



## **Response to the Non-Paper of the European Commission on Trade and Sustainability in Trade Agreements**

This response is directed at the European Commission's Non-paper on TSD chapters in EU FTAs. It provides insights from a research project conducted by FES<sup>1</sup> Asia in countries that promote export industries in global value chains to the European Union. The response supports the central features of the Model Labour Chapter<sup>2</sup> (MLC)<sup>3</sup> that was presented to EU Commissioner Cecilia Malmström by MEP Bernd Lange, Chair of the Committee for International Trade (INTA), in June 2017. It discusses the labour dimension of TSD chapters and suggests innovative legal structures to better monitor compliance. We have structured our suggestions and thoughts around the four questions posed at the end of the Non-paper and focus our recommendations on the labour standards section of a TSD.

### **1. Are EU TSD chapters meeting expectations? If not, what are the shortcomings to be addressed and what could be done to improve them?**

#### Involvement and mandate of the DAGs

The involvement of civil society in the current TSD system is limited. Civil society—including the social partners—should be involved systematically during the drafting of the TSD chapter. As soon as the agreement is in place, the task of monitoring the TSD chapters should also involve civil society, including the social partners. TSD chapters are still a quite new instrument of EU FTAs and not many FTAs feature such a chapter yet. However, some first conclusions can be drawn already and in our assessment the current monitoring mechanisms display shortcomings both regarding membership and mandate. The TSD Chapter in the EU-Korea FTA, for example, provides for an advisory role for the DAGs without any controlling or supervisory mandate. Based on our field studies, we therefore recommend the reform of the DAGs as follows: not only the recruitment and the composition of DAGs needs to be re-visited, but also DAGs need to be strengthened by providing for a clear mandate, task and authority and by support with human and financial resources. It should also be mandatory for governments to send representatives to DAG meetings for reporting if requested by the DAG.

Similar shortcomings may be soon demonstrated in the case of Vietnam. The current TSD chapter refers full responsibility for forming and implementing the DAGs to the partner state of the agreement. In cases like Vietnam where the political system does not allow for an independent civil society—since freedom of association is restricted under one-party rule—DAG members will likely be chosen from among party ranks and hence lack a critical distance to the government.

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<sup>1</sup> The Friedrich-Ebert-Stiftung (FES) is a German political foundation that focuses on the core ideas and values of social democracy—freedom, justice and solidarity. FES works with CSOs, political actors and trade unions in more than 100 countries.

<sup>2</sup> "Model Labour Chapter for EU Trade Agreements", downloaded on 12 January 2018 from: [http://www.fes-asia.org/fileadmin/user\\_upload/documents/2017-06-Model\\_Labour\\_Chapter\\_DRAFT.pdf](http://www.fes-asia.org/fileadmin/user_upload/documents/2017-06-Model_Labour_Chapter_DRAFT.pdf)

<sup>3</sup> The MLC was drafted by lawyers from the University of Göttingen: Prof. Dr. iur. Peter-Tobias Scholl, Henner Gött, LL.M. and Patrick Abel, MJur.

### Institutional mechanisms

We ask the COM to review the institutional mechanisms. Our research shows<sup>4</sup> that the current institutions do not enable the DAGs to effectively react to a violation of agreed standards. An independent institution (e.g. a “Panel of Experts”) needs to be established and be empowered to evaluate complaints that are brought forward either by a state party or by another stakeholder (such as the social partners).<sup>5</sup> It is expected that an enforcement mechanism that involves the stakeholders that are directly affected would help to address labour rights violations more effectively. Therefore, we propose a collective complaint mechanism that would enable civil society and the social partners—independently from their governments—to initiate a complaint procedure. This could be done by the DAG (and potentially by the Civil Society Forum (CSF)). A two-thirds majority in the DAG should be necessary to file a complaint to the independent institution (e.g. “Panel of Experts”). Furthermore, it will also lead to an overall empowering of civil society and trade unions in countries where they so far have weak structures (mostly due to limited rights). To be effective, this mechanism requires the existence of independent social partners and civil society (see previous chapter).

### Informing stakeholders about TSD chapters

Both within the EU and in partner countries there is a lack of knowledge and understanding about the TSD chapters in EU FTAs. To guarantee valuable contributions by civil society and social partners in monitoring processes, it is indispensable to improve information and sponsor awareness campaigns. This should not only include arguments about why we trade and why trade is beneficial. It should be made mandatory for the EU delegations in the partner countries to proactively organize information, dialogue and capacity building for prospective and current members of the DAG and secure funding for effective meetings of the joint fora.

