance of distinct rules or preconditions.

⁸ I.a. in relation to human rights: Fritz, Thomas (2017): Menschenrechte als uneingelöstes Versprechen, Nachhaltigkeit, Arbeit- und Sozialstandards in EU-Handelsabkommen, study on behalf of: Brot für die Welt, Forum Umwelt und Entwicklung, Unternehmensgrün, verdi, February 2017.

been embedded in trade agreements in the past, although there are a number of relevant international standards that define consumer protection, the interaction between consumers and traders, or relate to distinct sector-specific questions of consumer protection.

Recently concluded trade agreements, such as the EU-Canada agreement CETA, unfortunately fall short of strengthening the enforcement of public interests. Especially consumer standards have been not been embedded in CETA. It is thus impossible to base a complaint for the breach of consumer law on the CETA text.⁹

Including the objective of high international consumer protection and embedding it in an exception clause in trade agreements strengthens the public good “consumer protection”. That way, a better balance between trade liberalisation and consumer protection¹⁰ can be struck. International standards can also be strengthened and made binding. This could for example be accomplished in a self-standing chapter on “trade and consumers”.¹¹

A self-standing “trade and consumer”-chapter enshrines important principles and standards of consumer protection in trade agreements and thus facilitates their effective implementation.

As a consequence, consumer protection rules and measures could not be qualified as “trade-irritants” so easily anymore. In the WTO dispute on the country-of-origin labelling of beef products already mentioned above, the United States were taken to court by Mexico and Canada, claiming that the US’ labelling rules were protectionist. At the same time, the labelling and thus breach of trade rules constituted a clear need and legitimate interest in information for American consumers.¹²

A stronger anchoring of international standards of consumer protection could balance potentially negative consequences of trade liberalisation with legitimate consumer and public interests.¹³

2. HORIZONTAL RULES

The *UN Guidelines for Consumer Protection* are the most comprehensive compendium of internationally acclaimed principles and rules of consumer protection.¹⁴ They do not only relate to questions of product safety and the access to affordable goods but also demand the protection of privacy of consumers, their rights in e-commerce, vis-à-vis traders and the right to effective enforcement of these rights.

⁹ This also relates to other ‘modern’ trade agreements such as EU-Vietnam or EU-Korea. See: Pitschas, Christian / Gerstetter, Christine (2017): Consumer Rights in International Trade Agreements, study commissioned by Verbraucherzentrale Bundesverband e.V., http://www.vzbv.de/sites/default/files/downloads/2017/03/20/17-03-18_study_vzbv_consumer_rights_in_trade_agreements.pdf

¹⁰ As defined in Art. 12 TFEU

¹¹ A model chapter on “trade and consumers” can be found in the trade policy vision paper from the European consumer organisation BEUC which is to be published in October 2017.

¹² Consumers Union: Letter to the WTO, 2010, <http://consumersunion.org/news/poll-finds-93-of-consumers-want-labeling-on-meat/>

¹³ The strengthening international agreements through trade agreements is also a demand of the OECD. See: OECD (2017): Making Trade Work for All, <https://www.oecd.org/trade/making-trade-work-for-all.pdf>

¹⁴ See: Pitschas, Christian / Gerstetter, Christine, 2017, above.

Until today, trade agreements do not perceive the *UN Guidelines* as foundation for consumer-friendly trade liberalisation. Unlike the comprehensive *UN Guidelines*, trade agreements' understanding of consumer protection is limited to questions of product safety and access to goods and services.¹⁵

Consumer rights such as the *UN Guidelines for Consumer Protection* have to be embedded in trade agreements as overarching objectives. It has also to be stipulated that standards cannot be lowered through a trade agreement.

3. SECTOR-SPECIFIC RULES

Trade agreements include many sectors and issues that are of immediate relevance to consumers. Trade liberalisation can thus have a direct impact on consumer welfare in different sectors of the economy. Therefore, the implementation of consumer protection standards and their enforcement has to be strengthened in these sectors.

In the area of **e-commerce**, a multitude of questions arise. Be it the applicable consumer law with respect to cross-border transactions, dispute resolution or redress if a consumer buys faulty products internationally. These questions call for a strengthening of international rules such as international standards on dispute resolution¹⁶, standards on consumer protection in e-commerce¹⁷, or providing dispute settlement in online transactions¹⁸.

The growing importance of the platform economy implies that it is increasingly easy for consumers to buy products from foreign traders channelled through online platforms. Generally a consumer benefit, new challenges arise with regard to **product safety** or non-compliant counterfeited products through this new canals of direct-imports.¹⁹ International standards on product safety hence need to be strengthened.

4. LABOUR AND ENVIRONMENTAL RIGHTS

Although not directly addressing the individual consumer and his or her power in liberalised markets, **rules on labour rights and environmental protection** are equally important parameters for international trading rules. The European Union has anchored these commitments in Art. 21.2 of the Treaty of the European Union (TEU). These goals should also hold for trade and investment agreements the Union negotiates.²⁰ All EU trade agreements therefore need to contribute to the promotion of human rights, fight against poverty and a sustainable development.

