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# Can EU Trade Foster Sustainable Development?

EU Efforts to Enforce Trade and Sustainable Development Chapters in Free Trade Agreements with South Korea and Vietnam

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By integrating chapters on Trade and Sustainable Development (TSD) in Free Trade Agreements, the European Union highlights its commitment to a “values-based trade agenda”, which fosters economic, social, and environmental development simultaneously. Tackling non-compliance and fostering the implementation of TSD commitments is crucial to achieving high labour and sustainability standards through trade tools.

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The European Union (EU) is the largest trading block in the world. While EU trade policy is an exclusive EU competence that seeks to create jobs and generate economic growth, it has evolved over the years to support changing policy priorities in the Union’s external action. Thus, economic and social development have become interdependent and mutually reinforcing components of the EU’s long-term sustainable development ambitions. As foreign governments increasingly count on protectionist measures to curtail trade, the EU’s ambition to use trade policy as a tool for the promotion of “European principles and values”<sup>1</sup> becomes more important than ever. The ongoing COVID-19 crisis has led to a stagnation of global economic growth with estimates suggesting a contraction of the global GDP by up to 5,2 per cent.<sup>2</sup> In this context, the economies of developing countries are predicted to suffer the most. The EU, with its commitment to multilateralism, free trade, and the promotion of social standards, should lead efforts to tackle these challenges in times of great economic uncertainty.

The EU manages its global trade relations with 72 countries through 41 existing trade agreements. Though these agreements vary in scope, they all abide by the principles of the World Trade Organization (WTO). Free Trade Agreements (FTAs) grant preferential market access through reciprocal market opening for developed countries, such as the Republic of Korea (hereafter South Korea), and emerging economies, such as the Socialist Republic of Vietnam (hereafter Vietnam). FTAs currently cover more than a third of EU trade, which could increase to two thirds if all ongoing

negotiations are successfully concluded.<sup>3</sup> The new generation of EU preferential trade agreements seeks to encourage the establishment of stronger, values-based regimes by including dedicated Trade and Sustainable Development (TSD) chapters in all comprehensive trade agreements since 2014.

### **Trade and Sustainable Development Chapters**

Trade liberalisation always entails the risk of lowering standards of labour and environmental protection in order to reduce costs.<sup>4</sup> TSDs therefore aim to ensure that economic performance is not implemented at the expense of environmentally and socially sustainable practices, ultimately leading to a “race to the bottom”.<sup>5</sup> These chapters are a commitment by the trading partners to enforce multilateral labour and environmental laws, and to promote sustainable public procurement. Until now, they have been included in trade agreements with Canada, Central America, Colombia, Ecuador, Georgia, Japan, Mercosur, Mexico, Moldova, Peru, Singapore, South Korea, Ukraine, and Vietnam.

Even though TSD chapters are binding to the signatory parties, their implementation is not covered by the trade agreement’s general dispute mechanism. Hence, they are neither subject to enforceable dispute settlement procedures, nor to economic and financial penalties in the case of non-compliance. Instead, TSD chapters have their own dedicated dispute resolution mechanism in which enforcement is achieved through public scrutiny measures, and via the cooperation of several administrative sectors.<sup>6</sup>

In case of a dispute between trading partners, an independent panel of arbitrators can be established to investigate non-compliance claims. Their findings are presented in a report and reviewed by both parties before the arbitration panel issues a final ruling. The accused party must then report on its measures to tackle the grievances within an agreed period of time.

**The main criticism is that the EU does not implement tough measures when there is evidence of a partner’s non-compliance.**

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Additionally, TSDs enable a monitoring and advisory role for civil society representatives via organised Domestic Advisory Groups (DAGs), which regularly review the progress made on the sustainability provisions, and act as a watchdog for their implementation. The EU sets up a DAG for every trade agreement, and the group meets annually with their partner country’s counterpart to discuss their advice. In order to ensure balanced representation of all interests, each DAG has a subgroup for employers, trade unions, and non-governmental organisations. The European Commission also appointed a Chief Trade Enforcement Officer in July 2020 to reinforce sustainability commitments within FTAs. The appointee will cooperate closely with the Commissioner for Trade, conduct consultations over alleged violations of sustainability commitments, and initiate dispute settlement procedures whenever necessary.

