

# Mind the Compliance Gap

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## Mind the compliance gap: managing trustworthy partnerships for sustainable development in the European Union's free trade agreements

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Denise Prévost\* and Iveta Alexovičová

Faculty of Law,  
Maastricht University,  
Bouillonstraat 1-3, 6211 LH Maastricht, The Netherlands  
Email: denise.prevast@maastrichtuniversity.nl  
Email: i.alexovicova@maastrichtuniversity.nl

\*Corresponding author

**Abstract:** Recent years have seen intensified interest in the labour and environment provisions in the EU's FTAs. The question has arisen whether the incorporation of 'trade and sustainable development' (TSD) chapters in the EU's FTAs deliver on their promise of using the EU's trade power to effectively promote the protection of the environment and improved working conditions in third countries. In particular, the compliance gap between the TSD provisions and their implementation has come to the forefront of the debate. Concerns have been raised that the EU's 'promotional approach' based on dialogue and cooperation is less effective than the 'sanctions-based' approach followed by the US and Canada. This article examines the mechanisms for compliance in the TSD chapters in recent EU FTAs and argues that they hold greater promise for real improvements in labour and environmental standards than a sanctions-based enforcement system. However, it posits that, to be effective, and thereby gain the trust of civil society, the EU's 'promotional' approach must be supported by effective mechanisms for transparency, institutionalised dialogue and accountability.

**Keywords:** EU; free trade agreements; trade and sustainable development; TSD; environmental and labour standards; enforceability; compliance mechanisms; promotional approach; managerial approach; sanctions.

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**Biographical notes:** Denise Prévost is an Associate Professor of International Economic Law and a fellow of the Institute for Globalisation and International Regulation (IGIR) at Maastricht University, the Netherlands. She is a non-resident fellow at the World Trade Institute in Bern, Switzerland. She is Associate Editor of the *Journal of World Trade* and serves on the editorial boards of the *Netherlands Yearbook of International Law*, the *Journal of the Colombian Institutes of Tax and Customs Law*, the *International Journal of Public Law and Policy* and the *Maastricht Law Series*. She regularly lectures at conferences and in training and capacity-building workshops on WTO law issues and has done consulting work for the European Commission and Parliament, industry groups and Brussels law firms on WTO law matters.

Iveta Alexovičová is an Assistant Professor of International Economic Law at Maastricht University, the Netherlands, focusing predominantly on international trade and investment law. She is a member of the Ius Commune Research School, a fellow of the Institute for Globalisation and International Regulation at Maastricht University and a non-resident fellow at the World Trade Institute in Bern, Switzerland. Since January 2018, she acts as Associate Editor of the International Journal of Public Law and Policy.

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“In a more connected world, the EU will reach out and engage with others. In light of global value chains, galloping technological advances and growing migration, the EU will participate fully in the global marketplace and co-shape the rules that govern it. The Union cannot pull up a drawbridge to ward off external threats. Retreat from the world only deprives us of the opportunities that a connected world presents.” *Shared Vision, Common Action: A Stronger Europe, A Global Strategy for the European Union's Foreign and Security Policy* (2016)

“... negotiation does not end with the conclusion of the treaty, but is a continuous aspect of living under the agreement.” Chayes and Chayes (1991)<sup>1</sup>

## 1 Pursuing trustworthy trade partnerships

Ensuring that trade supports rather than undermines sustainable development<sup>2</sup> is one of the most pressing challenges faced by trade policy makers today.<sup>3</sup> The social cost of economic globalisation is a matter of significant public concern, as evidenced by the strong public opposition to, and evident mistrust of, economic liberalisation, particularly in developed countries. The impact of competitive pressures arising from liberalised trade on labour standards and the protection of the environment have led to fears of a ‘race to the bottom’ in regulatory requirements with a negative impact on sustainable development. Incidents such as the Rana Plaza collapse and the reports on deforestation practices by palm oil producers in developing countries have turned the spotlight onto the devastating effect of the failure to ensure that labour and environmental standards are met throughout the dispersed global value chains that characterise modern production and trade. These concerns are among those that need to be addressed in order to restore public support for and trust in the international trading system.

While populist responses to prevailing anti-globalist trends include inward-looking unilateral trade policies,<sup>4</sup> the European Union’s 2016 *Global Strategy* reflects a contrary approach,<sup>5</sup> pursuing trustworthy trade partnerships by international engagement, support for a rules-based trading system and full participation in shaping the rules that govern the global marketplace.<sup>6</sup> The *Global Strategy* refers specifically to the use of the EU’s trade agreements to underpin sustainable development.<sup>7</sup> The EU is committed to taking ‘a leading role in driving the sustainable development agenda at global level’<sup>8</sup> and, as also reflected in its 2015 *Trade for All* strategy, to use trade agreements ‘as levers to promote, around the world, values like sustainable development, human and social rights, fair and ethical trade and the fight against corruption’.<sup>9</sup>

It has proven difficult for the EU to pursue its trade and sustainable development (TSD) objectives multilaterally, in the context of the World Trade Organization (WTO) as the necessary global consensus is lacking. The continued resistance of developing-country Members to putting labour standards on the agenda for negotiations

at the WTO,<sup>10</sup> and the lack of outcome of negotiations on environmental issues that are part of the Doha Agenda,<sup>11</sup> have meant that these issues have had to be addressed outside the WTO framework. By contrast, negotiating free trade agreements (FTAs) bilaterally or with small groups of countries provides greater opportunities for the EU to incorporate sustainable development provisions, due to its greater negotiating power as the world's largest trading partner and the fact that FTAs provide more opportunities for close regulatory cooperation between their more limited numbers of parties.<sup>12</sup> As originally argued by Meunier and Nicolaïdis (2006), as a huge trading bloc, the EU uses its formidable power *in* trade to exercise power *through* trade, offering market access as a bargaining chip to obtain concessions on reform of domestic policies in the areas of labour standards and environmental protection and 'shape new patterns of global governance'.<sup>13</sup> As of 2006, on the basis of the new policy set out in Commission Communication *Global Europe: Competing in the World*,<sup>14</sup> the EU started to negotiate 'deeper' or more far-reaching FTAs including dedicated trade and sustainable development (TSD) chapters with selected partners.<sup>15</sup> More recently, in its 2017 reflection paper on *Harnessing Globalisation*, the Commission notes that the "EU-27 remains the world's largest trader ... deeply integrated into global value chains and will continue to carry weight even as other powers emerge. Rather than sitting back and letting globalisation shape our destinies, we have the opportunity to shape globalisation in line with our own values and interests".<sup>16</sup>

It has been argued that, due to this significant market power, the EU's FTAs can deliver global public goods by promoting wide acceptance and implementation of sustainability standards across the globe, with parties to the EU's FTAs persuaded to accept EU standards in exchange for preferential market access, and non-parties motivated by market forces to adopt dominant standards set by the major players in the global market.<sup>17</sup> The EU clearly intends to 'govern *through* trade',<sup>18</sup> and is committed to using its trade agreements to 'provide strong support to sustainable development by linking trade with development and good governance'<sup>19</sup> as part of its 'responsible trade policy'.<sup>20</sup> In this way, it aims to restore trust in trade liberalisation initiatives. This has translated into an evolution in EU practice of incorporating sustainable development provisions in its FTAs, from early preambular statements, through hortatory provisions scattered throughout the agreements, to the current approach of including dedicated chapters on TSD.

