

## **Possible tools for strengthened implementation of sustainable development provisions in EU free trade agreements (FTAs)**

### **Executive summary**

The main objective of this analysis is to develop a set of possible tools to be included in EU FTAs in order to improve implementation and enforcement of their sustainable development provisions. This analysis is a follow up to the 2016 report by the National Board of Trade, and is based on its main findings.

This analysis proposes a range of practical and easily applicable mechanisms which can be included in EU FTAs with an aim of strengthening the implementation of sustainability provisions, and responding to some of the criticism expressed in the course of the TSD implementation debate. Firstly, it suggests creating a *structured complaint mechanism* under which civil society representatives could launch a complaint about breach of a TSD provision. Secondly, it proposes an introduction of *individual implementation plans* which will concretise and contextualise the process of implantation and thus make it more streamlined and effective. Thirdly, the analysis calls for establishing an explicit and direct *link between TSD implementation and technical/financial assistance*, and thereby incentivising credible commitment through strategic management of development aid. Fourthly, the analysis suggests *institutionalising structured ex-post assessment* and introduction of a revision clause. Fifthly, it advocates explicit and *direct involvement of the ILO and the MEA institutions* in TSD implementation, enforcement and monitoring.

Apart from suggesting a number of institutional tools which can be inserted in TSD chapters, the analysis proposes to complement those tools with a number of support mechanisms, which could additionally

reinforce their effectiveness. These include the development of a simple, concise and informative *handbook* outlining the necessary steps towards effective implementation of TSD provisions for FTA partners; institutionalisation of the *pre-implementation activities*; developing effective *communication* on TSD and TSD implementation; and finally a more structured *involvement of the private sector* in the implementation process.

## 1 Introduction: objective, method and scope

In May 2016, the National Board of Trade (NBT) issued a report “Implementation and enforcement of sustainable development provisions in free trade agreements – options for improvement.”<sup>1</sup> This analysis is a follow up to the 2016 NBT report, and is based on its main findings. The main objective of this analysis is to develop a set of possible tools to be included in EU FTAs in order to improve implementation and enforcement of their sustainable development provisions.

The present analysis builds on the analysis and the conclusions of the 2016 NBT report as well as comments on the report received from a range of institutions. It also encompasses a number of documents and studies developed during the last 18 months in the course of the discussion of the reform of Trade and Sustainable Development (TSD) chapters in EU FTAs. In particular, it builds on the non-paper of the European Commission services on “Trade and Sustainable Development (TSD) chapters in EU Free Trade Agreements (FTAs)”<sup>2</sup> as well as comments to the non-paper submitted by Sweden and a number of other Member States<sup>3</sup>. A range of other studies and policy papers was examined and referred for the purpose of this analysis, a list thereof can be found at the end of this document.

The present analysis attempts at developing a range of practical and easily applicable mechanisms which can be included in EU FTAs with an aim of responding to some of the criticism and challenges expressed in

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<sup>1</sup> National Board of Trade (2016), “Implementation and enforcement of sustainable development provisions in free trade agreements – options for improvement” available at: <https://www.kommers.se/In-English/Publications/2016/Implementation-and-enforcement-of-sustainable-development-provisions-in-free-trade-agreements--options-for-improvement/>

<sup>2</sup> European Commission, *Non-paper of the Commission services on “Trade and Sustainable Development (TSD) chapters in EU Free Trade Agreements (FTAs)”*, WK 8022/2017 INIT, Brussels, 11 July 2017.

<sup>3</sup> At the time of developing this study, the National Board of Trade had access to comments submitted by the governments of Finland and Belgium.

the course of the TSD implementation debate. Thus, methodologically, it applies a hands-on approach, translating policy analysis into concrete applicable solutions. It needs to be pointed out that the suggested solutions are neither the only possible tools to be applied, nor do they respond to all challenges facing TSD implementation. It is merely an attempt to suggest a number of possible solutions which directly respond to some of the most recurrent criticism towards TSD implementation, which can easily be incorporated in the current TSD model, and which have a potential of delivering tangible results in line with the Commission's *Trade for All Strategy*<sup>4</sup>.

