



Making TSD chapters more effective

Joint contribution to the EU's Trade and Sustainable Development (TSD) Review

European trade policy must reflect the EU's environmental ambitions. The EU was a leader in the adoption of the Paris Agreement, and is promoting a Green Deal that contains ambitious objectives for ecological and social transition. This programme includes achieving climate neutrality by 2050 with an intermediate point of minus 55% of its GHG emissions by 2030. It also promotes a European economy "where economic growth is decoupled from resource use".

The Green Deal is now reflected in numerous sectoral policies such as the "Farm to Fork" strategy, which includes ambitious objectives on environment and animal welfare. These new orientations have also been reflected in the new trade policy proposal presented by the European Commission in February 2021.

Yet, their operational implementation is still insufficient. The environmental transformation of our production methods and social justice must guide all public policies to meet the challenges of the 21st century.

It is essential to make trade policy consistent with climate and environmental policies, including on animal welfare. There is no point in reducing intra-European emissions if the EU's carbon footprint - that is, the emissions contained in imported products - continue to grow. The same goes with improving animal welfare standards within the EU, while externalising animal welfare issues by simply importing more lower welfare products. The EU is responsible for the environmental and social impacts its consumption generates in third countries. Aligning EU trade policy with the EU's commitments not only implies trying to maximise the positive effects of trade. But it also requires changing the rules governing it to prevent and mitigate the negative

impacts it has globally. The EU needs to maintain the leadership in upholding and developing high environmental and animal welfare standards.

The Commission announced in its new trade policy strategy communication an early review in 2021 of the 15-points action plan of 2019 on the implementation and enforcement of Trade and Sustainable Development (TSD) chapters of EU free trade agreements, “*including the scope of commitments, monitoring mechanisms, the possibility of sanctions for non-compliance, the essential elements clause as well as the institutional set-up and resources required*”.^[1]

ClientEarth, Eurogroup for Animals, Veblen Institute, Fern, EEB and Fondation Nicolas Hulot welcome this consultation to improve the implementation of TSD chapters. We wish to contribute to the review by identifying **10 key reforms necessary for a better incorporation of sustainability objectives and ambitious innovation**, both within and beyond TSD chapters.

The proposals presented in this document have been selected in the framework of the consultation on the revision of TSD chapters in bilateral trade agreements. They do not reflect the full range of proposals that our organisations are working on to put trade policy at the service of the ecological and social transition. Our work also covers the introduction of unilateral market access measures or the revision of multilateral rules or investment protection agreements.

Demand 1 - EU FTAs should feature a number of structural provisions to put sustainability at the core of trade agreements

EU trade agreements should include structural provisions to effectively anchor sustainability objectives at the core of trade agreements, ensure policy space for sustainable development policies and avoid *de facto* regulatory chill:

- a commitment to ratify (when not yet a Party) and effectively implement a core list of multilateral environmental agreements (MEAs)¹, international labour conventions, international human rights law and other relevant international standards (ie. OIE recommendations on animal welfare);

¹ UN Framework Convention on Climate Change, the Paris Agreement, the Vienna Convention for the Protection of the Ozone Layer, the Montreal Protocol, the Convention on Biological Diversity, the Cartagena Protocol on Biosafety, the CITES Convention on International Trade in Endangered Species of Wild Fauna and Flora, the Convention on the Conservation of Migratory Species of Wild Animals and the International Plant Protection Convention (IPPC).

- core environmental principles in the general chapter, in particular the precautionary principle (with wording aligning with CJEU interpretation)², as guiding principles to the interpretation and implementation of the entire agreement;
- a hierarchy clause in the general chapter stipulating that in the event of inconsistency between the trade agreement and listed international instruments, obligations from the latter shall prevail.

Demand 2 – EU FTAs should set conditional preferential tariffs for certain products

The TSD chapter should also establish conditions or criteria conditioning the granting of preferential tariffs to specific products with higher risks related to climate and biodiversity, animal welfare, or human rights violations. This list of products would depend on each FTA and would be compiled in consultation with relevant stakeholders and civil society organisations.

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.”³ The conditions for the products to be granted preferential access could be related to the respect of certain TSD commitments (ie. of the climate trajectory established under the country’s NDC).