Although the EU has taken a number of steps to make sustainability a core theme of its trade ambitions, the approach to TSDs is often criticised as “lacking teeth”.<sup>7</sup> The main criticism is that the EU does not seem to be willing or able to implement tougher measures, such as tariff conditionality, withdrawal of trade preference, or stricter economic sanctions, even when there is evidence of a partner’s non-compliance. Instead,

the EU prefers a promotional approach in which “provisions do not link compliance to economic consequences but provide a framework for dialogue, cooperation, and/or monitoring”<sup>8</sup> in order to avoid broader political and diplomatic consequences. This approach fundamentally differs from the conditional approach, which allows the implementation of sanctions if one of the parties violates the TSD agreements. This option can include both pre-ratification and post-ratification conditionality, and is often used in FTAs concluded by the United States or Canada.<sup>9</sup>

The European Commission is evidently aware of the lack of assertive enforcement in TSDs.<sup>10</sup> After a number of consultations launched in 2017 with a variety of stakeholders, the Commission published a 15-Point Action Plan. The proposed actions aim for more assertive enforcement by increasing the monitoring role of civil society, creating a more flexible cooperation with the International Labour Organization (ILO) and the Organisation for Economic Co-operation and Development (OECD), and making more EU resources available for ensuring partners’ compliance with their commitments.

Yet, the current model has so far been unsuccessful in generating significant sustainability improvements. Therefore, in a recent joint proposal, France and the Netherlands called on the EU to raise or lower tariffs according to a partner’s performance in meeting sustainability obligations. This joint proposal echoes a frequent demand to make “sustainability requirements enforceable, verifiable and sanctionable”.<sup>11</sup>

Although the EU considers itself to be a “fierce defender of a multilateral rules-based trade system”,<sup>12</sup> it often hesitates to be more assertive when a trading partner fails to comply with TSD commitments.

**The Case of South Korea**

The EU–South Korea FTA, applied since July 2011 and formally ratified in December 2015, is the first new generation agreement between the EU and an Asian partner.<sup>13</sup> From an economic

point of view, the FTA is very ambitious and has shown significant improvements in bilateral trade relations. In 2019, South Korea ranked as the seventh biggest export nation, and the ninth biggest import nation in the world.<sup>14</sup> According to the European Commission, European companies have achieved savings of 2.8 billion euros through the reduction or abolition of customs duties.<sup>15</sup>

### **To safeguard the implementation of environmental and labour provisions, the chapter includes a number of mechanisms for supervision and consultation.**

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The TSD chapter of the EU–South Korea FTA, Chapter 13, makes reference to (amongst others) the 2002 Johannesburg Plan of Implementation on Sustainable Development and the 2006 Ministerial Declaration of the UN Economic and Social Council on Full Employment and Decent Work.<sup>16</sup> To safeguard the implementation of environmental and labour provisions, the chapter includes a number of mechanisms for supervision and consultation, including designated TSD contact points, the submission of written requests, and the establishment of an investigatory panel of experts. Furthermore, the DAG and a separate Committee on Trade and Sustainable Development (CTSD), comprised of senior officials from both sides, meet regularly to discuss progress made.

On 17 December 2018 the EU made use of the arbitration mechanism for the first time by submitting a written request “concerning certain measures, including provisions of the Korean Trade Union Act, which appear to be inconsistent with South Korea’s obligations related to multilateral labour standards and agreements under the EU-Korea FTA”.<sup>17</sup>

