

Horizontes verdes - Para um comércio mais sustentável após a Revisão do TSD

Green horizons - Towards more sustainable trade after the TSD Review

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Abstract—Todas as atenções estão viradas para a Comissão Europeia na sequência da comunicação sobre uma nova abordagem aos capítulos do Comércio e Desenvolvimento Sustentável (CDS) dos Acordos de Comércio Livre (ACL) da UE. O ponto focal da política comercial da UE recuou recentemente para acordos comerciais bilaterais com um maior escrutínio dos objectivos de sustentabilidade incorporados nos Capítulos do CDS, tais como enfrentar emergências globais, incluindo a crise climática, a deflorestação e a perda de biodiversidade. Mas o que implica esta nova abordagem, e qual será a sua eficácia para melhorar a monitorização e a aplicabilidade dos Capítulos do CDS? Este artigo analisa a nova abordagem dos Capítulos CDS e avalia o seu objectivo global de abordar as preocupações de sustentabilidade ligadas ao comércio internacional. O artigo discute as oportunidades perdidas para melhorar a sustentabilidade nos acordos comerciais da UE e reflecte o que a nova abordagem CDS poderia significar para os acordos comerciais recentemente celebrados e em curso.

Palavras-Chave — Acordos comerciais da UE; desenvolvimento sustentável; aplicabilidade; mecanismos de controlo, sociedade civil.

Abstract— All eyes are on the European Commission following the communication on a new approach to Trade and Sustainable Development (TSD) Chapters in EU Free Trade Agreements (FTAs). The focal point of EU trade policy recently shifted back towards bilateral trade agreements with a greater scrutiny on the sustainability objectives embedded in the TSD Chapters such as tackling global emergencies including the climate crisis, deforestation, and biodiversity loss. But what does this new approach entail, and how effective will it be at improving the monitoring and enforceability of the TSD Chapters? This article reviews the new TSD Chapter approach and assesses its overall objective to address sustainability concerns linked to international trade. The article discusses missed opportunities for enhancing sustainability in EU trade agreements and reflects what the new TSD approach could mean for newly concluded and ongoing trade agreements.

Keywords — EU trade agreements; sustainable development; enforceability; monitoring mechanisms, civil society.

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1 Introduction The trade and climate nexus

Progress towards achieving the Sustainable Development Goals (SDGs) is not yet occurring at the pace and extent required to deliver the SDGs by 2030. This final decade began with an unprecedented modern-day pandemic, pushing the world's most vulnerable into an even more precarious situation (United Nations, 2022). The sudden and steep reduction of greenhouse gas emissions worldwide brought on by the pandemic and subsequent lockdown policies, have been more than compensated for in 2021, as the return to "business as usual" saw energy-related CO₂ emissions break new records (United Nations, 2022). Furthermore, and amid the aftermath of the worst effects of the pandemic, Russia's war in Ukraine triggered an energy crisis, which was felt mostly in Europe but also exacerbated a global food crisis.

In such a tense geopolitical environment, trade is often presented as a solution to foster cooperation and sustainability worldwide. Although Europe is a frontrunner regarding progress towards the SDGs, it still faces internal challenges in the areas of sustainable dietary habits, agriculture, climate and biodiversity. Europe's lacking performance in these areas is partly due to the international spillovers generated by its trade patterns (Lafortune et al., 2021).

Indeed, the European Union's (EU) trade policy has been familiar to controversies, recalling civil society organisations and at times, Member States' protest against the negotiation and ratification of free trade agreements (FTAs). Examples include the trade deals with Canada and the Mercosur region, which were unpopular among civil society due to a lack of safeguards for environmental action, human and labour rights embedded into the agreements (Nienaber, 2016; Toni Tubiana, 2021).

In an effort to rebuild the climate credibility of its trade policy, the EU announced it would review its approach to the Trade and Sustainable Development (TSD) Chapters, after already having published a non-communication on TSD Chapters in 2018 (European Commission Services, 2018). Acknowledging its contribution to the global environmental degradation embodied in trade, the

European Commission published the new TSD Action Plan in June 2022, detailing twenty action points to be undertaken to ensure that EU FTAs deliver for the environment and sustainable development (European Commission, 2022d).

Box 1: What is the TSD Chapter and why is it relevant?

The TSD Chapter has been a common feature of EU FTAs since 2011, with the signature of the first "new generation" trade deal between the EU and the Republic of Korea. It houses commitments made by the trade partners to tackle social and environmental concerns linked to trade such as labour conditions and human rights; gender equality; climate change; or illegal, unreported and unregulated fishing activities. These provisions aim to prevent unwanted social and environmental consequences from trade liberalisation and leverage trade agreements to support sustainable development.

