Non-paper of the Commission services

Trade and Sustainable Development (TSD) chapters in EU Free Trade Agreements (FTAs)

1. Introduction

The Commission's recent reflection paper on harnessing globalisation [1] underlined the EU's commitment to a fair, international, rules-based order based on high standards through cooperation and strengthening of multilateral institutions.

As a consequence, the Union needs to ensure that commitments in bilateral trade and investment agreements in such areas as trade, labour standards, climate and environment protection are respected.

EU citizens rightly expect that EU trade agreements with our international partners should support workers' rights, environmental and climate objectives and to enhance global governance in these fields. These expectations reflect the EU's commitment to UN Sustainable Development Goals as well as the EU agenda on jobs and growth, for which trade with our international partners is crucial. The *Trade for All* strategy [2] adopted right after the UN 2030 Agenda, commits the EU to a responsible trade and investment policy as an instrument of SDG implementation contributing to boosting jobs, sustainable growth and investment in Europe and outside.[3] Sustainability is therefore one of the key objectives of EU trade policy, and the Commission is committed to including Trade and Sustainable Development (TSD) chapters[4] in free trade agreement (FTA) negotiations as part of our value-based trade agenda.

However, it is important to stress that not all sustainability issues can be effectively addressed by trade agreements alone and there are many other tools at the EU, Member State, and regional level to address the impact of globalisation. In this context, the new European Consensus on Development, adopted on 7 June 2017[5], provides a common EU and Member State response to the 2030 Agenda from a development perspective. Sustainability issues feature prominently and stronger coherence between trade and development policies is called for.

[1] https://ec.europa.eu/commission/sites/beta-political/files/reflection-paper-globalisation_en.pdf

[2] European Commission Communication COM(2015)497 of 14 October 2015 "Trade for All: Towards a more responsible trade and investment policy".http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf

[3] European Commission Communication COM(2016) 739 final of 22 November 2016 "Next steps for a sustainable European future – European action for sustainability" http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1498641277121&uri=CELEX:52016DC0739

[4] For the purposes of this paper, TSD relates specifically to the trade and sustainable development related-provisions in EU trade agreements and does not apply to broader actions undertaken by the EU.

[5] https://ec.europa.eu/europeaid/policies/european-development-policy/european-consensus-development_en

The EU-Korea FTA[6] was the first time a TSD chapter was included and this is now in its sixth year of implementation. The TSD chapters in the EU agreements with Central-America[7], Colombia[8] and Peru[9] have each had 3 years of implementation, those with Georgia[10] and Moldova[11] for over a year and the one with Ukraine[12] for one year.

Over the last two years, interest in labour and environment provisions in trade agreements has intensified. Discussions are taking place within the European Parliament, Council, in Member States, third countries and among stakeholders including NGOs and civil society.

There is overall strong support in the EU for including ambitious commitments on labour rights and environmental protection, as well as active role of civil society, in current and future FTAs. This paper is intended to contribute to a discussion in the coming months with the European Parliament and the Council. Following a description and an assessment of current practice, the paper puts forward for discussion possible options for discussion on improving implementation. Clearly, reflection on the best option should take into account the diverse needs and capacities of the partners with whom we seek to conclude TSD chapters.

The feedback from the discussion with the two institutions will be important for ongoing TSD negotiations[13], such as Mexico, which is conducted following a public consultation that took place in 2015[14] and an impact assessment[15].

2. The current TSD approach

Description

Existing TSD chapters in EU trade agreements contain a comprehensive set of binding provisions, which are anchored in multilateral standards, notably International Labour Organisation (ILO) conventions and Multilateral Environmental Agreements (MEAs). The EU approach treats labour and environment, including climate protection, on an equal footing in the same institutional framework.

In terms of scope, EU TSD provisions therefore seek to promote:

- the effective implementation of the fundamental international labour conventions[16] and beyond as regards other ratified up-to-date international labour conventions and working conditions[17] and multilateral environmental agreements (MEAs)[18];

[6] Official Journal of the European Union, L 127, 14 May 2011
[7] Official Journal of the European Union, L 346, 15 December 2012
[8] Official Journal of the European Union, L 354, 21 December 2012
[9] Official Journal of the European Union, L 354, 21 December 2012
[10] Official Journal of the European Union, L 261, 30 August 2014
[11] Official Journal of the European Union, L 260, 30 August 2014
[12] Official Journal of the European Union, L 161, 29 May 2014
[13] For an overview of negotiations http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf.
[14] http://trade.ec.europa.eu/consultations/index.cfm?consul_id=216
[15] http://trade.ec.europa.eu/doclib/docs/2016/march/tradoc_154399.572244.1.SWD_2015_290_EN%20IAR%20Executive%20Summary.pdf
[16] Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), Right to Organise and Collective Bargaining Convention, 1949 (No. 98); Forced Labour Convention, 1930 (No. 29); Abolition of Forced Labour Convention, 1957

- a level playing field, by not lowering labour and environmental standards for the purpose of improving trade or attracting investment and ensuring effective implementation; and
- sustainable management of natural resources in areas of low carbon development, forestry, fisheries, biodiversity, including fighting illegal harvesting practices and promoting corporate social responsibility and fair and ethical trade initiatives[19].

