POSITION PAPER OF THE GREEN MEPS OF THE INTERNATIONAL TRADE COMMITTEE ON THE REVIEW OF THE 15-POINT ACTION PLAN[1]

Structure of the position paper

[1] The paper is based on several contributions, inter alia:

- E. Blot, A. Oger and J. Harrison (2022), "Enhancing sustainability in EU Free Trade Agreements: The case for a holistic approach", policy report, Institute for European Environmental Policy (IEEP)
- European Economic and Social Committee (2021), Opinion on "Next Generation Trade and Sustainable Development – Reviewing the 15-point action plan"
- JB. Velut & al (2022), " Comparative Analysis of Trade and Sustainable Development Provisions in Free Trade Agreements", The London School of Economics and Political Science
- K. Schwarz, T. Landman, J. Smetek (2022), "External policy tools to address modern slavery and forced labour", European Parliament, Policy Department
- EESC, EU DAGs (2021), "Strengthening and Improving the Functioning of EU Trade Domestic Advisory Groups", non-paper

Disclaimer. The position paper is endorsed by MEPs Saskia Bricmont, Reinhard Bütikofer, Anna Cavazzini, Markéta Gregorová, Heidi Hautala, Sara Matthieu, Manuela Ripa and does not represent a policy position of the Green/EFA Group. April 2022.

I. Introduction

As demonstrated in the European Sustainable Development Report 2021[2], "*European countries generate sizeable negative spillovers outside the region – with serious environmental and socio-economic consequences for the rest of the world. (...)*
Decoupling socio-economic progress from negative domestic and imported impacts on climate and biodiversity requires further effort, through domestic actions and international cooperation".

The Greens consider that an overhauled trade policy with a review of the TSD chapters at its core should combine rather than juxtapose the goal of optimizing market opportunities with scaling up sustainability practices across the board in conformity with the Sustainable Development Goals. In our view, instead of a trade-off, win-win situations can arise from a fruitful reform widely reflected in all existing and future trade deals. Trade agreements have to be designed as a partnership of equals striking a balance between more trade and more sustainability. This should participate to enhanced ownership and legitimacy of trade deals, increasingly scrutinised and criticised by EU citizens.

In order to achieve this, the EU should review its premise that trade's primary objective is to increase trade volumes and support economic growth, while environmental, social and human rights considerations are side-effects to be mitigated. A shift is therefore needed in order to make sustainable development a genuine primary goal of EU trade agreements in line with the European Green Deal, the Communication "Decent Work Worldwide", the EU Action Plan on Promotion of Human Rights and Democracy in the World, the EU Gender Action Plan III to name a few. In that sense, we consider that sustainability is a transversal concern to pull all provisions in the same direction, avoiding diverging, even contradictory effects.

Actually, the objective to steer the EU trade policy toward more sustainability has a sound legal basis (art.11 TFEU, art.21.3 TEU) and received strong political commitment (mission letters of President von der Leyen, trade policy review). On top of that, in its Opinion 2/15, the European Court of Justice found that "*the objective of sustainable development now forms an integral part of the common commercial policy of the EU and that the envisaged agreement is intended to make liberalisation of trade between the EU and Singapore subject to the condition that the parties comply with their international obligations concerning social protection of workers and environmental protection*"[3].
Yet, "*within the EU, current separation of trade policy from other areas of competence [is] highlighted as a barrier to effective coordination across policy domains within the EU*."[4] The 2021 report on Implementation and Enforcement of EU Trade Agreements attests this lack of interest since all along the 41 pages, sustainability concerns are not addressed. Consequently, we generally witness a lack of FTA-driven action from the EU, even in case of blatant

[2] https://eu-dashboards.sdgindex.org/chapters
[3] https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-05/cp170052en.pdf
[4] K. Schwarz, T. Landman, J. Smetek (2022), "External policy tools to address modern slavery and forced labour", European Parliament, Policy Department

infringements of the commitments as revealed by the urgency resolutions adopted by the EP or complaints evidenced by CSOs. When the Commission triggered a TSD-related dispute settlement procedure with South Korea due to the sluggish ratification process of the required ILO conventions, it did so only eight years after the first discussion with South Korea on the matter. When it comes to human rights depicted as an essential element between the EU and its trading partners, the human rights dialogue platforms appear not to "*provide a 'stick' to generate stronger incentives for compliance*"[5], especially with countries not willing to engage. They remain pointless if not coupled to trade measures.

TSD chapters should be tailored-made according to the challenges faced by the trading partner. Rather than being a Christmas tree buckling under the weight of too many balls, it should prioritise issues identified by the Sustainability Impact Assessments (SIAs) as described below. In case of a regional agreement (like Mercosur, Central America, etc.), country-specific TSD priorities and pre-ratification commitments should be determined rather than at the regional level.