The first issue at hand was the exclusion of parts of the workforce from the scope of freedom of association. According to the Korean Trade Union Act, a worker is a person who pursues a job and lives on the wage or salary resulting from this activity, effectively excluding the self-employed, dismissed, or unemployed persons from the freedom of association. This classification of workers also has an impact on the definition of trade unions. As soon as an organisation allows individuals from outside the category of workers to join, it will no longer be considered a trade union. Furthermore, the EU criticises the Korean Trade Union Act for establishing the elections of trade union officials only through its members, giving ground to free discretion when it comes to certification procedures for the establishment of trade unions, and enabling Korea’s Labour Administration to request changes in collective agreements. Furthermore, the EU dissents to the application of section 314 of the Korean Criminal Code by the police and public prosecutor’s office to obstruct certain peaceful strikes. These criticisms led the EU to assume that the trading partner had breached obligations under the FTA. Additionally, the request admonished South Korea for not having ratified four fundamental ILO Conventions<sup>18</sup> on the freedom of association and the right to collective bargaining. This is especially concerning to the EU, considering that the agreement entered into application more than eight years ago and South Korea and the EU have been in a Strategic Partnership to “shape global change and promote fundamental values”<sup>19</sup> since 2010. Correspondingly, the last government consultation between the EU and South Korea in January 2019 “failed to address satisfactorily all concerns raised by the EU”.<sup>20</sup> In May 2019, in response to the arbitration request, the South Korean government submitted a request to its own National Assembly to ratify three out of the four ILO conventions. The proposed resolution excluded the convention on abolition of forced labour, due to a lack of compatibility with local statuses related to South Korea’s supplementary military service. A legal revision would be required to facilitate the potential adoption of this final convention. However, observing the repeatedly declared “indispensability of the mandatory



Strong mandate: Elections for South Korea's National Assembly brought about a landslide win for President Moon's Democratic Party – Moon has the opportunity to push through any legislation that supports his political agenda. Source: © Chung Sung-Jun, Reuters.

military service amid the confrontation on the Korean Peninsula”,<sup>21</sup> it seems unlikely that the ratification of this convention will soon be implemented. Yet, the South Korean government has submitted a package of bills seeking changes in those elements of domestic law that run contrary to the ILO principles of freedom of association

and the right to collective bargaining. While the EU has noted these positive developments, concerns remain notably due to a lack of majority in the National Assembly to facilitate these legal changes, as well as to the South Korean government's overall lack of willingness to advance on ratification.

The panel of experts thus started an investigation on 30 December 2019. Initially, their report was to be presented by the end of March 2020.<sup>22</sup> However, due to the outbreak of the COVID-19 pandemic, the publication of the report has been postponed to an unknown date. At this point, it is uncertain how the experts will address the TSD issues and whether their recommendations can lead to a settlement of the dispute. The settlement mechanism itself does not foresee any further steps if the recommendations are not implemented.

### **South Korea now has the opportunity to settle the dispute by proving its political will to implement better labour provisions.**

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Elections for South Korea's National Assembly – the competent body for ratification of international treaties according to the South Korean Constitution – were held in April 2020. The elections went ahead on schedule despite the global COVID-19 pandemic and brought about a landslide win for President Moon's Democratic Party. The scale of this coalition's victory (180 out of 300 seats)<sup>23</sup> makes it almost impossible for the conservative opposition to obstruct major legislation in the future. Because of the strong mandate received, Moon has the opportunity to push through any legislation that supports his political agenda.<sup>24</sup> Since the opposition parties' objection to changes in domestic legislation was considered a key obstacle to moving ahead on the ratification of ILO conventions, South Korea now has the opportunity to settle the dispute by proving its political will to implement better labour provisions. However, to what extent the new progressive government will prioritise the TSD dispute still remains questionable. With a number of geopolitical and security issues in the region, the recommendations of the expert panel are unlikely to receive the same attention in South Korea as they do in Europe. As long as there are disparities

between Korean domestic laws relating to supplementary military service and ILO conventions, no ratification is to be expected. Given the major importance of industrial policy in Korea, the progressive government's policies are also likely to remain oriented towards the interest of large corporations. Although South Korea has high legal standards and strong unions, it currently has no visible interest in complying with multilateral labour conventions. This is also due to a steady opposition of Korean business lobby groups, who are interested in keeping the strong labour unions in check. In addition, the EU is primarily perceived as a trading partner while the organisation and assessment of political processes in South Korea and the EU fundamentally differ.

Because it is the first time that the EU has denounced the non-compliance of a trading partner on TSD commitments, the case of South Korea has become an important opportunity for the EU to position itself as a champion of trade and sustainability. Openly addressing the dispute has been an important first step in this regard. However, if the EU wants TSD chapters to become a meaningful tool for comprehensive and systemic development, it should not settle for a lack of resolution.