### Using pre-ratification policy space

Ratification conditions provide opportunities that are too often still neglected. Basic international norms and standards—among which are the ILO Core Labour Standards—need to be considered a bottom line when signing an agreement with a partner country. We think that the COM would have much more policy space and leverage than has so far been used. We will discuss this issue in our answer to question 2.

## **2. Should the EU pursue a more assertive partnership on TSD in bilateral FTAs as described in option 1?**

We think that option 1 and 2 of the Non-paper should not be answered in a binary, either-or way. We strongly advise looking at the two options and engaging both in a complementary approach which can be effective if the strengths of both options are applied. Research suggests that a combined approach—promotional and conditional trade policy—has an overall impact on compliance with labour standards.<sup>6</sup> Therefore, we recommend both—the consistent and forceful application of the existing mechanisms and the combination of promotional and conditional approaches.

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<sup>4</sup> Scherrer, Christoph/Moore, Madeleine (2017): Conditional or Promotional Trade Agreements—Is Enforcement Possible?, downloaded on 12 January 2018 from: <http://library.fes.de/pdf-files/bueros/singapur/13446.pdf>

<sup>5</sup> See page 32 of the MLC

<sup>6</sup> See Scherrer/Moore (2017)

## Combined promotional + enforcement approach



*Stoll/Gött/Abel: Model Labour Chapter*

*Non-paper: “early and continuous engagement aiming to achieve ratification of the eight fundamental labour conventions”*

Derived from our consultations in the partner countries and the research results, we argue that the EU COM could contribute to the protection of human and labour rights by using its pre-ratification policy space more effectively. Pre-ratification conditions can be a strong instrument when used in a consistent manner. The ratification of the eight ILO Core Conventions (CLS) needs to be a pre-condition. This would furthermore require the development (before ratification) of a clear and binding road map with which domestic legislation is brought in line with those conventions within the very foreseeable future after ratification and before all tariff suspensions have been made. The Vietnam TPP case, for example, shows that there was policy space to trigger labour law reform (the ratification of ILO Convention 89 – Freedom of Association) as a pre-condition to join the FTA. (The fact that Vietnam stopped all efforts to reform its labour law as soon as the US pulled out of the TPP and lobbied for the suspension of the labour clause in a CPTPP only makes this point stronger.) This stands in contrast with experiences with the EU-Korea FTA. Korea failed to ratify fundamental ILO conventions before the FTA was signed. Until today, no progress has been made on the Korean side to fulfil its commitment to sign/ratify the conventions.

*Non-paper: “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”*

Raising awareness and training for political actors, social partners and civil society on their respective role in the monitoring and implementation of a TSD is crucial. The EU should therefore strategically use the Global Public Goods and Challenges Programme of the Development Cooperation Instrument (DCI) to help the actors prepare for their new tasks. With the increasing number of FTAs planned, the EU’s Partnership Instrument should be enhanced so as to launch projects that support civil society’s role in the monitoring and implementation of EU FTAs. These programmes should be started during the process of negotiations. In the case of Vietnam, the MUTRAP project that served to accompany the negotiation process was focused on trade facilitation and was nearly exclusively directed towards the business sector.

Non-Paper: *"Enhance the advisory role of civil society by improving the functioning of the Domestic Advisory Groups and the Joint Forums"*

The rights, responsibilities and institutional mechanisms of the DAGs and Joint Fora should be clearly laid out in a TSD chapter; the current article is far too vague. Different from the current regulations, the DAGs should have been formed before ratification so that it becomes obvious that representation of independent CSOs and social partners is guaranteed and the formation process has been following democratic principles.

**3. Do you think a sanctions-based approach as described in option 2 would address the shortcomings identified?**

We believe that a sanctions-based approach should be combined with a promotional approach. However, we do not believe that option 2 provides an efficient model for sanctions.