Still, the effectiveness of the TSD Chapters to enforce the commitments made by the trade partners has been called into question (Harrison & Paulini, 2020). Issues include the TSD enforcement mechanism, or dispute settlement mechanism, which has been criticised as "toothless" compared to its counterpart, the general FTA dispute settlement mechanism. However, recently a precedent has been set that the TSD Chapter commitments are legally binding. This follows a TSD expert panel ruling on the EU-Korea dispute regarding Korea's failure to make sufficient progress towards ratifying the International Labour Organisation (ILO) conventions once the FTA was in force (Blot, Oger, & Harrison, 2022). In recent years the European Commission has made efforts to improve the enforceability of the TSD Chapter such as the appointment of the Chief Trade Enforcement Officer to follow up on the implementation and enforcement of the TSD Chapter commitments. Also, the launch of the online platform known as the 'Single Entry Point' (SEP) provides stakeholders with the opportunity to bring potential violations of the TSD Chapters to the attention of the European Commission.

This article reviews the EU's new approach

to TSD Chapters and aims to assess whether the new approach is sufficient to deliver sustainable trade in the future, building on work by the Institute for European Environmental Policy and existing literature. In section 2, the author classifies the content of the new TSD approach into five categories, which are then assessed in more detail. Following this assessment, section 3 discusses what additional measures could have strengthened the new TSD approach. Section 4 reflects on what the new TSD approach means for recently concluded trade agreements, as well as those still under negotiation. Section 5 concludes this article, summarising the main findings and reflections on the new TSD approach.

2 Assessment What is in the new approach to TSD Chapters

The following sub-sections review the action points of the new TSD Chapter approach. Table 1 presents an overview of the twenty action points, as well as their correspondences into each of the following five categories:

- 1) Leveraging FTAs for sustainability;
- 2) Enhancing the environmental credentials of FTAs;
- 3) Empowering broader civil society;
- 4) Targeted actions for the Domestic Advisory Groups (DAGs);
- 5) Strengthening enforceability of environmental and social commitments.

Table1: The TSD Chapter Action Points and their categorisation

Categorisation	TSD Chapter Action Points
Leveraging FTAs for sustainability	(1) Step up cooperation with trade partners on compliance with international labour and environmental standards.
	(2) Support and incentivise reform processes and capacity building in trade partner countries through technical and financial assistance, when needed.
	(3) Use trade agreements to facilitate dialogue with partner countries.
Enhancing the environmental credentials of FTAs	(4) Tailored approach to TSD Chapters, identifying country-specific sustainability priorities, and early and better targeted impact assessments.
	(5) Negotiate detailed and time-bound roadmaps with milestones, where appropriate, with a clear role for civil society for the monitoring and implementation.
	(6) Prioritise market access for environmental goods and services.
Empowering broader civil society	(7) Ensure (sustainability) impact assessments analyse all relevant FTA chapters, and identify which provisions and commitments are most likely to have an impact on sustainability issues.
	(8) Develop a comprehensive EU approach across services, using all available instruments to monitor the implementation of the TSD commitments.
	(9) Work with EU Delegations in their support and definition of best practices, as trade partners work with their local Domestic Advisory Groups (DAGs).
	(10) Support continuous involvement of the European Parliament in the implementation of TSD Chapters and assist it in its effort for regular country-specific discussions on trade and sustainable development.
	(11) Revise the Operating Guidelines for the Single Entry Point to increase transparency and predictability for stakeholders.
	(12) Ensure an inclusive consultation process with civil society through all stages of the lifecycle of FTAs.
Targeted actions for the DAGs	(13) Further strengthen the role of EU DAGs by providing resources for their logistical support, capacity building and functioning.
	(14) Increase involvement of EU DAG representatives in TSD Member States' Expert Groups and TSD Committee meetings.
	(15) Promote and facilitate interaction between EU and partner countries' DAGs.
	(16) Foster transparency on the composition of DAGs.
	(17) Exchange views with EU DAGs on EU TSD-related technical assistance projects.
	(18) Ensure that the remit of the DAGs extends beyond TSD in order to cover the entirety of the FTA.
Strengthening enforceability of environmental and social commitments	(19) Further strengthen enforcement of TSD commitments in future agreements: <ol style="list-style-type: none"> (a) Extend the general state-to-state dispute settlement (SSDS) compliance stage to the TSD Chapter. (b) Involve DAGs in monitoring the compliance stage. (c) Extend the possibility to apply trade sanctions in cases of failure to comply with obligations that materially defeat the object and purpose of the Paris Agreement or in serious instances of non-compliance with the ILO fundamental principles.
	(20) Prioritise the enforcement of TSD cases based on the importance of the nature of the commitments at issues, the seriousness of the violation and the impact on the environment or workers.