However, in order to generate trust and to restore the support of civil society and other stakeholders in trade liberalisation, it is essential that TSD provisions in EU FTAs deliver on their promise of using the EU's trade power to *effectively* promote the protection of the environment and improved working conditions in third countries. Recent years have seen intensified interest in this issue, including debate in the European Parliament and the Council, in the Member States and third countries and within civil society.<sup>21</sup> In particular, the 'compliance gap' between the TSD commitments and their implementation in the EU's trading partners has come to the forefront of the debate on the EU's FTAs.<sup>22</sup> Concerns have been raised regarding the enforceability of TSD provisions and the EU's promotional approach to compliance, based on dialogue and cooperation, has been criticised as being less effective than the 'sanctions-based' approach to trade and environment commitments in the FTAs of the US and Canada.<sup>23</sup>

In order to contribute to the debate, in July 2017 the European Commission services published a non-paper on *Trade and Sustainable Development Chapters in EU Free Trade Agreements (Non-paper of 2017)*, assessing the current practice and putting

forward some suggestions for improving the implementation of the TSD chapters, including the possibility of including sanctions for non-compliance.<sup>24</sup> Following discussions and feedback received from various stakeholders, in February 2018 the Commission services issued a second non-paper entitled *Feedback and Way Forward on Improving the Implementation and Enforcement of Trade and Sustainable Development Chapters in EU Free Trade Agreements (Non-paper of 2018)*.<sup>25</sup> In the latter document, the Commission acknowledged once again “a clear consensus that the implementation of TSD chapters should be stepped-up and improved” and outlined 15 ‘concrete and practicable’ actions to take, but rejected the use of sanctions to enforce compliance.<sup>26</sup>

This paper aims to examine the ‘promotional’ compliance mechanisms incorporated in the TSD chapters of recent EU FTAs, which reflect a ‘managerial’ approach,<sup>27</sup> against the background of these two recent Commission documents. In doing so, it recognises that compliance in areas such as TSD, involving regulatory standards and encompassing both hard and soft commitments, is not binary, but occurs on a spectrum with a broader or narrower gap between the aims of the TSD chapters and the progress on the ground.<sup>28</sup> Thus, it argues that the effectiveness of the relevant mechanisms in reducing the gap in compliance with both hard and soft provisions is more important than the possibility to establish and punish violations of hard rules. This paper examines whether the EU’s ‘managerial approach’ to addressing the compliance gap in its trading partners<sup>29</sup> is appropriate to achieve its stated objective of the *effective* promotion of global governance in the area of sustainable development,<sup>30</sup> and assesses proposals for reform against this objective. In this context, it argues against the enforcement-focused approach to compliance promoted by many and instead supports a ‘managerial’ approach to compliance, which pursues long-term cooperative partnerships and attitudinal alignment<sup>31</sup> and thus ‘minds’ the gap between sustainable development provisions and their implementation. It posits, however, that to be effective, and thereby gain the trust of civil society, the managerial approach must be supported by effective mechanisms for transparency, institutionalised dialogue and accountability.<sup>32</sup>

More specifically, Section 2 provides the necessary background by briefly sketching the nature and content of the TSD provisions in recent EU FTAs, as this allows the assessment of the most appropriate mechanisms to promote compliance with provisions of this type. Section 3 examines the debate surrounding the use of sanctions to enforce TSD obligations, and, by contrast, explains the managerial approach to compliance. It also identifies three conditions that we argue are essential for the effectiveness of a managerial approach, namely enhanced transparency, institutionalisation and accountability. Section 4 turns to examine the ‘promotional’ compliance mechanisms incorporated in the TSD chapters of the EU’s FTAs, which we argue reflect a ‘managerial’ approach, against these conditions. In Section 5, the reforms proposed in the Commission’s *Non-Paper of 2018* are discussed and further recommendations are made for ways to reduce the compliance gap by strengthening the managerial approach reflected in the TSD chapters. Finally, we conclude with some observations on the need for a long-term perspective in pursuing trustworthy trading relationships in areas that entail regulatory convergence and thus the importance of ‘minding’ rather than sanctioning the compliance gap.

## 2 Nature and content of TSD provisions in the EU's FTAs

The TSD chapters in the EU's recent so-called 'new generation' and 'deep and comprehensive' FTAs, continue the past practice of earlier EU FTAs of containing hortatory statements and best-endeavour obligations in the area of sustainable development. These include those calling for cooperation between the parties, both directly and in the framework of other regional or global agreements or fora, and those obliging FTA parties to 'strive' towards higher levels of environmental protection and labour standards.<sup>33</sup> These aspirational provisions are broad in scope and cover a wide range of actions and possibilities for collaboration. However, they do not create enforceable obligations to protect the environment or labour standards, nor to provide the means to do so.

By contrast, in addition to these 'soft' cooperative or aspirational provisions, the dedicated TSD chapters in recent EU FTAs now also contain binding obligations. Typically, these are of two types. First, TSD chapters contain a prohibition to lower environmental or labour standards in national legislation, or to derogate from such legislation, in order to promote trade or investment,<sup>34</sup> commonly known as non-derogation provisions. These provisions limit FTA parties' 'right to regulate' and to set own 'objectives, strategies, policies and priorities' for sustainable development and to adopt and modify national legislation to that effect as the party deems appropriate.<sup>35</sup> By linking the non-derogation obligation explicitly to trade and investment promotion, these provisions aim to prevent that competitive pressures arising from greater economic liberalisation lead to a 'race-to-the-bottom' in standards. Thus, while stronger due to their binding language, these provisions are narrower in scope than the best-endeavour obligations to 'strive to improve' environmental and labour laws and policies mentioned above since their prohibition extends only to derogations that affect trade or investment.<sup>36</sup> Rather than aiming to promote high levels of protection of the environment and labour standards, and thus contribute to the EU's goal to promote 'global governance' for sustainable development, such provisions clearly have an economic objective, namely ensuring a level playing field for EU industries.<sup>37</sup>

Second, TSD chapters reaffirm binding obligations based on international instruments in the areas of labour standards and environmental protection, reflecting the EU's commitment to multilateralism. FTA parties are bound by their TSD commitments to effective implementation of obligations under certain ILO Conventions<sup>38</sup> and specific MEAs that they have committed to,<sup>39</sup> and efforts to ratify other ILO conventions and MEAs are required.<sup>40</sup> The EU preference for internationally agreed standards is motivated by the realisation that the governance of fragmented and dispersed production in global value chains necessitates common solutions.<sup>41</sup> Where no multilaterally agreed environmental standards exist, or in areas of particular concern to the EU, additional obligations may be included in the FTA, such as those related to conservation of forest cover or combatting illegal, unreported and unregulated fishing.<sup>42</sup>

In light of the new binding obligations included in the dedicated TSD chapters, expectations of real improvements in the labour and environmental standards of partner countries were raised. However, so far, the TSD chapters have failed to meet these expectations and much of the debate has centred on the compliance gap that has been identified in various case studies.<sup>43</sup>

### **3 Closing the compliance gap: sanctions or cooperation?**

It is mainly with regard to the binding commitments in TSD chapters that the debate regarding how to address the compliance gap has arisen. On one side, the critique of the current approach has centred on the fact that TSD chapters are excluded from the general dispute settlement mechanisms (DSMs) that are available for disputes under other provisions of the EU's FTAs. According to this view, the state-to-state DSMs that have been created specifically for the TSD chapters, which exclude the possibility to impose sanctions in case of non-compliance with the outcome of dispute settlement proceedings, are ineffective in enforcing binding TSD obligations, leading to inadequate compliance. Proponents of this view see sanctions (in the form of fines or the withdrawal of trade concessions) as a necessary last resort, or the 'stick behind the door' to enforce TSD obligations.<sup>44</sup>

On the other side of the debate are those that argue that one should not underestimate the potential of the 'softer' monitoring, cooperation and dialogue mechanisms in TSD chapters to ensure the implementation of the environment and labour commitments of FTA parties, and thus promote greater compliance, also with the non-binding provisions in TSD chapters.<sup>45</sup> As noted in a recent study by the Swedish National Board of Trade (2016), 'the traditional conception of enforcement has broadened and transformed, extending the scope of actors involved and opening for collective enforcement mechanisms'.<sup>46</sup> This report points out that scholarship on the enforcement of international law now recognises in addition to the 'sanctions' approach to compliance outlined above, also the managerial approach. The latter approach is cooperative in nature and manages the causes of non-compliance through positive means, including transparency, continuing dialogue between the parties and civil society, collaborative dispute settlement and capacity building. It aims at 'attitudinal alignment' between the parties through ongoing discussion and collaboration, and uses reputational pressure to progressively increase levels of compliance.