First, conditionality in EU trade schemes is nothing new. Thus, hinting at the US and the Canadian approach as examples for sanctions-based mechanisms is misleading. The EU has so far conducted three suspensions of trade preferences because of non-compliance with labour and human rights standards: in Myanmar (1995), Belarus (2003) and Sri Lanka (2004).<sup>7</sup> In 2010, then-Commissioner de Gucht stated with regard to the Colombia/Peru FTA that "the agreement allows for the immediate and unilateral adoption of appropriate measures—including suspension—whenever an essential element of the Agreement has been violated."<sup>8</sup> The FTA with Colombia and Peru foresaw labour standards to be essential elements. The Council itself stated in 2004 that "sanctions should be targeted in a way that has maximum impact on those whose behaviour we want to influence."<sup>9</sup>

Second, sanctions can be of a very different nature. When talking about effectiveness, one needs to look at the different types of enforcement. It is the specific design of sanctions which leads to a certain effect on or in a partner country. A smart sanctions approach would be able to differentiate between targets. Since the general suspension of benefits has negative effects on the economy and risks harm to jobs and workers, targeted sanctions penalize certain products, companies or even persons who are responsible for violations of the labour law or labour standards.<sup>10</sup> Our empirical experiences show that one needs to look closely at the connection between product lines and leadership (e.g. the government/garment sector nexus in Bangladesh). A smart and effective sanction could display the sectors with a close linkage and protect those sectors where workers would be severely impacted. Furthermore, an integrated sanction approach may also be a protection for the participation of CSOs and trade unions in the monitoring of TSD chapter implementation.

Third, the reason why the US or Canadian approach has shown little or no improvement in compliance is that the complaint and dispute settlement mechanism is reduced to trade-related violations. We are convinced that a value-based trade policy should include the universal respect of labour rights, not only those affected by the trade between the partner countries. Such a holistic approach would not be new to the COM since it is already operationalised and practised in schemes such as GSP+. Moreover, violations of labour standards in all cases lead to social dumping and can be seen as directly or indirectly trade-related. The Bangladesh case—although not an FTA—shows that intensification and concentration of exports to the EU, within a textile market characterized by price pressure and intensifying mass production, can lead to the deterioration of environmental and labour standards.

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<sup>7</sup> Portela, Clara/Orbie, Jan (2014): "Sanctions under the EU's Generalised System of Preferences (GSP): Coherence by accident?", *Contemporary Politics* 20, no. 1: 63-76

<sup>8</sup> De Gucht, Karel: "On the EU Trade agreement with Colombia and Peru", Speech at the European Parliament, Brussels, 16 March 2010.

<sup>9</sup> Council of the European Union: "Basic Principles on the Use of Restrictive Measures (Sanctions)", Brussels, 7 June 2004

<sup>10</sup> Portela, Clara (2014): "The EU's use of "targeted" sanctions: Evaluating Effectiveness", CEPS Working Document, No. 391

It is important to stress that the “sanctions option” is not a *sine qua non* of the MLC proposal. The essential part clearly is about a dispute settlement mechanism that can be invoked also by non-state actors. But since the COM explicitly asks about the sanctions-based approach, we discuss this question and outline why we think that the conclusions drawn in the Non-paper are misleading.

#### **4. Are there any other issues related to TSD to be addressed?**

We encourage the EU to think beyond ILO Core Labour Standards. Our research in many of the export-oriented countries shows that the Core Labour Standards are important, but should be complemented with more or equally pressing issues for workers in global supply chains.<sup>11</sup> Especially for developing countries with high export rates, fire, safety and health standards, working hours and overtime regulation as binding standards would improve the working conditions for workers immensely. Our research in Vietnam, for example, shows that workers, especially women, are suffering from up to 100 hours of overtime work per month, also in supply chains with buyers from Europe.

Even more important, the TSD chapter should insist that at least minimum wages are paid, and state the goal of aiming for living wages. It is the stagnating wages and the non-shared prosperity which keep many of the developing trading partners of the EU from growing further and graduating into the middle-income or higher-income countries.<sup>12</sup> Violation of payment of minimum or living wages or work hours is often related to the monopsonic purchasing practices of the European brands (lead time, penalty for delays, payment procedures, etc.). Since these trade partners on the European side are beneficiaries of the tariff suspensions, the inclusion of these standards may motivate the big European brands to improve on their purchasing practices.

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<sup>11</sup> FES Asia: “Who benefits from trade?”, downloaded on 12 January 2018 from: <http://library.fes.de/pdf-files/bueros/singapur/13430.pdf>.

<sup>12</sup> See pages 17-19 of the MLC