The conditions for a staged implementation of tariff reduction under a FTA should reflect and go hand in hand with the establishment of pre-ratifications commitments regarding (i) the ratification of some key international conventions and respect of relevant international standards and/or (ii) action to be taken on specific sustainability issues identified notably during the conduct of the Sustainability Impact Assessment.

Demand 3 - EU FTAs should include specific, measurable and enforceable sustainability obligations

Trade negotiations should make trade relationships an opportunity for all parties not only to reaffirm their international environment, labour, animal welfare and human rights-related commitments, but also to strengthen and detail them. The more detailed the provisions, the more effectively and promptly a Party’s breach of a specific obligation can be addressed.

² CJEU, Case C-157/96 Minister of Agriculture, ECLI:EU:C:1998:191; Case C-180/96 United Kingdom v. Commission, ECLI:EU:C:1998:192; General Court, T-74/00, Artegoda v. Commission, ECLI:EU:T:2002:283.

³ See the Non-paper from the Netherlands and France on trade, social economic effects and sustainable development, <https://nl.ambafrance.org/Non-paper-from-the-Netherlands-and-France-on-trade-social-economic-effects-and#t2-Social-economic-aspects-of-trade-agreements>

Drawing lessons from the ruling on the dispute under the EU-Korea FTA, it is also important to ensure that the obligations listed in the TSD chapter stand on their own. No obligation to demonstrate an effect of non-compliance with these sustainability provisions on trade flows should be imposed.

1. Detailed provisions on the implementation of ratified multilateral environmental and climate agreements

Negotiating FTAs is an opportunity to build on provisions of multilateral environmental and climate agreements. Parties can develop and negotiate more detailed binding provisions that will operationalise better existing obligations deriving from those agreements, and even go beyond these commitments of the Parties to comply with them. That should include the elaboration of more detailed provisions in the context of national communications, strategies, and implementation instruments (such as the National Biodiversity Strategies and Action Plans (NBSAPs) under the Convention on Biological Diversity (CBD) and the Nationally Determined Contributions (NDCs) under the Paris Agreement). For instance, in the case of the Paris Agreement this would refer to the development of concrete measures to effectively reduce greenhouse gas emissions and achieve their respective NDCs, as well as reviewing those regularly to enhance climate ambition.

2. Closing the gap in the absence of international binding instruments

It can happen that not all parties to a FTA have ratified multilateral environmental agreements or that those are not yet in force. It can also be the case that there are no existing international standards that regulate some environmental matters, as it is the case for example with illegal logging or deforestation. In those cases, and depending on the types of traded goods and services and their potential adverse environmental impacts, Parties should develop specific provisions in the TSD chapter to enhance and ensure the best protection possible. 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. While doing so, parties should always remain careful to leave sufficient space to develop international standards.

Demand 4 - EU FTAs should include an *ex-post* monitoring system and a ‘review and revision’ clause

First, EU FTAs should provide for a rigorous and independent *ex post* monitoring system to (1) assess environmental and social *impacts of the commercial provisions* of the FTA and (2) review the *effectiveness/implementation* of TSD provisions.

- ✓ The *ex-post* assessment of the environmental and social impacts of the commercial provisions of the FTA and the review of the effectiveness/implementation of TSD provisions should be conducted by an

independent body with appropriate expertise and should be appropriately resourced.

- ✓ It should be based on SMART indicators agreed by the Parties, and in consultation with relevant Domestic Advisory Groups.
- ✓ This assessment would allow defining binding roadmaps.
- ✓ The ex-post assessment and review process should be based on continuous information and reports/recommendations of Domestic Advisory Groups. It should also be conducted on the basis of transparent information and procedures, taking into account all available and relevant evidence, and in widespread consultation with stakeholders, beyond DAGs, in particular individuals and groups affected by the commercial and environmental provisions of the agreement.
- ✓ A comprehensive ex post assessment and review process should be carried out no later than 5 years after the date of signature/entry into force and on a regular basis every 5 years.
- ✓ A report of the impact assessment and review should be published.

Second, EU FTAs should include a review and revision clause providing that, where the ex post monitoring process show either (1) *negative impacts* of commercial provisions on the environment, human rights or animals, or (2) environmental or social provisions failing to be *effective*, action is then taken to address those issues either by *revising the text agreement* or by *adopting any other appropriate action (e.g. suspension of trade preferences)*.

