



Trade and Sustainable Development chapters in EU FTAs

1. Introduction

The relationship between trade and sustainability is one core focus of the current debate on the future of the EU's trade policy. With the presentation of the Trade for All strategy in 2015, the European Commission has chosen to base its trade policy increasingly on the EU's values, including its commitment to sustainable development through the inclusion of provisions on labour and environmental protection in its trade agreements.

Binding sustainable development provisions are now included in all FTA negotiations, since the Agreement with Korea (KOREU) that entered provisionally into force in July 2011. It is this agreement, and in particular the mechanism it established for monitoring the implementation of sustainability provisions by civil society, that is being scrutinised as a primary example of the EU approach. All subsequent agreements have followed its blueprint, including those concluded by the EU with Central America; Colombia, Peru and Ecuador; Georgia; Moldova and Ukraine.

While the scope of Trade and Sustainable Development (TSD) chapters has been considerably expanded since KOREU, the public debate has mainly focused on the alleged lack of an enforcement mechanism.

On 11 July 2017, the Commission presented a non-paper¹ on the implementation and enforcement of sustainable development provisions in free trade agreements, launching a reflection process on whether the current TSD chapters are meeting expectations, and what could be done to improve them.

With the objective of contributing to the public debate, we would like to draw the attention to the business perspective on the most relevant points concerning effective implementation and enforcement of TSD chapters in EU FTAs. Such position builds also on the experience achieved by BusinessEurope as a member of various Domestic Advisory Groups (DAGs) tasked with monitoring the implementation of the FTAs in force.

2. Principles

European business is convinced that the trade of goods and services in itself is an effective driver of sustainable development. Millions of people all over the world have been lifted out of poverty by tapping the potential of international trade and investment. Trade makes environmental friendly technologies, goods and services produced in a more sustainable way, widely available and affordable.

Operating in the framework of Global Value Chains (GVCs), companies face a number of challenges, having to master complex production processes, scattered around different locations, in many cases using inputs that come from many different suppliers.

¹ [Non-paper of the Commission services](#) – Trade and Sustainable Development (TSD) chapters in EU Free Trade Agreements (FTAs).



The question is how to create added value in a “sustainable” manner and how to build a business model that is competitive while promoting high level environmental and social standards.

BusinessEurope believes that competitiveness and sustainability are no contrasting elements. In fact, competitiveness is the keystone for companies to play their role in the society: businesses create more value and operate in a socially and environmentally sustainable way, if they are economically sustainable. European companies are committed to deliver sustainable solutions and lead sustainability efforts, both in the EU and abroad, in close cooperation with governments, local communities and the broader civil society.

Trade policy is indeed closely linked to sustainability in the sense that it can be a means not only to promote economic growth but also norms and values that will help address today’s complex Global Value Chains, achieving a level playing field, while promoting social inclusion and environment protection. We recognize that trade agreements are a lever for promoting social and environmental standards to tend towards a more level playing field, and we are in favour of strengthening the consideration of sustainable aspects in free trade agreements. Nevertheless, free trade agreements are not and should not be the preferred vehicle to disseminate of EU social and environmental standards. In other words, trade agreements must first and foremost focus on enhancing trade and maintaining the international competitiveness of EU companies. Consequently, BusinessEurope is not in favour of conditioning the beginning of negotiations or the entry into force of the EU free-trade agreements to the ratification of international conventions and treaties.

European companies operating in third countries are the vehicle for such promotion and as such they must be able to perform the role that it is expected of them. Companies are more and more operating in a sustainable way and act voluntarily, based on their own specificities and resources, working with a vast range of performance indicators including those based on existing national and global Corporate Social Responsibility (CSR) frameworks and in the context of implementing the Sustainable Development Goals (SDGs). Businesses are the main drivers of CSR practices or responsible business conduct. Initiatives that aim for companies to take further action to comprehensively control social, environmental, consumer protection and human rights aspects along the supply chain should focus on realistic objectives. While large companies may be equipped for complying with a number of different reporting requirements, the same is usually not true for the vast majority of SMEs.

BusinessEurope believes the debate should focus on how to better encourage and promote implementation of sustainability provisions in FTAs. BusinessEurope stands behind the better enforcement of environmental and social norms in FTAs both from a humanistic perspective and for the development of third countries, as well as for economic reasons related to the competitiveness of European companies and to ensure a level playing field conducive to fair competition. Lack of reciprocity by our international partners in terms of production conditions and constraints has a remarkable negative impact on the competitiveness of our companies.

The EU model should take into account the fact that there are different approaches and different levels of understanding of sustainability between the EU and its partners. Furthermore, partners don’t always agree on priorities. The EU should not impose its



views and elevate itself to a position of superiority. Sustainability is a process, where we should develop a common understanding and empower civil society organisations.

