

Non paper of the Commission services*

Feedback and way forward on improving the implementation and enforcement of Trade and Sustainable Development chapters in EU Free Trade Agreements

Background

Open trade policies drive prosperity by deepening economic ties between consumers, workers and citizens across the globe. These new and deeper relationships highlight differences and raise critical comparisons between social and environmental conditions in the EU and its trading partners. In the *Trade for All* communication¹, the Commission therefore put values and principles such as high social and environmental standards at the core of EU trade policy. While trade policy alone cannot solve all the problems of the world in these areas, it can make a significant contribution based on constructive cooperation focused on specific trade-related challenges.

Recent free trade agreements (FTAs) negotiated by the EU systematically include provisions on trade and sustainable development. Their aim is to maximise the leverage of increased trade and investment on issues like decent work, environmental protection, or the fight against climate change in order to achieve effective and sustainable policy change. As shown in the FTA implementation report of 2017 (COM/2017/0654 final), the sustainable development chapters (TSD chapters) of EU FTAs have, in broad terms, worked well. The approach in these TSD chapters is based on three pillars: binding commitments by Parties to a range of multilateral environmental agreements and conventions of the International Labour Organisation, structures to involve civil society organisations in the implementation of those commitments and a dedicated dispute settlement mechanism in which independent arbitrators make findings public of fact regarding compliance. The ultimate objective is to foster real and lasting change on the ground, through the effective application of enhanced social and environmental standards, to the direct benefit of the citizens of our FTA partners.

The Debate

However, some have called for an improvement of the system. The debate on the approach to the implementation of TSD chapters of EU trade agreements is an important part of this effort and sought to engage stakeholders in exploring how to maximise that contribution.

* This non-paper has been drawn up by Commission services and does not engage the Commission as an institution.

¹ Communication COM(2015)497 of 14 October 2015 "Trade for All: Towards a more responsible trade and investment policy"

Since 11 July 2017, EU Member States, the European Parliament, as well as civil society organisations including the Social Partners discussed on the basis of a Commission services non-paper on how to improve TSD implementation. The Commission received a variety of written and oral inputs, from a range of perspectives and stakeholders, and listened to the discussions around those contributions. The contributions and inputs were not limited to the approaches outlined in the non-paper, but went beyond to include various enhancements and innovations to the current approach and which have been fully considered in the context of the way forward.

As regards Member States, the subject was discussed in meetings at various levels, notably at expert level in the Trade and Sustainable Development expert group meeting, at senior level in the Trade Policy Committee at Full Members level, and at ministerial level in the Foreign Affairs Council in trade formation (FAC Trade). In addition, the Commission received written submissions from five Member States as well as a letter signed collectively by five Member States. In the European Parliament, the subject was discussed during the International Trade (INTA) Committee meeting of 30 August 2017, preceded by a technical briefing by the Commission to MEPs on 12 July 2017, and in a plenary discussion at the European Parliament on 16 January 2018. In addition, several MEPs (from various groups S&D, ECR, EPP) wrote letters to the Commission expressing their views. The Commission services also met and received inputs from other various stakeholders who expressed an interest (European Economic and Social Committee, businesses, social partners and other CSOs, both in Brussels and in capitals; and our trade partners and international organisations) and academics engaged in research in the field of TSD.

These conversations and input identified a clear consensus that the implementation of TSD chapters should be stepped-up and improved. All participants in the debate expressed their wish to maintain the current broad scope of TSD chapters in EU FTAs and to support the effective implementation of the global framework of social, labour and environmental standards. More effective means are needed to achieve this however. There was also consistent support for the EU's comprehensive and inclusive approach to implementation - based on active and transparent engagement and cooperation with partner countries and civil society, including the Social Partners - leading to real and lasting changes on the ground. Again however, contributors to the debate were clear that the level of activity needed to be stepped up.

The consultations showed divergent points of view on the application of trade sanctions, with a majority of voices supporting the current model for enforcing TSD chapters and a broad consensus between both positions that the broad scope should be maintained.