Although the primary focus of this analysis is on future EU FTAs, the suggested tools could also be used in TSD chapters in existing FTAs, especially as they do not require significant adjustment of their other elements. This could be considered particularly with regard to the FTAs which have been equipped with a revision clause.

One last introductory point which should be made here is that although this analysis aims at developing tools which can be used with regard to all EU trade partners, some of them will be applicable with certain limitations. This is particularly valid for the mechanism described in section 3.3 below, which can apply to trade partners that are at the same time recipients of EU's development assistance.

## **2 Incentive-based implementation model: benefits and challenges**

Before presenting the proposal for concrete mechanisms to strengthen implementation of TSD chapters, the following section will briefly present the current state of the debate on the benefits and shortcomings of the current setup with TSD in EU FTAs. The objective is not to restate the analysis presented in the 2016 NBT report, but rather to place it in the context of the ongoing debate and summarise the key issues.

In their substantial content, existing TSD chapters in EU FTAs build on references to the parties' commitments under other multinational instruments, namely the International Labour Organisation (ILO) conventions and Multilateral Environmental Agreements (MEAs). Hence, their primary objective is to support and strengthen effective enforcement of these multinational instruments with an aim of improving

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<sup>4</sup> European Commission, *Trade for All – Towards a more responsible trade and investment policy*, October 2015.

environmental and labour conditions in the partner countries. Consequently, TSD chapters are not meant to create new rights and obligations between the parties, but reinforce their existing commitments under other international instruments.

This particular setup with TSD provisions involves more than a bilateral relation, as it encompasses also the parties' relation with the ILO and MEA convention bodies, under the relevant international agreements. Such an arrangement requires a specific system for implementation and enforcement. The model applied in the EU FTAs is a managerial or incentive-based one. It advocates a cooperative, problem solving approach to promoting compliance with international law.<sup>5</sup> Compliance strategies should, here, focus on actual causes of non-compliance and "manage" these through positive means, consisting of a blend of transparency, dispute settlement and capacity building.<sup>6</sup> Departing from an assumption of growing international interdependence, the theory argues that states can now only realise their sovereignty through participation in various international regimes, which makes them rationally prone to comply in order to retain a good standing as a member of the international system.<sup>7</sup> Such approach has the capacity to bring about tangible benefits, but it also marked by a number of challenges.

Sustainable improvement of labour and environmental conditions requires a continuous and long-term engagement with partner countries. Building inclusive reform processes in partner countries as well as their implementation and enforcement in a manner of joint responsibility and ownership is a time consuming process that cannot happen overnight. It often involves the need to address and resolve highly sensitive issues. It also often requires a gradual reform process and a need for long-term commitment. As a result, the tangible effects of TSD implementation take time to materialise, and they are often difficult to quantify and report on. An additional difficulty is that direct causal link between the TSD implementation activities and improvement of labour and environmental conditions is often difficult to establish, which is mainly due to the fact that TSD implementation is often one of many factors that have contributed to the long-term change in national conditions.

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<sup>5</sup> A.Chayes, A.Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements*, Harvard University Press, 1998.

<sup>6</sup> *Ibid*, pp.22-25.

<sup>7</sup> *Ibid*, p.28 as well as J. Brunnee, "Enforcement Mechanisms in International Law and International Environmental Law", in: U. Beyerlin, P.T. Stoll and R. Wolfrum, *Ensuring Compliance with Multilateral Environmental Agreements. A Dialogue between Practitioners and Academia*, Brill, 2006, pp.1-23.

The implementation system based on incentives and dialogue gives ample opportunities to support positive change in the partner countries committed to reform, but seems less well equipped to address the challenges in countries that are less devoted to the TSD agenda. TSD chapters, however, create a structure where a broad range of actors can be involved in addressing challenges, both domestic and international. It offers a platform for co-operative activities and constructive dispute resolution. All these options, as well as operationalisation of monitoring and evaluation can be improved in order to strengthen implementation of TSD chapters and to make it more transparent to the public.