The suitability of each of the two approaches to secure compliance with international commitments depends on the nature of the commitments at issue.<sup>47</sup> It has been argued that the sanctions approach is suitable in areas where the economic or political benefits of non-compliance may otherwise exceed its costs, such as trade liberalisation. It relies on ensuring compliance by mechanisms that remove benefits of non-compliance and create costs. However, it is costly and difficult to mobilise in international law, so its use is rare even when the necessary sanctions mechanisms exist.<sup>48</sup> Nevertheless, its availability, as a last resort, may be a useful incentive for compliance in these areas. By contrast, in areas where international commitments deal with regulatory standards and include aspirational commitments, such as in the TSD chapters, low levels of compliance may result from capacity constraints<sup>49</sup> and sanctions may be counterproductive and 'exacerbate the conditions that led to non-compliance'.<sup>50</sup> Instead, the managerial approach, which relies on dialogue, assistance and reputational pressure to solve problems of non-compliance, offers a way forward. Chayes and Chayes (1991) disagree with the common conception that "treaties are not complied with because they are unenforceable, and that the cure for this condition is treaties "with teeth".<sup>51</sup> Instead, they note that "negotiation, which is the principal method for dealing with compliance problems, has had a significant measure of success".<sup>52</sup>

Unlike in the case of outright prohibitions, these authors note that many other international law commitments allow for 'levels of compliance', as is clearly the case

with the hortatory and aspirational provisions in the TSD chapters. While such provisions reflect ideals, these authors argue that “they were designed to initiate a process that over time, perhaps a long time, would bring behavior into greater congruence with those ideals”.<sup>53</sup> In their view the main instrument to effect an acceptable level of compliance is “an iterative process of discourse among the parties, the treaty organization, and the wider public”.<sup>54</sup> In light of the nature of TSD provisions, which entail progressive regulatory coordination and comprise both hard and soft commitments, we argue that the managerial approach is more effective than sanctions to create the conditions necessary to facilitate and induce increasingly higher levels of compliance and thus close the compliance gap. It is well-suited to complex, long term relationships between states, in which reputation and goodwill are important to obtain promises of future collaboration,<sup>55</sup> as is the case with the EU’s FTAs.

As noted above, EU promotional approach to ensuring compliance with the provisions of the TSD Chapters reflects ‘managerial’ characteristics, while it is not explicitly referred to as such by the EU. The EU Commission warned already in its *Non-Paper of 2017* that including sanctions as an instrument to effect compliance with the TSD chapters could ‘jeopardise long term-links with partners to improve capacity and effect changes’.<sup>56</sup> After engaging in stakeholder consultations on this issue, the Commission’s *Non-Paper of 2018* reports that while convergence on maintaining the broad scope of TSD chapters was apparent, there was divergence regarding the application of sanctions as a compliance mechanism. However, “a majority of voices support[ed] the current model for enforcing TSD chapters”.<sup>57</sup> The Commission is also of the view that sanctions “would not fit easily within the EU’s model” and would ‘not guarantee that this will result in effective, sustainable and lasting improvement of key social and environmental standards on the ground’.<sup>58</sup> It also points to the difficulty in quantifying the economic damage that results from non-compliance with TSD provisions in order to determine the level of sanctions to be applied, and to the fact that a sanctions approach would lead to a narrowing of the scope of the TSD chapters.<sup>59</sup>

We concur with the Commission’s position. As seen from the example of US and Canadian FTAs, the availability of sanctions does not mean that this tool is actually used to improve compliance. Not only are labour or environmental complaints very rarely pursued to the phase of dispute settlement, with only one such dispute coming before a panel so far,<sup>60</sup> but even when they are, the difficulty of proving the existence of a ‘recurring course of action or inaction’ that led to the violation, and of establishing that this occurred ‘in a manner affecting trade or investment’, minimises the chances of successful complaints.<sup>61</sup> Arguably, this high evidentiary threshold reflects the reluctance of trading partners to enforce TSD obligations through sanctions-based dispute settlement.<sup>62</sup> The requirement of an impact on trade or investment demonstrates that the focus is narrowly on ensuring a ‘level playing field’ for domestic industries rather than on governance of labour and environmental standards.<sup>63</sup> Consequently, sanctions mechanisms seem to aim more at appeasing public opinion in the short term than at improving TSD implementation in the long term.

Instead, we argue that a managerial approach is better suited than a sanctions approach to inducing compliance with international commitments in regulatory areas, such as environmental protection and labour standards, where attitudinal alignment and long-term cooperation are essential. By focusing on engagement, dialogue and collaboration, this approach allows for recognition of the distinctive contexts of the



trading partners that affect the operationalisation of TSD commitments. In our view, the managerial approach is especially well suited to TSD provisions in FTAs, as trade agreements inherently embody a cooperative approach based on a long-term partnership and agreement to abide by common rules, in contrast to the unilateral granting of trade preferences in Generalised Systems of Preferences (GSPs) where the EU can, and sometimes does, sanction non-compliance by withdrawing trade preferences.<sup>64</sup> However, it is notable that even in the context of GSP, and in particular the special incentive arrangements for sustainable development and good governance,<sup>65</sup> known as GSP+, the EU is increasingly using mechanisms of enhanced monitoring, capacity building, dialogue and stakeholder consultations to promote the compliance of GSP+ beneficiaries with sustainable development and good governance criteria.<sup>66</sup>

The Commission's stakeholder consultations identified 'consistent support for the EU's comprehensive and inclusive approach to implementation - based on active and transparent engagement and cooperation with partner countries and civil society, including the Social Partners - leading to real and lasting changes on the ground'.<sup>67</sup> Nevertheless, as demonstrated by reports of poor compliance with TSD chapters, reforms are needed if this approach is to bear fruit. We argue that to be effective the managerial approach must be supported by effective mechanisms for transparency, institutionalisation and accountability.<sup>68</sup> These interlinked conditions merit attention before proceeding to assess the compliance mechanisms incorporated in the TSD chapters.

*Transparency*, in general terms, relates to "access to information held by those exercising public powers and in relation to the exercise of those public powers".<sup>69</sup> It helps to generate trust in those powers and their appropriate exercise. However, transparency is a context-specific concept and arguably operates as an 'interstitial' norm,<sup>70</sup> between substantive rules, "in order to ensure that the legal system conforms with the contemporary ethos",<sup>71</sup> inter alia by creating opportunities for stakeholders to engage with the system. In the context of compliance mechanisms, it encompasses both the availability and accessibility of information regarding the performance of the parties and the steps taken to address poor performance, as well as the degree of procedural openness of the compliance mechanisms to stakeholder participation. Chayes and Chayes (1991) note that "[t]ransparency helps to induce compliance in a variety of ways. It may reassure a party that others are in compliance. It permits coordinated policy planning to achieve treaty objectives. It provides the basis for embarrassing and shaming a party that departs from treaty norms, thus helping to deter defections and to bring violating parties back into compliance".<sup>72</sup> Transparency about the level of compliance and opportunities to participate in both identifying non-compliance and the follow up process also stimulates domestic and transnational actors, such as labour unions and NGOs, to put pressure on policy makers to come into compliance. It can therefore be a powerful tool to induce compliance.

*Institutionalisation* means the process of establishing something as a convention or 'norm' in an organisation. In the context of TSD chapters, the term refers to the extent to which the compliance mechanism enables the activities of monitoring and reporting, dialogue, stakeholder participation and resolution of disputes to become 'normal practice' within and between the parties concerned.<sup>73</sup> Two elements have been identified by Van den Putte (2015) as important in this regard: obligation and precision.<sup>74</sup> Obligation entails that the establishment and functioning of these mechanisms is not left to the discretion of

the parties but is obligatory. Precision refers to the level of detail in which the functioning of such mechanisms is regulated. Both these institutional elements must be present for a well-functioning compliance mechanism to be established.

Lastly, *accountability* relates to the extent to which policy makers are answerable to stakeholders for the way in which they carry out their duties, including through obligations to report and explain. An important element of accountability is responsiveness, or the degree to which the input of stakeholders finds its way into the policy process, i.e., the extent to which the state parties are obliged to consider these views.<sup>75</sup> This can be strengthened by the presence of a formal feedback mechanism by which policy makers inform stakeholders of whether, and if so how, their input has been taken into account.<sup>76</sup> Particularly in the context of deliberative compliance mechanisms, such as the ones embodied in the managerial approach, accountability is essential to ensure both the continued engagement of stakeholders in the identification and monitoring of compliance problems and the effectiveness of their input in bringing about reforms.

We turn now to examine the compliance mechanisms in TSD Chapters against the criteria of transparency, institutionalisation and accountability, to see whether they are useful in effecting compliance. In making this assessment, one should bear in mind that FTAs with TSD chapters have not been in force very long, so there is not much empirical data. However, some preliminary conclusions can be drawn from the information presented in the Commission's *FTA Implementation Reports* and the accompanying *Country Reports and Info Sheets*,<sup>77</sup> as well as recent studies.<sup>78</sup>

#### **4 Compliance mechanisms in the EU FTAs' TSD chapters**

Compliance mechanisms contained in the TSD chapters of the EU FTAs fully reflect the EU's promotional approach towards the implementation of TSD commitments, thereby recognising that improvements in labour and environmental conditions necessitate 'continuous and long-term engagement' with FTA partners.<sup>79</sup> While the EU does not call its approach 'managerial' it is clear from their design that the compliance mechanisms in the TSD chapters embody such an approach. The EU highlights the importance of creating 'ownership' of the reform process by government and civil society and stresses the primary role of international instruments not only in providing substantive labour and environmental standards but also in respect of compliance mechanisms.<sup>80</sup> The EU sees itself as a normative power that prefers persuasion to coercion.<sup>81</sup> Consequently, the role of the bilateral enforcement mechanism contained in the dispute settlement provisions sustainable development chapters is seen as only 'complementary'.<sup>82</sup> The focus is on monitoring, dialogue and cooperation with trading partners and on the involvement of civil society. We therefore first take a close look at the design and application of the monitoring mechanisms for the TSD chapters in EU FTAs, namely the contact points, the TSD Committees and the mechanisms for civil society participation. As the latter is an innovative element, it will be given specific attention in a separate section. Thereafter, the dispute settlement mechanism will be discussed.