The way forward

The areas for improvement in the implementation and enforcement of TSD chapters, where there is a consensus, form the basis for the way forward are outlined in this document. It suggests a set of **15 concrete and practicable actions** to be taken to revamp the TSD

chapters, building on recommendations received and categorised **under four broad headings**: Working Together; Enabling and civil society including the Social Partners to play a greater role in implementation; Delivering; and Transparency and Communication.

There are three specific issues where substantial strengthening and innovation are proposed, as compared with provisions in existing TSD chapters: climate change; the substantive scope for civil society, including the Social Partners' contribution, and the resources available to support the implementation of TSD chapters. These should be complemented and supported by improvements in several other areas, in particular more assertive enforcement, which build on existing features of TSD chapters. The Commission will regularly review, together with the other EU institutions, the functioning and impact of the implementation of TSD chapters and will continue to engage with interested stakeholders to analyse the effectiveness of the implementation of the TSD chapters.

The Commission services' perspective, having assessed the various views, is first and foremost that the absence of consensus on a sanctions-based model makes it impossible to move to such an approach.

In any case, the Commission services also assess that such an approach would not fit easily with the EU's model. Trade sanctions are typically included in trade agreements as a means to compensate parties for quantifiable economic damage resulting from a failure to comply with commitments under the agreement. In the case of a breach of TSD standards by a third country, it would mean that the EU would be "compensated" for such a breach if it could be quantified, but would not guarantee that this will result in effective, sustainable and lasting improvement of key social and environmental standards on the ground. Furthermore, there is a need, in a sanctions-based approach, to find ways to determine how a breach of social or environmental standards can be translated into economic compensation, and this narrows down the scope of the TSD chapter. Countries that use a sanction based approach have so far chosen a much narrower scope than the EU. Negotiating partners have been clear that they would not accept a broad scope combined with trade sanctions.

In view of the Commission services, this list of suggested actions however is not exhaustive: further actions and other measures could also be taken depending on the necessity or the actual case. The Commission service consider it key to continue to engage with Member States, the European Parliament, interested stakeholders and the public to continuously analyse the effectiveness of the implementation of the TSD chapters (e.g. through review clauses; annual FTA implementation reports; ex-post impact assessments). Based on this analysis, it will examine, whether additional measures are needed to ensure the full and effective implementation of TSD chapters, at the latest within 5 years. In respect of the dispute settlement procedures, there should also be appropriate follow-up to further recommendations made in expert panel reports.

A. Working Together

1. Partnering with Member States and the European Parliament

Based on feedback received across the board, the Commission services consider it important to strengthen the partnership with Member States and the European Parliament, pooling in a more efficient manner the resources and leverage of the various institutions to promote the TSD agenda and the compliance with TSD obligations in FTA partner countries. Action should be more coherent, consistent and tailored to the specific priorities and needs of our partners. The Commission services consider it crucial to endeavour to improve the coordination between the institutions in Brussels (the Commission - the Council - the European Parliament), in the FTA partner countries (EU Delegations - Member States embassies – EP/INTA MEPs missions) and with the relevant international bodies (e.g. ILO, MEA Secretariats, OECD). This may involve, more specifically:

- Holding regular meetings and developing more effective and efficient channels of information sharing with Member States, both at home in the EU and on the ground in third countries. This will include regular meetings of capital-based TSD experts in Brussels and regular meetings on TSD matters between EU delegations and Member State' embassies in partner countries. The European Parliament will continue to be invited to participate in TSD Expert meetings. The Commission will discuss further with the European Parliament what other channels would be most suited for deepening information flows (e.g. through existing country-focused monitoring groups or ad hoc meetings).
- Work with partners would be organised on the basis of the country priorities approach (as described under the heading of Delivering -see below).