2.1 Leveraging FTAs for sustainability

The first three action points aim to leverage the cooperative framework of FTAs to encourage sustainability reform by increasing cooperation, dialogue, and assistance with the trade partner country. Trade deals typically encapsulate both a "trade and investment agreement" in addition to a "political and cooperation agreement" which makes them ideal avenues to pursue cooperation on global challenges such as climate change and environmental degradation (Arróniz Velasco Peters, 2022).

A platform for continuous dialogue between trade partners is necessary to discuss evolving sustainability and trade issues, as well as follow up on the implementation of, and compliance with bilateral commitments under the FTA.

For less developed countries, the EU aims to provide targeted technical and financial assistance to support the elevation their domestic standards to meet the EU requirements and standards.

Such support is essential to ensure no country is excluded from international trade, while elevating sustainability standards worldwide (Kettunen, Gionfra, Monteville, 2019).

This is relevant in the context of both the EU's autonomous trade policy measures and domestic environmental policies which will set new requirements and standards for goods and services sold on the EU market. Cooperation and dialogue aim to ensure partner countries' understanding of, and compliance with these upcoming sustainability initiatives. Examples of such initiatives include the carbon border adjustment mechanism, the deforestation-free supply chains Regulation, and the Ecodesign for sustainable products Regulation (Halleux, 2022; ajn, 2022; Titievskaja, Morgado Simões, Dobрева, 2022).

2.2 Enhancing the environmental credentials of FTAs

Action points four through eight propose approaches to bolster the environmental credentials of EU FTAs, both within and outside the TSD Chapter. Firstly, to put an end to the one-size-fits-all approach to TSD Chapters (i.e., a default set of provisions across TSD Chapters in various FTAs), the European Commission proposes to introduce a tailored approach. This new approach would entail the identification of country-specific environmental and social priorities based on a more comprehensive impact assessment, supported by civil society inputs. The findings of these assessments and consultations would be taken up into the TSD Chapter with provisions to address these country-specific issues.

Building on the country-specific assessment, action point five would see the European Commission negotiate, where deemed appropriate, so-called "implementation roadmaps" with timelines and milestones for the delivery of TSD commitments. These roadmaps have the potential to accelerate progress towards achieving the SDGs

when linked to international environmental frameworks (Blot Kettunen, 2021). However, the non-committal phrasing of this action point indicates that the European Commission may be apprehensive to negotiating these roadmaps for every future FTAs.

At a global level, the prioritisation of market access for environmental goods and services launched the start of negotiations of the Environmental Goods Agreement at the World Trade Organisation in 2014. However, after two years, negotiations ceased with the conclusion that tariff liberalisation for environmental goods would not be sufficient. Additional efforts must be undertaken to address the non-tariff barriers that environmental goods face to market access (de Melo Solleder, 2020). Therefore, action point six is a positive step to address the trade barriers environmentally-friendly goods and services face compared to environmentally polluting goods and services (Shapiro, 2021).

Action point seven focuses on the targeted use of impact assessments as tools to improve the environmental credentials of FTAs. The early-stage impact assessment, conducted in close collaboration with the partner country and civil society, would serve as the basis for scoping country-specific environmental and social priorities to be addressed with tailored TSD Chapter provisions. At a later stage, these country-specific priorities would be further assessed in the Sustainability Impact Assessments and monitored with the ex-post impact assessments. These assessments would be supported by continuous involvement of civil society, and more refined methodologies such as the new guidance for assessing EU trade agreements impact on biodiversity (IEEP, Trinomics, IVM, UNEP-WCMC, 2021). The knowledge obtained from better and more granular environmental impact assessments, as well as stakeholder consultation, should steer the uptake of country-specific environmental provisions in the TSD Chapter, as well as in sector-specific chapters, where relevant.

These action points could significantly improve the environmental credentials of FTAs, however, the devil is in the details. For example, if the country-specific TSD provisions do not use stronger language than past TSD Chapters, enforceability may remain an issue. Further-

more, the enforceability of the implementation roadmaps is also unclear because the roadmaps would be negotiated in parallel with the TSD Chapter, thereby not falling explicitly under any enforcement mechanism. Going forward, the European Commission should also provide more transparency on how the findings of the impact assessments are taken up into the final text of the agreement, and communicate how the TSD commitments aim to address specific findings related to labour and environmental issues concluded by the impact assessment (Blot Kettunen, 2021).