Preferential trade relations ought to strengthen sustainable patterns of consumption and corporate responsibility. To this end, existing commitments such as ILO Conven-

¹⁵ See: Pitschas, Christian / Gerstetter, Christine, 2017, above.

¹⁶ UNCITRAL Technical Notes on Online Dispute Resolution, 2016, http://www.uncitral.org/uncitral/en/uncitral_texts/odr/2016Technical_notes.html

¹⁷ OECD, Consumer Protection in e-Commerce, OECD Recommendation, 2016, <http://www.oecd.org/sti/consumer/ECommerce-Recommendation-2016.pdf>

¹⁸ See ICPEN Network and its website on consumer complaints in e-commerce www.econsumer.gov

¹⁹ OECD, Trade in Counterfeit ICT Goods, 28 March 2017, <http://www.oecd.org/gov/trade-in-counterfeit-ict-goods-9789264270848-en.htm>

²⁰ According to Art. 207 TFEU

tions and multilateral environmental agreements need to be respected as the foundation of trade agreements. Accordingly, the *Sustainable Development Goals* (SDGs), the *UN Guidelines on Business and Human Rights*²¹, the *OECD Guidelines on Multinational Enterprises* as well as international environmental agreements – such as the *Paris Agreement*²² – constitute important building blocks for a sustainable and consumer-friendly trade policy.

EU trade policy has to support fair rules in global value chains. Competition at the expense of the environment or labour rights is not sustainable – also not for consumers.

The CETA agreement at least incorporated rules on labour and environmental rights and on corporate responsibility in the agreement's text. Inter alia, CETA made reference to the *ILO core labour standards*²³ and the *OECD Guidelines for Multinational Enterprises*. Also, the importance of the *Paris Agreement* and the SDGs was underlined.²⁴ However, those chapters are not subject to the general dispute settlement mechanism of the CETA agreement which could lead to the above described suspension of trade preferences.²⁵

III. MECHANISMS TO ENFORCE CONSUMER RIGHTS AND INTERESTS

Complaint mechanisms in the context of trade agreements need to address factual problems related to international trade. Consumer organisations need to be able to flag deficits, kick-off reviews and be heard as interested party. Complaint procedures need to be transparent; enabling civil society actors to raise their voice.

1. STRENGTHENING STATE-TO-STATE DISPUTE SETTLEMENT

Consumer protection standards are currently not included in trade agreements. But many modern trade agreements contain rules on labour and environmental rights. These chapters, however, are not subject to the formal dispute settlement mechanism between the trading partners. Under the CETA rules, breaches of rights anchored in the chapters on labour and environmental rights, such as the Paris Agreement, cannot involve trade-related sanctions. They only entail a dialogue between experts that publish a non-binding report on the matter of complaint.²⁶

In order to counter this imbalance between general public interests – such as environmental protection – and other parts of trade agreements, a first step should be to

²¹ Guiding Principles on Business and Human Rights www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

²² For an encompassing list of relevant environmental standards: Transport and Environment / Client Earth, Sustainable Development and Environment in TTIP – moving from empty language to equal consideration, October 2015.

²³ Chapter 23.3, CETA and in the joint interpretative instrument 8b).

²⁴ Joint interpretative instrument 9c)

²⁵ Chapter 29, CETA

²⁶ See i.e. chapter 24 „Trade and Environment“, CETA

broaden the general dispute settlement mechanism to include these chapters. Consumer protection rules that will be agreed in future agreements will also have to be included.

Trade agreements in their entirety need to be subject to the state-to-state dispute settlement mechanism.

2. CREATING A CIVIL SOCIETY COMPLAINT MECHANISM

A singular enlargement of this mechanism to resolve conflicts between the parties, however, is not enough to strengthen consumer and other public interests in international trade. This is because states often have little interest in taking a fight with their trading partner. Therefore, a civil society complaint mechanism should be created in order to create an independent institution for complaints.

The introduction of a civil society complaint mechanism enables inter alia consumer organisations to file complaints on breaches of consumer, labour, or environmental rights in the context of a trade agreement. This collective mechanism should be independent of the political willingness of the European Commission to investigate this matter in the context of a dispute settlement procedure.²⁷

The civil society complaint mechanism gathers the trading partners in equal numbers around a table and can take binding decisions independently from the political willingness of the European Commission or the interest of the state concerned.

Such a mechanism gives consumer organisations a voice in the implementation, application and follow-up of a trade agreement if there are violations of the objectives or rules of the agreement. Should a trading partner for example dedicate too little means to effectively control that the sanitary and phytosanitary rules for foodstuffs have been respected before export, consumer organisations could file a complaint as the failure to uphold the commitments of the trade agreement directly impact consumers.

In order to be effective, the mechanism should at least comprise the following aspects:

- ❖ A committee should be appointed that includes all parties to the agreement and civil society representatives involved in the complaint.
- ❖ The committee should determine whether the civil society complaint is justified and propose measures that are binding for the countries. These can stretch from a dialogue between the parties, withholding of trade preferences, trade sanctions to the formal suspension of the agreement.
- ❖ Decision-making procedures should be designed in a way so that the committee is able to take actions against the will of the state concerned (no unanimous decision-making).
- ❖ The committee drafts a public report where the legitimacy of the complaint is assessed and concrete measures are proposed. The report must be published within a timeframe to be codified.