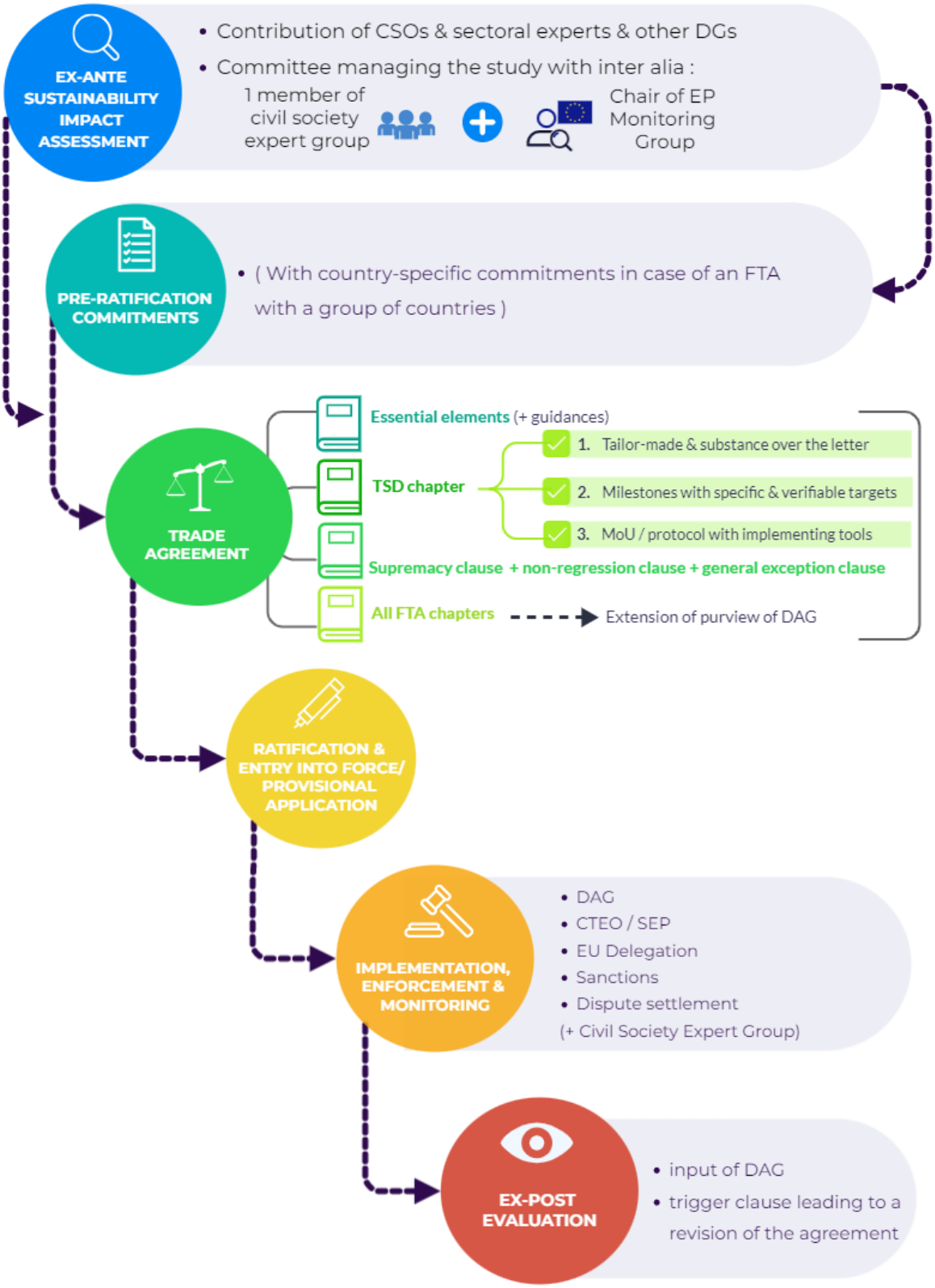
It is also often overlooked that our trade partners may at times pursue more ambitious goals than the EU[6] and that this level of ambition is eventually mirrored in the TSD chapters. It goes without saying that the implementation by the EU and the Member States would not in such cases be less demanding for ourselves and that if applied, sanctions should not be softer.

Regarding our trade deals with developing countries, the TSD chapter and the entirety of the FTA should be grounded on the "common but differentiated responsibilities" and the Policy Coherence for Development principles. This implies that the negotiations should lead to realistic compromises in terms of commitments and objectives bearing in mind the partners' starting point and possibilities. Indeed, an upward review of the 15-point action plan may lead to more demanding efforts on the side of these countries but at the same time, the EU should offer more because of the more constraining standards in our domestic legislations. Exempting them from such an effort would prevent them from tapping the potential of the EU market. Special arrangements in terms of capacity building, technical and financial assistance should be determined to live up to the new challenge.

The strengthening of the sustainability provisions of the FTAs and the likes (EPAs, etc.) can by no means be undercut by the development of autonomous measures like the deforestation regulation, the sustainable corporate due diligence directive, the CBAM, the future product withdrawal mechanism tackling forced labour, etc. There can be no either/or approach since all these instruments will reinforce each other.

[5] Schwarz & al (2022)
[6] For instance, New Zealand on the phasing out of fossil fuel.

II. Overview of the main steps for a proper TSD process



III. Ex ante Sustainability Impact Assessments

Ex ante Sustainability Impact Assessments have to be carried out well before the conclusion of the negotiations in order to be meaningful. SIA should inform the drafting of the chapters, and if necessary lead to designing flanking measures to mitigate the potentially negative impacts foreseen.