2.3 Empowering broader civil society

This sub-section elaborates on the role of broader civil society, while the following sub-section discusses the role of the FTAs designated stakeholder monitoring mechanism, the Domestic Advisory Groups (DAGs). The new approach to TSD Chapters aims to more closely integrate the role of civil society throughout the FTA and states that civil society consultations will form an integral part of the FTA life cycle, from early gap-analysis to the monitoring of TSD implementation once the agreement is in force.

The first action point of this category aims to develop a comprehensive approach to better utilise and coordinate between existing instruments for the monitoring of TSD Chapter implementation. Greater coordination regarding monitoring efforts is essential for current FTAs, but especially in the context of the new TSD approach which will require more targeted monitoring of country-specific priorities. Current monitoring efforts are undertaken by both EU Institutions and civil society at varying levels.

On one hand, the role of the civil society and the European Parliament in the monitoring of the TSD Chapters is explicitly stated and valued. The European Commission intends to utilise all existing expertise, and available instruments and programmes to facilitate the monitoring of TSD Chapter implementation, while expanding on the number of stakeholders to be involved in the process. This encompasses EU Delegations, Member States, and a stronger role of the European Parliament notably through its Committee on International Trade.

On the other hand, the European Commission has proposed to "split up" politically contentious agreements, such as those with Mercosur and Mexico, to simplify the ratification process (Moens Hanke Vela, 2022). The splitting of a trade agreement involves negotiating two separate agreements: one on trade and investment and a political and cooperation agreement. With the recent conclusion of the EU-Chile trade deal, which was also split (European Commission, 2022a), the European Commission indicates its intention to circumvent the role of Member State governments in ratifying the trade section of the agreement.

If this approach to ratifying trade agreements becomes the new norm, the role of the European Parliament as representatives of EU citizens must be reinforced and informed on the negotiations where appropriate. In this manner, the European Parliament could provide checks as to the level of sustainability negotiated in the text and minimise the political blowback once the agreement text is concluded.

Operating guidelines of the Single Entry Point

Civil society actors have access to a wealth of knowledge to feed into the FTA process. These insights are especially critical for the development of (ex-post) impact assessments, for which environmental data is often lagged (IEEP et al., 2021). Furthermore, civil society organisations in trade partner countries typically have a better understanding of specific environmental and social concerns on the ground before these issues are documented in databases (Blot Kettunen, 2021).

The understanding of country-specific issues is not only integral for the impact assessments and the monitoring of TSD Chapter implementation once the agreement is in force but also for flagging potential violations of TSD commitments to the European Commission. Therefore, to empower stakeholders in the monitoring of TSD commitment implementation, action point eleven proposes to revise the Operating Guidelines of the Single Entry Point (SEP) to improve the platforms accessibility (European Commission, 2022c).

Launched in 2020, the SEP is a contact point for EU stakeholders to file complaints regard-

ing a trade partners non-compliance with TSD Chapter commitments, as well as market access issues. Although it is an EU-based platform, it is possible for an EU organisation or citizen to file a complaint representing the interests of those outside the EU, on the condition that this is clearly stated. However, with its introduction, the initial functioning of the SEP was drawn into question concerning its transparency, and accessibility regarding the burden of evidence required by complainants to file (Henriot Van den Berghe, 2021).

Regarding transparency, the SEP revised guidelines explain the steps taken from the initial receipt of a complaint¹, the complaint assessment, and the weighing of countermeasures dependent on the gravity of non-compliance. The complainant is assigned a contact person who is required to keep track of progress on the complaint². Moreover, a deadline for the delivery of the preliminary assessment of the complaint is set³, making the process time bound. However, this could be considered a soft deadline, because the European Commission reserves the right to suspend the deadline if more time is required for the assessment.

On accessibility of the platform, the European Commission acknowledges stakeholders' concerns surrounding the burden of evidence placed on the complainant in cases related to TSD non-compliance. With the review of the guidelines, the European Commission clarifies that there is no expectation for the complainant to provide full information regarding the TSD commitment violation. One solution provided to facilitate complaint submissions is for stakeholders to engage in "pre-notification". This allows stakeholders to consult with SEP contacts to discuss issues such as the legal basis of the complaint and the available information, prior to filing the complaint.

Since its inception, the SEP has received one complaint pertaining to non-compliance of TSD commitments. The complaint was filed on 17 May 2022 by CNV Internationaal on behalf of

trade union organisations in Peru and Colombia regarding the violation of the right to trade union freedom, collective bargaining and the right to equality (Van Beers, 2022). So far it has been reported that the European Commission has suspended the deadline for the preliminary assessment (POLITICO Pro, 2022).