2. Working with international organisations

During the debate, strong and recurrent messages, notably received during consultations with Member States, called on the Commission to continue to maintain the TSD chapters in a multilateral context (i.e. based on the rules and principles of the International Labour Organisation (ILO) and of Multilateral Environmental Agreements (MEAs)) and to intensify work with the relevant bodies to strengthen this mutually beneficial relationship. The Commission services see the need to systematically coordinate with these bodies and ensure coherence with their activities in support of TSD implementation. The Commission services will start working closely during an early implementation phase to benefit from their expertise and assistance. Such close cooperation with the relevant international bodies will also ensure coherence in interpretation of the international labour and environmental agreements included in the TSD provisions. This approach can help to avoid any risk of introducing parallel labour and environmental standards and being seen as undermining the multilateral governance in these areas.

Over the last year the Commission services have intensified exchanges with ILO in order to ensure a coherent approach in the implementation of the ILO conventions. The ILO, is ready

to provide technical assistance on the ratification and implementation of international labour standards. The same approach will be explored in the case of MEAs.

In order to benefit fully from these important cooperation opportunities, EU Member States will need to play their role in those bodies. Increased effort and coordination, facilitated by the Commission, at the EU level among the labour and environmental experts is needed.

B. Enabling civil society including the Social Partners to play their role in implementation

3. Facilitate the monitoring role of civil society including the Social Partners

During the consultations, Member States, the European Parliament and other stakeholders identified organisational and logistical challenges as important shortcomings for the proper functioning of the civil society bodies. In order to facilitate the civil society bodies' monitoring of the FTA's implementation and their advisory role towards the parties, the Commission will take further steps to support Domestic Advisory Groups (DAGs) in the EU and in partner countries, where relevant.

To this end, a EUR 3 million project supporting civil society including the Social Partners in their roles is being launched under the EU's Partnership Instrument.

This funding will also be used to encourage the exchange of best practices between DAGs in different FTA partner countries, a point raised frequently in the TSD discussions, and to improve interaction between TSD committees (i.e. governmental bodies) and civil society bodies under our agreements by building on best practices such as: participation of the DAGs chairs in the TSD committees; holding meetings back-to-back; and regular Commission services meetings with DAGs to ensure follow-up to recommendations presented by the civil society bodies.

Moreover, recurring requests were made for clear, transparent rules and procedures for the establishment and functioning of the civil society structures (DAGs of both parties and the joint civil society forums (CSFs)) and also to ensure their balance and representativeness, in particular on the side of our trade partners. In response, bearing in mind their independent nature, the Commission services will promote best practices, rules and recommendations for establishment and functioning of DAGs and CSFs, and stimulate creation of guidelines for DAGs based on existing experience and practices in this context. These specific actions should be developed jointly with the European Economic and Social Committee, given its crucial role in the EU civil society structures.

Social dialogue is particularly important for the EU, as it is at the heart of fundamental principles and rights at work. Social partners in particular, have a special role in organizing and monitoring of the labour markets and working rights.

4. Extend the scope for civil society, including the Social Partners, to the whole FTA

Several interlocutors and in particular civil society representatives requested the scope of the civil society structures be extended beyond the TSD chapters.

Under the EU's current standard legal text on TSD, the civil society structures of the FTAs (DAGs of both parties and the joint civil society fora (CSFs)) are competent to discuss and advise on implementation of TSD chapters. This legal limitation has constrained the ability of the groups to provide advice on the sustainability implications of other parts of agreements - e.g. technical barriers to trade, or sanitary and phytosanitary measures, etc. Civil society participants in DAGs have made recurring requests to be able to engage in such a broader discussion on sustainability and FTAs and this call was repeated during the debate. In response the Commission has broadened the substantive scope of competence of DAGs' advice to cover the implementation of the whole agreement in future FTAs. This approach will be first rolled out with the EU-Mexico and EU-Mercosur FTAs, and thereafter become part of the Commission's standard negotiating approach.²

5. Take action regarding responsible business conduct

Various inputs, from the European Parliament, Member States and stakeholders, pointed at the role of business in pursuing our efforts of ensuring sustainable trade. All recently concluded trade agreements contain specific provisions, which have been further reinforced³, committing the parties to promote Corporate Social Responsibility / Responsible Business Conduct (CSR/RBC) referring to internationally agreed instruments in this area. This reinforced approach, developed also in response to calls from the EP, Member States and stakeholders, will translate into TSD implementation activities with FTA partner countries, and build on the expertise and leverage of relevant international organisations and stakeholders (e.g. the ILO, the OECD and its National Contact Points Networks).