#### 4.1 Monitoring, dialogue and cooperation

##### 4.1.1 Contact points and TSD committees

In line with its cooperative, or managerial approach, the EU's priority is to incentivise the FTA partner to work with it to ensure compliance with the TSD chapters. Thus, these chapters set up institutional mechanisms to facilitate monitoring (including through promoting transparency), regular dialogue and close cooperation.<sup>83</sup>

To begin with, the TSD chapters oblige each FTA party to designate an office within its administration as a contact point,<sup>84</sup> so as to facilitate communication between the parties in the implementation of the TSD chapters, for example by receiving communications from, or providing information to, the other FTA party or other TSD bodies, such as the Panel of Experts.<sup>85</sup> This mechanism facilitates exchange of information between the parties which, as noted above,<sup>86</sup> is an essential element of transparency and thereby a condition for an effective monitoring of compliance of EU's trading partners with their TSD commitments. However, with the exception of CETA, all other EU FTAs limit access to information through these contact points to the other FTA party, to the exclusion of civil society (and the general public).<sup>87</sup> This reduces contribution of these contact points to external transparency about implementation of TSD provisions by declining affected actors an opportunity to participate in identifying non-compliance and following the subsequent process.

Further, each TSD chapter establishes a Committee on Trade and Sustainable Development (TSD Committee).<sup>88</sup> This is a specialised intergovernmental committee composed of senior officials of the relevant Ministries (trade, environment and labour) of each FTA party that is assigned the task of monitoring compliance with the TSD chapter, including cooperative activities. This role creates opportunities for constructive and continuing dialogue between the parties on sensitive issues, and a search for common solutions. It also allows the EU to use its leverage to engage with its FTA partners on their compliance with the TSD chapter, beyond the narrow scope of the binding and legally enforceable obligations. Unlike the dispute settlement mechanism, this organ provides a forum to discuss compliance with not only binding obligations but also with the best-effort provisions in TSD chapters, thus ensuring a broad scope for the compliance mechanism. Positive incentives for parties to engage constructively in the dialogue, such as the provision of technical or financial assistance to support efforts to comply, can enhance the role of TSD Committees as a useful mechanism for compliance.

TSD Committees additionally further compliance with TSD objectives by promoting learning through dialogue and information exchange. They have been called 'permanent laboratories' that allow countries very different from each other 'to learn from their respective experiences and design innovative solutions',<sup>89</sup> thus contributing to attitudinal alignment between FTA parties. Further, in some FTAs the parties commit to jointly reviewing, monitoring and assessing the contribution of the TSD chapter, including the cooperation activities thereunder, to sustainability.<sup>90</sup> Such review can operate to increase 'ownership' of the process of achieving sustainable development objectives, and thus generate the political good will needed for successful long-term strategies.

Reports on the actual functioning of the TSD Committees show a mixed picture, however. Both the *Non-Paper of 2017* and the *first FTA Implementation Report* note that the focus of the EU in the early years of implementation of the TSD chapters has been on

setting up the institutional structures and monitoring practices,<sup>91</sup> and establishing priority areas for work.<sup>92</sup> This is particularly the case for more recent FTAs (with Georgia, Moldova and Ukraine).<sup>93</sup> For the FTAs that have been in force longer (with South Korea, Central America, and Colombia and Peru), the institutional structures have allowed for 'regular and focused dialogues' to take place with FTA partners on often sensitive issues, priorities to be established and joint projects to be launched.<sup>94</sup> In 2016, TSD Committee meetings were held with Central America, Colombia and Peru, Korea, Georgia, and Moldova<sup>95</sup>; in 2017 with Korea, with Colombia, Peru and Ecuador, with Moldova and for the first time also with Ukraine<sup>96</sup>; and in 2018 with Korea, central America, Georgia, Ukraine and for the first time with Canada.<sup>97</sup> In the context of these meetings, the EU representatives drew attention to problematic aspects of TSD chapter implementation, and noted encouraging progress made in other areas.<sup>98</sup> However, not in all cases have these dialogues led to real progress in implementation.<sup>99</sup>

The limited effectiveness of the monitoring and dialogue mechanisms has been ascribed to an inability or unwillingness of the EU to use its leverage effectively.<sup>100</sup> As noted above, a managerial approach to compliance relies on reputational pressure, coupled with the interest of parties in securing future promises of collaboration, to effect compliance. As a large market, the EU is well placed to link its trading partners' compliance efforts with regard to TSD provisions, and thus its 'trustworthiness' as an FTA party, to its willingness to pursue greater levels of trade liberalisation in future agreements. Its averseness to make use of this trade power, until recently, gave cause for concern.

Apart from the reluctance of the EU to exercise greater pressure on its trading partners to promote compliance with their TSD commitments, we consider that insufficient institutionalisation, transparency and accountability are factors that have contributed to the limited effectiveness of the existing monitoring, dialogue and cooperation mechanisms thus far.

The inadequate level of transparency has weakened the potential of the oversight potential of civil society in the TSD compliance mechanisms. The website of the European Economic and Social Committee (EESC), which provides the Secretariat for the EU DAGs, provides access to some meeting reports, and implementation reports which could potentially facilitate monitoring of follow-up to concerns raised. However, complaints have been raised that these reports are provided late, are incomplete, do not refer to information provided or how it was evaluated, and thus provide little insight into how concerns were dealt with.<sup>101</sup> This lack of transparency is lamentable.

As noted previously, in a managerial approach to compliance with international commitments, the monitoring role of civil society and other stakeholders is crucial. Under recent FTAs,<sup>102</sup> each meeting of the TSD Committee is to include a session with the public, at which views can be exchanged and matters of interest relating to the implementation of the FTA can be discussed.<sup>103</sup> In other FTAs, there is only a requirement that the decisions of the TSD Committee be made available to the public, unless the Committee decides otherwise.<sup>104</sup> Thus the conditions of transparency and institutionalised dialogue need to be strengthened for civil society's monitoring role to be an effective tool for enhanced compliance.

In practice the meetings of TSD Committees are often held back-to-back with meetings of the Civil Society Forums,<sup>105</sup> and end with a session where the TSD Committee reports to the Civil Society Forums on the progress made towards implementing the TSD chapters, and the remaining challenges and receives their input.

This allows civil society representatives of both parties to be informed and to have governments listen to them in a formal setting. However, this practice is informal and in the discretion of the parties to implement, thus lacking the obligation and precision needed for institutionalisation of the dialogue with civil society. In addition, there is no requirement that the TSD Committee respond to the issues raised by the Civil Society Forum or report on actions undertaken to address these issues, seriously weakening the accountability of the TSD Committee in respect of concerns raised by civil society.

#### 4.1.2 Civil society involvement

The significant role of civil society and other stakeholders in monitoring and enforcement of TSD chapters constitutes an important innovative element of the enforcement mechanisms for the TSD chapters in EU FTAs, starting with that with South Korea. The European Commission's *Trade for All* strategy emphasises the objective of maximising the potential for civil society involvement.<sup>106</sup> The EESC Opinion of 2019 notes that civil society participation in the implementation of the TSD Chapters 'responds to the need for monitoring, as well as a way to convey proposals and to put forward legitimate issues that have an impact on all parts of society'.<sup>107</sup> While US and Canadian FTAs also envision a role for civil society dialogue, this is less far-reaching than in EU FTAs.<sup>108</sup>

The role for civil society in the EU FTA's TSD chapters is institutionalised in two ways, namely through national and transnational mechanisms. While the specific features of these mechanisms vary across the relevant FTAs, some common elements emerge that give an indication of the enforcement potential of these forms of civil society involvement in respect of TSD chapters, and the design flaws that undermine this potential.

