

ETUC submission on the Non-paper of the Commission services on Trade and Sustainable Development (TSD) chapters in EU Free Trade Agreements (FTAs)

The ETUC welcomes the opening by the European Commission of a debate on the TSD chapters in EU FTAs and its consultation of stakeholders on the issue. The ETUC has expressed its general views on EU trade policy in its "[Resolution for an EU progressive trade and investment policy](#)" adopted by the ETUC Executive Committee in June 2017. Issues raised in that Resolution covering the functioning of TSD chapters should be taken into account as part of this submission.

The ETUC agrees that TSD chapters should enable monitoring and enforcement of all issues covered in an FTA affecting stakeholders and not only those listed in the Chapter. Workers' rights must not be brought into question in any fields not covered by labour chapters. On the contrary, the respect of labour rights, which are human rights, should constitute "essential elements" of all trade and investment agreements, including possible suspension of the agreement in case of sustained breaches.

The ETUC is in favour of TSD chapters which encompass an improvement in all the current EU instruments for monitoring and dialogue, completed by an economic sanctions mechanism for labour rights violations, without the need to demonstrate a relation to trade, without the use of limiting language such as "in a manner affecting trade" or the requirement that violations be in a "sustained or recurring course of action or inaction," as the ultimate means of enforcement when dialogue mechanisms fail.

The non-paper is overly narrow in its consideration of the essential issue of how to enforce labour rights through trade agreements. We are particularly disappointed in the two options tabled by the Commission. We call on the Commission to think creatively of other options apart from the current 'European approach' and 'North-American system'.

The position of the Commission has been to say that the effectiveness of a sanctions-based approach has not been proven, referring to a judicial case on Guatemala filed by the United States through the CAFTA Agreement¹. We believe that singling out the sanctions based approach referring to this only case is neither fair nor accurate.

At the outset, we note that the alleged violation at issue was whether Guatemala had violated the following:

"A Party shall not fail to effectively enforce its labour laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement."

¹ <https://ustr.gov/issue-areas/labor/bilateral-and-regional-trade-agreements/guatemala-submission-under-cafta-dr>

Had the U.S. prevailed in the case, trade sanctions could not have been applied. Instead, the panel could have imposed a fine, which would have been returned back to Guatemala to be sued to improve its labour enforcement regime. Nevertheless, the failure of the U.S. to prevail in the case had nothing to do with whether or not trade sanctions were theoretically available and everything to do with the substance of the obligations.

One of the shortcomings of this case, and indeed of the US approach in general, is that the main condition to impose sanctions is to that the violation occurred “in a manner affecting trade,” which has never previously been interpreted by a trade panel. In this case, the panel, in an effort to understand why this language, rather than the more usual “trade-related,” was used, decided that the use of “in a manner affecting trade” was intended to set a higher bar. In other words, this language was interpreted as a limitation to enforcement. We do not believe this is the right approach. We consider violations of labour standards as breaches of the level playing field of fair competition. Violations of core labour conventions lead to social dumping: when a government does not enforce the right to organise, it supports the atomization of the labour market, and makes it easier and more likely that employers will pay lower wages. This leads to unfair competition and undermines the objectives of sustainable development that is enshrined in EU Foreign Policy (Art. 2 of the EU Treaty).

The modest number of cases solved through the sanction based approach in the US and Canadian trade agreements are therefore not the result of the very nature of sanctions but of the inadequacy of the procedures and the standards involved (scope, admissibility, length of procedures). The lessons from the US and Canada must be drawn.

We therefore oppose the argument that a sanction based approach is not effective. Sanctions, if well designed and enforced, can lead to substantial progress on the ground².

In most cases, it will not be necessary to come to sanctions. This is particularly true if the Parties focus on ensuring rights for workers as the measure of success. The very existence of a real risk of sanctions has already been proved to be sufficient to trigger progresses on the ground for example in the case of EU GSP+ for El Salvador. The risk of removal of the US GSP to Georgia was pivotal in bringing positive change on the labour code in the country.