The institutional structure of EU TSD chapters is designed to be inclusive, through platforms where civil society can play an advisory role. They participate in the monitoring of the FTA implementation through direct exchanges amongst civil society actors and with governments. These platforms include the Domestic Advisory Groups (DAGs) on the side of each FTA partner and Joint Platforms bringing together civil society organisations from both FTA partners.

Implementation and enforcement

Improvements in labour and environmental conditions require continuous and long-term engagement with partner countries to create ownership at government and civil society level and inclusive reform processes[20]. In implementing and enforcing the obligations, the Union recognises the primary role of international instruments both in terms of standards and compliance mechanisms. This is complemented with the bilateral enforcement mechanism set out below.

The EU efforts focus during a first stage on incentivising the partner country to work with the Union.

This is addressed through structured dialogues on sensitive issues, launching joint projects, enhancing interaction with international bodies and setting-up dedicated institutional and civil society structures. TSD provisions in an FTA are binding and subject to a dispute settlement mechanism. This establishes the following procedure with the possible involvement of civil society and international organisations (ILO, MEAs) at every stage:

- government-to-government consultations,
- setting up a panel consisting of independent experts on trade, labour and environment,
- drafting a panel report that is public and that neither party can block,

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(No. 105); Minimum Age Convention, 1973 (No. 138); Worst Forms of Child Labour Convention, 1999 (No. 182); Equal Remuneration Convention, 1951 (No. 100); Discrimination (Employment and Occupation) Convention, 1958 (No. 111)

[17] As provided for in the ILO declaration on Social Justice for a fair globalization of 2008

[18] By means of illustration, these include for instance: Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES Convention); Minamata Convention on Mercury (Minamata Convention); Convention on Persistent Organic Pollutants (Stockholm Convention); Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (Rotterdam Convention); Convention on the Control of Transboundary Movements of Hazardous Wastes and their disposal (Basel Convention); Framework Convention on Climate Change (UNFCCC); Kyoto Protocol, The Paris Agreement; Convention on Biological Diversity (UN) (CBD) and its Protocol on Biosafety to the Biodiversity Convention (The Cartagena Protocol), Protocol on Liability and Redress to the Cartagena Protocol on Biosafety (The Nagoya – Kuala Lumpur Supplementary Protocol) and Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of the Benefits Arising from their Utilization to the Convention on Biological Diversity (The Nagoya Protocol); Protocol to the Convention for the Protection of the Ozone Layer on Substances that deplete the Ozone Layer (Montreal Protocol),

[19] See for example Chapter 13 of the EU-Trade Agreement with Georgia, OJ L 261/89 of 30.8.2014.

[20] Opinion 2/15 of the Court of 16 May 2017, para 154. As the Court indicated in its Opinion of 16 May 2017, "*the scope of the obligations stemming from the international agreements to which the envisaged agreement refers is a matter covered by the interpretation, mediation and dispute settlement mechanisms that are in force for those international agreements".*

- monitoring of the implementation of the panel report.

This approach for the TSD chapter differs from the general dispute settlement procedure foreseen for the FTA where no explicit role is foreseen for civil society and international organizations - though the text does provide for *amicus curiae* submissions. This approach does not include sanctions.

Evaluation

The EU and its trade partners have been implementing TSD chapters for a relatively short period[21]. For most of the Union's FTA partners, these provisions are still unfamiliar and as a consequence sometimes challenging to implement. The emphasis has therefore been on putting into place institutional structures and monitoring practices. The dispute settlement mechanism has so far not been used.

Still, progress is already visible. Notable milestones include the establishment of unprecedented TSD institutional and civil society structures[22] in countries where civil society was not always associated in trade matters. Such structures have allowed for the establishment of regular and focused dialogues on often sensitive TSD issues with FTA partner countries.