This will include the organisation of dedicated capacity building and outreach activities. The Commission is also developing through its Partnership Instrument with the ILO and the OECD a EUR 9m project on responsible supply chains designed to promote responsible business conduct approaches in key Asian trading partners (China, Japan, Myanmar, Vietnam, Thailand and the Philippines). The OECD and the ILO are foreseen as the main implementers. A similar project is being envisaged for Latin America. Other projects could be explored in future.

² As included in the negotiating mandates approved by Council for these negotiations.

³ Starting in negotiations with Mexico and Mercosur

C. Delivering

A key message from Member States, the European Parliament and all stakeholders was that the EU should do more to deliver results under the TSD chapters.

To deliver better results, a combination of actions is necessary, making use of the whole cycle of negotiations and implementation. The actions set out below are intended to bring more focus (prioritisation), improve the functioning of the available monitoring tools and make more assertive use of the dispute settlement procedures. In addition, they are intended to deliver early results (ratification), ensure sufficient resources and materials are available for capacity building and awareness raising (PI and Aid for Trade, handbook), and design concrete implementation actions in priority areas (climate action).

6. Country priorities

Based on feedback from all partners, the Commission services will identify, consider and address priorities for each partner country throughout the whole cycle of an FTA, starting with the content-scoping phase of a future agreement. In addition to pursuing the negotiation of a "standard" TSD chapter, this may include further specific issues of relevance for a given partner. This will be done in cooperation with and relying on the expertise of the relevant Commission services (notably those in charge of social, environmental and climate policy, including circular economy).

The early identification of priority areas and actions should enable a more efficient implementation of commitments under the agreement and should also provide early information on the key needs in terms of awareness and capacity building among the stakeholders (governments, social partners, environmental actors and business). The parties will enable a more focussed use of the various tools throughout the cycle, to step up compliance efforts.

Finally, the Commission services consider it necessary to develop TSD country priorities for implementation. These would identify the main challenges and opportunities in relation to a given FTA partner in relation to TSD implementation. They should facilitate more focused and tailored EU actions. At the level of the Commission and Member States, this should bring focus to the implementation work. Having a clear set of priorities would also provide the basis for coherent efforts of EU stakeholders.

7. Assertive enforcement

Member States, the EP and stakeholders made a strong call to more assertively enforce the commitments under the TSD chapters. Many complained that the existing dispute settlement mechanism has so far not been triggered.

Under EU FTAs, the implementation of commitments is ensured through the monitoring roles of the dedicated government bodies (TSD Committee and the Trade Committee) and the civil

society structures (Domestic Advisory Groups and Civil Society Forums). Where a party fails to comply with a commitment, the other party can resort to the dispute settlement mechanism, including recourse to the independent panel procedure leading to a public report with recommendations. This step is yet to be tested in practice.

In order to improve compliance with commitments, the Commission services will be more assertive in making full use of the existing range of tools and mechanisms available. The Commission services envisage a combination of actions: to step up actions in the monitoring phase; to enable the civil society including the Social Partners to perform its monitoring functions on TSD; to resort swiftly to the panel proceeding where warranted; and to ensure the proper implementation of recommendations of panel reports, in liaison with the civil society bodies.

The Commission has recently stepped up the monitoring and analysis of compliance with TSD commitments by a number of FTA partner countries: letters setting out compliance concerns and actions to be taken in the absence of which dispute settlement would need to be launched have been sent to a number of partner countries. The countries concerned have recently reconfirmed their commitments to comply with their TSD obligations and concrete steps are currently under discussion with each of them. Likewise, the Commission services are currently analysing a recent submission from CSOs concerning compliance in the field of labour and environment by a partner country and will take appropriate action in line with its findings and following consultations with the partner country.

Should the results of these actions not be satisfactory and compliance concerns persist, the Commission services take the view that dispute settlement proceedings should be launched without hesitation, and appropriate follow-up to recommendations made in expert panel reports should be ensured. Once the results of these proceedings are available, the Commission might, if necessary, explore ways to learn from them to keep ensuring compliance.