We note that the Commission cannot present any evidence of the effectiveness of its “soft” approach based on diplomatic talks. On the other hand, trade unions have provided evidence over many years that diplomatic talks, in the framework of EU FTAs with Korea³ or Latin American countries, have not been effective in addressing labour rights abuses in these countries. One of the key reasons for this is the lack of an independent collective complaints mechanism to trigger investigations into labour rights abuses, lack of support for engagement with social partners to address labour rights abuses and the lack of penalties when labour rights are abused.

We therefore believe that to honour the commitment of the Commission’s Trade for All strategy to promote human rights through trade it must address the shortcomings in the enforcement mechanisms that currently exist in EU FTAs. Stakeholders should be consulted in the preparations prior to any negotiations.

² The US removal of GSP for Bangladesh led to changes in the law to allow freedom of association in the garment sector.

³ For instance, the EU-Korea Domestic Advisory Group requested twice to the Commission formal consultations be initiated, based on widespread violations of labour rights, particularly freedom of association, were taking place in Korea but the Commission responded by rejecting the requests.

Key elements needed to ensure respect for labour rights:

- a. We consider the ratification and implementation of the eight ILO Core Labour Standards, as well as compliance of up-to-date ILO conventions and instruments such as the Forced Labour Protocol and ILO Conventions on health and safety at work, are a pre-condition for entering in trade negotiations. However, if a partner country has not ratified or properly implemented these conventions, it must demonstrate through a binding roadmap how this will be achieved in a timely manner. We call the European Commission to establish clear, transparent and binding roadmaps in the pre-negotiating phase, focusing on the implementation of a legal and policy framework to guarantee freedom of association and the right to collective bargaining along with strict labour inspections leading to penalties if workers are mistreated.
- b. Primacy of social and human rights throughout trade agreements – every part of trade agreements (such as sections on investment protection or service listing) be consistent with human rights commitments. For trade unions it is crucial that there are commitments to the Decent Work agenda (which include the ILO core conventions) and the Sustainable Development Goals that relate to Decent Work.
- c. A fully independent dispute settlement mechanism should be established to enforce commitments to the labour rights mentioned in (a). This should take into consideration guidance and decisions of ILO statutory bodies and in any event, not contradict them.
- d. Trade unions should be able to submit complaints through this mechanism for violations against workers' rights. Complaints could be routed through a labour secretariat and/or DAG.
- e. When this independent labour secretariat receives a substantiated complaint, it should initiate an investigation not later than 30 days. The investigations should include fact-finding missions and public hearings where relevant stakeholders are invited to testify.
- f. If the independent dispute settlement mechanism deems that a country has violated its commitments and failed to address the issue in a timely manner, there must be material penalties, like trade sanctions in the form of countervailing tariffs targeted to the tariff lines where the violations occurred or/and fines directly to companies. Consideration should be given to establishing a fund into which monetary compensation could be paid, for use in funding decent work-promoting projects in the country or sector concerned.
- g. The independent dispute settlement mechanism should review the issue when appropriate and deem whether the violation of labour standards is addressed and any awarded compensation to workers has been given. Governments must prove that they enforced the decisions of the body by enforcing the national law and international commitments on the violator, including by prosecution of executives, fines and withdrawing export licenses.
- h. Ensure adequate resources are provided to enable trade unions to be involved in monitoring labour rights commitments in agreements, and post a Labour Attaché in EU Missions.

Finally, a strong labour chapter is urgent but there are also threats for workers in other parts of trade agreements – such as regulatory cooperation, public services and investment protection – that must also be addressed in order to ensure workers' rights are respected in trade agreements. We recall demands made around these concerns in the ETUC progressive trade agenda document.

We believe that making TSD chapters in EU FTAs more effective is possible and urgently needed. It is only a matter of political will and political priority.