Demand 5 - EU FTAs should include an obligation to establish a complaint mechanism along with formal procedural rules

Together with the creation of the Chief Trade Enforcement Officer, the establishment of a Single Entry Point whereby EU citizens, EU based NGOs and EU MS can file a complaint alleging a violation of the TSD commitments by EU's trading partner is a step in the right direction. However, this mechanism is EU-centred and should be further improved in order to provide a reliable system whereby civil society are effectively empowered to seek resolution to non-compliance:

- ✓ EU FTAs should require each Party to establish or designate a competent and independent authority/body in charge of dealing with complaints from individuals and CSOs. This would ensure reciprocity among the Parties.
- ✓ It should also require the establishment of rigorous procedural requirements. A provision should specify that when a complaint is substantiated, the competent authority/body is required to conduct a full examination, respect certain time limits, allow for a hearing, and take a formal decision as to whether or not the complaint requires action on the basis of the provisions of the FTA in question. In case a complaint is deemed not sufficiently substantiated, the complaint authority should provide substantiated reasons for not following up in the complaint. In accordance

with the Aarhus Convention, this provision should also ensure transparency, notably by providing a record of complaints.

- ✓ This complaint mechanism must not simply be a post-box: it must be connected into a powerful enforcement mechanism. EU FTAs should empower the complaint authority, on the basis of its findings, to adopt an enforcement action plan, or a decision to trigger the dispute settlement mechanism attached to the TSD chapters. In case the Party does not comply with the enforcement action plan, this automatically triggers the establishment of a panel of experts. This will avoid relying exclusively on the Parties' will to launch proceedings against their partners in relation to TSD chapters failings.
- ✓ The complaint mechanism should also be empowered, where explicitly provided by the text of the agreement to trigger the suspension of certain trade preferences.

Demand 6 – EU FTAs should reinforce the expertise and powers of the panel of experts provided in the TSD chapter

The type of dispute settlement and enforcement chosen reflects the importance attached towards the norms subjected to them. EU trade agreements tend to adopt a soft approach to the enforcement of sustainability provisions. However, these provisions deserve an equally effective dispute settlement mechanism. In order to be on par with commercial provisions, the EU should reinforce its TSD specific dispute settlement two-step procedure.

It is first key to reinforce the powers of the panel of experts, while ensuring their expertise on sustainability issues. Crucially, the report of the Panel of Experts has no real teeth. The report is binding, but it cannot be enforced in the absence of political willingness. Indeed, the dispute settlement mechanism of TSD chapters cannot result in sanctions or penalties, whereas the general dispute settlement mechanism available to trade provisions is enforceable as it does benefit from sanctions and/or penalties (see Demand 7).

The panel of experts should thus have:

- ✓ demonstrable environmental and/or social expertise;
- ✓ an obligation to consult and seek opinions of external experts and MEAs/ILO relevant bodies with regard to matters related to compliance;
- ✓ an obligation to make its report publicly available and provide civil society a reasonable opportunity to respond to these reports;
- ✓ an obligation to determine a period of implementation of the report recommendations;
- ✓ the capacity to impose sanctions, in case of non-compliance with the panel of expert's recommendations after the period of implementation (see Demand 7).

Demand 7 – EU FTAs should include the possibility of penalties/sanctions in case of violations of TSD chapter provisions

The establishment of additional mechanisms sanctioning the behaviour of trading partners in terms of respect for social and human rights, the environment, animals, and the fight against climate change is necessary to bolster the environmental approach of European trade policy. 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 penalties regime would help to give sustainability provisions of the future relationship real bite, and to encourage compliance. The threat of meaningful sanctions via a hard-edged approach to enforcement and fines is a driver for compelling compliance with environmental law and international human rights law. This is the case, for instance, for illegal, unregulated and unreported fishing (IUU), where the EU imposes an import ban when partner countries do not comply with the EU IUU regulation. The EU has almost never applied the sanctions foreseen under this regulation, rather it has deeply engaged with the targeted countries to help them fix the violations.