8. Encourage early ratification of core international agreements

Fundamental ILO Conventions cover subjects that are considered as fundamental principles and rights at work, universally endorsed by the international community: freedom of association and the effective recognition of the right to collective bargaining, the elimination of all forms of forced or compulsory labour, the effective abolition of child labour, and the elimination of discrimination in respect of employment and occupation.

Multilateral Environmental Agreements (MEAs) are the instruments by which the international community responds to global and transboundary environmental challenges, including the fight against climate change. Such agreements include, inter alia, the UN Framework Convention on Climate Change including the Paris Agreement, the Convention on Biological Diversity, or the Convention on International Trade in Endangered Species.

Responding to criticisms raised in the debate regarding that not enough is done early stage to ensure that partner countries ratify the key conventions, the Commission services consider it key to identify the core labour and environmental international agreements (i.e. fundamental ILO conventions and core MEAs) that are pending ratification on our partners' side to ensure

that the fundamental principles they represent provide a basis for our trade and economic relationship. Early ratification is visible in most recent agreements. We will step up the efforts to ensure early ratification on the course of trade negotiations, using all available tools, including economic diplomacy and bilateral (labour and environmental) dialogues, technical assistance and capacity-building, work in international organisations, and trade negotiations. Member States should be encouraged to step up and coordinate their own diplomatic efforts to this end.

9. Reviewing the TSD implementation effectiveness

Many interlocutors in the EP, Member States and amongst stakeholders found it important to assess on an ongoing basis the effectiveness of implementation and enforcement.

The Commission services consider it important to ensure that, together with the Council and EP, the Commission is able to regularly review the functioning and impact of the TSD chapters. The basis for this will be the annual report on FTA implementation, and the in-depth ex-post evaluations of FTAs. The Commission services consider that review clauses should be consistently proposed to trade partners, presenting an opportunity for changes of bilateral commitments if these become warranted.

10. Handbook for implementation

Many interlocutors and in the EP, Member States and among stakeholders pointed at the need to step up awareness raising already in early stages of the content of the TSD chapters.

As part of this effort, the idea of a handbook for implementation was presented; it will facilitate the early implementation efforts for our FTA partners. This will explain the TSD chapters both in terms of content and process, while also promoting best practices. Based on experiences and joint work with EU Member States in Ecuador, a joint pilot project with the government of Sweden to draft such a TSD implementation and enforcement handbook will be completed in the first semester of 2018.

In respect of labour issues, together with the ILO, the Commission developed a handbook to provide social partners and governmental officers with hands-on information on labour provisions in trade agreements. The ILO training centre developed training material which accompanies the specific chapters of the handbook. The experience of this handbook will feed into the TSD handbook. A similar approach for MEAs will be considered.

11. Step up resources

Many interlocutors among Member States and the EP emphasized the importance of making resources available to support the implementation of TSD chapters.

In response, the Commission services consider that the focus and cohesion of various existing funding opportunities should be improved, to support the implementation of TSD chapters. Including through the aforementioned EUR 9 million project on responsible supply chains

and the EUR 3 Million project to support civil society, including the Social Partners, in their role.

EU Aid for Trade (AfT) supports sustainable development. With combined commitments of over EUR 13 billion per annum, the EU and its Member States are the primary providers of global AfT. Delivering on commitments in its new Aid for Trade strategy (agreed in December 2017) the Commission will better connect existing projects supporting the mutually supportive relationships of trade and labour, and trade and environment and communicate these actions proactively. Furthermore, new AfT projects, agreed with trade partners, will be designed with the objective to maximise the opportunities presented by TSD chapters.

The Commission is also actively contributing and participating in the Vision Zero Fund (VZF), an initiative of the G7 countries, aiming at preventing work-related deaths, injuries and diseases in sectors operating in or aspiring to join global supply chains (GSCs). VZF's main objective is to increase the collective public and private action aimed at fostering and enhancing concrete occupational safety and health prevention activities in businesses operating in low and middle income countries.

