

# The EU's Commitment to Social and Environmental Standards in its Modernised Trade Defence Instruments

Pieter Van Vaerenbergh\*

## Table of Contents

|  |     |
|--|-----|
| A. Introduction  | 844 |
| B. EU and WTO Members' Environmental Commitment in Trade Remedies                | 845 |
| C. Environmental Considerations in the EU's Modernised Trade Defence Regulations | 846 |
| I. Significant Distortions   | 846 |
| II. Injury Margin  | 848 |
| III. Union Interest Test   | 851 |
| D. Analysis of the EU's Approach to Social and Environmental Trade Defence Rules | 853 |
| E. Conclusion  | 856 |

## Abstract

Since the modernisation of the Basic Regulations in 2017 and 2018, the EU explicitly exerts social and environmental goals through the application of its trade defence instruments. Whereas the Commission portrayed the new rules as a guarantee that high European standards would not disadvantage the European industry in application of trade defence instruments, commentators were quick to question the EU's true intentions behind the inclusion of social and environmental considerations. This article reviews three major aspects of social and environmental considerations in trade defence practice: the significant distortions methodology, the new calculation of the injury margin and the application of the Union interest test. This article commends the EU's effort to reconcile the two seemingly opposing goals of trade defence and social and environmental protection, and identifies areas of improvement as well as possibilities to options to further "green" the trade defence instruments.

\* Dr. Pieter Van Vaerenbergh is associate at Fieldfisher, Brussels (Belgium). This article is prepared for academic purposes and does not constitute official views of Fieldfisher or its clients. This article builds upon the author's PhD thesis on environmental considerations in the law and practice of WTO trade remedies. The author thanks Méliné Jakhian for her input and feedback on an earlier draft of this article. Email: Pieter.VanVaerenbergh@fieldfisher.com.

**Keywords:** Trade Defence Instruments, Anti-Dumping, Modernisation Package, Environmental Protection, Significant Distortions, Injury Margin, Compliance Costs, Union Interest Test

## A. Introduction

The European Union (EU) recently updated its trade defence rules in 2017 and 2018. Not only was this the first major overhaul of the legal framework since 1995, it was also the first time social and environmental considerations were included in the Basic Anti-Dumping and Anti-Subsidy Regulations (BADR, BASR).<sup>1</sup> The Commission will now take into account compliance with the core International Labour Organization (ILO) Conventions and multilateral environmental agreements (MEAs) during the investigation. Furthermore, trade unions can fully participate in the investigation, representing EU workers whose jobs can be affected by unfair imports.<sup>2</sup>

The EU announced the “greening” of the EU’s trade defence rules with lots of bells and whistles. The Institutions underlined how the Basic Regulations now reflect the EU’s commitment to high environmental standards and workers’ rights.<sup>3</sup> However, commentators were quick to take a more critical stance on the new rules. They questioned whether the EU’s intentions were “green governance” or “veiled protectionism”,<sup>4</sup> or criticised the new measures for being “tasteless”<sup>5</sup> or amounting to “greenwashing”.<sup>6</sup> Indeed, the inclusion of social and environmental standards in the trade defence instruments (TDI) inevitably sparks heated debate on protectionism, green governance and environmental policy choices within the EU’s common commercial policy (CCP).

This article takes a closer look how the EU’s commitments have been translated into practice. After positioning the EU’s modernised Basic Regulations in comparison to the applicable legislation in other members of the World Trade Organization (WTO) (B), this article reviews in detail three major aspects of environmental and social considerations in practice: the significant distortions methodology, the new

1 Regulation (EU) 2016/1036 on protection against dumped imports from countries not members of the European Union, OJ L 176 of 30/6/2016, p. 21; Regulation (EU) 2016/1037 on protection against subsidised imports from countries not members of the European Union, OJ L 176 of 30/6/2016, p. 55.

2 See Art. 5(1), 6(7), 21(2) BADR and Art. 10(1), 11(7), 31(1) BASR.

3 *European Commission*, EU modernises its trade defence instruments, 23 January 2018, available at: [https://ec.europa.eu/commission/presscorner/detail/en/MEMO\\_18\\_396](https://ec.europa.eu/commission/presscorner/detail/en/MEMO_18_396) (18/8/2022); *European Parliament*, Tougher defence tools against unfair imports, MEPs strike deal with ministers, 6 December 2017, available at: <https://www.europarl.europa.eu/news/sl/press-room/20171205IPR89528/tougher-defence-tools-against-unfair-imports-me-ps-strike-deal-with-ministers> (18/8/2022).

4 *Trapp*, NR 2021/2, p. 195.

5 *Gustafsson/Crochet*, in: Orsini/Kavvatha (eds.), p. 200.

6 *Willems/Danneels/Natens*, ITLR 2022/3, p. 160.

calculation of the injury margin and the application of the Union interest test (C). This review serves as the basis for a discussion of the rules in terms of policy, effectiveness, governance, missed opportunities and future possibilities (D). The last section concludes (E).

## B. EU and WTO Members' Environmental Commitment in Trade Remedies

The inclusion of environmental and social standards in the modernised TDI rules in the EU was one of the most hotly debated issues in the trilogue negotiations. The European Parliament took the position that environmental and social standards were to be meaningfully included in the new rules.<sup>7</sup> The Parliament opined that imported goods from countries that do not have sufficient levels of environmental protection had to be tackled with stiffer duties. In 2017, the Parliament reaffirmed its position that environmental considerations were required for the deal to go through.<sup>8</sup> The Parliament's efforts bore fruit with the inclusion of several references to environmental and social standards in the adopted legislative amendments.