The type and nature of sanctions that would come as a last resort in the case of a violation of TSD commitments, should depend on the type of violation and be proportionate to its degree of seriousness. The potential socio-economic impacts of the sanction should also be carefully assessed. These sanctions could take the shape of:

- The payment of a financial compensation to be paid into a fund established for supporting appropriate environmental or social initiatives; or
- The imposition of targeted trade sanctions (including suspension of tariff liberalisation or other import restriction) on goods that are implicated in the sustainability violation; or
- The termination or (partial) suspension of tariffs liberalisation under the agreement in response to a serious and substantial violation (such as of the ‘essential elements’).

Demand 8 – EU FTAs should clarify and reinforce the role and powers of Domestic Advisory Groups in the monitoring, enforcement and dispute settlement processes

Domestic Advisory Groups provide civil society with an institutionalised basis to monitor the implementation and enforcement of the provisions of TSD chapters. However, their effectiveness has shown to be limited. EU FTAs should clarify and reinforce their roles and powers:

- ✓ EU FTAs should prescribe for DAGs to be set up as of the entry into force, even if provisional, of the trade agreement.
- ✓ Whether established through new or existing mechanisms, EU FTAs should clarify that DAGs must be identifiable and balanced, and members must have relevant expertise.

- ✓ The mandate of the DAG should not be limited to the TSD chapters alone, but should cover all provisions of the agreements that have an impact on the environment, animals, or the respect of social and human rights.
- ✓ EU FTAs should provide DAGs with the power to commission independent assessments of (1) whether the parties are living up to their social and environmental commitments in practice or (2) whether the trade agreements itself is having detrimental environmental and social outcomes.
- ✓ DAGs should be automatically informed and consulted on:
 - the state-to-state consultation process and the decision to request or not the establishment of a panel of experts to examine the matter;
 - on the decision on the measures taken to comply with the panel of experts reports and on the decision on the types of remedies in case of non-compliance;
 - on determining a period for implementation of the panel of experts' report recommendations and verifying compliance;
 - on the types of sanctions to be applied by the panel of experts in case of non-compliance with the report and recommendations.
- ✓ DAGs should have sufficient funding and technical support.

Demand 9 - EU FTAs negotiations should ensure democratic participation and involve relevant sustainability experts and decision makers

In order for EU trade agreements to contain meaningful sustainable development provisions and commitments, the EU needs to rely on the relevant expertise and know-how of social, environmental or other non-trade ministries to negotiate these provisions. This requires:

- relevant departments of EU institutions are sufficiently resourced and are given a leading role in the negotiations of environmental provisions (for eg. DG ENV, DG CLIMA, DG SANTE, DG INTPA, ...);
- relevant departments of EU Member States can make their voice heard during the national and, later on, international discussions on the FTA;
- relevant committees of the European Parliaments can participate in the FTA negotiations and discussions on the same footing as the lead committee of the Parliament, the Committee on Trade;
- greater transparency and access to documents: after each round of negotiation, the EU should strive to ensure that the consolidated texts (i.e. integrating the various options considered) can must be published to allow civil society and elected officials to react and give their opinion;
- meaningful opportunities for CSOs to engage and be listened to during the negotiations (such as the reintroduction of trade expert groups dedicated to trade sustainability related issues).

Demand 10 - EU FTAs negotiations should be based on sound ex-ante sustainability impact assessments

In order to effectively integrate sustainability considerations into trade agreements, the EU must ensure democratic participation throughout the entire process of FTA negotiations, so that EU, national and international civil society organisations can closely follow FTA negotiations, and discuss at EU and national level on the environmental concerns. This requires in-depth ex-ante sustainability impact assessments are conducted:

- in a pluridisciplinary approach (involving economists but also lawyers, agronomists, veterinarians, climate and biodiversity experts, etc.),
- on the basis of a comprehensive and balanced involvement of stakeholders and in a timely and appropriate manner so that the findings and recommendations can guide/support negotiating positions.

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[1] Communication from the European Commission, Trade Policy Review - An Open, Sustainable and Assertive Trade Policy, https://eur-lex.europa.eu/resource.html?uri=cellar:5bf4e9d0-71d2-11eb-9ac9-01aa75ed71a1.0001.02/DOC_1&format=PDF