The above resources will enable further concrete action in FTA partner countries like those the Commission has recently initiated. For example, joint actions under CETA supporting the effective implementation of the Paris Agreement; cooperation with Colombia and the ILO to strengthen labour inspection in the country; awareness raising and capacity building on TSD provisions in Ecuador (covering also civil society including the Social Partners); organization of a workshop on responsible sourcing on the mining sector in Colombia or a regional workshop on labour inspection for the three East European country partners.

12. Climate action

There were clear calls throughout the debate to support climate action.

Indeed, the fight against climate change is more crucial than ever. Whereas all TSD chapters in recent EU trade agreements include provisions on trade and climate change; those negotiated after the Paris Agreement (including the EU's agreements with Singapore, Vietnam, and Japan) will contain stronger and more detailed provisions to this end.

These will (i) reaffirm a shared commitment to the effective implementation of the Paris Agreement, (ii) commit the parties to close cooperation in the fight against climate change, (iii) and commit the parties to agree on and carry out joint actions.

To this end, the Commission services consider that innovative activities bringing together communities from both the EU and our FTA partner countries (governmental and non-governmental, including environmental NGOs and business) should also be promoted, to encourage cooperation going beyond the governments' levels.

Joint actions that the parties could commit to could include: promoting business opportunities for clean tech industry with special attention to SMEs; facilitating trade and investment for

climate change mitigation such as in renewable energy and energy efficient goods and services; promotion of international standards for climate-friendly goods, services and technologies; and cooperating on trade-related aspects of the international climate change regime.

The Commission services will continue to ensure it has the necessary policy space to take measures to pursue its ambitious commitments pursuant to UNFCCC as well as other Multilateral Environmental Agreements.

13. Trade and labour

In addition to the fundamental ILO conventions, the most recent Trade Agreements (CETA) and the ongoing negotiations (e.g. Mercosur, Mexico, Indonesia) have widened the number of themes covered with occupational safety and health, working conditions, labour inspection, access to remedy and responsible management of supply chains. Building on the achievements in CETA, we will continue to include commitments on the effective occupational health and safety and labour inspection system in line with international standards.

C. Transparency and Communication

14. More transparency and better communication

All institutions and stakeholders underlined the importance of transparency and communication. They considered that more should be done.

TSD processes conform with the Commission's broader commitment to transparency in trade policy and negotiations. The Commission services envisage that the agendas and minutes of meetings of the government-to-government 'TSD bodies' and related events are published; and work together with the European Economic and Social Committee (EESC) to achieve the same results for the FTA based activities of the civil society including the Social Partners (i.e. in Domestic Advisory Groups - DAGs and joint Civil Society Fora). These bodies will be invited to contribute to ensuring transparency towards stakeholders by publishing their agendas, minutes and results of their meetings.

The Commission services consider it important to more actively communicate developments and results of its work with partners on TSD, including progress towards implementation of TSD commitments, related events and where necessary dispute settlement. This will include improvements to the TSD webpages, for example, to include up to date country- or region-specific sections. The Commission services will continue to structurally brief EU Domestic Advisory Groups (on average four times per year per FTA) and twice per year include progress on the implementation of TSD chapters in the Civil Society Dialogue meetings organised by DG Trade.

15. Time-bound response to TSD submissions

Many interlocutors from Member States, the EP and stakeholders pointed at the need to have an efficient system in place to respond to submissions received from stakeholders.

Having analysed the various possibilities, the Commission services have found that existing legislation and practice provide the right basis for such action.⁴ The Commission services are committed to responding to written submissions from citizens on TSD in a structured, transparent and time-bound way. In particular, the Commission will acknowledge receipt within 15 working days, indicating the responsible services, and presenting opportunities for submitting additional information. It will respond within two months from the date of receipt providing information about any follow up, and including justification of any action taken. Should an additional period of time for analysis be needed, because of the complexity of the matters raised, the Commission will inform the author as soon as possible and within the above mentioned time-limit, indicating the necessary extra time needed.

⁴ In line with its commitment to its Code of Good Administrative Practice.