This explicit inclusion of social and environmental aspects in the EU stands in sharp contrast with the domestic trade remedy rules of other WTO Members. A review of the WTO's Environmental Database<sup>9</sup> – which contains environment-related provisions notified to the WTO, including under the WTO's trade remedy agreements – confirms that the overlap between environmental measures and the trade remedy agreements is minimal.<sup>10</sup> Besides the EU's Basic Regulations, a noteworthy example is Brazilian anti-dumping law, which requires applicants for anti-dumping measures to provide the investigating authority with information about investments made to comply with environmental requirements.<sup>11</sup> Furthermore, several jurisdic-

7 See Amendments adopted by the European Parliament on 5 February 2014 on the proposal for a regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1225/2009 on protection against dumped imports from countries not members of the European Community and Council Regulation (EC) No 597/2009 on protection against subsidised imports from countries not members of the European Community (COM(2013)0192 – C7-0097/2013 – 2013/0103(COD)), OJ 2014 C 93/261.

8 See *European Parliament*, Tougher Defence Tools Against Unfair Imports, MEPs Strike a deal with Ministers, 6 December 2017, available at: <https://www.europarl.europa.eu/news/de/press-room/20171205IPR89528/tougher-defence-tools-against-unfair-imports-meps-strike-deal-with-ministers> (18/8/2022).

9 See WTO Environmental Database: <https://edb.wto.org/> (18/8/2022).

10 Around 1.5% of the entries are connected to the WTO's trade remedy agreements. The Database contains 6,987 environment-related notifications, 14,629 environment-related measures and 9,383 environment-related TPR entries and covers data from 2009 to 2021. It is prepared under the WTO Secretariat's own responsibility.

11 Art. 39 and 101 of Decree No. 8058, dated 26 July 2013. See Committee on Anti-Dumping Practice, Committee on Subsidies and Countervailing Measures, and Committee on Safeguards, Notification of Laws and Regulations under Articles 18.5, 32.6 and 12.6 of the Agreements, Brazil, G/ADP/N/1/BRA/3/Suppl.2 and G/ADP/N/1/BRA/3/Suppl.5, 18 September 2104 and 31 January 2019.

tions also notified exceptions to anti-subsidy challenges for environmental subsidies.<sup>12</sup>

Therefore, it can be concluded that WTO Members have thus far not actively pursued environmental goals through the application of trade remedy measures. Yet the EU's new rules illustrate possible legal innovations and new mechanisms that explore the crossover between trade defence and non-economic goals.

### C. Environmental Considerations in the EU's Modernised Trade Defence Regulations

The TDI modernisation package introduced several social and environmental commitments into the Basic Regulation. This section reviews the two most bespoke changes, namely the new significant distortions methodology (I) and the new calculation rules to determine the injury margin (II). Beyond that, this section also delves into the discussion whether the Union interest test should include social and environmental policy considerations (III).

#### I. Significant Distortions

The significant distortions methodology was perhaps the most important legislative change recently implemented by the EU. On two points, the new methodology touches upon social and environmental standards.

First, although the definition of significant distortions does not include the failure to comply with social and environmental standards,<sup>13</sup> Recital 4 of the Modernisation Regulation acknowledges a link to the concept of significant distortions, by providing that “relevant international standards, including core conventions of the [ILO] and relevant [MEAs]” shall be taken into account.<sup>14</sup> Connecting the notion of significant distortions to a lack of environmental protection would render the anti-dumping instrument a strong tool to tackle the unfair effects of low environmental and social standards in exporting countries.

However, nothing suggests that this preambular reference creates an obligation for the Commission to consider social and environmental standards.<sup>15</sup> First, the reference is not mirrored in the operative part of the Basic Regulation, so the Commission is not obliged to consider social and environmental standards when assessing the existence of significant distortions. For instance, in *Organic coated steel from China*, the Commission refused to follow the argument raised by the applicant that

12 See e.g. Liberia, Regulation C/Reg.05/06/13 Relating to the Imposition of Countervailing Duties, Art. 5(6) and Montenegro, Decree for the Implementation of the Law on Foreign Trade, Art. 16.

13 See Art. 2(6a)(b) BADR.

14 Recital 4 to Regulation (EU) 2017/2321.

15 *De Baere*, in: Hahn/Van der Loo (eds.), p. 358.

distortions on the Chinese market in the form of low environmental standards exist.<sup>16</sup> Second, the country reports prepared by the Commission describing significant distortions do not dedicate a chapter to the status of ratification and implementation of social and environmental agreements. China's report only contains scattered references to environmental protection in domestic legislation.<sup>17</sup> By contrast, Russia's report includes a section on the ratification and implementation by Russia of various international environmental conventions, but confined to Chapter 8 on Land.<sup>18</sup> The chapter concludes that "environmental impacts of various types of industrial activities are not reflected in the prices of land which diminishes the incentives of economic operators to improve their environmental track record".<sup>19</sup> It is therefore unsurprising that applicants are discouraged to advance arguments on the environmental track record of the country under investigation.