Our experience so far with the EU-Korea and EU-Colombia-Peru FTAs as well as the EU-Cariforum European Partnership Agreement (EPA) – which are different from one another – indeed shows that there is room for improvement. But in this context, we should not forget that there is no tangible proof that stronger enforceability increases effectiveness or guarantees enforcement of labour right provisions (e.g. US-Guatemala case).

The Commission non-paper describes the current approach to TSD chapters followed by the EU in its FTAs and presents two options for the way forward: first, to do better with what we have; second, to do differently – i.e. introducing sanctions. In the next two paragraphs, we will assess what we believe are the strengths and shortcomings of each option. In the final paragraph, based on the analysis conducted, we will present our recommendations for a more effective implementation of TSD chapters.

3. The current system – “consultative approach”

Evidence suggests that an approach based on dialogue and a deep cooperation mechanism is the best suited for complex and intertwined issues such as labour rights and environmental protection, where sensitivity to context and flexibility are required to find intelligent solutions that are acceptable to all parties involved. An efficient approach to TSD enforcement mechanisms is ideally based on the creation of incentives to implementation rather than on the sanctioning of non-compliance, thus building on engagement, cooperation and capacity-building with the trading partner(s). The ultimate goal of TSD provisions in FTAs is to improve the de facto situation regarding social and environmental standards in the partner country.

BusinessEurope considers that the following positive elements are found in the current EU system and should be retained in the future:

- It is designed to strengthen a multilateral approach to labour and environment provisions against a proliferation of bilateral and often non-harmonised approaches anchored in various bilateral agreements;
- Ensures that companies operate in third countries in the respect of laws in force, and it includes provisions that prevent a race to the bottom through weakening domestic labour or environment protection for the purpose of increasing trade;
- Allows for a continuous and sustainable engagement with third partners on labour and environmental issues on the long term;
- Supports the establishment of a government-to-government systematic dialogue on sensitive issues;
- Allows for the empowerment of civil society structures, promoting dialogue between governments and organisations in third countries that many times have a different understanding of the role of civil society in public policy choices;
- Combines a specific monitoring and enforcement mechanism to ensure compliance with commitments.
- Foresees the possibility, under the most recent FTAs, of exerting strong public pressure on third countries through the adoption of a report.



4. A model based on sanctions

BusinessEurope recognizes the need for a robust enforcement mechanism of social and environmental norms in FTAs. In order to remain credible, the EU should have adequate means at its disposal to act effectively and decisively to address repeated and systematic violations of international obligations by the third country. However, evidence suggesting that a model including sanctions provides the most effective enforcement approach is far from conclusive². Furthermore, a sanctions-based model has many potential shortcomings related to concrete questions of trigger requirements, the scope of sanctions as well as diminished leverage in trade negotiations. In our view, such a model raises some questions, summarised below.

Firstly, the latest TSD chapters and in particular the most advanced – CETA – include a very ambitious and broad scope. How would a violation be determined, and by whom, according to what criteria and thresholds? A procedure for the determination of violations of provisions on sustainability should be defined. Such a procedure could be based on the monitoring carried out by civil society, launched by reports of the relevant DAG and recommendations given by independent and reputable bodies, subject to a final decision adopted by the European Union.

While independent organisations like the International Labour Organisation (ILO) should be closely involved in the monitoring and assessment of the respect of labour rights in third countries, their role needs to be defined: the EU cannot bilaterally interpret ILO rules and cannot and should not duplicate and consequently undermine the work of the ILO. Similarly, we believe that EU trade policy should not try to duplicate the work of the Conference of the Parties (COPs) on climate arrangements. Clear links can be made with environmental and social conventions, already binding under international law, in FTAs but the EU should not create new bilateral enforcement mechanisms or obligations that are supposed to address deficiencies in other legal systems. EU trade policy can be an enabling factor but not the lead instrument. In this respect, 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. But it did point out that the ILO supervisory mechanisms are the best way to ensure universal promotion of labour rights and obligations³.

Secondly, it is evident that sanctions as part of a free trade agreement would have to be linked to violations that caused a quantified and significant “trade damage” for one of the respective partner countries. Otherwise, the sanctions would be difficult to defend from a legal point of view. Should violations be determined, what kind of sanctions could the EU impose (withdrawal of preferences established by the FTA or monetary fines)? Would the sanctions apply to the sector(s) where violations were determined, or would they be

² World Trade Institute, University of Bern. According to a study conducted by Assistant Professor Damian Raess, the impact is larger when labour provisions include deep cooperation mechanisms. Sanctions do not influence neither the raise of trade nor the improvement of state compliance with labour rights.

³ Assessment of Labour Provisions in Trade and Investment Arrangements, International Labour Organisation, 2016.



applied to the sectors that would allow for the stronger impact on the trading partner(s)?
Would sanctions be applied incrementally?

