

Revising the content of trade and investment agreements : A Concrete Way to Strengthen Climate Action

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This note suggests concrete avenues to start making trade policy compatible with the Paris climate agreement. It states that some of the main provisions included in bilateral trade deals being prepared are detrimental to climate action and therefore should be removed. In addition, in response to the recent statements made by France and the EU, it highlights a first step towards effectively integrating the Paris Agreement into any new trade deal.

Such a proposal would allow countries to suspend their trade deals if their trade partners do not comply with their climate commitments under the Paris agreement. This would require amending CETA (EU-Canada trade treaty) and JEFTA (EU-Japan) in particular. This proposal therefore offers a concrete response to the White House's position on climate change and the Paris Agreement. More than 2 years after the Paris agreement was adopted, it also suggests ways to strengthen the implementation of the climate agreement.

The French Climate Action Network, the Foundation for Nature and Humanity (FNH) and the Veblen Institute, three Paris-based organisations, think this proposal could be discussed between President Macron and other Heads of State and Government, for instance when preparing the June G7 summit in Quebec. It would be a very concrete way for Emmanuel Macron to walk the talk on climate. The French President made a speech at the Bonn Climate Conference (COP23) as well as the 2018 World Economic Forum suggesting that trade and globalisation should be made compatible with the protection of the Commons. At COP23, he had become the first Head of State and Government of the countries of the North to make an explicit connection between climate and trade issues in a UN Climate forum. Not to mention that France has developed a strong narrative on protecting the climate since Donald Trump's decision to withdraw the USA from the Paris agreement. After a French independent experts committee identified potential risks for the climate because of CETA, the government defined a so-called CETA Action Plan to make the CETA compatible with the Paris agreement. But in reality, this plan remains largely insufficient and doesn't match the French Government's strong narrative.

In addition to the revision of the anti-climate ("climaticide") provisions included in current trade negotiations, we propose to make any new trade agreements (such as CETA and JEFTA) dependent on compliance with commitments made as part of the Paris Agreement, in order to make the latter more binding and prevent any rollback of national climate commitments - that means both GHG emissions reductions and climate finance. Trade agreements should be suspended if Parties to this agreement fail to achieve their climate and climate finance goals. This would show the private sector that it has a direct interest in operating and investing in states that honor their climate commitments. The opposite would mean for instance that they would face higher custom duties.

While this policy would make the Paris Agreement more binding, it should not give states an excuse not to increase their national climate contributions, especially in 2018 in the context of the Talanoa Dialogue.

Why?

The climate crisis compels us to revisit public policy at every level. Emissions reduction targets as set in the Paris agreement must be mainstreamed in every public decision.

Trade policy is undoubtedly one domain that has been slow to evolve in this direction. Climate and trade issues have been treated in complete independence from one another. Thus the United Nations' Framework Convention on Climate Change (UNFCCC) specifies that its implementation should not restrict international trade. During the COP21, the European Union also ensured that the Paris Agreement resulted in no additional trade restrictions and it has been reluctant to include binding climate commitments in the so-called "new generation" of trade and investment agreements that the EU promotes.

The official expert report requested by the French government to evaluate CETA's health and environmental impacts says exactly the same thing [1] : *"Whereas the financial sphere, after the COP21, has begun to take into consideration the issues and risks associated with climate threats, actors engaged in international trade and its regulation have, in this area, avoided the issue. The Paris Agreement contains no trade measures, even if commitments made as part of this agreement have important implications for international trade. The WTO has not, for now, integrated climate issues into the multilateral trade system. Air and particularly maritime transportation still lag far behind other forms of transportation in their efforts to reduce carbon emissions. Consequently, the cost of such transportation does not take into consideration climate change's cost to society and related emissions are not included in national inventories."*

In the case of CETA, an impact study on sustainable development published in 2011 [2] identified several factors contributing to rising greenhouse gas emissions that were directly tied to the trade agreement itself (methane emissions due to the size of cattle operations, increased investment in polluting industries, and rising emissions due to maritime and air transportation), as well as to the risk that governments would engage in self-censorship in matters of environmental regulation due to its resolving disputes between investors and states.