Nonetheless, the Commission confirmed that it considers any kind of competitive advantages of Chinese exporting producers in terms of social or environmental requirements to be captured under the broader notion of significant distortions. In *Fasteners from China*, it explicitly held that "the alleged competitive advantages [including less stringent legal environmental requirements] were in reality significant distortions on the Chinese market".<sup>20</sup> In this case, it meant that the Commission did not explore the allegation of competitive advantages but simply considered them caught under the notion of significant distortions, even though the investigation on the existence of significant distortions does not focus on social and environmental compliance.

A second environmental aspect of the significant distortions methodology is the consideration of social and environmental standards in reference countries for constructing the normal value. To that extent, Art. 2(6a)(a) of the BADR foresees that corresponding costs of production and sale in an appropriate country will be used, and that "preference shall be given, where appropriate, to countries with an adequate level of social and environmental protection."<sup>21</sup> Whereas Annex Ia to the BADR lists eight ILO Conventions (the so-called core ILO Conventions), no equivalent list of potential MEAs exists.<sup>22</sup>

16 See Regulation (EU) 2019/687, *Organic coated steel from China*, OJ L 116 of 3/5/2019, rec. 51 and 53. Similarly, see Regulation (EU) 2021/1805, *Wire rod from China*, OJ L 364 of 13/10/2021, rec. 42.

17 *European Commission*, Commission Staff Working Document on significant distortions in the economy of the People's Republic of China for the purposes of trade defence investigations, SWD(2017) 483 final/2.

18 *European Commission*, Commission Staff Working Document on significant distortions in the economy of the Russian Federation for the purposes of trade defence investigations, SWD(2020) 242 final, pp. 185 ff.

19 *Ibid.*, p. 188.

20 Regulation (EU) 2022/191, *Steel fasteners from China*, OJ L 36 of 17/2/2022, rec. 469–470.

21 See also Recital 6 to Regulation (EU) 2017/2321.

22 Compare to the list of MEAs in the GSP Regulation. See Regulation (EU) No 978/2012, OJ L 303 of 31/10/2012, Annex VIII, Part B.

Social and environmental standards will only be considered as a secondary criterion when searching for a representative country and the wording is broad so the Commission retains a high level of flexibility.<sup>23</sup> Although this aspect of significant distortions is discussed more widely than the first, it is even less likely to have any effect on the level of anti-dumping duty in practice.<sup>24</sup> Indeed, the relevance of this criterion has so far been limited in practice. In only one investigation, *Organic coated steel from China*, the Commission looked at the compliance with and the ratification of the ILO Conventions as well as one major MEA, the Stockholm Convention on Persistent Organic Pollutants.<sup>25</sup> In all other cases, the Commission found a representative country without the need to further resort to an analysis of the level of social and environmental protection, as suitable data was available for only one country. The Commission is adamant that social and environmental considerations are merely a secondary criterion and refuses to discuss arguments raised by the applicant when the application of the primary criteria suffice to select a representative country,<sup>26</sup> as illustrated by the frequent dismissal of arguments brought by interested parties.<sup>27</sup>

Also in investigations on goods imported from non-WTO Members, the selection of representative countries is subject to a secondary criterion of social and environmental standards.<sup>28</sup> In *Steel fasteners from China*, interested parties opposed to the selection of Thailand as a representative country, citing inadequate levels of social and environmental protection.<sup>29</sup> The Commission did not address this argument, simply referring to the fact that social and environmental considerations were only secondary in nature.<sup>30</sup>

In sum, the significant distortions methodology considers environmental standards in both the country under investigation and the representative country, yet the rules are construed in such manner that they have no impact on the final duty. The extremely limited practice from the Commission illustrates this point and proves that neither of these social and environmental aspects of the significant distortions methodology influence the outcome of dumping investigations.

## II. Injury Margin

A second legislative change using social and environmental standards in the Modernisation Package was the renewed calculation of the injury margin. When applying the lesser-duty rule (LDR), the Commission calculates the injury margin by

23 *Shadikhodjaev*, JIEL 2018/4, p. 898 f; *Tietje/Sacher*, in: Bungenberg et al. (eds.), p. 96 f.

24 *Gustafsson/Crochet*, in: Orsini/Kavvatha (eds.), pp. 197–198.

25 Regulation (EU) 2019/687, *Organic coated steel from China*, OJ L 116 of 3/5/2019, rec. 110 ff.

26 *Hoffmeister*, in: Hahn/Van der Loo, p. 341.

27 See e.g. Regulation 2022/191, *Steel fasteners from China*, OJ L 36 of 17/2/2022, rec. 228.

28 See Art. 2(7) BADR.

29 Regulation (EU) 2022/191, *Steel fasteners from China*, OJ L 36 of 17/2/2022, rec. 227 ff.

30 *Ibid.*

comparing the export price with the non-injurious price of the Union industry, the so-called target price. Art. 7(2d) BADR and Art. 12(1a) BASR now foresee that costs to comply with MEAs and ILO Conventions to which the EU is a party must be added to the target price. Importantly, not only actual costs but also future costs resulting from these conventions are to be calculated. This provision intends to level the playing field for compliance costs with MEAs and ILO Conventions.