²⁷ Similar mechanism have already been established in North American Agreement on Environmental Cooperation (NAAEC) as well as in the Committee on the Freedom of Association of the International Labour Organisation (ILO).

3. REFORMING THE WTO DISPUTE SETTLEMENT

The dispute settlement mechanism in the World Trade Organisation is the most important and generally recognised body to solve trade-related conflicts between trading partners. The WTO state-to-state dispute settlement mechanism still is the most widely used instrument for trade-related complaints and is often the blue-print for bilateral or plurilateral dispute resolution arrangements.

Under this mechanism, only a WTO member state can bring complaints against another WTO member state. Civil society or businesses can only bring forward their position informally – through so called *Amicus Curiae Briefs*.²⁸ Non-state interests are thus only indirectly embedded in the dispute settlement proceedings.²⁹ Furthermore there is a low level of transparency of the proceedings spanning from the choice of adjudicators to the actual proceedings during the investigation of a case.

WTO dispute settlement mechanism needs to be reformed to embed civil society contributions as formal part of the proceedings. The rules on transparent proceedings and choice of adjudicators proposed by the European Union in the context of the reform of investment protection regimes need to be expanded to the WTO dispute settlement mechanism.

Within the European Union, it should also be considered to create a right to initiate complaints for non-governmental organisations. Such a collective complaint would enable consumer and other civil society organisations to flag shortcomings with the European Commission. A similar mechanism is already anchored in the *Market Access Partnership*³⁰ of the European Commission and in the EU Trade Barriers Regulation³¹ for companies and business associations. Through these instruments, businesses can flag trade barriers or unfair trading practices to the European Commission.

4. FURTHER MECHANISMS TO ADVANCE CONSUMER INTERESTS

Trade agreements can only contribute to a successful market economy if they contribute to a high level of consumer protection and follow the principles of sustainable development. To that end, a stronger enforcement mechanism is just as necessary as a proper implementation and reliable evaluation of trade agreements. Civil society actors need to be able to contribute.

In order to secure the benefits of trade for all parts of society, it is indispensable to enable a regular and institutionalised **participation of representative civil society** in the monitoring and implementation of trade agreements, including consumer organisations. In current EU trade agreements, two forms of institutions were developed in this respect: *Domestic Advisory Groups* relating to inner-EU coordination and *Civil Society Forums* relating to the transnational representation of civil society.

²⁸ See Gerstetter, Christine / Donat, Lena (2017): The enforcement of consumer rights in international trade agreements, study commissioned by Verbraucherzentrale Bundesverband e.V. p. 11

²⁹ See above

³⁰ In the context of the *Market Access Partnership* enterprises and their associations are able to signal potential trade barriers to the EU Commission which then assesses the complaints. See: European Commission (2017): Report on Trade and Investment Barriers, , 23.06.2017

³¹ Regulation No. 2015/1843

Consumer organisations need to be represented in civil society advisory groups.

Civil society needs to be able to accompany all processes related to the **implementation** of trade agreements. Looking at the high number of trade agreements currently under negotiation, a coherent approach to civil society coordination observation and input is a must – both inside the European Union and the civil society dialogue established between trading partners.³² It should be envisaged to bundle thematic and/or regional dialogues in order to ensure an effective participation of civil society actors.

The European Commission should investigate to what extent consumer organisations have to be strengthened in order to analyse the factual implementation and effects of trade agreements on consumers.

Furthermore, the European Commission has to review the functioning of civil society dialogues within partner countries as to their effective functioning and to ensure a meaningful cooperation. The *Civil Society Forum* of the EU-Korea Agreement underlined the need for the European Commission to take a closer look at a the trading partner's choice of representatives which ought to be an equal representation of independent civil society organisations.

Furthermore, the evaluation of trade agreements is paramount to monitor the effectiveness of trade agreements and to properly review their functioning. An assessment whether or not trade agreements are a 'good deal' for consumers can only be made after tangible data is gathered. This data needs to at least demonstrate to what extent consumers benefited from the agreement, for example through lower prices, wide product choice or higher purchasing power. The evaluation should also use consumer complaints as sources.

Evaluations of trade agreements must include a self-standing chapter on "effects on consumers" representing to what extent trade agreements have had an effect on consumers in different segments of the market.

³² The importance of coherent structures of civil society monitoring is underlined by a recent study of Friedrich Ebert Foundation and reflections from the EU-CARIFORUM civil-society dialogue. See: Moore, Madelaine / Scherrer, Christoph (2017): Conditional or Promotional Trade Agreements – Is Enforcement Possible?, June 2017; Martens, Deborah et al. (2016): Civil Society Meetings in EU Trade Agreements, Recommendations and Lessons from EPAs, ECDPM Briefing Note, September 2016.