### **3 Possible tools for strengthened implementation and enforcement**

This section will present a number of proposals for concrete institutional solutions which can be introduced in EU TSD chapters as a means of creating potential for their more effective implementation and enforcement.

#### **3.1 Establishing a structured complaint mechanism**

One of the most recurring points of criticism towards the current setup of TSD chapters is the organisation of participation of the civil society in the enforcement process. In order to constructively respond to this criticism and to make civil society's role in the process more explicit and more effective, it is here suggested to establish a *structured complaint mechanism*. If stakeholders are to be genuinely given a role in monitoring and enforcement, their participation needs to be far more formalised, structured and transparent, for example through institutionalising such a complaint procedure, under which civil society representatives could launch a complaint about a potential breach of a TSD provision.

Such a complaint mechanism should be open to all relevant civil society representatives, it should be transparent and clearly structured. Clear procedures for the admission of cases, institutional framework for their processing, time framework for the various stages of the procedure, as well as access to information and the possibility for other actors to participate (including external experts and expert organisations such as the ILO and the MEA institutions) in the proceedings should be established. Finally a link to the available consultation and dispute settlement procedure under the TSD chapter should be clarified. In developing and operationalising the complaint mechanism, one can build

on the experiences of the complaint function of the National Contact Points established under the OECD guidelines for Multinational Enterprises.

A complaint mechanism as suggested here can easily be fitted under the current implementation and monitoring scheme for TSD chapters. It will, at the same time constitute a concrete improvement and a tangible contribution to the strengthening of TSD enforcement. Such mechanism would make civil society's participation significantly more effective, strengthen the legitimacy of the process and limit the scope for potential abuse by stronger actors. Moreover, such an open and transparent procedure would make the enforcement activities more visible to the stakeholders and the society at large, which would put additional pressure on the trade partner in question to adequately address the contested issue.

### 3.2 Institutionalising individual implementation plans

The second possible improvement would be an institutionalisation of *individual implementation plans* guiding implementation of TSD chapters of each party to an FTA, as routine mechanisms under TSD chapters.

The need for this kind of individualisation of the implementation process in order to make it more applicable to the particular national context and adjusted to needs of concrete trade partners, has been reflected in a number of contributions to the TSD implementation discussion over the last couple of months. It also resonates with the existing mechanism under the ILO enforcement system, namely the labour development plans, which were discussed in the 2016 NBT report. The individual implementation plans suggested here, however, refer to all areas covered by the TSD chapter.

Such individual implementation plans can support the TSD implementation process in a number of different ways. Firstly, they offer a possibility of developing custom-made solutions, reflecting the current needs, challenges and capacity of a concrete trade partner.

Secondly, they can be more flexible and dynamic allowing to adjust the content and the tempo of the implementation process to the changing circumstances.

Thirdly, individual implementation plans can additionally strengthen the relationship between the parties in the context of implementation. It has been established that one of the challenges with implementation of TSD

chapters is the need to engage a broader range of institutions and stakeholders, both domestic and international, in the activities. Here, the individual implementation plans offer a platform for such broad cooperation, inclusion and information sharing, which can be particularly useful in countries with less developed traditions of inter-institutional coordination and broad public consultations. Through engagement of actors beyond ministries responsible for trade, individual implementation plans can facilitate this process and make it more efficient. They will also make it easier to conceptualise implementation as a joint effort and promote co-ownership of and co-responsibility for the implementation process.

Fourthly, individual implementation plans enable more continuity in the implementation process. Through setting internal deadlines and establishing time-bound actions, implementation can remain in focus on a continuous basis, and not only in the event of annual TSD committee meetings. Having a shorter time perspective for implementation activities can additionally act as a mobilising factor for trade partners, forcing them to plan and sequence activities in a more efficient manner.