The 2017 French expert report also acknowledged that :

- *"Nothing has been planned (in CETA) to limit fossil fuel trade and rising CO2 emissions from maritime and air transportation resulting from increased commercial flows."*
- *"The liberalization of services and investment could furthermore favour those of the polluting industries such as the extractive and energy industries, including the petroleum products derived from tar sands, mining, or hydraulic fracking."*
- *"There is a risk for a regulatory measure designed to combat climate change to be considered a barrier to trade, and that arbitration procedures result in demands for compensation."*

The experts produced more than 25 recommendations related to the investor state dispute settlement mechanism, the overall objectives of the regulatory cooperation mechanism, the traceability of products or the respect of the precautionary principle.

How ?

1. The content of trade agreements should be reviewed in order to remove all anti-climate provisions

- Exclude all climate harming goods and services from the deal and allow differentiation policies based on environmental criteria
- In the preambles, recognize that trade agreements should be subject to environmental and social law, as included in international agreements [3] if they ever hinder or conflict with the compliance with those environmental agreements
- Review the objectives of the regulatory cooperation mechanism putting environment, social and human rights protection first and ensuring a democratic control over this process
- Remove investor state dispute settlement mechanism
- Use positive listing for liberalization of services and protect effectively public services
- Allow relocalization efforts and local content provisions in order to foster local and sustainable production when it is possible
- Strengthen the content and the legal scope of trade and sustainable chapters and ensure the full respect of the precautionary principle

(see more detailed proposals in Annex)

2. The respect of the Paris Agreement on climate change should be a central criteria in our trade relationships

A country should only get trade benefits from trade agreements if it complies with the Paris Agreement which states that countries should cooperate to limit global warming to well-below 2°C and tend towards 1.5°C. All the agreements already concluded should be reviewed along this line and this should become a priority in all new trade agreement.

Where do we stand ?

The EU Trade Commissioner, Cecilia Malmstrom, claims that a *“Paris deal reference is needed in all EU trade agreements today”*. This is a step ahead for the Commission but this is far from sufficient. It only means that a provision will be included in a non-binding trade and sustainable development chapter stating that State Parties:

- *“reaffirm their commitment to effectively implementing the United Nations Framework Convention on Climate Change (UNFCCC) and the Paris Agreement adopted by the Conference of the Parties to the UNFCCC at its 21st session”*
- and commit to cooperate and work together to take action to address climate change

The impact of such of provision is entirely symbolic. Nothing concrete would happen if a country didn't comply with its climate commitments. **To be credible, this position should at least lead the EU to drop the negotiation mandate it has from the Member states for the TTIP with the US.**

The French government has shown willingness to go a step further. In its *“CETA action plan”*, France commits itself to the principle that all future trade agreements will *“include compliance with the Paris Agreement among the essential element clauses of the political dialogue and cooperation agreements that are decided along with trade agreements - these trade agreements may be revoked or suspended in the case of confirmed violations of essential elements clauses, consistent with customary international law.”* [4]

While this proposal would seem to be a welcome one, it is necessary to measure its practical scope by analyzing the current use of existing essential elements clauses in political dialogue and cooperation agreements. In the domain of human rights promotion and monitoring, studies reveal that this type of clause has rarely been used [5] and specialized NGOs recommend that these mechanisms be significantly strengthened. Furthermore, the compliance criteria remains unclear and might only mean *“having ratified”* the Paris Agreement. In that case, such a provision would only target countries such as Russia, Iran or Turkey.

Thus, the inclusion of the Paris Agreement in the essential element clauses of political dialogue and cooperation agreements is not sufficient. Nor does simply mentioning it in non-restrictive chapters (relating to the environment or sustainable development)—and there alone—constitute a more appropriate answer.

The goal is to subject trade law to international environmental and social law. The EU and Canada, which both have great ambitions in the struggle against climate change, must send a strong signal to their trade partners, as well as to the whole world, concerning their desire to implement their COP21 commitments. These commitments are registered, notably, in the voluntary nationally determined contributions (NDCs) that states agreed to before the COP21.

A graduated response mechanism could be applied to make trade agreements effectively dependant on compliance with the implementation of the Paris Agreement and countries' commitments.