Furthermore, we are convinced that a sanctions-based model would present a number of shortcomings and we would like to draw the attention to the following elements:

- Such a model would put the EU at risk of diminishing its leverage during negotiations in cases where partner countries may not be willing to engage with an excessively demanding EU. It must be avoided that third countries are pushed away from the negotiating table as the objective should be, on the contrary, to engage with them as a way to convince them of the advantages of the EU approach. Furthermore, the threat of sanctions will likely deter many third countries from concluding FTAs with the EU, making a sanctions-based model counter to the EU agenda of enhancing trade liberalisation and promoting sustainable growth through bilateral agreements.
- Ratification and implementation of international conventions and treaties should not be a pre-condition to engage in trade negotiations, as this could discourage a significant number of trading partners from engaging with the EU. A roadmap to ratify and implement in a timely manner could be part of the negotiations. Besides, BusinessEurope is opposed to the gradual dismantling of customs duties according to the ratification or implementation of international conventions and agreements.
- The impact on trade of violations of obligations referred to in the TSD chapters must be a pre-requisite for the imposition of sanctions. Businesses and states operate in an (international) legal system where retaliation measures such as the unilateral withdrawal of tariff concessions have to be duly justified under international law.
- Finally, a model with sanctions would not necessarily address the shortcomings of the current approach. The decision to adopt or change domestic legislation or implementation will always be the exclusive competency of the third country.

5. Recommendations

Instead of adopting the problematic and seemingly inefficient sanctions approach, we believe that the European Commission and the EU's social partners should work together to improve the existing model (e.g. through a better mediation process). Possible enhancements of the current sustainable development chapters include (but are not limited to):

- Improving sustainability impact assessment studies with a better focus on sustainable issues before negotiating, and carrying out ex-post studies to ensure a follow-up of the commitments, including in social and environmental matters.
- Developing a model that takes into account not only the end result, but the progress made by trading partners in relation to the implementation of sustainability provisions since entry into provisional application of a FTA. TSD provisions should be defined on a case by case basis, rather than by a one-size-fits-all-approach. Every case is different and the situation on the ground needs to be assessed in its own merits, with consideration to the specific starting point, the level of development and eventual cultural differences. Even the understanding



and recognition of the role of civil society may differ greatly in other countries and this must be taken into account.

- Increasingly providing for capacity-building projects (for example on labour inspections) in third countries to help their relevant national and local authorities in their efforts to monitor, apply and enforce environmental and social obligations. They bear the primary responsibility for compliance with international standards and norms. In this context, focus must be on issues identified as a shared priority by partners (for example on circular economy, responsible value chains, etc.). Appropriate funding and other means should be provided by partners when relevant.
- Further empowering civil society structures and promoting the recognition of independent representative organisations.
- Strengthening the role of private sector. Investments for development are key and companies bring their experience, technologies and expertise, supporting their partners – including SMEs – becoming more competitive, expand their product and client range and also become more export-oriented, as they open up opportunities to join Global Value Chains. They also support employment, create high quality jobs, promote skills diversification, gender balance and social inclusion in the EU and partner countries.
- Addressing the absence of a streamlined complaint mechanism. This would be the first step towards the creation of a procedure that allows for the determination of a violation of TSD provisions. Such a procedure should establish clear timelines, clearly define the involvement of actors at the institutional and non-institutional level and establish their agreement as a requirement for launching the dispute settlement, i.e. BusinessEurope is against the “automatic” trigger of dispute settlement by civil society.
- Increased efforts by EU institutions and Member States as well as stakeholders on informing European citizens on the purpose of TSD chapters and what are the EU competences in this regard. Awareness should also be raised on the functioning, achievements and objectives of Domestic Advisory Groups established under the various EU trade agreements. Expectations of all parties involved need to be managed in order to avoid frustration and misperceptions.
- Companies need legal certainty and planning reliability. This being said, the role of business as the main driver of CSR-Corporate Social Responsibility practices and responsible business conduct must be recognised. TSD chapters in FTAs should include provisions that allow for flexibility and promote voluntary schemes by companies, based on their own specificities and resources and the environment they operate in. What may be possible for a large company, may be an excessive burden for a small enterprise, de facto preventing it from seizing the opportunities opened by the FTA.
- Keeping the scope of TSD chapters within the remit of the EU exclusive competence. The scope of TSD chapters is being expanded to new areas⁴ that may potentially involve a shared EU-member states competence, following the ruling of the European Court of Justice on the EU-Singapore FTA and the division

⁴ Responsible supply chain management, corporate social responsibility (CSR) and responsible business conduct (RBC), anti-corruption, gender equality, promoting sustainable production standards as well as sustainability assurance and fair and ethical trade schemes.



of competences between the EU and its member states. There is also a need to focus on priorities among these new areas. In this regard, we are in favour of exploring the idea of having provisions related to the fight against corruption, for instance based on the OECD Anti-Bribery Convention. Undue solicitations that companies are from time to time facing at the border during for the customs clearance should especially be addressed.

- Deepening the cooperation at the international level to efficiently address sustainable development issues (e.g. more cooperation between ILO and WTO, proactive agenda in G20 etc.).