Examples include non-discrimination in the work place in the EU and Korea; ILO projects in El Salvador and Guatemala focusing on fundamental conventions on freedom of association, collective bargaining and non-discrimination; and a dialogue with Colombia regarding implementation of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES); projects in the field of Corporate Social Responsibility involving also the ILO and the OECD in Asia and Latin America.[23]

Overall broad support from trade partners for the EU's ambitious TSD scope and enforcement can be registered. This is a major advantage of the current system.

Importantly this approach has helped to strengthen the existing multilateral governance structure**s**[24] rather than creating a parallel set of bilateral rules on labour and environment. Products imported into the EU under trade agreements must respect key international labour and environmental standards and EU FTAs encourage partners to do more to effectively implement these standards. Given the re-organisation of production along Global Value Chains (GVCs) and the fight against climate change, international solutions are essential.

However, some EU stakeholders find that current TSD implementation mechanisms do not provide sufficiently swift or visible responses to concerns put to the attention of governments (for instance, alleged lack of compliance with an ILO convention) or addressing long standing implementation

[21] The implementation of the first FTA TSD provisions has entered its sixth year.

[22] government to government TSD meetings and civil society meetings (Domestic Advisory Groups and Joint Forums) are held regularly under 6 FTAs in application with Central America, Colombia-Peru, Georgia, Korea, Moldova and Ukraine.

[23] http://europa.eu/rapid/press-release_IP-16-1795_en.htm and http://ec.europa.eu/dgs/fpi/documents/2016-aap/20160527_1_a7_-_c_2016_2989_f1_annex_en_v1_p1_850179_en.pdf

[24] The European Commission Reflection Paper on Harnessing Globalisation states that: "*multilateral institutions and rules are needed to enable countries to jointly promote common solutions in a globalised world*". Also EU preferred approach is "*multilateral cooperation with our global partners*".

issues or lack of cooperation. Some have called for improvements in TSD enforcement, by introducing trade sanctions, whilst others rather seek improvements by stepping up the implementation of the current model, including through stepping up activities of and training. Several of those involved in the civil society structures established under the FTAs (Domestic Advisory Groups) have stressed the importance of improving their functioning.

Most concerns are related to the implementation practice[25]. For example, resources to support implementation are not yet pooled effectively in specialised working groups comprising Commission and Member States, neither locally in the partner countries (EU delegations and Member State embassies), nor in Brussels (specialised TSD working group). This means that implementation issues are addressed in a less focused way, not making the best use of the potential of gathering together resources and knowledge in expert groups. Available tools such as dispute settlement have not been used, which gives the impression that enforcement is not effective. Cooperation with international bodies is underway but also remains underutilised. The civil society structures (Domestic Advisory Groups) have not been able to work to its full potential due to, inter alia, capacity constraints and/or, in the case of partner countries, the novelties in brings to their practices.

In addition, concerns have been expressed that not all complaints are effectively addressed. Examples given are the lack of clarity of how complaints are taken up and what procedure to follow. Finally, civil society structures have not realised yet their full potential, in part due to difficulties of an organisational and logistical nature (for instance, organisation of meeting venues, participation of civil society in activities related to TSD implementation).

3. Options for discussion

With at least a few years of TSD implementation experience, and while the data for a full evaluation of this policy are not yet available, it is nevertheless time for a thorough stocktaking of the EU TSD provisions.

As a basis for this discussion, the Commission services are seeking feedback from the European Parliament and the Council on two possible options and related questions to see if EU TSD chapters are meeting expectations and if not, what are the shortcomings to be addressed and, depending on the nature of these shortcomings, what could be done to improve them :

Option 1: a more assertive partnership on TSD

[25] For example, see the European Parliament resolution of 5 July 2016 on the implementation of the 2010 recommendations on social and environmental standards, human rights and corporate responsibility (2015/2038(INI)), http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fTEXT%2bTA%2bP8-TA-2016-0298%2b0%2bDOC%2bXML%2bV0%2f%2fEN&language=EN ; the European Economic and Social Committee (EESC) opinion on the Commission communication 'Trade for all: Towards a more responsible trade and investment policy' http://www.eesc.europa.eu/?i=portal.en.rex-opinions.39089;
Letter of five EU Member States to Commissioner Malmström of 11 may 2017 http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetailDoc&id=33338&no=22;
Regular Civil Society Dialogue meetings with Commissioner Malmström and Director-General for Trade Jean-Luc Demarty, http://trade.ec.europa.eu/civilsoc/index.cfm

This option would involve an upgraded partnership for enhanced coordination and joint action with Member States, the European Parliament, international organisations and trade partners. It would also include a more assertive use of the TSD dispute settlement mechanism, and leverage could be applied in a more systematic way.