The very first step would be to include in the committee managing the study the Chair of the European Parliament Monitoring Group (MG) (in order to avoid that a paramount topic for the Members of the European Parliament active in the MG is omitted or shallowly addressed, creating tensions later on in the ratification phase) , a representative of the Civil Society Expert Group to be reinstated (see below).

Civil society organisations (CSOs) should be systematically invited to contribute to the process by sending remarks to the authors of the SIAs, by reviewing their preliminary observations of the latter and suggesting additional ones. Beside DG Trade, other relevant DGs (ENV, CLIMA, EMPL, etc. possibly via an inter-service consultation) and the EEAS should be able to comment as well early in the process, ideally at the stage of the scoping exercise.
Further, as illustrated by the LSE comparative study, CSOs could be invited to draft specific provisions of the agreements in the spirit of the US-Peru FTA's Forest Annex, for which environmental NGOs provided significant input, or the US-Cambodia Textile Trade Agreement, partly shaped by the Union of Needletrades, Industrial and Textile Employees (UNITE). Labour unions were also involved in the negotiations of the USMCA's Rapid Response Mechanism.

As to the modelling part of the SIAs, there is a need to rebalance the weight of Computable General Equilibrium (CGE) model in current SIAs and to provide a more nuanced interpretation of their results. The outcome of the CGE model depends to a large extent of the underpinning assumptions. The use of a different model such as the Global Policy Model used by the United Nations would lead to different figures as evidenced in the cases of the TTIP[7] or CETA[8]. Considering that models are no crystal balls predicting with certainty the future, the main objective should be to ensure transparency and impartiality by highlighting the caveats to policymakers and stakeholders. It would ultimately buttress the robustness and the ownership of the SIAs.

The Commission should examine with the Joint Research Center (JRC)[9] how best to factor in the SDGs as a compass of SIAs independently of the model chosen. If no satisfactory solution emerges, the Commission should launch a call among the academic community under Horizon Europe to design a new model supporting the overarching sustainability ambitions of the 2021 Trade Policy Review[10].

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[7] https://www.academia.edu/6429052/The_Transatlantic_Trade_and_Investment_Partnership_TTIP_and_the_Role_of_Trade_Impact_Assessments_Managing_Fictional_Expectations

[8] https://trade.ec.europa.eu/doclib/docs/2017/april/tradoc_155490.pdf

[9] https://knowsdgs.jrc.ec.europa.eu/models-mapping

[10] "*a new trade policy strategy – one that will support achieving its domestic and external policy objectives and promote greater sustainability in line with its commitment of fully implementing the UN Sustainable Development Goals*" https://trade.ec.europa.eu/doclib/docs/2021/february/tradoc_159438.pdf

Following the conclusion of an FTAand prior to its ratification, the team of researchers in charge of the SIA should produce an independent follow-up paper, to be presented in the EP, comparing their findings with the final agreement in order to identify their recommendations that were left aside and the Commission should explain why they were discarded.[11]

IV. Pre-ratification commitments

The pre-ratification phase should be used to bolster a positive reform dynamics in the trading partners and to put to the test their good will, especially when their track record in other international bodies is not impressive in terms of compliance. They could take the form of the ratifications of ILO Conventions related to women's rights[12] in countries witnessing significant gender discrimination or an increase in the budget of an agency monitoring the environmental situation or in the labour inspectorate. The partners may be asked to cease harassment of journalists or human rights defenders or to obtain their immediate release. Considering their knowledge of the country or group of countries concerned, the corresponding EP Monitoring Group should be involved in the identification of a limited set of pre-ratification commitments that, if delivered, would increase the support of the political families, in the European Parliament and in the Member States.

To the extent that partners have committed themselves previously to these texts and to the overarching SDG framework, such a requirement by the EU should not be perceived as neocolonialism. In some cases, the frame of the TSD chapter should follow up on the commitments taken by the parties in high-level summits, like the recent EU-Africa Summit where the leaders enumerated their common priorities and shared values, including gender equality and women's empowerment, climate, environment and biodiversity, the fight against inequalities, support for children's rights, and food security.

Introducing provisions pertaining to labour rights is not to be seen as protectionist. On the contrary, as documented in ILO studies, "*if labour provisions lead to improved working conditions, workers are likely to become more productive, which boosts firms' competitiveness, allowing them to gain a larger share of both domestic and foreign markets. As a result, exports will increase and imports will decline*"[13].
Furthermore, labour provisions are increasingly present in developing countries' trade agenda. Proof of this is the increasing number of South-South Regional Trade Agreements with labour provisions between developing and emerging country partners. According to the ILO[14] theserepresent about one-quarter of all regional trade agreements with labour provisions.

[11] The Commission already produces a Position Paper commenting the main findings and recommendations of the SIA reports. The added value of the subsequent comparative paper by the researchers would lie on the investigation of the final product - the concluded agreement - with the set of recommendations contained in the SIA. This step would enhance the accountability of the Commission and answers to the question: "to what extent are the SIA taken into account in the negotiations?".
[12] ILO Conventions No. 100 on Equal Remuneration and No. 111 on Discrimination (Employment and Occupation)), Conventions 189 on domestic workers, 156 on workers with family responsibilities, 190 on violence and harassment
[13] https://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_498944.pdf
[14] https://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_719226.pdf

In case of a regional trade agreement (like Mercosur and EPAs), a pre-ratification commitment could be the establishment of mutual cooperation and support between them because a proper implementation of the whole FTA, not only the TSD chapter, would be facilitated if tools exist to assist each other.