#### **The Case of Vietnam**

Vietnam is one of the ten members of the Association of Southeast Asian Nations (ASEAN) and has become the EU's second most important trading partner in the region, after Singapore. The EU-Vietnam FTA, which entered into force on 1 August 2020, will increase respective market access through substantial tariff elimination. Since day one of this agreement, 65 per cent of EU exports to Vietnam and 71 per cent of EU imports from the country will enjoy duty-free status, whereas the remaining goods will be liberalised over a transitional period (a maximum of ten and seven years for EU and Vietnamese goods, respectively).<sup>25</sup>

Chapter 13 on TSDs outlines the key commitments of both parties to environmental sustainability and labour rights. Articles 13.2 (1b) and

Article 13.3 highlight the right of the parties to set their own levels of domestic protection according to their respective level of economic development. This stipulation has allowed Vietnam to attract investments in the past, especially in areas of labour-intensive production, due to the nation's competitive wages. Article 13.3 further aims to prevent a dramatic reduction of environmental and labour standards as a means to gain comparative trade and cost advantages.

### **It remains to be seen how the Vietnamese authorities will implement their understanding of the “free operation of trade unions”.**

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Under the agreement, the two parties have committed to ratify and implement the eight fundamental ILO Conventions and respect, promote, and effectively implement ILO principles concerning fundamental rights at work. The agreement foresees the involvement of independent civil society actors in monitoring the implementation of these commitments by both sides. Vietnam has already made progress on the commitments of improved labour standards by ratifying ILO Convention 98 on collective bargaining in June 2019, adopting a revised Labour Code in November 2019, and promising to ratify the remaining fundamental ILO Convention on forced labour by 2023.

At present, Vietnam has only one legal, state-led trade union federation: the Vietnam General Confederation of Labour (VGCL). The VGCL is neither independent of the ruling Communist Party nor of employers, as independent unions are currently forbidden.

The recently ratified Convention 98 should help break the employer dominance of trade unions at the company level, as it requires workers' and employers' organisations to be free from mutual interference. Convention 87 – which Vietnam

plans to ratify by 2023 – will legalise independent labour organisations and therefore allow them to operate without being subordinate to the Communist Party. It is unprecedented for a one-party socialist state to actively promote reforms that significantly increase the ability of trade unions to operate independently.

However, while discussions about Conventions 105 and 98 have been in progress over the past few years, Vietnam has simultaneously been cracking down on activists and civil society organisations, including labour activists.<sup>26</sup> Additionally, researchers investigating controversial topics, such as workers' health, have been subjected to harassment from the authorities. It remains to be seen how the Vietnamese authorities will implement their understanding of the “free operation of trade unions”, which contradicts the authoritarian state's interest in maintaining its dominant power.<sup>27</sup>

The EU, along with a number of International NGOs operating in Vietnam, sees the challenges of properly monitoring and enforcing labour and social rights on the ground. Therefore, the consultative bodies of DAG and CTSD should focus on developing clear benchmarks and action plans so that step-by-step monitoring and evaluation of the implementation of ILO conventions can occur in close cooperation with the relevant Vietnamese stakeholders. The EU should proactively seek close cooperation with other donors to strengthen the capacity of Vietnamese stakeholders to build national and local capacities in order to monitor the implementation of conventions. Furthermore, stakeholders should pursue a change in the cultural mindset of companies to transparently address and admit to shortcomings, and to improve and promote workers' participation and working conditions.

### **Conclusion: Applying Intelligent Case-by-case Diplomacy to Implement TSD Chapters**

Being the world's largest trading power gives the EU an important leverage to negotiate trade agreements in line with objectives of trade liberalization and, equally important,


the promotion of common public goods. Linking trade policies and liberalisation objectives to other agendas can emphasize the partner countries' commitments to international conventions and treaties. While most of the EU's trade partners have signed these treaties, many still lack either the political will or the capacity to enforce them. While the case of South Korea shows the dilemma of enforcing TSD commitments in practice, the case of Vietnam clearly illustrates how sustainability commitments can

be interpreted differently by trading partners. If TSD chapters are supposed to reach their full potential of high labour and sustainability standards in the long run, more effective implementation is key. The EU is aware of the many shortcomings of TSD chapters and has already worked on a number of improvements regarding implementation and transparency issues. To ultimately reach full enforcement of sustainability commitments, the following steps are recommended:



Growing importance: Vietnam has become the EU's second most important trading partner in the region after Singapore. Source: © Nguyen Huy Kham, Reuters.