Regarding the scope of TSD violations, the European Commission clarifies in the revised guidelines that the nature of the TSD violation to which a complainant has filed, must be systemic in nature, meaning it should not be an isolated case of non-compliance. At first glance this could limit the scope of violations that could result in a suspension of trade arrangements. However, systemic failures to apply laws or regulations aligned with TSD commitments would also constitute a violation.

2.4 Targeted actions for the Domestic Advisory Groups (DAGs)

This sub-section assesses action points thirteen through eighteen, which list specific actions to enhance the role and functioning of the DAGs. Each FTA since the EU-Korea FTA is required to set up a DAG, which is a small group of business, labour, and environmental stakeholders tasked with monitoring TSD Chapter implementation (Mazzola, 2018).

These action points aim to reinforce the capacity, legitimacy, efficacy, and transparency of the DAGs, as well as mainstream DAG involvement to cover sustainability in sector-specific chapters. Previous assessments concluded that the EU DAGs face several issues such as an underrepresentation of environmental stakeholders and insufficient resources to further investigate environmental and social concerns (Blot Kettunen, 2021; Blot et al., 2022). Therefore, it is essential that DAGs receive adequate resources for their logistical support, capacity building and functioning, which in turn can incentivise environmental stakeholders to join the DAGs.

Box 2 provides an example of how EU and partner country DAGs can come together to discuss sustainability priorities and develop concrete recommendations on how to further cooperate on environmental and social issues.

¹With confirmation of receipt within 10 working days.

²For example, a first update on progress is expected within 20 working days from the receipt of the complaint.

³The deadline to deliver the preliminary assessment is set at 120 working days following the receipt of complaint.

Box 2: Outcomes from the EU-Vietnam DAGs

On 18 October 2022, the EU and Vietnam DAGs met in Hanoi for the second time, along with the EU-Vietnam TSD Committee. This DAG session aimed to foster a collaborative approach to support stakeholders involved in value chains linked to deforestation patterns, in light of the upcoming EU Regulation tackling global deforestation (European Economic and Social Committee, 2022). This is aligned with the TSD approach to address sustainability concerns through collaborations and partnerships rather than legal obligations and sanctions.

This DAG-to-DAG meeting yielded some concrete results on sustainability aspects such as:

- An agreement to create a common working group aimed at in-depth joint discussion on EU-Vietnam supply chains in the context of due diligence. The working group will meet online and report to the next DAG-to-DAG meeting.
- The suggestion that a roadmap on climate and environmental protection should be developed by the Parties.
- Both DAGs reminded the Parties of their commitments to ratify and implement all the ILO fundamental conventions, which, as a result of the International Labour Conference (ILO, 2022), should include ILO conventions 155 and 187 on occupational safety and health.

This DAG-to-DAG meeting illustrates how civil society involvement in FTA implementation in the DAG framework can initiate recommendations that may have strong resonance on sustainability aspects for both Parties. Yet, the phrasings used by the DAGs emphasise that these civil society considerations are collaborative in nature (e.g., partnerships, common working groups) or limited to suggestions and recommendations. The continuous monitoring of the implementation of the EU-Vietnam agreement will demonstrate whether these recommendations are taken on by the Parties as new legal obligations.

Yet, concerning their monitoring capabilities, DAG members felt no accountability from the European Commission to respond to their concerns raised on TSD implementation by partner countries. In the case of the EU-Korea dispute on labour rights provisions, DAG members had notified the European Commission about Korea's inaction to ratify the core ILO conventions in 2013. However, it wasn't until 2018, after the European Parliament issued a resolution on the matter, that the European Commission formally acknowledged the concerns and sought out bilateral consultations with Korea (Blot et al., 2022).

To address such issues going forward, the European Commission has clarified that EU DAGs are permitted to file complaints on TSD violations to the SEP. However, the workings of the DAGs benefit from having a direct line of contact with the European Commission. The possibility for EU DAGs to submit any concerns on TSD violations via the SEP along with other stakeholders risks delegitimising the DAGs as the monitoring mechanism of TSD implementation. It could be more beneficial for the European Commission to introduce a rapid response mechanism which would require the Commission to acknowledge and respond to concerns brought up by the DAGs within a predetermined timeframe (Blot Kettunen, 2021; Blot et al., 2022).

2.5 Strengthening the enforceability of environmental and social commitments

Finally, one of the main criticisms of the TSD Chapters was the toothlessness of the dispute settlement mechanism and the lack of outcome-oriented resolutions. Assessments of the TSD dispute settlement mechanism conclude that while the TSD provisions are legally binding, there is no mechanism in place to ensure the disputed trade partner effectively addresses the TSD violation within a specified timeframe (Blot Kettunen, 2021; Blot et al., 2022).