Practice revealed that the future compliance costs mainly relate to the costs incurred by Union producers under the EU's Emission Trading Scheme (ETS). In *UAN from Russia, Trinidad and Tobago and the US*, the Commission lauded the EU's ETS as the cornerstone of the EU's policy to comply with MEAs.<sup>31</sup> The costs were calculated on the basis of the average estimated additional EU allowances which will have to be purchased during the life of the measures (5 years) and the Commission estimated the costs based on projections of Bloomberg New Energy Finance.<sup>32</sup> This first application of the new provision did not go without opposition. Several interested parties challenged the Commission's findings for not being supported by sufficient positive evidence and challenged the calculation method compared to past compliance costs – claims, which the Commission rejected.<sup>33</sup>

Later, the scope of compliance costs was broadened beyond allowances under the ETS. In several cases, the Commission also considered indirect CO<sub>2</sub> costs stemming from an increase in electricity prices because of the EU ETS and the forecasted prices of EU allowances under the ETS.<sup>34</sup> In *Electrolytic chromium coated steel from China and Brazil*, the Commission went even further and considered additional future cost resulting from investments to reduce CO<sub>2</sub> emissions in terms of depreciation of such investments.<sup>35</sup> Moreover, in *MES from the US and Saudi Arabia*, compliance costs from the EU Industrial Emissions Directive (IED).<sup>36</sup> The Commission tagged the IED as the main instrument regulating pollutant emissions from industrial installations, which ensures compliance with MEA obligations.<sup>37</sup> Calculations were based on data supplied by a Union producer and crosschecked by the Commission.<sup>38</sup>

Whereas the Commission thus far focused on compliance costs linked directly and indirectly to the EU's ETS, there are other potential pieces of legislation that

31 Regulation (EU) 2019/576, *UAN from Russia, Trinidad and Tobago and the US*, OJ L 100 of 11/4/2019, rec. 202.

32 Ibid.

33 Regulation (EU) 2019/1688, *UAN from Russia, Trinidad and Tobago and the US*, OJ L 258 of 9/10/2019, rec. 196.

34 See e.g. Regulation (EU) 2021/582, *Aluminium flat-rolled products from China*, OJ 124 of 12/4/2021, rec. 469; Regulation (EU) 2021/1812, *GES from China*, OJ L 366 of 15/10/2021, rec. 302; Regulation (EU) 2021/983, *Aluminium converter foil from China*, OJ L 216 of 18/6/2021, rec. 373.

35 See Regulation (EU) 2022/802, *Electrolytic chromium coated steel from China and Brazil*, OJ L 143 of 23/5/2022, rec. 232.

36 See Regulation (EU) 2021/939, *MEG from the US and Saudi Arabia*, OJ L 205 of 11/6/2021, rec. 264.

37 Ibid.

38 Ibid.

may be used in the future. For instance, upcoming legislation as part of the EU Green Deal or the Fit-for-55 Package may be expected to lead to higher compliance costs in the EU. In this regard, scholars have warned for a potential overlap with state aid for the implementation of EU environmental legislation<sup>39</sup> or the proposed EU carbon border adjustment mechanism (CBAM).<sup>40</sup> Regarding the latter, the Commission already opined that it is irrelevant that the mechanism of Art. 7(2d) BADR would amount to a carbon adjustment mechanism.<sup>41</sup>

In practical terms, the Commission inquires about compliance costs linked to MEAs incurred in questionnaires for Union producers. Absent claims by the Union producers, the Commission will not investigate whether such additional costs should be added to the target price, despite the wording “shall” used in Art. 7(2d) BADR. In a range of recent cases, no claims were made by the Union industry and the Commission did not add compliance costs to the non-injurious target price.<sup>42</sup> Nonetheless, in *Superabsorbent polymers from Korea*, despite the fact that the Commission noted that no claims were made, upon receiving complaints by the Union industry and an interested party, the Commission confirmed that it had included future costs in its calculation.<sup>43</sup>

In several cases, the Commission has discussed its views on the interpretation of Art. 7(2d) BADR. For instance, it has made it clear it does not see any problem in the one-sided nature of the provision. The Commission consistently dismissed the argument that exporting producers also may incur environmental compliance costs, for instance under national emission trading schemes or international conventions such as UN Framework Convention on Climate Change (UNFCCC) and the Paris Agreement.<sup>44</sup> The Commission has always referred to the wording of Art. 7(2d) BADR to reject these arguments.

The Commission has also discussed environmental compliance costs under the separate Union interest test of Art. 7(2b) BADR.<sup>45</sup> In *Hot-rolled stainless steel from Indonesia, China and Taiwan*, it confirmed it sees Art. 7(2d) BADR as the only way

39 *Trapp*, NR 2021/2, p. 198.

40 *Willems/Danneels/Natens*, ITLR 2022/3, p. 160.

41 See Regulation (EU) 2021/1976, *MEG from the US and Saudi Arabia*, OJ L 211 of 15/6/2021, rec. 233.

42 See e.g. Regulation (EU) 2022/191, *Steel fasteners from China*, OJ L 36 of 17/2/2022, rec. 488; Regulation (EU) 2020/492, *GFF from China*, OJ L 46 of 25/2/2022, rec. 529; Regulation (EU) 2021/2239, *Utility scale steel wind towers from China*, OJ L 450 of 16/12/2022, rec. 409. See also Regulation (EU) 2021/2011, *Optical fibre cables from China*, OJ L 410 of 18/11/2021, rec. 558.

43 See Regulation (EU) 2022/547, *Superabsorbent polymers from Korea*, OJ L 107 of 6/4/2022, rec. 382.

44 With regard to the Chinese ETS, see Regulation (EU) 2021/1784, *Aluminium flat-rolled products from China*, OJ L 359 of 11/10/2021, rec. 554–555. With regard to South Korean ETS, see Regulation (EU) 2020/1524, *Heavyweight thermal paper from Korea*, OJ L 346 of 20/10/2020, rec. 78–79.