**Moving away from the sanctions debate:** Consensual decision-making is a highly complex process which should not be limited to a binary debate about sanctions versus non-sanctions. Experience suggests that the use of sanctions does not speed up the implementation of labour standards. The EU should not handcuff its trading partners as a punishment for non-compliance, given that sanctions mostly impact the most vulnerable and not the targeted elites. Instead, effective implementation becomes more viable when TSD chapters are carefully developed in consideration of the local political, economic and social contexts, and address country-specific sustainability shortcomings.

**Developing feasible roadmaps:** Both trading partners should clearly define a feasible and country-specific roadmap with joint priorities and targets for TSD implementation. Through a process of regular exchange and involvement of civil society, there can be an opportunity to build trust and achieve progress in translating TSD commitments into national legislation.

**Increasing capacity development:** When TSD commitments rank low on the agenda of a partner government, the EU should recognise its obligation to substantially increase capacity development. If the EU seeks constructive cooperation, it will need to increase a number of activities. This includes labour inspections and effective adjunction of labour disputes through structured, transparent, and time-based complaint mechanisms. Capacity development can be a useful tool in making the entire implementation more tailor-made and demand driven. Special attention should be paid to potential disparities between TSD commitments and domestic laws of trading partners. It can also help to direct the beneficiary's focus to the importance of implementing sustainability commitments.

**Stepping up reporting:** The EU should conduct annual implementation or monitoring reports that are specific to the trading partner and the respective TSD. Increased data collection on performance will improve understanding of shortcomings and bottlenecks that trading

partners face in the implementation of TSD commitments. Current implementation reports cover all trade agreements; this does not allow for the necessary differentiation. A thorough understanding of country-specific challenges is necessary to identify the key concerns and constraints of effective implementation.

### Whether independent civil society actors are active and can act independently varies across partner countries.

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**Strengthening the involvement and mandate of DAGs:** The Domestic Advisory Groups offer an opportunity to meet an increasing demand for constructive dialogue with civil society on trade. DAGs should be capacitated to monitor the entire FTA, including chapters other than TSDs, in order to bring sustainable development to the mainstream of trade policy. DAGs should fulfil an advisory, consultative and institutionalised role. Yet, the adequate representation of independent civil society actors – and their ability to exercise their duties independently, impartially, and safely – varies across partner countries. The involvement with different political structures and the resulting composition of the respective DAGs must nevertheless lead to a balanced DAG composition so as to monitor and evaluate EU FTAs as independently as possible.

**Looking inwards:** Labour standards and decent work can have a beneficial effect on the economic efficiency, innovation, and productivity of all trading partners, including the EU itself. In this sense, the EU's ambition to pursue fair trade is not entirely altruistic as it also addresses trade fairness for its own businesses, employers, and the environment.

**Patience and consistency:** In order to create space for constructive dialogue on jointly set targets, the EU should use its economic leverage in moderation, as opposed to as a threat. This may reduce the risk of backfire, where demands

are felt by the partner as an imposition of the EU's will, disregarding social, cultural, political, and economical contexts. The EU should also differentiate between countries which have a high capacity and the financial means to implement such chapters, and countries with less developed state and oversight structures.

The inclusion of such TSD chapters in FTAs provides the EU with a diplomatic opportunity to constructively highlight and address shortcomings on environmental, labour, and human rights issues in partner countries. The incentive of improved EU-market access creates new leverage for advocating and supporting the implementation of reforms in accordance with multilateral treaties and conventions, especially in partner countries that did not show a political interest in such agreements in the past. Depending on the country context, the EU might find allies and receive support from national stakeholders (such as CSOs, trade unions, and others) that promote a similar political agenda. In other cases, the EU has to be more patient as political cultures and agendas, participatory structures, and domestic laws might not be conducive to implementing reforms at the speed desired by the EU. The EU should continue with its assessment that competitiveness should not be achieved at the expense of sustainability. In the long term, environmental sustainability and improved labour standards in partner countries strengthen the overall business and investment climate. TSDs are therefore an important step to strengthen the trade-development nexus to the economic and social advantage of both trading parties.

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