V. TSD Chapters

Taking into account the starting point of each partner, the Commission should negotiate "tailor-made" TSD chapters with partners, to ensure that TSD provisions are in line with the specific societal (environmental, social, human rights) challenges of each country or region.
In doing so, the Commission should prioritize the substance over the letter, giving more weight to the actual implementation of the spirit of the UN principles over formal ratifications.[15]

The negotiations of TSD chapters should be grounded on the SIA, including specific proposals submitted by CSOs and feedback of experts.
In terms of terminology, TSD provisions must become more stringent when defining commitments and expectations from trade partners under the trade agreement. "Shall" and "must" ought to become the norm instead of "aim" or "seek to".

Provisions should be explicit and not leave room for interpretation. For instance, if deforestation is a concern, it should indicate what needs to be done in terms of capacity building of the surveillance authority or the expected increase of forest cover, so that the commitment can be deemed satisfactory.

One of the lessons learned from the EU-South Korea panel of experts and from the LSE comparative study on the sustainability provisions in major economies' FTAs, is the need for time-bound commitments and milestones as a necessary condition to improve the enforceability of the TSD chapters.

A binding framework should be designed to evaluate actual progress on the ground by including specific indicators, targets, and timelines for delivering on TSD Chapter provisions. Such framework would allow the Commission, the European Parliament and stakeholders to monitor and evaluate more accurately TSD Chapter implementation. This operationalisation of the TSD provisions should be linked to a "trigger clause" to initiate a review of an agreement when the progress towards the targets is significantly insufficient (see below).

The TSD chapter should recognise the UN Free, Informed and Prior Consent (FIPC) principle where appropriate to empower indigenous population.

The TSD chapter would be an ideal springboard to push further the Ministerial Statements signed by the EU in December 2021 on plastic pollution, fossil fuel subsidies and trade and

[15] For instance, Australia, New Zealand and the United States have not ratified the ILO Convention C138 with regard to minimum age for admission to employment. Yet, one can reasonably argue that they are not in the same situation as Somalia, Liberia or Iran which belong to the same group of countries.

environmental sustainability and develop concrete actions with other signatories with which an FTA is envisioned.[16]

The EU should provide technical assistance and financial support to developing countries for the setting up and maintaining of sustainability initiatives which are initiated or strengthened as a result of commitments in an FTA. Instruments such as Aid for Trade and the new Neighbourhood, Development, and International Cooperation Instrument (NDICI) or, more specifically, the 150 Bn€ Africa-Europe Investment Package[17] must be mobilised to that effect. An Annex or a Memorandum of Understanding related to the TSD chapter could be envisaged in order to lay out the instruments and financial measures (Aid for Trade, NDICI, Global Gateway, EIB...) that would be mobilised by the Parties to implement the commitments listed in the agreement. The MoU would acknowledge the main capacity constraints faced by the partner countries and improve the credibility of the sustainability aspects of the FTA and that the poorer trading partners will not be left alone in assuming potential future failures. The MoU could ideally rest on a burden sharing of the implementation costs between the EU, the trading partner and other international bodies, like the OECD, the ILO or MEA secretariats (UNFCC, CBD, CITES) and possibly, private contributors and donors focused on a specific field. Another possible way of contributing to the costs of implementation is the entry into force of autonomous measures (like CBAM) bringing about adaptation measures by developing countries, be they covered by a trade deal with the EU or not.

VI. Beyond TSD: mainstreaming sustainability throughout all FTA chapters

Sustainability provisions can by no means be limited to a single TSD chapter. All the chapters of the FTAs should be consistent in this respect. There cannot be contradictory effects stemming from the implementation of different provisions.

Sustainability being a cross-cutting issue, others chapters like those related to agriculture and sanitary and phytosanitary measures[18], technical barriers to trade, government procurement, energy and raw materials, institutional provisions, rules of origin have to be brought in conformity accordingly and take into account the findings of the SIAs. For instance, research has found that import tariffs and nontariff barriers are significantly higher on clean industries than dirty ones, which has the effect of providing a subsidy for CO2 emissions. This is because tariff schedules in FTAs have been so far the result of negotiations between the parties driven by commercial interests and do not seek to achieve environmental objectives.

Consequently, the remit of the DAG should be extended to all matters impacting sustainability in the FTA, rather than only the TSD chapter, as it is already foreseen in the EU-UK Trade and Cooperation Agreement.

[16] https://www.wto.org/english/news_e/news21_e/envir_15dec21_e.htm
[17] Paragraph 4 of the Joint Vision for 2030 adopted on 18 February 2022 lays out the 7 priority areas for the Package.
[18] The respect of the Precautionary Principle is particularly important in this regard.