National mechanisms for the involvement of civil society comprise Domestic Advisory Group(s) ('DAG(s)') on sustainable development (labour and environment). DAGs have an advisory role with regard to the implementation of the relevant TSD chapter.<sup>109</sup> They can submit their views and recommendations on the implementation of the TSD chapter and give advice on how to better achieve the objectives of this chapter to their own (though not the other) FTA party.<sup>110</sup> In specific cases, the DAGs may also submit own initiatives.<sup>111</sup>

EU FTA parties are obliged to establish new DAGs or designate existing national bodies as DAGs.<sup>112</sup> While the EU creates a new EU-wide DAG for each FTA, several of its FTA partners consult with existing national bodies. As reported in a recent CLEER study (2016),<sup>113</sup> the possibility to designate existing bodies has met strong criticism from civil society, and leads to a situation where civil society organisations that are not already a part of the existing national bodies are excluded from participating in discussion of the TSD chapters of EU FTAs, whereas participants in the existing national bodies are not always aware that they have the additional responsibility of discussing the sustainable development aspects of the EU FTA.

The composition of DAGs is also a matter of concern, as acknowledged by the EU Commission in its *Non-paper of 2018* and reiterated by the EESC Opinion of 2019.<sup>114</sup> In most (but not all) cases, the TSD chapters specify that DAGs are composed of independent civil society organisations.<sup>115</sup> These groups must have a balanced representation of environment, labour and business organisations as well as other relevant stakeholders of the FTA party at issue.<sup>116</sup> However, in none of the EU's FTAs are procedures for the appointment of members of DAGs laid down,<sup>117</sup> so in most cases

members are appointed by each FTA party according to its own procedures, which in many cases are non-transparent.<sup>118</sup>

This weakness in the design of the mechanism undermines its potential and concerns arise regarding the independence, representativeness and competence of DAG members.<sup>119</sup> In the case of South Korea, for example, one of the main labour federations was initially excluded from the Korean DAG, and only included after strong pressure from the European Commission and EU DAG.<sup>120</sup> In many other cases the Commission reportedly expressed concern regarding the composition of the DAG of an FTA partner but exerted little or no pressure to solve the problem, emphasising the sovereignty of the FTA partner over its own domestic mechanisms.<sup>121</sup> We argue that without precise and binding rules on the appointment of DAG members to ensure representativeness and independence, these bodies cannot fulfil their potential as mechanisms for enforcement (in the broad sense) of TSD chapters. This aspect of civil society involvement in promoting compliance clearly needs to be institutionalised.

Other organisational and logistical problems that have been identified with regard to the working of the DAGs are the lack of procedural rules for meetings, the fact that information on the agenda and date of the meeting is often circulated too late to allow effective preparation by civil society organisations, the financial constraints that hinder civil society participation in DAGs, and the lack of a functioning secretariat for DAGs of FTA partners, among others.<sup>122</sup> These flaws in transparency and institutionalisation weaken the potential of DAGs to be effective actors in the promoting compliance.

The transnational mechanism for the involvement of civil society in the implementation of TSD chapters in EU-FTAs is the Civil Society Forum (CSF). This is a joint meeting of civil society organisations, usually from the DAGs, and the public from both FTA parties. Such meeting is to be organised annually under each FTA, and usually occurs back-to-back with the meeting of the TSD Committee.<sup>123</sup> Unless parties agree otherwise, meetings of the TSD Committee must include a session in which Committee members report on the implementation of the TSD Chapter to the CSF. In turn, the CSF may express its views and opinions in order to promote dialogue on how to better achieve the objectives of the TSD chapter.<sup>124</sup> For this mechanism to work well as a tool for enforcement, however, the accountability of the TSD Committee to civil society must be strengthened,<sup>125</sup> for instance by providing feedback and informing stakeholders in the CSF regarding how their input has been taken into consideration by the parties in the TSD Committee.<sup>126</sup> Currently, no TSD chapter in EU FTA's requires such feedback and no such commitment is included among actions to be taken by the EU Commission under its *Non-paper of 2018*.<sup>127</sup>

The full potential of the DAGs and the CSFs has thus not been met,<sup>128</sup> although some visible progress has been made, including the establishment of civil society structures in countries where civil society is not typically involved in trade matters.<sup>129</sup> While the limited contribution of DAGs and CSFs to improving compliance is in part due to capacity constraints and the novelty of civil society participation for some FTA partners,<sup>130</sup> we argue that for the civil society participation mechanisms to effectively contribute to the monitoring and compliance of TSD commitments, the establishment and operation of mechanisms must be better institutionalised and their transparency and accountability must be strengthened.<sup>131</sup>

#### 4.2 *Dispute settlement mechanism*

As mentioned previously, all EU FTAs with a TSD chapter explicitly exclude this chapter from the regular dispute settlement mechanism (DSM) generally available for disputes under that FTA in the form of state-to-state arbitration. Instead, TSD chapters provide for a distinct DSM specific to TSD chapters.<sup>132</sup>

Unlike trade liberalisation obligations, compliance with which requires removal or modification of trade restrictive measures, TSD commitments necessitate comprehensive regulatory action that is achieved gradually and through collaboration. This affects the approach to enforcing compliance. A recent study identified a number of reasons why it would be challenging for panels under the regular DSM of FTAs to adjudicate disputes under the TSD chapters.<sup>133</sup> These include the fact that TSD obligations are often less clear and compliance therefore more difficult to assess; the reference in TSD provisions to non-trade instruments, such as MEAs and ILO Conventions, which require systemic assessment of the regime; and the difficulty in quantifying the damage caused by non-compliance with TSD obligations in order to apply sanctions. Consequently, arbitration of disputes under TSD chapters requires a particularised approach taking account of these challenges.

The TSD chapters in EU FTAs thus provide for a specific dispute settlement system entailing government-to-government consultations and, if these are unsuccessful, eventual recourse to a Panel of Experts to arbitrate the dispute, with a certain – albeit limited – role for civil society in this process, and without the possibility of sanctions as a remedy for non-compliance.<sup>134</sup>

A dispute regarding non-compliance with the TSD chapter may be initiated by any party to the FTA. Unlike in the US and Canada,<sup>135</sup> under TSD chapters in the EU FTAs civil society does not have legal standing to initiate disputes, although DAGs may submit their concerns on non-implementation to their FTA parties, and have done so, also upon their own initiative.<sup>136</sup> However, there is no formal procedure through which complaints are investigated and a reasoned response motivating a decision whether to initiate dispute settlement procedures or not is not required. In fact, the failure of TSD Committees to act on concerns raised by DAGs and the reluctance of the European Commission to pursue these issues through dispute settlement have been criticised.<sup>137</sup> The absence of a dedicated procedure for the submission and investigation of complaints undermines accountability to civil society.

In line with the cooperative focus of the managerial approach, the primary aim of the DSM under the TSD chapters is the mutually satisfactory resolution of “any matter of mutual interest arising under [the TSD chapter]”.<sup>138</sup> Hence, all disputes must first be addressed through formal government-to-government consultations, and if consultations fail, the matter must be brought to the TSD Committee, before resort to arbitration by a Panel of Experts is possible.<sup>139</sup> During consultations and the TSD Committee’s involvement, both the FTA parties and the TSD Committee may seek advice of relevant international organisations or any other relevant person or body, including the DAGs. The latter may also make submissions on their own initiative.<sup>140</sup> This allows civil society to be heard in the search for an amicable solution.

Only if no satisfactory solution is found within a prescribed period of time,<sup>141</sup> is an independent Panel of Experts<sup>142</sup> convened to address the matter.<sup>143</sup> When discharging its duties, the Panel may seek information and advice from either party, a DAG, or relevant organisations, bodies or persons, as it deems fit. In matters related to the respect of ILO

Conventions or MEAs referred to in the FTA, seeking advice from the ILO or relevant MEA Secretariat is prescribed to ensure a proper understanding of the regime at issue. The Panel of Experts receives submissions from the parties and in some cases also *amicus curiae* submissions, thus creating an additional possibility for input from civil society and other stakeholders, also if not consulted by the Panel.<sup>144</sup> The report of the Panel of Experts, issued within a prescribed period of time, sets out established facts, applicable provisions, the findings of (in)consistency with TSD obligations,<sup>145</sup> and the recommendations of the Panel on actions to achieve compliance.<sup>146</sup> Panel reports are legally binding, although recommendations for actions to be undertaken by the responding FTA party are not. FTA parties are nevertheless required to take them into account and make best efforts to accommodate them.