1. In the event of a Party's withdrawal from the Paris agreement and/or the UNFCCC, a full suspension clause of the trade agreement would apply.

If one of the Parties to the trade agreement decides, to leave the Paris agreement—as the United States announced in June 2017—or the UNFCCC, the implementation of the entire trade agreement would be suspended until the Party rolls back on its decision or effectively rejoins the climate deal. With regard to CETA, such condition may be useful considering past decisions, as Canada left the Kyoto Protocol in 2011.

2. Further, the implementation of trade benefits would be subject to the effective fulfilment of climate commitments.

There is currently no existing trade agreement (including CETA) which effectively makes the link between trade benefits and compliance with the Paris agreement. There is therefore a need to integrate this aspect in already-negotiated trade agreements.

a/ GHG emissions and low carbon pathways

If a country deviates from the GHG emission reduction pathway included in its Nationally determined contribution (NDC) or fails to regularly enhance it (at least every 5 years, according to the NDC revision process included in the Paris agreement), then the trade agreement or at least some of its provisions, depending on how seriously the country has deviated from its objectives, must be suspended until its emission trajectory is back on track or scaled up. According to the Paris agreement, each country must indeed prepare an NDC at the national level. The implementation of this NDC will be assessed through an enhanced transparency framework comprising biennial reports, a technical expert review and a peer-review process, with built-in flexibility for developing countries.

In the case of CETA, an ad-hoc climate committee composed of independent scientists and NGO representatives from Canada and the EU could therefore be formed in order to review these reports and assessments once they are carried out and adopt the appropriate trade sanctions if needed. If national emissions increase, the entire trade agreement would be automatically suspended. If targets are not fully met (e.g. if emissions decrease insufficiently), the committee might define more targeted trade sanctions.

b/ Climate finance

The implementation of trade agreements would also be subject to the respect of climate finance pledges from developed countries. Currently, countries do not have to register their financial commitments in international legal documents. If the Paris agreement states that *“developed countries shall provide financial resources to assist developing countries”* and that *“climate finance should represent a progression”* over time, each country remains free to announce its own pledge to meet the internationally agreed objective (currently \$100bn by 2020). Countries must report on their progress every two years but there is no sanction if commitments are not met.

To make these commitments more binding, financial pledges and projected levels of public resources to be provided to developing countries could be included into joint declarations annexed to CETA and JEFTA. This information could be monitored every two years and subject to potential trade sanctions. For example, a temporary increase in custom duties would enable to raise funds and bridge the gap between pledges and climate finance actually mobilized by a specific country or group of countries.

For future agreements (including JEFTA), the implementation of the trade benefits offered to partners could be made progressive and tied to the implementation of climate commitments. Some rate reductions or the allocation of specific quotas could, for example, be made conditional to progress on environmental policy, such as the revision of climate commitments or other specific measures such as the end of fossil fuel subsidies and the adoption of a long-term carbon neutrality strategy.

When should the proposal be made?

2018 is an important year for the climate, particularly at the international level, with the launch of the Talanoa Dialogue. The G7, chaired by Canada, cannot remain silent on this process. And the June summit in Charlevoix which will bring together four large European countries, Japan, and Canada G7 is a perfect opportunity for announcing that the Paris Agreement will be fully and completely integrated into CETA as well as JEFTA. Such an action would significantly mark Canada's G7 presidency and would allow concerned countries to offer a bold response to the White House, whose discourse on trade policy and the fight against climate change has become increasingly isolationist.

It is also an opportunity for Emmanuel Macron and Justin Trudeau to strengthen their international leadership on climate policy by surrounding themselves with countries that also want to distinguish themselves on the international stage.