In addition, we propose to include a supremacy clause similar to the one contained in Article 1.3 of USMCA[19] as a means to resolve conflicts between environmental and social issues and trade arising under the trade framework and first and foremost, to avoid the regulatory chill that could lead governments to put to the backburner ambitious domestic measures needed to ensure a sustainable and just transition. These trade-restricting measures are WTO-compatible to the extent that they are not discriminatory and they are grounded on a general exception[20]. Such a clause would be instrumental in case of a (regular, not the TSD-related) dispute settlement where taxpayers' money and the public interest are at stake.
The need for a supremacy clause would be redundant if strong sustainability provisions were included in all chapters of the FTA, the remit of the DAGs extended and the dispute settlement revamped as proposed below.

Furthermore, we consider that non-regression clauses formulated in the manner of Article 387(2) of the EU-UK TCA and the accompanying Article 391(4) on the relevance of environmental targets in national laws could provide for a useful safeguard.[21]

Beside the FTA, the Commission should issue a guidance on the human rights essential elements clause outlining the circumstances giving rise to an action of the EU, its nature and its scope in accordance with Article 60 of the Vienna Convention on the Law of Treaties. The Commission claims that it will react to violations of human rights only when they are systemic and grave. A human rights violation could be considered as a material breach of the agreement bringing about its suspension or termination by the other party. These concepts are vague and need to be objectified: to what extent a violation of human rights can be tolerated by the EU? and for how long? This is all the more important since among our trade partners, 4.6% are closed autocracies, 36.8% electoral autocracies.[22] The Commission could find inspiration in the compromise on the GSP reform among EP political groups (Article 2 (11a) new[23]) and "*take into account whether the relevant monitoring bodies, treaty and supervisory mechanisms have signalled potentially serious and systematic violations of the principles of the relevant conventions, based on such indicators as: the establishment of monitoring mechanisms supported by the UN, the findings by the UN High Commissioner for Human Rights, - relevant procedures in the framework of the ILO Committee of Application of Standards (...)".*

[19] "*In the event of any inconsistency between a Party's obligations under this Agreement and its respective obligations under the following multilateral environmental agreements ("covered agreements"): (...) a Party's obligations under this Agreement shall not preclude the Party from taking a particular measure to comply with its obligations under the covered agreement, provided that the primary purpose of the measure is not to impose a disguised restriction on trade*."
[20]https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/689359/EPRS_BRI(2021)689359_EN.pdf
[21] "*A Party shall not weaken or reduce, in a manner affecting trade or investment between Parties, its labour and social protection below the levels in place at the end of the transition period, including by failing to effectively enforce its laws and standards.*"
[22] K. Schwarz & al (2022)
[23] Under Article 2 point 11a (new) on the definition of serious and systematic violations, 'serious and systematic violation' means widespread and systematic violations or abuses related to the international conventions of Annex VI, including but not limited to the following: i. genocide; ii. crimes against humanity; iii. torture and other cruel, inhuman or degrading treatment or punishment; iv. slavery or forced labour; v. extrajudicial, summary or arbitrary executions and killings; vi. enforced disappearance of persons; vii. arbitrary arrests or detentions; viii. trafficking in human beings, including people-smuggling; ix. sexual and gender-based violence; x. other violations of the laws and customs of war; xi. violations or abuses of freedom of peaceful assembly and of association; xii. violations or abuses of freedom of opinion and expression; xiii. violations or abuses of freedom of religion or belief; xiv. serious and systematic violations as defined and determined within the framework of the Paris Agreement on Climate Change

A similar guidance should be released on the Paris Agreement as another essential element to make sure that the intents announced in the nationally determined contributions (NDCs) as a tool for the implementation of the Agreement and that the level of ambitions will increase in comparison with the previous submission.

A WTO-compliant general exceptions article should be introduced to match with these guidances.[24]

Close to the urgent need to fight climate change, the biodiversity loss is a major threat to habitability on Earth. The Convention on Biological Diversity (CBD) should equally become an essential element of FTAs (provided that mandatory mechanisms for reviewing national targets are agreed upon).
The future treaty on pandemics prevention and preparedness[25] appears to be a suitable pick to become another essential element.

VII. Implementation, enforcement and monitoring

Monitoring mechanisms are largely meaningless without frameworks for enforcement, whether these involve strict sanctions or 'soft' enforcement. The EU's new generation FTAs typically enforce human rights standards and social and environmental commitments through softer enforcement than the negative conditionality mechanism of the GSP.
The level of influence one country can exert on its partner depends to the relative importance of its markets with respect to the exports of its partner. The EU is the largest export market for around 80 countries. To date, the EU has 102 trade agreement partner countries—countries for which agreements are in place (in force or provisionally applied) or currently being adopted or ratified.

If the delivery of the commitments lags behind, it is most of the time because either the trading partner does not know how to deal with them or because the issue was pushed by the EU and accepted by the partner and despite the partner's failure to take action, the EU does not insist. Except in some cases (like when Japan resumed whaling or when Vietnam continued to crack down on civil society, notably candidates for the DAGs), the lack of follow-up is not a sign of ill-will, deliberate to harm the people or the environment. The abovementioned MoU could help the authorities of the partner countries foster the adequate follow-up by creating a trustworthy long-term engagement of the EU towards their countries.

We outline below different complementing ways to enhance enforcement of TSD chapters.