In many respects, the resolution of disputes under TSD chapters resembles that under regular DSMs applicable to the rest of the FTA provisions.<sup>147</sup> Both involve government-to-government consultations and, if these fail, arbitration of the dispute by a panel.<sup>148</sup> The particularised approach lies in the specific expertise of the Panel of Experts, the possibilities for DAGs and other stakeholders to be heard during the government-to-government consultations and in the arbitration process, and the mandatory consultation of the ILO and MEA Secretariats in disputes involving these instruments. The most notable difference, however, thus lies not so much with the process of arriving at a determination of a violation of TSD obligations, but with the subsequent steps to ensure compliance with the panel report.

Unlike in the regular DSMs, for disputes under the TSD chapters the implementation of findings and recommendations of the Panel of Experts is not left solely to the responding FTA party. Instead both FTA parties are required to “engage in discussions and ... endeavour to identify appropriate measures to be implemented” and under CETA even decide on ‘a mutually satisfactory action plan’, if appropriate.<sup>149</sup> In some cases parties are even encouraged to discuss possible cooperation in support of the report’s implementation.<sup>150</sup> The complaining party is thus invited to participate constructively in the process of compliance. These provisions are clearly reflective of the cooperative spirit of TSD chapters, which applies also to the entire dispute resolution process, including the implementation stage.

Another difference from the regular DSMs,<sup>151</sup> is the surveillance of the implementation of the Panel report by the TSD Committee, which monitors whether the implementation action plan submitted by the respondent to the Committee is carried out.<sup>152</sup> This resembles the surveillance function of the WTO Dispute Settlement Body (DSB), actively engaging parties in the surveillance of the implementation of dispute settlement reports, and reflects the managerial approach taken by the EU to enforcement of TSD chapters. For surveillance to be an effective enforcement tool, however, TSD Committees must meet sufficiently frequently to generate enough political pressure to induce compliance.<sup>153</sup> As importantly, minutes of the TSD Committee meetings must be made public to enable civil society to exercise its monitoring role with respect to the implementation of panel reports. If non-complying parties are reminded of, and face questions about, their non-implementation of panel reports relatively often, under the watchful eye of civil society and the public, this ‘shaming’ mechanism can be an effective enforcement tool. It has been argued that DSB surveillance in monthly meetings contributes to the high compliance level of WTO Members with dispute settlement rulings.<sup>154</sup> However, in most TSD chapters, the TSD Committee is required to meet as often ‘as necessary’ and the practice thus far has been to meet once a year. This limits



their potential to generate reputational pressure through the surveillance of compliance with any future dispute settlement rulings. There are also no rules on the publication of the minutes of these meetings. This lack of transparency weakens their compliance potential.

An additional distinctive feature of the dispute settlement system under TSD chapters, reflective of the EU's non-traditional approach towards compliance, is the possibility of civil society involvement. It is noteworthy that effective monitoring by civil society organisations can further the implementation of both enforceable and non-enforceable provisions in TSD Chapters.<sup>155</sup> Under all TSD chapters, DAGs and CSFs may communicate their views with regard to the implementation of a Panel report to the TSD Committee.<sup>156</sup> However, the publication of final report of the Panel of Experts is not prescribed in all FTAs. This lack of transparency is remarkable and cannot be compensated, in our view, by the publication of the resolution by the TSD Committee prescribed under all TSD chapters.<sup>157</sup> Given the independent nature of the Panel of Experts' assessment and recommendations, civil society's access to its final report is indispensable for the proper discharge of its monitoring role in the TSD compliance mechanism. The same applies to the need for follow-up on the input by civil society with regard to the implementation of Panel's and TSD Committee's recommendations.

Debate surrounding the enforceability of TSD commitments under EU FTAs has focused on the absence of sanctions for non-compliance with Panel reports and the lack of appetite of the EU to use the DSM for enforcing compliance with TSD provisions.<sup>158</sup> Indeed, the Commission's *Non-Paper of 2018* refers to the many complaints regarding the fact that the existing dispute settlement mechanism had then not once been triggered. While emphasising that dispute settlement is a last resort for when compliance efforts through the monitoring roles of the TSD Committee the civil society structures (DAGs and CSFs) have not succeeded, the Commission has acknowledged that more assertive use of this mechanism is needed and has indicated that it will 'resort swiftly to the panel proceeding where warranted' and will 'ensure the proper implementation of recommendations of panel reports, in liaison with the civil society bodies'.<sup>159</sup> This intention was recently given effect by the first initiation by the Commission of formal consultations under the DSM of a TSD chapter, namely that in the EU-Korea FTA,<sup>160</sup> and by a letter by Commissioner Malmstrom to Peru's Trade Minister, indicating a willingness to do likewise should Peru not improve its implementation of its TSD obligations.<sup>161</sup> However, the lack of an institutionalised procedure for the investigation of complaints and, if necessary, the initiation of dispute settlement proceedings means that the use of this more assertive but still collaborative instrument to promote compliance is subject to the vagaries of political will.

## 5 Recommendations for improving compliance

The 'compliance gap' between the TSD chapters and the level of implementation by the EU's FTA partners has evoked harsh criticism and several proposals have been made to address these concerns.<sup>162</sup> The majority of these focus on strengthening the dispute settlement system for TSD chapters or bringing these chapters within the scope of the regular DSMs in the relevant FTAs. The availability of sanctions for non-compliance is a common element of many of these proposals.

The Commission has responded to these criticisms by exploring the alternatives of a sanctions-based approach and a strengthened cooperative approach in its *Non-Paper of 2017*,<sup>163</sup> and subsequently, after broad stakeholder consultations, by rejecting the former approach in favour of the latter in its *Non-Paper of 2018*.<sup>164</sup> In this most recent policy document the Commission also proposes a number of reforms to improve TSD implementation. In doing so, the Commission reiterates that “[t]he ultimate objective [of the TSD Chapters] is to foster real and lasting change on the ground, though the effective application of enhanced social and environmental standards, to the direct benefit of the citizens of [the EU’s] FTA partners”.<sup>165</sup> This is consistent with the earlier stated goal of the effective promotion of global governance in the area of sustainable development,<sup>166</sup> and fits well with a managerial approach to compliance.

It is therefore useful to examine the Commission’s reform proposals in light of this objective, against the foregoing analysis of deficiencies in transparency, institutionalisation and accountability in the TSD compliance mechanisms. Such analysis establishes whether the Commission’s recent proposals go far enough in improving the effectiveness of the compliance mechanisms and allows the identification of additional areas for reform.

In the area of transparency of compliance with TSD commitments, strides have been made through the establishment of national contact points to provide information on compliance to the parties, as set out above. However, to ensure that these bodies’ potential to enhance transparency is fully met, we propose that, like the CETA contact point, the mandate of all contact points be extended to providing information to civil society, not just to the parties. In addition, capacity is still lacking for the optimal functioning of these offices, and financial and technical support can be improved. In line with the managerial approach of facilitating compliance through assistance, we recommend that the Commission allocate funding to this purpose.

Transparency is also served by the interaction between TSD Committees and the CSFs, including the DAGs, in discussing challenges in the implementation of TSD chapters, particularly useful for FTA partners with little practice of engaging with civil society. As noted by Postnikov and Bastiaens (2014), the dialogue mechanism established by EU FTAs may provide societal actors with strategic leverage in their interaction with state authorities.<sup>167</sup> They argue that pressure and learning from civil society actors promotes the greatest improvement in core labour standards in FTA partners, and can thus be seen as a mechanism of *ex post* enforcement.

Rules of procedure on the content and timely circulation of meeting agendas and reports are however needed to further enhance transparency. Like other international peer review mechanisms, when their outcomes are communicated to the public, the TSD Committee meetings can serve the dual function of on the one hand drawing attention to flaws in implementation thereby publicly ‘shaming’ the non-complying party into making the necessary reforms, and on the other hand encouraging and providing support for efforts made towards compliance. Therefore, for TSD Committees to play an effective role in promoting compliance with the TSD chapters, it is essential to ensure transparency and the institutionalised involvement of civil society in their work.<sup>168</sup>

The importance of participation of Civil Society Forums (CSFs), alongside the chairs of the domestic advisory groups (DAGs),<sup>169</sup> in the TSD Committee meetings, has been recognised by the EU Commission in its *Non-paper of 2018*, and the 2019 Opinion of the European Economic and Social Committee (EESC Opinion of 2019).<sup>170</sup> This practice should however be institutionalised through binding and precise procedural rules.