45 For a discussion of the “general” Union interest test, see section C.III below.



to consider the ecological footprint of imports of dumped products in the investigation.<sup>46</sup>

In sum, the consideration of environmental compliance costs in the injury margin is the most impactful change to the dumping rules, as it has the potential to jack up the determination of the target price and therefore the injury margin and the duty imposed. Indeed, a review of the practice reveals that the Commission is willing to increase the price slightly for the (future) costs incurred. In only one case thus far, the Commission conclude that no additional costs would be incurred by the Union industry.<sup>47</sup> Overall, the impact of the new injury margin is quite modest, yet existent.

### III. Union Interest Test

The Commission also frequently considers environmental policy arguments in the Union interest test. Although not mandatory under the WTO agreements,<sup>48</sup> the EU Basic Regulations foresee the application of a Union interest test in trade defence investigations.<sup>49</sup> The Commission has repeatedly refused to introduce non-economic considerations in the Union interest test,<sup>50</sup> including in the latest round of modernisation.<sup>51</sup> Therefore, the Commission will only address environmental considerations when parties bring it up, *i.e.* when the environmental considerations coincide with the aims of the parties.<sup>52</sup>

A frequently advanced argument by Union producers is that production in the EU is more environmentally friendly and sustainable compared to in the countries under investigation. For instance, the greener production methods in the EU would contribute to environmental goals set by the Commission, rendering protection of the EU industry warranted in the steel and aluminium sector.<sup>53</sup> Similar arguments have been raised in the production of goods that contribute to the production of greener steel.<sup>54</sup> The Commission indeed favours a restoration of the level playing

46 See Regulation (EU) 2020/1408, *Steel sheets from Indonesia, China and Taiwan*, OJ L 325 of 7/10/2020, rec. 286.

47 Regulation (EU) 2021/1811, *Calcium silicon from China*, O L 366 of 15/10/2021, rec. 272.

48 Art. 9.1 ADA, Art. 18.1 ACSM.

49 Art. 21 BADR, Art. 31 BASR.

50 See e.g. Commission Clarification Paper on the Community Interest Test in Anti-dumping and Anti-subsidy Proceedings, 13 January 2006; Communication from the Commission to the Council and the European Parliament on Modernisation of Trade Defence Instruments adapting trade defence instruments to the current needs of the European economy, COM/2013/0191 final, 10 April 2013.

51 *Hoffmeister*, in: Herrmann/Simma/Streinzi (eds.), p. 375.

52 *Melin*, GTCJ 2016/3, p. 110; *Sinnaeve*, GTCJ 2007/4, p. 162.

53 See e.g. Regulation (EU) 2021/546, *Aluminium extrusions from China*, OJ L 109 of 30/3/2021, rec. 314.

54 See Regulation (EU) 2021/1812, *GES from China*, OJ L 266 of 15/10/2021, rec. 290.

field to allow the Union industry to make further investments to comply with environmental and social requirements.<sup>55</sup>

Users and importers opposing to measures frequently point out how additional duties have potential adverse effect on the EU environmental commitments. They may argue, for instance, that alternative products to replace the product under investigation are not equally environmentally friendly.<sup>56</sup> The Commission generally does not consider such argument strong enough to outbalance the imposition of duties. In *Birch plywood from Russia*, for instance, the Commission rejected carbon leakage concerns by finding the claims unsubstantiated.<sup>57</sup> Users have furthermore pointed out that anti-dumping duties play against EU environmental policies, such as the encouraged use of electric bicycles.<sup>58</sup> These examples illustrate how interested parties expose inconsistencies between the EU's trade defence practice and environmental commitments, climate policy or circular economy goals.<sup>59</sup> This should encourage the Commission to streamline its trade and environmental policies.

Inconsistencies between trade and environmental policies are even more obvious in cases where both interested parties supporting and opposing measures rely on environmental grounds in the same investigation. In the *Aluminium extrusions from China*, Union steel producers pointed to the more sustainable production methods in the EU at the same time that rail transport companies claim that measures obstruct the development of environmentally friendly modes of mass transportation by rail.<sup>60</sup> In *GFF from China and Egypt*, the wind energy sector feared that the EU's renewable energy targets will be endangered if measures were to be imposed, whereas ski producers pointed to their research and development cooperation efforts with EU producers to develop environmentally friendly products.<sup>61</sup> In *PV Modules from China*, several environmental non-governmental organisations submitted that duties on PV modules run contrary to the achievement of climate change goals, the UNFCCC and the Paris Agreement by slowing down the deployment of solar energy.<sup>62</sup> Other environmental groups supported the EU producers and pointed out that Union-produced PV modules would overall be more environ-

55 See e.g. Regulation (EU) 2021/9, *Hot-rolled flat products from Turkey*, OJ L 3 of 7/1/2022, rec. 177; Regulation (EU) 2022/1221, *Aluminium road wheels from Morocco*, OJ L 188 of 15/7/2022, rec. 165.

56 See e.g. Regulation (EU) 2020/1336, *Polyvinyl alcohols from China*, OJ L 315 of 29/9/2020, rec. 559; Regulation (EU) 2019/576, *UAN from Russia, Trinidad and Tobago and the US*, OJ L 100 of 11/4/2019, rec. 25; Regulation (EU) 2019/1688, *UAN from Russia, Trinidad and Tobago and the US*, OJ L 258 of 9/10/2019, rec. 268.