[24] It could be drafted along the lines of the proposal of Prof Rhea Tamara Hoffmann and Prof. Dr. Markus Krajewski (see https://www.cidse.org/wp-content/uploads/2021/05/Legal-Opinion-EU-Mercosur_EN_final.pdf, Annex 2).
[25] https://www.consilium.europa.eu/en/policies/coronavirus/pandemic-treaty/

1. Domestic advisory groups

The role of civil society in monitoring the impacts of trade agreements is key, these organisations are well positioned to identify the impacts of trade agreements and trade relations at the local level. Structured dialogues on sensitive issues, joint projects, enhanced interaction with international bodies and dedicated civil society engagements are all aspects that have been highlighted as best practice in leading to some improvements in labour and environmental conditions in trade partner countries.

The DAG should also have an exchange of views on the reasons and implications of the possible TSD delivery gaps according to the pre-determined milestones and targets. They should also have an exchange of views with their counterpart in the trading partner on the explanations for the lag and on the way forward.

The EU-UK TCA for the first-time states that DAGs can be convened "*in different configurations*" (i.e. different DGAs for different issues), to "*discuss the implementation of different provisions of this Agreement or of any supplementing agreement*" (i.e. DAGS are not constrained to TSD Chapter provisions). The extension of the scope of action for DAGs could be replicated to all other EU FTAs. Capacity issues would of course remain problematic in some instances, but the possibility would be there for DAGs to discuss other aspects of FTAs. Financial capacity constraints could be remediated by the Commission providing funds to DAG members, even more so if they are assigned the task of monitoring sustainability across all chapters of the FTA. It would allow DAG members to commission independent assessments of whether the parties are living up to their social and environmental commitments and/or whether FTAs are having detrimental environmental and social outcomes.

One option to incentivise stakeholder participation in the DAG process would be to establish a feedback procedure whereby the Commission must officially respond to concerns raised by DAG members within a specified timeframe. Such information should be shared with the appropriate Monitoring Group of the European Parliament.

Last but not least, the relationship between DAGs and their relevant joint committees should be closer. The composition of the joint committees should be enlarged to include the chair of the DAG.

2. Chief Trade Enforcement Officer and Single Entry Point

The role of the Chief Trade Enforcement Officer (CTEO) and the functioning of the single entry point (SEP) could be formalized in a Regulation similarly to the EU Ombudsman regulation.

The SEP is the first point of contact within the Commission's trade department for all EU stakeholders who are facing market access issues in third countries or who find non-compliance with sustainability commitments.

Similarly to the practices of the Canadian public communication process, the regulation should establish guidelines for citizens' submissions, including a detailed step-by-step description of the process, clear time limits for every step, guidance on submission, criteria for acceptance and review of public communications and ambitious transparency requirements.[26]

[26] For further details, see Velut & al (2022)

It should be accessible to extra-EU stakeholders. The DAG could also intervene to ring the alarm bell.
Because of the sensitivity of the matter and because they may face retaliation in countries where freedom of expression is not fully respected, submitters of complaints have the right to keep the submission confidential.
The relevant Monitoring Group needs to be regularly informed of the submission of a complaint and of its treatment by the CTEO.
The two-yearly implementation report of the common commercial policy should give an account of these developments and the follow-up by EU institutions. The report should pay more attention to the sustainability dimension, including the gender differentiated impacts of FTAs.

3. EU delegations

The EU is represented through some 140 EU Delegations and Offices. They act as the eyes, ears and mouthpiece of the Commission vis-à-vis the authorities and population in their host countries. Therefore, they are in the best position to play a role in a proper implementation of the TSD chapters and complementary autonomous measures in order to help domestic authorities, CSOs and DAGs (EU and partner sides), also in view of future complaints in case of breaches by the trading partners or of wrongdoings by European undertakings or investors. Each EU delegation should make the promotion of the SEP and facilitate its access to non-EU stakeholders if the trading partner has not such a mechanism yet.

4. Dispute settlement

The TSD dispute process must become more robust, doing away with any ambiguity surrounding the Expert Panel resolution. This should involve resolutions requiring a timeframe for implementation or a penalty mechanism in case of inaction, in addition to improved dialogue between civil society, trade and MEA officials and ILO Secretariat to support timely identification of concerns. In the case of future dispute on environmental or social issues, the convened panel of experts must bear adequate, qualitative expertise in the fields concerned - not only trade expertise - to appropriately handle cases disputes.

5. Sanctions

The previous sections showed the emphasis set on a collaborative approach. Sanctions should act primarily as a deterrent. The lack of sanctions as part of the enforcement toolbox contributes to conveying a misleading signal that failure to act will bear no consequence at all. It is a matter of credibility for the EU, which aims at steering globalization according to the compass of the SDGs and for the perceptions of EU citizens, workers and companies alike towards the European institutions.

Sanctions should be triggered at last resort in case of:

a. a significant delivery gap in terms of TSD commitments;
b. a violation of essential elements (human rights, Paris Agreement/NDCs) or a violation of the non-regression clause.

The next graph depicts the functioning of the mechanism, distinguishing two scenarii.