Description

The EU would **continue with its broad TSD scope**, but would strengthen the policy in various ways:

- strengthen collaboration with ILO and MEAs international bodies: a closer and better-structured cooperation for a better monitoring and implementation where appropriate
- improved actions to react to allegations of non-compliance: enhancing transparency of the complaints mechanism, clarifying the steps to respond better to stakeholder's inputs.
- greater focus: countries priorities and strategies with a focus on priority areas on trade related labour and environment, through the development of individual strategies for each FTA partners.
- step up monitoring and follow-up of all TSD issues raised at government level, involving also all relevant sources including SDG reporting mechanisms and other UN reporting instruments: a more results-oriented, regular dialogue with partner countries to define and address specific priority areas and shortcomings in the TSD chapter. Follow-up of all TSD actions/ issues raised at the level of government would be stepped up.
- more assertively use all existing TSD tools, including dispute settlement.
- identification of actions linked to commitments and activities; awareness raising and training on TSD commitments; identification of possible shortcomings at an early stage, ahead of the implementation of an FTA.
- early and continuous engagement aiming to achieve ratification of the eight fundamental labour conventions.
- enhance partnership with Member states and their embassies and cooperation with EU Delegation to use more efficiently resources for TSD implementation: strengthening of the expert group through new implementation tasks would improve the situation. These tasks could include for example compliance, providing recommendations and cooperation activities. EU delegations countries would have a key role in implementation raising and monitoring TSD issues and identification of relevant actions and required technical support.
- Enhance the advisory role of civil society by improving the functioning of the Domestic Advisory Groups and the Joint Forums.

Evaluation

This approach would ensure continuity with existing agreements as well as those not yet in force and with current negotiating partners. The TSD chapters would continue with their comprehensive scope. The EU would also continue to rely on internationally recognised labour and environmental protection standards, further strengthening multilateral governance and preserving the role of civil society in enforcement as well as monitoring. Current transparency practices would continue, and be

stepped up and we would continue to rely on the application of the dedicated TSD dispute settlement mechanism.

Such an approach could also lead to a better and faster handling of stakeholders' complaints on TSD implementation. Throughout the process, the EU would ensure support for civil society to allow them to engage more fully and thus take advantage of the opportunity, which the agreements offer through their substantive provisions, institutional arrangements and procedures.

This approach would require better coordination and prioritisation of resources – across the relevant EU actors.[26]. In this way, robustly responding to TSD infringements would be considered as a key priority in the implementation of an FTA.

Better use of pressure and leverage, including during the negotiation stage, would facilitate the subsequent implementation of TSD provisions described above. Such a new approach would step up actions to engage with partner countries and at the same time underline the binding character of the EU's TSD, including through the more assertive use of the existing dispute settlement procedures. An approach based on partnership and cooperation is favored by the new Consensus for Development, which provides that the EU and its Member States will promote and facilitate trade and investment in developing countries in support of sustainable development.

Option 2: A model with sanctions

Analysis

This option is based on taking over certain aspects of FTA implementation and enforcement as currently in practice in the US and Canada.

This option would introduce a dispute settlement mechanism including government-to-government consultations, a panel procedure, the publication of a public report, and the possibility to apply sanctions in case of non-compliance impacting trade or investment between the parties.

Similar to the EU, the US and Canada both have labour and environmental provisions in their FTAs, which include obligations to enforce domestic labour and environmental laws, and clauses prohibiting the lowering of labour and environmental standards.

For labour, both jurisdictions refer to the basic set of international standards (core labour standards) without including the overall underlying conventions as both countries had not ratified all the underlying conventions at the time of negotiations. However, Canada has now ratified the last missing underlying ILO convention (Convention No 98 on collective bargaining. The sole instrument taken up is the 1998 ILO Declaration: parties to the agreement commit to the principles of the Declaration, but not the details of the Conventions and not the follow-up procedures (ILO monitoring systems). For environment, they focus on a limited number of multilateral environmental agreements. The US and Canada do not promote civil society involvement by setting up institutional structures for stakeholders to support implementation.

Both jurisdictions use economic sanctions as an enforcement tool to ensure compliance. In the US case, this means the withdrawal of trade concessions, while Canada relies on fines.

[26] For example, the creation of labour attachés in EU Delegations or EU Member States Embassies in partner countries.

The US dispute settlement procedures include sanctions that can only be applied in case where complainants can demonstrate a quantifiable harmful impact on bilateral trade or investment in economic terms as result of violation of FTA commitments.