57 Regulation (EU) 2021/940, *Birch plywood from Russia*, OJ L of 205 of 11/6/2021, rec. 202.

58 Regulation (EU) 2019/73, *E-bikes from China*, OJ L 16 of 18/1/2019, rec. 189.

59 See e.g. Regulation (EU) 2017/367, *PV modules from China*, OJ L 56 of 3/3/2017, rec. 314 ff.

60 Regulation (EU) 2021/546, *Aluminium extrusions from China*, OJ L 109 of 30/3/2021, compare rec. 314 and 343.

61 Regulation (EU) 2020/492, *GFF from China and Egypt*, OJ L 46 of 25/2/2020, compare rec. 503 and 508.

62 Regulation (EU) 2017/367, *PV modules from China*, OJ L 56 of 3/3/2017, rec. 314 ff.

mentally friendly.<sup>63</sup> In cases where a lot of opposition by interested parties, it is an uphill task for interested parties opposing to the measures to change the Commission's mind based on environmental policy grounds. As illustrated in *Steel wind towers from China*, the Commission still favoured "deployment across the Union by creating a level playing field" over increased imports of (dumped) goods.<sup>64</sup>

It is difficult to draw conclusions on the impact of environmental considerations in the Union interest test where a multitude of factors is considered across a wide range of actors on the Union market. Nonetheless, as the reviewed cases above show, the environmental considerations play a relatively modest role in the Union interest test for at least three reasons. First, the Commission maintains the Union interest test as an economic one where policy considerations have no place. Second, if interested parties advance environmental arguments, the Commission tends to side with the Union industry side and find environmental counterarguments by other interested parties not convincing. Third, in any case, the Union interest test is largely inconsequential to the outcome of the trade defence investigation, as it is rarely used to refuse or modify TDI duties.<sup>65</sup>

Against that background, a popular suggestion amongst scholars is to oblige investigating authorities to consider climate policy and environmental protection objectives in the public interest test by introducing a so-called mandatory environmental interest test.<sup>66</sup> Such test could particularly spur discussion in the case of environmental goods, the price increase through the imposition of trade remedies and the development of the EU market of such environmental goods. Another suggestion is to strengthen the position of environmental stakeholders in trade defence investigations or encourage more internal discussion within the Commission (e.g. in the form of an exchange between the Directorate-General for Trade and the Directorate-General for the Environment).<sup>67</sup>

#### D. Analysis of the EU's Approach to Social and Environmental Trade Defence Rules

The provisions of EU's Basic Regulations show how social and environmental standards are increasingly considered in the Commission's trade defence investigations. At least five observations can be made.

First, the inclusion of social and environmental considerations in the Basic Regulations is to be situated in the context of external action goal setting in the EU. Since the Lisbon Treaty, several legal bases – notably Art. 21(1) and (2) of the Treaty of the European Union (TEU), Art. 9 and 11 of the Treaty on the Functioning of the European Union (TFEU), and Art. 3(5) TEU – blend non-economic considerations

63 Ibid.

64 Regulation (EU) 2021/2239, *Utility scale wind towers from China*, OJ L 450 of 16/12/2021, rec. 451 ff.

65 See *Van Bael & Bellis*, pp. 278–279.

66 *Kampel*, p. 19; *UNCTAD*, p. 16.

67 See *Ricardo Meléndez-Ortiz*, p. 11.

in the goals pursued by the EU's external action. In the field of external trade relations, the Court of Justice interpreted these provisions as meaning that the objective of sustainable development forms an integral part of the CCP.<sup>68</sup> EU trade policy shall therefore balance trade liberalisation goals with other goals, including social and environmental protection. In the field of trade defence, it is important to maintain a connection between the reaching of environmental goals and the reduced market access to prevent the EU's trade defence policy from becoming a protectionist tool in the name of environmental protection.<sup>69</sup> Only as such can the new rules reflect the EU's commitment to high social and environmental standards in a matter consistent with the Treaties.

In one case, the Commission discussed the importance of Art. 11 TFEU on anti-dumping investigations. The Commission underlined that it does not see Art. 11 TFEU as a card to trump economic interests of the Union industry, and that in no way the provision can be used as an excuse to allow polluting Union industries to be wiped out for the sake of the environment.<sup>70</sup> Rather, the Commission understands that the environmental protection requirements are to be integrated into the policies guiding economic activity in the Union.<sup>71</sup>

Second, the new social and environmental provisions can be split into two categories: those concerning standards in the EU and those concerning standards in third countries. Most of the new provisions concern the standard of social and environmental protection in the exporting country, yet those provisions are the least prone to have real impact on the duty levels. For instance, this article illustrated how the social and environmental aspect of the significant distortions methodology is not translated into the operative part of the BADR.<sup>72</sup> By contrast, only one provision looks inward to the EU's standard of protection, yet that provision does actually raise the level of anti-dumping duty. Indeed, a review of the application of the injury margin calculation where actual and future compliance costs for MEAs and ILO Conventions are accounted for lead to an increase of the final duty.<sup>73</sup>

Third, although the Parliament's insistence on tackling social and environmental dumping has been translated in several measures, it has not fully succeeded to push through its entire agenda. Notably, the Parliament had advanced a proposal for an additional ground not to apply the LDR.<sup>74</sup> The Parliament had proposed that exporting producers would not be allowed to enjoy the beneficial measure that anti-dumping or anti-subsidy duties be applied on the level of the injury margin in cases

68 ECJ, Opinion 2/15 of the Court of 16 May 2017, *EU-Singapore FTA*, case C-2/15, ECLI:EU:C:2017:376, para. 147.

69 *Trapp*, NR 2021/2, p. 195.