To prove its commitment to trade and sustainability, action point nineteen strengthens TSD enforceability by extending the FTA's general state-to-state dispute settlement (SSDS) compliance stage to the TSD Chapter. This requires

the Party in violation to inform how it plans to implement the expert panel’s decision within a predetermined timeframe. Going further, the European Commission proposes the possibility of trade sanctions as a last resort for violations of the ILO fundamental principles and the Paris Agreement. These sanctions will most likely take the form of suspension of trade concessions, as quantifying failures to protect the environment in monetary terms remains an issue.

A sanctions-based outcome of TSD violations can only be triggered by the SSDS, meaning no private or non-governmental organisation can file a complaint resulting in the suspension of trade concessions. Rather, these actors can file grievances regarding a TSD violation or a market access barrier through the SEP system. The implementation of sanctions would follow an expert panel’s decision as well as further failure from the violating party to bring itself into compliance.

The European Commission’s more assertive stance on handling trade and sustainability disputes is promising. Yet, the extent to which this new approach will foster sustainability in trade partner countries remains to be seen. For example, a breach in the implementation of the Paris Agreement is worded as "any action or omission which materially defeats the object and purpose of the Paris Agreement." Without a set precedent of what action or inaction could be considered a breach, it is unclear how this new stance will be enforced. Moreover, regarding the composition of expert panels, there should be transparency as to the relevant expertise of the panellists handing TSD disputes (Henriot Van den Berghe, 2021).

3 Discussion What could have strengthened the review of the TSD Chapters?

The European Commission’s review of the TSD Chapter approach cements the EU’s position as a global leader regarding the integration of sustainability in trade policy. Yet, there are missed opportunities that could have further enhanced the sustainability of the EU’s FTAs.

The left column of table 2, shown below, summarises some of the most noteworthy explicit commitments made by the European Commission to foster sustainable trade. The right column provides a few missed opportunities that could have been integrated in the review of the TSD approach. The omission of these measures could potentially challenge progress towards more sustainable trade in the future. The final rows of the table highlight the non-committal phrasings used in the TSD review and uncertainty surrounding the implementation of the new TSD approach.

Table2: Explicit commitments and non-committal phrasings in the TSD review that could foster or challenge sustainable trade

Fosters sustainable trade	Challenges sustainable trade
Tailored TSD provisions to address country-specific sustainability priorities.	No formal consideration on how to achieve pre-agreement commitments.
Paris Agreement and ILO conventions as essential elements, with sanctions for non-compliance as a last resort.	No consideration of compliance with other multilateral environmental agreements as an essential element.
More actionable and outcome-oriented dispute settlement mechanism.	Limited applicability to existing FTAs, with questionable enforceability if introduced as an accompanying document after the FTA has been ratified.
Better involvement of, and support to civil society including in partner countries, to improve monitoring efforts.	No "ratchet-up" mechanism to revise TSD provision after the agreement is in force.
Financial and technical support for reform processes and capacity building in partner countries.	
Non-committal phrasings in the TSD review	
The introduction of implementation roadmaps could foster greater sustainability commitments than those in the TSD Chapter, as well as more civil society involvement.	The applicability of implementation roadmaps is unclear, i.e., the decision is left to the will of the Parties. It is also unclear the extent to which the implementation roadmaps will be enforceable.
The possibility to use FTAs as a channel to align bilateral trade rules with EU legislation that can be more ambitious on certain sustainability aspects (e.g., deforestation-free supply chains Regulation).	Risk of non-ambitious implementation or backsliding of new TSD approach in upcoming FTAs.

First, the European Commission aims to step up engagement with trade partners regarding sustainability. Yet, one key missed opportunity is the absence of pre-agreement efforts in the scoping phase of trade negotiations. Pre-agreement cooperation would commit parties to implement certain national policy frameworks pertaining to sustainability. Whether or not trade negotiations are successful, the pre-agreement efforts signal to EU trade partners that tangible efforts on sustainability are central to EU trade (Blot et al., 2022).

Second, there is no further consideration of compliance with other multilateral environmental agreements beyond the Paris Agreement. While the integration of the Paris Agreement as an essential element of future trade agreements is positive, the reality is that the scope is limited to the climate crisis. The EU should seek concrete commitments from its trade partners to tackle other environmental priorities linked to the SDGs such as protected areas and biodiversity conservation (Kettunen et al., 2021), sustainable forest management and restoration, and sustainable production and consumption through circular economy principles.