Fifthly, individual implementation plans can be an arena for testing innovative solutions to improve and strengthen TSD implementation. For example, they open up a possibility to strategically link implementation activities included in the plans to development assistance (as is described further in 3.3 below).

In terms of procedure, enforcement of the individual implementation plans would be linked to all the institutions and processes under the TSD chapter. This refers to the use of the institutional structure with the contact points, committees and civil society organs, as well as the processes such as consultations and dispute resolution.

Formally, a modelled individual implementation plan could be made part of the FTA, for example as an annex to the agreement directly linked to the TSD chapter, or a side agreement. The provision in the TSD chapter referring to the individual implementation plan, or a provision in the annex/side agreement itself should contain a strict revision clause, committing the parties to revise and update the individual implementation plan at regular intervals. Revision periods can, for example, be linked to the TSD sub-committee meetings, allowing the individual implementation plans to reflect and endorse (validate) their outcome.

### 3.3 Establishing an explicit and direct link between TSD implementation progress and development assistance and cooperation

Another possibility of supporting the implementation process, which was already briefly introduced above is that of linking implementation activities to development assistance, both technical and financial. Through establishing direct dependencies between the countries' performance in implementing TSD provisions on the one hand, and availability of development assistance on the other, one can strategically use development assistance to promote TSD implementation.

This will, firstly, increase incentives to effectively implement TSD commitments. It will make active engagement in the activities undertaken in the process of TSD implementation more attractive, and facilitate gathering support for them in the partner countries. One of the possible instruments to streamline, organise and control this relationship is through the individual implementation plans, as suggested above.

Secondly, it will facilitate efficient use of resources for implementation, by channelling development assistance towards TSD implementation activities that are progressing, and thereby further increase their chances of success. It should be pointed out here, that the updated Aid for Trade strategy makes a direct reference to the need to proactively seek synergies with EU trade agreements and schemes, where Aid for Trade will help promote a positive implementation dynamic of the agreements from the outset and contribute to turning them into a success.<sup>8</sup> A specific action foreseen by the Strategy is to use the institutional monitoring mechanisms established by EU FTAs as an additional means to identify relevant Aid for Trade activities. Moreover, the Strategy foresees a possibility of inclusion in implementation plans of targeted measures to help developing partner countries make better use of the opportunities offered by the EU trade agreements.<sup>9</sup> There is, therefore a clear momentum, both from the trade as well as development policy side to join forces in implementation of the sustainability agenda, which is important to build further on and activate in the context of the FTA TSD implementation. It is also clearly in line with the aims of the 2030

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<sup>8</sup> European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Achieving Prosperity through Trade and Investment. Updating the 2007 Joint EU Strategy on Aid for Trade*, COM(2017) 667 final, Brussels, 13.11.2017, p.6.

<sup>9</sup> *Ibid.*



Agenda, in particular target 8A, and the objective of striving for policy coherence for sustainable development.<sup>10</sup>

Finally, the suggested setup offers a possibility to discipline trade partners in case of non-compliance or lack of engagement in the implementation of TSD commitments. In such cases, development assistance can be suspended or withdrawn until tangible progress is achieved. This type of strategic application and management of development assistance in the FTA context can create pressure on TSD implementation without having to introduce recourse to sanctions. A certain parallel can here be drawn to the GSP+ system.

In the proposed scenario, the TSD committee could be involved in evaluating progress and deciding on eventual suspension or withdrawal of the assistance in question in case of lack of compliance or lack of tangible progress in implementation of commitments agreed in the TSD chapter and possibly concretised in the individual implementation plan.

### 3.4 Institutionalising structured *ex-post* assessment and introduction of a revision clause

In order to be able to assess the actual sustainability effects of an FTA and measure effectiveness of TSD implementation, it is essential to institutionalise a thorough, structured and comprehensive *ex-post* evaluation mechanism. Such *ex-post* sustainability impact assessment would build on the findings of the *ex-ante* Sustainability Impact Assessment (SIA), and would entail an analysis of the agreement's factual effects on environment and labour, concentrating on areas of specific concern and evaluating effectiveness of the measures developed in the agreement in order to properly address them. It is important to bear in mind that in order for such assessment to capture the entirety of sustainability implications, it should ideally go beyond the evaluation of application of particular sustainability provisions, and include assessment of sustainability effects of the entire agreement.