70 Regulation (EU) 2021/2287, *Aluminium converter foil from China*, OJ L 458 of 22/12/2021, rec. 761–762.

71 *Ibid.*

72 See sect. C.I above.

73 See sect. C.II above.

74 See Amendments 16 and 30 adopted by the European Parliament. See fn. 6 above.

where the exporting country has an insufficient level of social and environmental standards.<sup>75</sup> This potentially impactful proposal did not make it into the final text.

Furthermore, Recital 12 entitles the Commission to initiate interim reviews, *ex officio*, in case the costs of the EU industry increase as a result of higher social and environmental standards, or circumstances in the exporting countries change related to social and environmental standards.<sup>76</sup> One could imagine this provision to be applied in a situation where a country for instance withdraws from a MEA, the interim review could result in the withdrawal of the undertakings in force.<sup>77</sup> This could potentially also prove an important tool, but is not reproduced in the operative part of the Basic Regulations and is therefore not applied in practice.

Fourth, the EU modernisation is to be placed in a broader trend of pursuing a value-based external trade policy. This manifests in both the bilateral<sup>78</sup> as well as in the autonomous or unilateral CCP.<sup>79</sup> Many doubt whether the TDI rules are the best-fit instrument to pursue social and environmental goals. It appears that the Commission also moves away from the further development of using the Basic Regulations for environmental purposes. The new Foreign Subsidies Instrument (FSI), for instance, will explicitly not pursue the goals of tackling social or environmental dumping.<sup>80</sup> Moreover, a number of instruments are developed with explicit environmental protection and climate change goals, including most notably the CBAM. This may be an illustration of a different focus of developing value-based market access condition instruments.

Fifth, the focus remains strongly on social and environmental considerations in anti-dumping investigations, not the other trade defence instruments. This review of recent Commission practice has focused predominantly on anti-dumping cases. Examples of social or environmental considerations in anti-subsidy investigations are extremely scarce – for instance, the new rules on the injury margin have not yet been applied in any anti-subsidy investigation.<sup>81</sup> Nonetheless, subsidy cases in the EU have counterbalanced environmental subsidy programs in third countries.<sup>82</sup> Safe-

75 Ibid.

76 Recital 12 to Regulation 2018/825.

77 Hoffmeister, in: Hahn/Van der Loo, p. 348.

78 See recently *European Commission*, The power of trade partnerships: together for green and just economic growth, COM(2022) 409 final, 22/6/2022.

79 Reinhold, in: Tietje et al. (eds.), p. 18 ff.

80 See eg *Tono Gil*, EU foreign-subsidies tool shouldn't be diverted into labor, green issues, Vestager says, mLex, 7 March 2022, available at: <https://mlexmarketinsight.com/news/insight/eu-foreign-subsidies-tool-shouldn-t-be-diverted-into-labor-green-issues-vestager-says> (18/8/2022) and *Foo Chun Lee*, No room for green, labour issues in foreign subsidies proposal, EU competition head says, Reuters, 7 March 2022, available at: <https://www.reuters.com/world/china/no-room-green-labour-issues-foreign-subsidies-proposal-eu-competition-head-says-2022-03-07/> (18/8/2022).

81 *Willems/Danneels/Natens*, ITLR 2022/3, p. 153.

82 See recently e.g. Regulation (EU) 2018/1690, *Tyres from China*, OJ L 283 of 12/11/2018; Regulation (EU) 2022/433, *Cold-rolled flat steel from India and Indonesia*, OJ L 88 of 16/3/2022; Regulation (EU) 2020/776, *GFF from China and Egypt*, OJ L 189 of 15/6/2020; Regulation (EU) 2017/969, *Hot-rolled flat steel from China*, OJ L 146 of 9/6/2019.

guard measures have remained totally absent from the debate. The safeguard rules were not reformed in 2018 and are generally a far more exceptionally used instrument in the EU.<sup>83</sup> Some scholars have indicated the utility of several aspects of safeguards investigations to develop a new instrument that pursues environmental goals.<sup>84</sup> The Commission, however, chose not to reform the safeguards rules and therefore did not insert for social and environmental protection goals.

## E. Conclusion

Since 2018, green governance is exerted through the EU's trade defence instruments. This article reviewed whether the criticism of early commentators on the green provisions in the Basic Regulations was warranted, by reviewing the recent TDI practice of the Commission. It finds that only the inclusion of costs resulting from MEAs and ILO Conventions into the injury margin calculation has the potential to affect the level of anti-dumping or anti-subsidy duty. By contrast, most provisions considering social and environmental standards in exporting countries are designed in such manner that they do not influence the final duty levels.

Nonetheless, the new provisions illustrate the EU's value-based approach to developing its trade defence instruments, which implements the general principles and objectives of the EU's external action. The EU is to be commended for its efforts in reconciling environmental and trade defence goals, which at first sight seems unlikely to many. The Commission can ensure a better application of the new provisions (e.g. automatically add compliance costs to the target price) and expand the greening of TDI even further (e.g. operationalise the recitals on significant distortions and interim reviews). Also the Union interest test remains an important platform for the Commission to discuss environmental policy arguments, although it should be wary of policy inconsistencies. Nonetheless, the anti-dumping and anti-subsidy instrument should not further burst outside its borders into a remedy against social or environmental dumping. Several other green market access measures, such as the CBAM and bilaterally agreed concessions, fulfil such roles.