Third, some of the most ambitious points of this communication such as the mainstreaming of sustainability provisions, the tailored approach to the TSD Chapter provisions, and the outcome-oriented dispute settlement aligned with the SSDS compliance stage, will not be back-cast onto existing agreements. While this is less problematic for agreements with developed countries that often have similar levels of environmental regulation as the EU, the same is not true for some trade partners with specific environmental and social concerns.

Lastly, the new approach does not include a "ratchet-up" mechanism to take into account the ever-changing environmental reality, which would allow trade partners to revise and strengthen environmental commitments over time. The triggering of such a mechanism could be at the discretion of both trade partners, or linked to the progression of the "implementation roadmaps" (Blot et al., 2022).

4 Reflection What does the new approach mean for future trade agreements?

Supply chain disruptions and materials scarcity triggered by the pandemic and continued by the war in Ukraine has seen the EU reaffirm its pro-trade stance. The European Commission and the Council are keen to conclude ongoing negotiations such as those with Australia, Indonesia, India, Mexico, and Mercosur. By concluding these trade agreements, the EU hopes to secure a more reliable stream of raw materials to meet the expected

increase in demand brought on by the green and digital transitions.

Since the communication on the new approach to TSD Chapters, two trade agreements have been concluded, specifically the bilateral agreements with New Zealand and Chile. This section briefly discusses the implementation of the new TSD approach in the EU-New Zealand and the EU-Chile agreements and reflects on the importance of an ambitious implementation of the new TSD approach into upcoming FTAs.

4.1 The EU-New Zealand Trade Agreement

Despite the novelty of the TSD Chapter review, the new approach is clearly on display in the EU-New Zealand FTA (European Commission, 2022b). The agreement's ambitious outcomes regarding trade and sustainability are due to the willingness and cooperation between both Parties. Some novelties in this trade agreement include two new Chapters dedicated to Mori trade and Sustainable Food Systems, as well as two new articles in the TSD Chapter on Trade and Fossil Fuel Subsidy Reform and Trade and Gender Equality. Finally, the TSD Chapter contains an annex with a non-exhaustive list of specific environmental goods and services of which the trade is to be liberalised, including circular economy-related services.

The EU-New Zealand trade agreement is the first of the EU's FTAs to remove the dispute settlement mechanism from the TSD Chapter. In this agreement, TSD disputes will be handled under the general dispute settlement Chapter, which introduces the possibility of sanctions for actions or omissions which materially defeat the object and purpose of the Paris Agreement.

Considering New Zealand's green ambitions regarding trade and sustainability, it is unlikely that their government would take actions that would materially defeat the objective of the Paris Agreement. However, it remains uncertain what actions or omissions are at odds with the Paris Agreement, as well as who would determine potential infringements. For example, the Nationally Determined Contribution of New Zealand and the EU are considered to be, respectively, "highly

insufficient" and "insufficient". In this case, how could the Parties' submission of their Nationally Determined Contributions, deemed "insufficient", not be considered defeating the objectives of the Paris Agreement?

4.2 The EU-Chile Advanced Framework Agreement

Compared to the EU-New Zealand FTA, the EU-Chile agreement does not appear to hold the same level of bilateral commitment to the implementation of the Paris Agreement, as it does not specify the "obligation to refrain from any action or omission which materially defeats the object and purpose of the Paris Agreement." Moreover, the general dispute settlement Chapter does not reference the ILO conventions, the Paris Agreement, or the TSD Chapter, as is the case in the EU-New Zealand agreement. Instead, the EU-Chile agreement has limited the enforceability of the TSD provisions back within the confines of the TSD Chapter.

While this may appear as backsliding on the part of the European Commission to fully implement the new TSD approach, taking a closer look at the EU-Chile TSD dispute settlement articles indicates a new outcome-oriented approach to dispute resolution. For TSD dispute settlement under the EU-Chile agreement, once a panel of experts has been convened and they have issued their resolution on the matter, the Parties are expected to discuss actions or measures to be undertaken considering the expert panel's recommendations. Furthermore, these actions or measures are expected to be implemented no later than three months after the expert panel's resolution is made public (European Commission, 2022a). This precise wording aims to ensure that the TSD dispute settlement resolution is taken beyond the expert panel's decision and delivers outcomes to be implemented, and no longer relying on the will of the Parties to take action (Blot Kettunen, 2021; Blot et al., 2022).

A final and most notable addition to the TSD Chapter is Article 26.23 "Review" which obligates the TSD sub-committee to discuss the effective implementation of the TSD provisions, considering major policy developments and developments in international agreements. Following the

outcomes of these discussions, either Party may request the review of the TSD provisions at any time after the entry into force of the agreement.