Under Canada's FTAs[27] (prior to CETA), a party can only initiate a dispute settlement case if it can show that a violation of labour provisions is trade-related. The resulting fine is equivalent to these adverse trade effects, i.e., also for the calculation of this type of sanction, the trade impact also needs to be quantified. Environmental chapters are not subject to dispute settlement.

Evaluation

The US and Canada systems focus on ensuring that domestic producers are not harmed by lower labour and environmental standards in partner countries. The EU TSD chapters and enforcement mechanisms intend to safeguard both this "level playing field" aspect and international standards and governance.

The idea behind this model is that providing for sanctions encourages partners to comply more fully with TSD provisions. Partners would be more willing to strengthen legislation or improve effective implementation of labour and environmental standards if there was a risk of economic consequences. The history of WTO dispute settlement in general shows that such consequences can have an impact.

This aspect of effectiveness of sanctions in the context of an FTA would require further analysis. To date, sanctions have never been applied to respond to a violation of labour and environment chapters. In the case of the US, complaints have been filed concerning a number of countries, including: Guatemala, Bahrain, Honduras, the Dominican Republic, Mexico and Peru. The only panel established under the US FTAs covers labour violations in Guatemala. The panel, which was established in 2011, issued its panel report recently, ruling inter alia that no violations of the FTA between the US and Guatemala could be determined. One of the reasons was that no trade impact of the non-compliance with the labour provisions could be established [28].

The question is whether this approach could not lead to a reduction of the number of complaints that would qualify for dispute settlement. The US and Canadian practice appear to suggest that this may be the case, in light of the requirement that the alleged violations with labour or environment provisions affect trade between parties (trade impact test). In the case of the EU, the majority of complaints about TSD implementation concern violations that are *relevant* in a trade context but have not had a measurable direct impact on bilateral exchanges.

The further issue to assess is to what extent this approach could be applied in a bilateral context to a system of labour and environmental commitments that are essentially anchored in ILO Conventions and MEAs. The EU has only suspended trade preferences for violations of international conventions under its unilateral trade arrangements under GSP[29]. Proving the economic injury necessary for sanctions may be a challenge and the question is whether this may not lead to narrowing the scope of the EU's TSD work.

There is also a question as to what extent a sanctions-based approach would allow the EU to stick to its current strategy of reinforcing the multilateral bodies dealing with sustainable development,

[27] The most Canada's FTAs in force (i.e. Korea, Honduras, Panama).

[28] http://trade.gov/industry/tas/Guatemala%20%20%E2%80%93%20Obligations%20Under%20Article%2016-2-1(a)%20of%20the%20CAFTA-DR%20%20June%2014%202017.pdf

[29] Applied to Sri Lanka, Belarus and Myanmar

taking into account ongoing process and efforts within the multilateral system. A recent ILO study of 260 trade agreements reported to the WTO, including 71 with labour provisions, did not conclude that one specific mechanism for enforcing labour provisions is more effective than the other. It did point out that the ILO supervisory mechanisms are the best way to ensure universal promotion of labour and environmental rights and obligations. It also indicated that well-designed partnerships as well as trade arrangements can support the effective implementation of labour standards and promote the wider decent work agenda. Another study carried out by the National Swedish Board of Trade[30] also points at the shortcomings of a sanction-based approach.

There may be an issue of perception with our negotiating partners, who may consider that the specific nature of trade sanctions in FTAs makes them a more confrontational tool when it concerns implementation of labour and environment commitments, with their inherent relation to different policy areas and to different multilateral governance systems, and so a move to adopt such a model in the EU's FTAs could overall jeopardise long term-links with partners to improve capacity and effect changes. There is also a question about the role of civil society groups and international experts in enforcement, since the use of such an approach would increase national sensitivities. In practice sanctions mechanisms on labour and environment issues have only been triggered in exceptional circumstances. And there seems, so far, to be only very limited evidence to demonstrate a positive impact on the issues in question.

Finally, such a change would require the establishment of a mechanism within the Commission for investigations for labour and environment (would need to be on the ground where the necessary expertise lies) and building up of expertise within the EU to monitor international standards in parallel to the already existing work carried out by the relevant international bodies.

Questions

1. Are EU TSD chapters meeting expectations? If not, what are the shortcomings to be addressed and what could be done to improve them?
2. Should the EU pursue a more assertive partnership on TSD in bilateral FTAs as described in option 1?
3. Do you think a sanction based approach as described in option 2 would address the shortcomings identified?
4. Are there any other issues related to TSD to be addressed?

[30] http://www.kommers.se/In-English/Publications/2016/Implementation-and-enforcement-of-sustainable-development-provisions-in-free-trade-agreements--options-for-improvement/