*Ex-post* assessment commitment should preferably be formulated as a time scheduled provision. Assessment should be performed at an agreed point in time and should be repeated at regular intervals. In order to strengthen the effectiveness of such *ex-post* assessment, one can additionally link it to a revision clause, which would make it possible to reflect and endorse the findings of the assessment in the TSD

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<sup>10</sup> National Board of Trade, *Trade and social sustainability. An overview and analysis*, 2017:2, pp.60-61 and 70.

implementation process, for example through updating of the individual implementation plan as indicated above in 3.2.

### **3.5 Explicit and direct involvement of the ILO and the MEA institutions**

As the logic of the EU's TSD chapters builds on references to multilateral instruments and institutions, such as the MEAs or the ILO, cooperation with these institutions, namely the ILO and the implementing/monitoring bodies of environmental conventions needs to be strengthened. A lot has already been done to harness cooperation with the ILO, for example through engaging their specific expertise and their knowledge of labour-related challenges of concrete countries in monitoring and improving implementation of TSD commitments under FTAs, including through joint technical assistance projects.

Strengthening this cooperation even further, for example through direct references to the role of those institutions in the implementation of TSD chapters can bring about additional benefits. Participation in implementation activities allows for the best possible use of competence and expertise. Partnership in technical assistance project is another such example. Moreover, co-responsibility for implementation, enforcement and monitoring can further reduce the risk of undermining the multilateral systems and their institutions, and strengthen the legitimacy of the TSD implementation process. The role of the ILO and MEA institutions in the dispute settlement system for TSD chapter should also be considered. One could build further on the experiences from the implementation of the GSP+ commitments and the cooperation practices developed therein.

Considering the potential difficulties of including specific provisions on formalised participation of the ILO and MEAs institutions' in the actual texts of TSD chapters in all EU FTAs, one can consider the individual implementation plans as an alternative platform for inserting relevant provisions and structures.

## **4 Supporting activities and mechanisms to improve effectiveness of sustainable development provisions in FTAs**

In order to further reinforce implementation of TSD chapters it could be considered to complement the institutional tools presented in the section

above with a number of support mechanisms, which could additionally strengthen their enforcement and effectiveness. This section suggests a number of possible such supporting mechanisms, which could be integrated in the TSD implementation processes and structures.

#### **4.1 Developing a roadmap/handbook on implementation**

The first such support activity would be to develop a simple, concise and informative handbook outlining the necessary steps towards effective implementation of TSD provisions for FTA partners. Such a handbook would assist FTA partners, in particular developing countries, in sequencing and prioritising implementation preparations and activities. It could, thereby, support timely establishment of the necessary institutional and procedural structures, as well as facilitate optimal management of resources for implementation. Moreover, it would enable dissemination of best practices of addressing the most challenging elements of TSD implementation, such as establishing mechanisms for consulting the civil society.

An additional benefit with such a handbook would be that actual implementation activities could be initiated early on, and thereby lead to reportable results sooner than it is possible in the current setup. One of the possible other benefits of a handbook would be to establish guidelines for a more streamlined use of the pre-implementation activities, which will be discussed further in the next paragraph.

#### **4.2 Institutionalising pre-implementation activities**

The period before the official implementation of an FTA begins, can be used more efficiently to establish grounds for future cooperation on TSD issues and initiate dialogue on some aspects of the implementation process and content. It can, for example, be used for activating national cooperation mechanisms and institutions for stakeholders' dialogue, which will participate in the implementation process. This would significantly speed up the start-up process and contribute to delivering tangible results earlier in the implementation. A handbook for implementation can be a useful tool for organising activities during this period and providing a platform for cooperation between the parties even before the official implementation institutions are put into place. Moreover, intensification of pre-implementation activities can enable a better use of the potential momentum connected with the successful completion of the negotiation process and signing of the agreement.