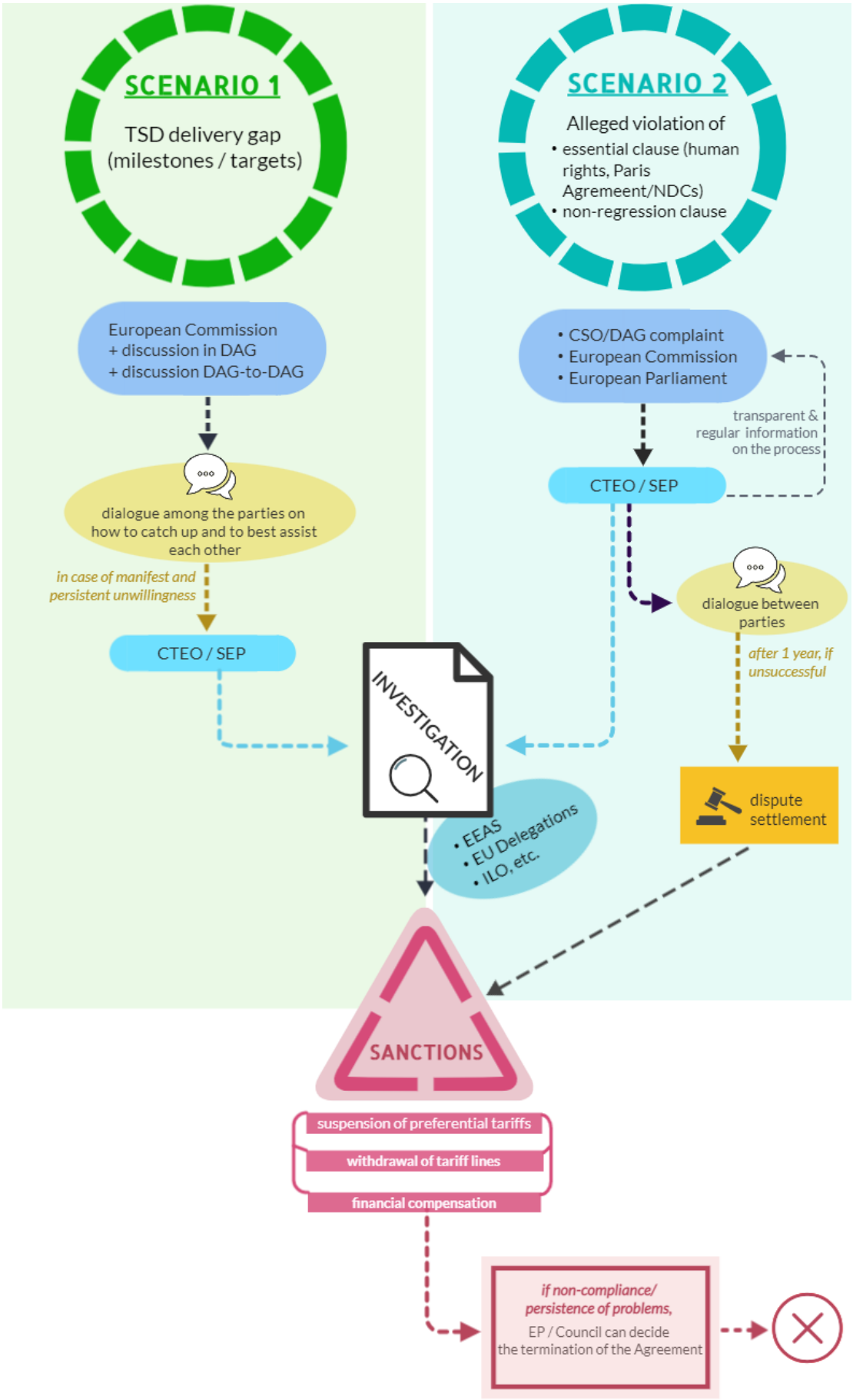
Under the first scenario, the TSD delivery of one or the two parties of an FTA falls short of the agreed commitments. Predetermined milestones and targets in the TSD chapter enable an objective assessment of non-compliance. The partners discuss the appropriate ways to live up to their commitments, including mutual assistance. Each DAG puts the issue on its agenda. A DAG-to-DAG meeting is held to have an exchange of views and evaluate better the hurdles and possible solutions submitted to the parties. If the EU considers that its partner is not willing to collaborate, the CTEO kicks in and investigates the matter.

Under the second scenario, there is an alleged violation of either an essential clause or the non-regression clause. It is per se not possible to "quantify" the infringements. The European DAG or CSOs that are not members of the DAG can lodge a complaint to the CTEO. The European Parliament can also initiate that step. The CTEO regularly informs the stakeholders and the EP at each stage of the process. At the same time, the door remains open to find a positive outcome among the parties. If the talks fail after one year, a dispute settlement procedure is initiated. In order to avoid sanctions from two parallel proceedings, the launch of the dispute settlement would put on hold the investigation of the CTEO.

Sanctions can take several forms: suspension of preferential tariffs, withdrawal of specific tariff lines, or a financial compensation determined by the panel of experts as a remedy aimed at inducing compliance.

When appropriate, the CTEO works in liaison with the EEAS, is supported by the EU Delegations and seeks out complementary information from relevant international bodies.

If non-compliance of the trading partner persists and serious problems remain after these steps, the European Parliament or the Council could call upon the Commission to take steps to terminate the Agreement.