## Bibliography

DE BAERE, PHILIPPE, *The EU's Amended Basic Anti-Dumping Regulation – a Practitioner's View*, in: Hahn, Michael; Van Der Loo, Guillaume (eds.), *Law and Practice of the Common Commercial Policy: The First 10 Years after the Treaty of Lisbon*, Leiden, 2021, pp. 356–379

GUSTAFSSON, MARCUS; CROCHET, VICTOR, *At the crossroads of Trade and Environment. The Growing influence of environmental policy on EU trade law*, in: Orsini, Amandine; Kavvatha, Elena (eds.), *EU Environmental Governance. Current and Future Challenges*, London, 2020, pp. 187–206

83 For an overview, see *Vermulst/Graafsma*, 2018/9, pp. 355 ff.

84 *Shaffer*, ILR 2019/1, pp. 33 ff.

- HOFFMEISTER, FRANK, *Modernising the EU's Trade Defence Instruments: Mission Impossible?*, in: Herrmann, Christoph et al. (eds.), *Trade Policy between Law, Diplomacy and Scholarship. Liber Amicorum in memoriam Horst G. Krenzler*, Cham, 2015, pp. 365–376
- HOFFMEISTER, FRANK, *The Devil is in the Detail – a First Guide on the EU's New Trade Defence Rules*, in: Hahn, Michael; Van Der Loo, Guillaume (eds.), *Law and Practice of the Common Commercial Policy: The First 10 Years after the Treaty of Lisbon*, Leiden, 2021, pp. 335–354
- KAMPEL, KIM, *Options for Disciplining the Use of Trade Remedies in Clean Energy Technologies*, ICTSD Issue Paper, May 2017
- MELÉNDEZ-ORTIZ, RICARDO, *Enabling the Energy Transition and Scale-Up of Clean Energy Technologies: Options for the Global Trade System*, E15 Expert Group on Clean Energy Technologies and the Trade System, Policy Options Paper, 2016
- MELIN, YVES, *Users in EU Trade Defence Investigations: How to Better Take their Interests into Account, and the New Role of Member States as User Champions after Comitology*, *Global Trade and Customs Journal (GTCJ)*, 2016, Vol. 11, Issue 3, pp. 88–121
- MÜLLER, WOLFGANG, *The EU's New Trade Defence Laws: A Two Steps Approach*, in: Bungenberg, Marc et al. (eds.), *The Future of Trade Defence Instruments. Global Policy Trends and Legal Challenges*, EYIEL Special Issue, Cham, 2018, pp. 45–62
- REINHOLD, PHILIPP, *Neue Wege der Nachhaltigkeit – Völkerrechtliche Probleme und europarechtliche Perspektiven einer wertbasierten Handelspolitik der Europäischen Union*, in: Tietje, Christian et al. (eds.), *Beiträge zum Transnationalen Wirtschaftsrecht*, 2022, Band 176
- SHADIKHODJAEV, SHERZOD, *Non-market Economies, Significant Distortions, and the 2017 EU Anti-Dumping Amendment*, *Journal of International Economic Law (JIEL)*, 2018, Vol. 21, Issue 4, pp. 885–905
- SHAFFER, GREGORY, *Retooling Trade Agreements for Social Inclusion*, *Illinois Law Review (ILR)*, 2019, Vol. 19, Issue 1, pp. 1–43
- SINNAEVE, ADINDA, *The 'Community Interest Test' in Anti-Dumping Investigations: Time for Reform?*, *Global Trade and Customs Journal (GTCJ)*, 2007, Vol. 2, Issue 4, pp. 157–181
- TIETJE, CHRISTIAN; VINZENZ, SACHER, *The New Anti-Dumping Methodology of the European Union: A Breach of WTO Law?*, in: Bungenberg, Marc et al. (eds.), *The Future of Trade Defence Instruments. Global Policy Trends and Legal Challenges*, Cham, 2018, pp. 89–105

- TRAPP, PATRICIA, „Global Green Governance” oder „Veiled Protectionism”? *Die Berücksichtigung sozial- und umweltpolitischer Belange in den reformierten Grundverordnungen der EU zur Verhängung von Anti-Dumping- und Ausgleichsmaßnahmen*, Nachhaltigkeitsrecht (NR), 2021, Vol. 1, Issue 2, pp. 195–204
- UNCTAD, *Trade Remedies: Targeting the Renewable Energy Sector*, New York and Geneva, 2014
- VAN BAELE & BELLIS, *EU Anti-Dumping and Other Trade Defence Instruments*, 6<sup>th</sup> ed., Alphen aan den Rijn, 2019
- VERMULST, EDWIN; GRAAFSMA, FOLKERT, *EU Safeguard Law and Practice: 1995–2018*, Global Trade and Customs Journal, 2018, Volume 13, Issue 9, pp. 355–375
- WILLEMS, ARNOUD; DANNEELS, CYRIEL; NATENS, BREGT, *The EU’s ‘Greened’ Injury Margin: a Closer Look at Law and Practice*, International Trade Law Review (ITLR), 2022, Vol. 28, Issue 3, pp. 153–160
- WOLFRUM, RÜDIGER; STOLL, PETER-TOBIAS; KOEBELE, MICHAEL (eds.), *Max Planck Commentaries on Trade Law – Trade Remedies*, Leiden, 2008