Appendix : Additional measures required to make trade agreements compatible with the fight against climate change

- For all trade agreements, regularly conduct and publish impact studies on sustainable development (compatible with 1.5°C or 2°C scenarios) and human rights in order to inform their revision.
- Consider the implementation of mutually-agreed differentiated customs duties and trade benefits at the international level, in order to take into account country differences in relation with taxation, social protection, and the environment. [6]
- Allow domestic public policies including local content provisions with the aim to foster the development of the renewable energy industry and technology transfers.
- Allow parties to support renewable energies thanks to specific subsidies and plan the end fossil fuel subsidies. Make it possible for fossil fuel subsidies and those that lead to the overuse of natural resources (overfishing, for example) to be challenged solely on the basis that they are slowing down the energy transition and the implementation of effective natural resource management policies.
- Remove from agreements the investors / states dispute settlement mechanism —which the Schubert Commission has deemed useless— in order to avoid to expose states to the risk of new investors claims. If it is maintained, several changes should, at minimum, be made (for example, the establishment of a climate veto that would automatically exclude all measures adopted by Parties to the Paris Agreement relating to reducing GHG emissions; the adoption of a more restrictive definition of appropriate investments; and a more restrictive framework for protecting investors, which could be limited to cases of blatant discrimination, denial of justice, or direct, uncompensated expropriation).
- Go back to a positive list for the liberalization of services in order to better manage the scope of commitments made in this field and allow, in the future, specific regulatory measures on services that do not yet exist. Better protect public services by adopting more efficient exclusion clauses [7].
- Refuse the neutrality principle for energy sources and ban (or at least discourage) the import of non-conventional fossil fuels. One can envisage several solutions, at several different levels. A revision of the European directive on fuel quality is necessary, but this reform may take time and will only cover oil. France could commit itself to implement a specific taxation that would vary according to an energy resource's carbon intensity. This could occur as early as January 2019, following the publication of the report on imports called for by the Hulot law on fossil fuel production.
- Build a coalition of progressive countries, including countries with which the EU is engaged in bilateral negotiations, which aims at reducing emissions from international transportation, and develop specific rules relating to merchandise transportation, with strict environmental norms clauses.
- Raise carbon prices considerably in the EU and establish a carbon border adjustment mechanism (beginning with carbon-intensive products, such as steel and cement).
- Implement extraterritorial regulation of private actors to avoid home companies' activities jeopardising the observance of MEAs in third countries. An example of this could be a carbon tax on FDI income to limit carbon intense activities that would otherwise undermine a country's capacity to meet its NDC targets under the Paris Agreement [8].

Notes

[1] Report to the Prime Minister, "L'impact de l'Accord Économique et Commercial Global entre l'Union européenne et le Canada (AECG/CETA) sur l'environnement, le climat et la santé," September 7, 2017: http://www.gouvernement.fr/sites/default/files/document/document/2017/09/rapport_de_la_commission_d_evaluation_du_ceta_-_08.09.2017.pdf

[2] *A Trade SIA relating to the trade negotiation of a comprehensive economic and trade agreement (CETA) between the EU and Canada, Final Report, June 2011 :*

http://trade.ec.europa.eu/doclib/docs/2011/september/tradoc_148201.pdf

[3] *The ILO's conventions, the Universal Declaration of Human Rights, and international environmental protection agreements: the United Nations' Framework Convention on Climate Change, the Paris Agreement, the Vienna Convention for the Protection of the Ozone Layer, the Montreal Protocol, the Convention on Biological Diversity, the Cartagena Protocol on Biosafety, the Convention on International Trade in Endangered Species of Wild Fauna and Flora, the Convention on the Conservation of Migratory Species of Wild Animals, and the International Plant Protection Convention.*

[4] *French Government's CETA action plan, October 25, 2017:*

http://www.gouvernement.fr/sites/default/files/document/document/2017/10/plan_action_ceta_du_gouvernement.pdf

[5] *A Model Human Rights Clause for the EU's International Agreements, Lorand Bartels, German Institute for Human Rights, Misereor, February 2014*

[6] *Gaël Giraud, "L'épouvantail du protectionnisme," Revue Projet, n°320, 2011/1.*

[7] *Markus Krajewski, "Model clause for the exclusion of public services from trade and investment agreements", Chamber of Labour Vienna & European Federation of Public Service Unions (EPSU), 02/2016, p.9*

http://www.epsu.org/sites/default/files/article/files/Study%20M%20Krajewski_Model%20clauses%20for%20the%20exclusion%20of%20public%20services_2016.pdf

[8] *Can trade and investment policy support ambitious climate action?, November 2017, Transport and Environment and Trade Justice Movement :*

https://www.transportenvironment.org/sites/te/files/publications/2017_11_trade_and_climate_report_final.pdf

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