This is a significant addition to the TSD Chapter, as it opens the door for amenable TSD provisions to better reflect the evolving nature of environmental and labour standards in FTAs (Blot Kettunen, 2021; Blot et al., 2022). Yet, the inclusion of a Review Article in new FTAs is not reflected in the new TSD approach, therefore, it is uncertain whether similar articles will be introduced in all FTAs going forward.

4.3 Upcoming trade agreements

With several other agreements in, or nearing, the final rounds of negotiations, the European Commission should seek to fully implement the new TSD. Table 3 lists bilateral trade agreements currently being pursued by the EU as well as country-specific environmental considerations that should be addressed with the new TSD approach.

Table3: List of upcoming bilateral trade agreements and environmental considerations

Bilateral agreement	Country-specific environmental considerations
EU-Australia	With its abundance of natural resources paired with the current political climate, Australia's leverage in negotiations has strengthened as the EU seeks to decrease its dependency on Russia. However, Australia's relatively less ambitious climate and environmental agenda compared to that of the EU and New Zealand could potentially undermine the environmental contents of the FTA.
EU-Mexico	Both Parties have come to an agreement in principle on the contents of the deal, however, the agreement has not officially concluded. In a joint statement, members of civil society have urged policymakers to not ratify the agreement in its current state (Transnational Institute, 2022). Yet, the European Commission has proposed to "split up" to simplify the ratification process within the EU (Moens & Hanke Vela, 2022).
EU-Mercosur	Civil society and some Member States oppose the ratification of the deal as it currently stands. In response, to save the deal, the European Commission and European External Action Service have been working on an accompanying instrument to address the environmental and human rights concerns of stakeholders. However, the content and degree of enforceability of this accompanying instrument remains unclear (Voituriez, Cremers, Guimarães, Moutinho, & Zerbini Benin, 2022).
EU-Indonesia	The liberalisation of palm oil trade under the FTA without adequate safeguards in place for deforestation could create additional economic incentives to accelerate forest conversion into palm oil plantations (Wittkopp, Ghislain, Fournier, & Ulmer, 2018). The TSD Chapter should take careful consideration of the wording on deforestation provisions, as well as in any other sector-specific chapter in the FTA that risks contributing to deforestation. The negotiations have been postponed by Indonesia's request, yet the EU Trade Commissioner Dombrovskis is keen to push bilateral negotiation efforts up the political agenda.
EU-India	The EU is keen to secure a deal with India for both economic and political reasons, and both sides hope to conclude negotiations before the end of 2023. However, the rushed relaunch of trade talks begs the question how closely the European Commission plans to adhere the new TSD approach. For example, the commitment to scope out country-specific environmental and social priorities early in the negotiation process is unlikely to be fulfilled, since negotiations have already started. This is particularly worrying as this FTA could be key in ensuring the ratification of core human rights and labour conventions in India.

5 Conclusion

The new TSD Chapter approach is ambitious and introduces for the first time concrete enforcement mechanisms for EU FTAs to foster sustainability in trade partner countries. The approach sets a course for embedding sustainability in FTAs by introducing new measures and mechanisms to ensure trade delivers for sustainable development.

The review overhauls the "one-size-fits-all" approach to TSD Chapter provisions in favour of a more tailored approach. It addresses the toothlessness of the TSD dispute settlement by adjusting the process to be both actionable and outcome-oriented. Furthermore, the European Commission commits to embed both the Paris Agreement and core ILO conventions as essential elements into future FTAs. The new approach

to the TSD Chapter also aims at reinforcing the role of civil society, both in the EU and in the trade partner country, in the monitoring of FTAs. Lastly, the EU intends to provide financial and technical assistance for reform processes and capacity building in partner countries, as well as increased dialogues, which aims to support the implementation of new sustainability standards and frameworks.

Yet, concerns remain related to the implementation and applicability of the new TSD approach due to some non-committal phrasings used in the review. In this regard, it is unclear what criteria the European Commission will use when deciding which trade partner to negotiate an "implementation roadmap" with. Moreover, some of the most ambitious sections of the TSD review will not apply to existing agreements, and the extent to which it is ambitiously implemented in already negotiated, but not yet concluded trade agreements, remains questionable.

Although the new TSD approach does not specify the introduction of a "review clause" or a "ratchet-up" mechanism, the EU-Chile agreement does include an article allowing the trade partners to renegotiate the contents of the TSD Chapter if deemed appropriate. The implementation of similar articles into future trade agreements is recommended, thereby ensuring that the contents of FTAs can better reflect the ever-evolving nature of sustainability issues.

Looking ahead, 2023 could yield several new trade agreements. Therefore, it is essential that the EU follows through with the implementation of the new TSD approach and tackles its contribution to global environmental degradation through trade.

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