



Recommendations for the effective implementation of TSD Chapters

Brussels, March 2022

As a powerful trade player, and one that has developed strong and cooperative relationships with its Free Trade Agreement (FTA) partners, the EU is well placed to use its market power to improve the implementation and enforcement of multilateral environmental and climate agreements as well as labour and human rights around the world.

However, for the Trade and Sustainable Development (TSD) chapters to live up to their promise to improve sustainable development, environment, labour and human rights, will depend on the specific clauses that are negotiated, the quality of the standards and procedures agreed, and the effective implementation of the obligations covered in these chapters - and thus - on the mechanisms available to ensure compliance. Despite TSD chapters being binding, their enforcement remains too weak.

As currently designed and implemented, the TSD chapters fall short of this promise and improvements are needed. TSD chapters' obligations and the implementation reality

demonstrate that the current compliance gap needs to be addressed for the chapters to fulfil their promise.

Hence, we want to put forward several recommendations for the TSD chapters to bridge this compliance gap.

1. Pre-ratification conditionality

FTAs negotiations provide policy space and open possibilities to set conditions for the conclusion of an agreement, such as the ratification and implementation of certain provisions of internationally recognized conventions, such as:

- ILO Core, governance (priority), and technical standards and up-to-date ILO conventions
- International Covenant on Civil and Political Rights (ICCPR)
- International Covenant on Economic, Social and Cultural Rights (ICESCR)
- Multilateral environmental and climate agreements.

Examples of the positive outcomes of pre-ratification conditionality can be found in the trade agreements of the United States. Pre-ratification has 'contributed to significant reforms of domestic labour legislation and practice'.¹ To ensure continuous compliance once the agreement enters into force, certain pre-ratification conditions, such as the conventions suggest above, should also be elevated to essential elements of the agreements.

2. Staged implementation of tariffs

In order to further integrate environmental, human rights and social concerns into FTAs, tariff preferences should be linked to the achievement of commonly agreed objectives, such as the ratification and alignment of domestic laws with internationally binding environmental, human rights and labour standards.

¹ Studies on growth with equity – Social dimensions of free trade agreements, ILO, 2019, p 2, see:

https://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_228965.pdf

As proposed in the French-Dutch non-paper on “trade, social economic effects and sustainable development”: “Parties should introduce, where relevant, staged implementation of tariff reduction linked to the effective implementation of TSD provisions and clarify what conditions countries are expected to meet for these reductions, including the possibility of withdrawal of those specific tariff lines in the event of a breach of those provisions”.²

3. Specific, measurable and enforceable sustainability obligations

Trade negotiations should be an opportunity for all parties not only to reaffirm their international environment, labour, animal welfare and human rights-related commitments, but also to develop and negotiate more detailed binding provisions that will build on and better operationalise these existing international commitments.

The more detailed the provisions, the more effectively and promptly a Party’s breach of a specific obligation can be addressed. These sustainability obligations should be integrated across all chapters.

Hence, FTAs should include;

- Detailed provisions on the implementation of ratified ILO and Human rights conventions, as well as multilateral environmental and climate agreements
- Closing the gap in the absence of international binding instruments; Those areas can include, depending on the trade flows, for example, circular economy, animal welfare, recycling and waste management, illegal fishing, deforestation, use of chemicals, or marine protection.

This should result in a country-by-country approach, where TSD Chapters are adapted to the specific challenges of the trading partner.

² Non-paper from the Netherlands and France on trade, social economic effects and sustainable development, see:

<https://www.tresor.economie.gouv.fr/Articles/73ceOc5c-llab-4O2d-95bl-5dbb8759d699/files/6b6ff3bf-e8fb-4de2-94f8-922eddd81dO8>

4. Enhanced public participation and transparency during the design, implementation and enforcement of TSD chapters

Ex-ante sustainability impact assessment (SIA) and consultations of civil society, social, human rights and environmental experts as well as policy makers from non-trade departments, are essential to help parties identify specific problems and anticipate key implementation issues. SIAs are also necessary to make sound and evidence-based policy choices when conducting negotiations. As a prerequisite for negotiation and design of sustainability provisions, it is of primary importance that;

- Transparency of the negotiation process be improved;
- SIA be conducted in due time;
- A democratic governance structure is established.

Adequate resources should be provided by the EU to enable trade unions and civil society organisations, from EU and partner countries, to be involved in monitoring environmental, labour and human rights commitments in FTAs. Environment, Labour and Human Rights Attachés in EU Missions would help.

Civil society and domestic advisory group (DAG)'s role in implementing and enforcing TSD chapters should be strengthened through the establishment of effective mechanisms.³

- FTAs should oblige the parties to set up independent and dedicated DAG, composed by representatives of the employers, the workers and human rights and environmental rights defenders, as well as other relevant interest groups.
- FTAs should also clarify the role and powers of DAGs to monitor and contribute to the enforcement of the TSD. This should include their involvement in the establishment of action plans and time bound roadmaps.
- FTAs should ensure the parties set up an effective complaint mechanism. Therefore, procedural guarantees should ensure it is a reliable system whereby civil society,

³ See for a broader and more detailed set of recommendations on improving the role and functioning of the DAGs the non-paper about strengthening the Domestic Advisory Groups. Available at: <https://www.cnvinternationaal.nl/en/dag>

including from trading partners, are effectively empowered to seek resolution to non-compliance.

5. Possibility of sanctions for non-compliance

The EU's existing TSD enforcement model of dialogue and consultation can only partially improve conditions in partner countries and could remain the primary tool to engage with its trade partner on TSD issues.

Therefore, the EU should move towards enforcement procedures that effectively discourage non-compliance with the agreement's provisions and secure compliance if a partner country refuses to comply with the Panel of Experts' recommendations.

A sanction-based enforcement approach could increase compliance just by resorting to the threat of sanctions. It is not always necessary for Parties to arrive at the stage of actually imposing sanctions for these mechanisms to be effective. Simply the existence of a robust penalty regime as a last resort would help to give the labour rights, human rights and environmental provisions of the future trade relationship a real bite.

Moreover, the essential elements mechanism should be activated in a more creative and targeted fashion. As it stands, the essential elements clauses lead the EU to envisage suspension of part of the agreement when a violation occurs. It however enables other types of measures such as the creation of dedicated problem-solving mechanisms, enhanced commitments, tripartite dialogue specific investigations, any measure being proportionate and that is adapted to the situation.

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