It is also crucial that all decisions adopted by TSD Committees, and in particular their responses to compliance concerns raised by the Civil Society Forums become publicly available, with no discretion to decide otherwise. Without access to such information, the transparency and accountability conditions for the effectiveness of the ‘managerial approach’ to compliance with TSD commitments would not be met.

In this respect, in its *Non-Paper of 2018* the Commission proposed the publication of the agendas and minutes of the meetings of the TSD Committees. It also promised to work together with the EESC to achieve this also with respect to FTA-based activities of civil society, including the DAGs and CSFs, thereby enhancing transparency towards stakeholders.<sup>171</sup> While the EU has largely implemented these steps, to ensure that this practice continues and is followed also by the EU’s trading partners, we propose its embodiment in binding procedural arrangements on publication, with sufficient detail regarding their timing and content, thereby meeting the obligation and precision requirements for effective institutionalisation.

In our view, transparency is essential to generate trust by civil society in the effectiveness of the managerial approach to compliance, despite the fact that it leads to incremental steps towards narrowing the compliance gap, rather than immediate enforcement. We consider that such trust can be achieved by active communication on the “development and results of [the EU’s] work with partners on TSD, including progress towards implementation of TSD commitments, related events and where necessary dispute settlement”, as is envisaged in the Commission’s *Non-Paper of 2018*. In this regard, the Commission promised to improve the TSD websites, to organise structural briefings of EU DAGs on average on a quarterly basis for each FTA, and to bi-annually report on the progress made on the implementation of TSD chapters in the CSF meetings organised by DG Trade.<sup>172</sup> These undertakings are to be commended as they are capable of enhancing transparency of compliance with TSD commitments.<sup>173</sup> However, such efforts are also needed on the side of the EU’s trading partners, and legal obligations in this regard are thus essential, while they should be coupled with technical and financial support, where necessary. Also Further, the EESC Opinion of 2019 has made useful and innovative proposals for a communication campaign, including the use of a dedicated webpage, an online platform to facilitate exchanges between the DAGs of the EU and partner countries and the use of social media.<sup>174</sup>

Turning to examine whether the condition of institutionalisation has been met in the compliance mechanisms of monitoring, continued dialogue, stakeholder participation and the settlement of disputes, it is apparent that this is partially achieved through the creation of dedicated bodies to carry out these functions in the TSD chapters. As mentioned above, collaborative monitoring mechanisms serve an important function in a managerial approach to compliance. Guzman argues that to be effective, compliance mechanisms should focus on ‘mundane’ low-stakes decisions, such as those reflected in regular monitoring rather than the high stakes decisions entailed in findings of violation. Consequently large-stakes issues should be approached by ‘searching for institutions and agreements that achieve the desired objectives through a series of discrete, low-stakes compliance decisions rather than through a single large-stakes decision’.<sup>175</sup> Monitoring and dialogue in the TSD Committees and in the work of the DAGs and CSFs is in line with this approach.

However, more remains to be done to ensure these mechanisms are effectively institutionalised so as to work optimally. As noted above, too many elements of the institutional set up are in the discretion of parties, or not clearly regulated in the TSD

chapters. These include the frequency of TSD Committee and DAG meetings; the appointment procedure for DAG members and the balanced composition of the DAGs; the organisation and funding of DAG meetings; the consultation of DAGs by the parties, TSD Committees and Panels, and the meetings between TSD Committees and CSFs; and under some TSD chapters also the publication of panel reports. This flexibility creates loopholes that undermine the compliance potential of the relevant mechanisms, as has been seen from the discussion in Section 4.

In its *Non-Paper of 2018*, the Commission recognises the need to facilitate the civil society bodies' monitoring of compliance and their advisory role towards the parties. It has committed EUR 3 million to supporting DAGs and CSFs in this role and to encourage the exchange of best practices (such as participation of the DAGs chairs in the TSD committees; holding TSD Committee meetings and CSF meetings back-to-back; and holding regular Commission meetings with DAGs to ensure follow-up to recommendations presented by the civil society bodies). This financial support is to be welcomed in providing positive incentives for improving the functioning of these inclusive compliance mechanisms. However, as practice has shown, while informal arrangements have emerged in these areas, best practices must be clearly regulated in binding rules in order to prevent undermining the potential of the institutional arrangements in the TSD chapters to promote compliance. We argue that the institutionalisation of best practices, for example by making it obligatory under all TSD chapters for meetings of the TSD Committees with CSFs to take place, and to be open to the public; by providing detailed procedural rules for such meetings; and by requiring parties to provide financial support for the functioning of DAGs,<sup>176</sup> could therefore strengthen the effectiveness of the mechanisms of monitoring, dialogue, stakeholder participation and dispute settlement in achieving compliance.

The most problematic element of the compliance mechanisms for TSD chapters is arguably their weak accountability structures. An important element of accountability is the degree to which the input and complaints of stakeholder representatives in DAGs and CSFs, and of civil society, find their way into the policy process, i.e., the extent to which the state parties are obliged to consider these views and respond to them.<sup>177</sup> The absence of an indication that such consideration took place is likely to lead to frustration and diminished engagement of civil society, weakening the enforcement of TSD commitments.<sup>178</sup> It has been argued that the European Commission's failure to act on civil society concerns (until recently) has already resulted in a relative indifference of FTA partners to the allegations of civil society concerning their lack of compliance with TSD obligations.<sup>179</sup> Moreover the lack of formal procedures for civil society to file complaints – and for the follow-up response on submissions filed – has been criticised as undermining accountability to civil society.<sup>180</sup>

The Commission's *Non-Paper of 2017* recognises the need to “step up monitoring and follow-up of all TSD issues raised at government level” and for “improved actions to react to allegations of non-compliance: enhancing transparency of the complaints mechanism, clarifying the steps to respond better to stakeholder's inputs”.<sup>181</sup> As noted above, the reluctance of the Commission to use its leverage to pursue complaints raised by stakeholders through the available compliance mechanisms was until recently a cause for concern.<sup>182</sup> The current absence of a formal feedback mechanism by which FTA parties inform stakeholders of how their input, through the institutional mechanisms set up in the TSD chapter, has been used, undermines accountability and discourages active engagement by civil society.<sup>183</sup> To address this problem, the Commission in its

Non-Paper of 2018 proposes that its existing *Code of Good Administrative Practice*<sup>184</sup> provides a useful basis for an efficient system to respond to input by stakeholders. The Commission has expressed a commitment to respond to written submissions from citizens on TSD matters in a 'structured, transparent and time-bound way'.<sup>185</sup>

While we welcome the Commission's clear timeframes for feedback to stakeholders, based on the relevant Code, we argue that a dedicated mechanism for submission of, and formal response to, complaints by DAGs and CSFs regarding non-compliance with TSD provisions should be created. This should include a formal procedure by which civil society can submit complaints of poor compliance with the TSD chapters to an expert complaints committee, which is in charge of investigating the complaint, deciding what action to take, and providing a motivated public report of its decision.<sup>186</sup> However, we do not propose an individual complaints mechanism whereby civil society can directly activate the dispute settlement mechanism,<sup>187</sup> as this would undermine the collaborative approach to enforcement in the TSD chapters by taking the decision to use the DSM out of the hands of the parties.

Different to the much-criticised complaints mechanism for environment and labour chapters in US FTAs,<sup>188</sup> the proposed mechanism would *require* an investigation and reasoned response, thus ensuring accountability in the dispute settlement process. Equally, stakeholder monitoring of compliance with Panel reports should be given 'teeth' by requiring follow up and reporting of the way in which information on non-compliance with the report has been assessed and how problems have been addressed, including by identifying avenues for assistance and capacity building projects. Such a formal follow-up mechanism would promote accountability and increase the leverage the EU can exercise to bring about effective reforms, while not undermining the collaborative approach that is essential to achieve a real and lasting narrowing of the compliance gap.

## 6 Conclusions

In the current climate of popular dissatisfaction with, and distrust of, economic globalisation, and the increasing realisation of the importance of sustainable development, EU must take up the challenge of ensuring its efforts to promote sustainable development through its trade agreements are effective, and live up to their promise.<sup>189</sup> While the compliance mechanisms in the TSD chapters in its 'new generation' FTAs represent first steps in this direction, the current compliance gap indicates that more needs to be done. As a powerful market player, and one that has developed strong and cooperative relationships with its FTA partners, the EU is well placed to push forward in its efforts to design effective compliance mechanisms and be a global leader in governing through trade.