Pre-implementation activities have recently been introduced by the Commission in a number of cases. It is here suggested that it should be endorsed as an established practice, and be made applicable to all new FTAs.

### 4.3 Communication/stakeholder dialogue

An important complementary activity to support the effort towards improved implementation of TSD chapters in FTAs is communication. It is, firstly, a question of openness about the possibilities and the limitations of the TSD model established by the EU. The logic of the functioning of the EU's TSD chapters based on references to other international agreements, and the institutional interdependency which it creates, may require some clarification in order to establish a level playing field for all the stakeholders. Moreover, there is a need to clearly articulate the need to establish a long-term relationship between the parties, in order to build an open dialogue and credible commitment for sustainable change. It makes it easier to avoid creating an expectation that FTAs will bring positive changes overnight and address all challenging areas effectively at once.

Secondly, it is a question of transparency and comprehensive reporting about the actual activities undertaken in the course of the implementation process and the tangible results achieved. This presupposes the existence on the side of the Commission and the Member States of sufficient knowledge of the activities and their results, which in its turn requires a systematic *ex-post* assessment of those activities and their effects in the EU and the FTA partner countries.

Last, but not least, the business community needs to be better informed about the relevance of TSD provisions in FTAs and their relevance for establishing and maintaining business friendly environment, where companies can conduct their activities without putting themselves at risk of breaching some of the fundamental internationally agreed principles in the field of labour and environmental protection. Both their role in the implementation process as well as their potential gains from successful enforcement of TSD provisions needs to be made clear to the private sector.

### 4.4 Involving the private sector in the implementation process

The crucial role of the private sector in implementing an ambitious sustainability agenda has been acknowledged both globally, in the 2030

Agenda, as well as at the EU level in the *Trade for All* strategy<sup>11</sup>. Furthermore, the updated *Aid for Trade strategy* makes a direct reference to the need for engaging the private sector. More explicitly, it speaks about a shift of focus towards using Official Development Assistance more strategically as a catalyst to mobilise other public and private financial flows (...) with public investment becoming an integral part of EU support to trade and productive capacity needs.<sup>12</sup> The current challenge ahead is to concretise this role for the private sector in the implementation of TSD chapters. Private sector financing and expertise can be used to support implementation of necessary reforms, especially in the partner countries with significant sustainability challenges. Acknowledging their different roles, capacities and fields of activity, measures undertaken by public authorities and private actors can be streamlined to support reform in a challenging sector. Parallels can here be drawn to the ongoing public-private initiatives in the field of trade and sustainable development such as the the Bangladesh Sustainability Compact.<sup>13</sup>

Such cooperation has a potential to bring mutual benefits. On the one hand, private sector actors with advanced sustainability policies, who engage in in depth due diligence and apply private codes of conduct, tend to have a lot of knowledge and expertise not only about the sustainability challenges at stake, but also about ways of addressing them in a value chain. This expertise and capacity can be used to support action at the government level in increasing levels of protection and implementing national regulation on labour and environmental protection. On the other hand, this can benefit the private sector as well, through strengthening a business friendly environment and encouraging reforms that facilitate their business activities, in particular in the complex markets.

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<sup>11</sup> European Commission, *Trade for All – Towards a more responsible trade and investment policy*, October 2015, p.24.

<sup>12</sup> European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Achieving Prosperity through Trade and Investment. Updating the 2007 Joint EU Strategy on Aid for Trade*, COM(2017) 667 final, Brussels, 13.11.2017, p.5.

<sup>13</sup> Joint Statement, *Staying engaged: A Sustainability Compact for continuous improvements in labour rights and factory safety in the Ready-Made Garment and Knitwear Industry in Bangladesh*, Geneva, 8 July 2013, available at: <http://trade.ec.europa.eu/doclib/html/151601.htm>.

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