SCENARIO 1
TSD delivery gap (milestones / targets)
SCENARIO 2
Alleged violation of
• essential clause (human rights, Paris Agremeent/NDCs)
• non-regression clause
European Commission
+ discussion in DAG
+ discussion DAG-to-DAG
• CSO/DAG complaint
• European Commission
• European Parliament
transparent & regular information on the process
dialogue among the parties on how to catch up and to best assist each other
in case of manifest and persistent unwillingness
CTEO / SEP
CTEO / SEP
dialogue between parties
after 1 year, if unsuccessful
INVESTIGATION
• EEAS
• EU Delegations
• ILO, etc.
dispute settlement
SANCTIONS
suspension of preferential tariffs
withdrawal of tariff lines
financial compensation
if non-compliance/ persistence of problems,
EP / Council can decide the termination of the Agreement

6. Civil Society Expert Group on EU Trade Agreements

Considering the high-profile engagement with the civil society sponsored by our position paper, we consider that the expert group on EU trade agreements put in place by the Commission in 2017 and whose mandate expired in 2019 should be reinstated. Its role was to provide extra advice to the Commission during trade negotiations and the implementation of trade agreements. The group included employers' organisations, trade unions, representative associations, socio-economic interest groups (like consumer associations) and other civil society organisations.

VIII. Ex post evaluation

An ex-post assessment is usually carried out every five years after the entry into force of an FTA. In case, it emerges that the outcome of the FTA falls significantly short of the expectations, the trigger clause would kick in so that a review of an agreement is initiated in the light of time-bound actions and targets set out in TSD Chapter, at which points:

- Identified negative impacts (either environmental, social or in terms of human rights) should trigger an immediate re-evaluation of the corresponding trade measures (either individual or by sector).
- Lack of progress should trigger a dialogue toward the improvement / strengthening of TSD provisions.

Considering that trade agreements are not zero-sum games, the ex post evaluation should be jointly realized by or on behalf of the EU and its partner country (with EU financial support made available for developing economies (e.g. as part of Aid for Trade mechanism)).
Again, the feedback of the members of both DAGs should nurture the ex post evaluation.

IX. Existing agreements

Existing FTAs cover close to 40% of EU trade. Yet very few include review mechanisms. The EU-UK FTA is by far the most advanced as it provides for a review of the Agreement every five years (Final Provisions - Part Seven) and for the possibility of termination with twelve months' notice in case of breach of the essential elements of the partnership.

EU FTAs are on the same line and limit the review mechanism essentially through cooperation in the joint committees. Efforts should be made to empower these committees to engage with meaningful revisions on sustainability provisions, in line with the improved ex-post assessments and trigger clause proposed earlier. The European Commission should put the outcome of the 15-point action plan review at the agenda of the upcoming meetings of the joint committees and probe the interests and intention of each partners to upgrade the agreements accordingly, notably by means of specific proposals for amendments. The European Parliament and the DAGs should be informed of such intent and of the outcome.

The addition of a MoU (see "TSD Chapters") could come to grips with the reluctance of some partners.

X. Sustainability applied to Investment Protection Agreements

Foreign investors should have to comply with due diligence before benefitting from an international investment agreement.

In the spirit of Article 21.3 2nd paragraph of the TUE on the consistency between internal and external policies, notably the European Green Deal, investments in fossil fuels or any other activities that pose significant harm to the environment and human rights should be excluded from treaty protections, in particular investor-state arbitration mechanisms.

Should inward foreign direct investments fuel unsustainable practices in the trading partner, a mechanism should be designed to allow the latter to terminate the FDI or seek compensations from the investors until the end of the adverse effects, under the "do not (significantly) harm" principle.

XI. Role of the European Parliament

In spite of Article 218 TFEU not recognizing any role for the EP at the start of the negotiation process, the EP can nevertheless express its views and send strong signals to the Commission as to its expectations and criteria for when it will vote on the consent. It should debate and adopt motions on the mandate and on pre-ratification commitments. The EP should make clear that it will not give its consent in case no ex ante SIA has been properly carried out so that it helped negotiators to frame the future FTA. The Monitoring Group will play a more active role from the very early stage of the ex ante SIA to the implementation and evaluation of the trade deal.

The European Commission, the Council and the EP could ideally iron out an interinstitutional agreement enabling the EP to have a say on EU negotiating mandates. In case the recommendations of the Conference on the Future of Europe lead to a Treaty reform, the possibility for the EP to amend such mandates should be enshrined in the updated European Treaties.

The EP should also discuss with the Commission the evaluation by the SIAs' authors of their comparison between the final product and their own recommendations, the ex post evaluation of the agreements and the implementation report of the common commercial policy.

The vote of an urgency resolution concerning a trading partner should elicit a proper follow-up by the EEAS and DG Trade.

The EP (International Trade Committee) should organize a hearing on a regular basis of members of the EU DAGs. MEPs of the DROI, ENVI, DEVE and EMPL Committees should be invited to take the floor. The Monitoring Group should systematically invite a representative of the EU DAG and when appropriate, a representative of the DAG of the trading partner. The MG should have an annual discussion on the progress made with respect to the time-bound commitments and milestones agreed in the TSD chapters.
It should also ensure that national parliaments are duly informed at every step of the process leading to the conclusion of an FTA.