In doing so, the EU should continue to resist the pressure to incorporate sanctions into the DSMs for TSD chapters or to focus narrowly on enforcing binding obligations. While this would give the appearance of a strong commitment to furthering TSD goals, and may appease its critics in the short term, it has been argued that in reality such a mechanism would be difficult to use due to the particular nature of TSD provisions and their regulatory context. In areas that entail regulatory convergence, such as labour standards and environmental protection, there is a need to take a longer-term perspective in pursuing trustworthy trading relationships through attitudinal alignment. A narrow, sanctions-based approach would damage the collaborative relationship essential for

promoting improvement in environmental protection and labour standards by FTA partners, and, if used, may harm those it aims to protect.

Instead, it is recommended that the EU further strengthen the innovative compliance mechanisms in the TSD chapters to lead to progressively greater compliance by its FTA partners with both hard and soft commitments, while not undermining their 'managerial' characteristics. Building on the recommendations in the Commission's *Non-Paper of 2018*, we argue that refining the design of the mechanisms for monitoring, dialogue, stakeholder participation and dispute settlement in order to enhance transparency, institutionalisation and accountability may go a long way to progressively reducing the compliance gap. It is to be hoped that the compliance mechanisms in the TSD chapters in the FTAs currently being renegotiated by the EU will take steps in this direction, and build trustworthy partnerships for sustainable development, thereby 'minding' rather than sanctioning the compliance gap.

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### Notes

- 1 Chayes, A. and Chayes, A.C. (1991) 'Compliance without enforcement: state behavior under regulatory treaties', *Negotiation Journal*, Vol. 7, No. 3, pp.311–330, p.313.
- 2 A study of the concept of sustainable development is beyond the purview of this article. For a useful discussion of this concept, see Barral, V. (2012) 'Sustainable development in international law: nature and operation of an evolutive legal norm', *European Journal of International Law*, Vol. 23, No. 2, pp.377–400. For purposes of this article, sustainable development is understood as incorporating three pillars, namely economic development, social development, and environmental protection, that are considered interdependent.
- 3 This challenge is also recognised in the United Nations Sustainable Development Goals. United Nations (2015) *Resolution Adopted by the General Assembly on 25 September 2015, Transforming our World: The 2030 Agenda for Sustainable Development*, A/RES/70/1, para. 68.
- 4 These are reflected in the US Trump administration's America First policy as well as in the aftermath of the Brexit referendum in the UK, both calling into question the Western consensus on a liberal economic order. Larik, J. (2017) *The EU's Global Strategy in the age of Brexit and Trump*, Leuven, Center for Global Governance Studies, Working Paper 193, pp.4–5.
- 5 *Ibid.*, p.5.
- 6 *Shared Vision, Common Action: A Stronger Europe, A Global Strategy for the European Union's Foreign and Security Policy* (June 2016), p.17 [online] [https://eeas.europa.eu/archives/docs/top\\_stories/pdf/eugs\\_review\\_web.pdf](https://eeas.europa.eu/archives/docs/top_stories/pdf/eugs_review_web.pdf) (accessed 5 August 2018).
- 7 *Ibid.*, p.27. The *Global Strategy* builds on a series of EU policy documents recognising the need to ensure mutual supportiveness between TSD (e.g., Commission Communication *Towards a Global Partnership for Sustainable Development*, COM(2002) 82 final, Brussels, 13.2.2002, p.9; and in 2006, in the *Review of the EU Sustainable Development Strategy* COM(2005) 37 final, Brussels, 9.2.2005, p.19) and reflects the affirmation in the 2009 Lisbon Treaty of the promotion of sustainable development as a goal of the EU's external action

- (Article 2.5 and Article 10A of the *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community* (2007) OJ C306/1).
- 8 *The 2005 Review of the EU Sustainable Development Strategy: Initial Stocktaking and Future Orientations*, Communication from the Commission to the Council and the European Parliament COM(2005) 37 final, Brussels, 9.2.2005, p.19.
  - 9 Press Release *Trade for All: European Commission Presents New Trade and Investment Strategy*, 14 October 2015 [online] [http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc\\_153846.pdf](http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf) (accessed on 5 August 2018).  
For the full text of the strategy, see *Trade for All: Towards a more responsible trade and investment policy*, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM (2015) 497, Brussels, 14 October [online] [https://trade.ec.europa.eu/doclib/docs/2015/october/tradoc\\_153846.pdf](https://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf) (accessed 5 August 2018).
  - 10 At the first WTO Ministerial Conference in Singapore in 1996, WTO Members issued a Declaration affirming their commitment to internationally recognised labour standards, but that these should not be used for protectionist purposes, nor should the comparative advantage of low-wage countries be put into question. Members called for continued cooperation between the WTO and ILO. Similarly, at the 1999 WTO Ministerial Conference in Seattle, the US proposal to include a labour standards in the WTO was firmly rejected by several Members, and agreement was reached that the ILO is the competent organisation to deal with labour standards.
  - 11 The Doha Development Agenda, launched in 2001, mandates negotiations on the relationship between the WTO and multilateral environmental agreements; on an agreement liberalising trade in environmental goods and services, and on improvement of WTO disciplines on fisheries subsidies. WTO Ministerial Conference (2001) *Doha Ministerial Declaration*, WT/MIN(01)/DEC/1, 20 November 2001, para. 31. While some progress has been made, particularly with regard to fisheries subsidies, after 16 years these negotiations have still not reached a successful conclusion.
  - 12 Leal-Arcas, R (2015) 'Mega-regionals and sustainable development: the transatlantic trade and investment partnership and the trans-pacific partnership', *Renewable Energy Law & Policy Review*, Vol. 6, No. 4, pp.248–264, p.248.
  - 13 Meunier, S. and Nicolaïdis, K. (2006) 'The European Union as a conflicted trade power', *Journal of European Public Policy*, Vol. 13, No. 6, pp.906–925, p.907. See also Meunier, S and Nicolaïdis, K. (2011) 'The European Union as a Trade Power', in Christopher Hill and Michael Smith (Eds.): *International Relations and the European Union*, 2nd ed., Oxford University Press, Oxford, pp.275–98, p.294.
  - 14 *Global Europe: Competing in the World*, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions COM (2006) 567 (final), Brussels, 4.10.2006, p.9.
  - 15 The first EU FTA to contain a dedicated TSD chapter is the EU-South Korea FTA of 2010, OJ L 127, 14 June 2011. However, it should be noted that environmental and labour concerns were already integrated into separate dedicated chapters in the EU-CARIFORUM Economic Partnership Agreement, OJ L 289/I/3, 30 October 2008, Chapters 4 (Environment) and 5 (Social Aspects). The Comprehensive Economic and Trade Agreement (CETA), OJ L 11, 14 January 2017, between the EU and Canada, evinces a slightly different approach, with a TSD chapter (Chapter 21) containing a framework of institutional rules for the separate Trade and Labour and Trade and Environment chapters (Chapters 22 and 23 respectively). This approach is not followed in the subsequent FTAs with Vietnam and Japan, though, which contain a single TSD chapter.
  - 16 European Commission (2017) *Reflection Paper on Harnessing Globalisation*, COM(2017) 240, Brussels 10 April, p.21 [online] [https://ec.europa.eu/commission/sites/beta-political/files/reflection-paper-globalisation\\_en.pdf](https://ec.europa.eu/commission/sites/beta-political/files/reflection-paper-globalisation_en.pdf) (accessed 5 August 2018).

- 17 Pauwelyn argues that modern PTAs are increasingly providing 'global public goods' i.e., concessions in the form of good- governance-type obligations, such as those contained in TSD chapters in EU FTAs, that are non-rivalrous (use by one does not diminish availability to others) and non-excludable (available to everyone), as they tend to spill over or 'leak' to third countries. He identifies market forces and coercion of future FTA partners, among others, as mechanisms for the transition from FTA standards to global standards. See Pauwelyn, J. (2015) 'Taking the preferences out of preferential trade agreements: TTIP as a provider of public goods?', in Morin, J-F. et al. (Eds.): *The Politics of Transatlantic Trade Negotiations: TTIP in a Globalized World*, Ashgate, pp.187–196.
- 18 Marx, A. et al. (2015) 'Global governance through trade: an introduction', in Wouters, J. et al. (Eds.): *Global Governance Through Trade: EU Policies and Approaches*, Edward Elgar Publishing, Cheltenham, pp.1–18, pp.5–6.
- 19 *Next Steps for a Sustainable European fuTure – European Action for Sustainability*, European Commission Communication COM(2016) 739(final), Brussels, 22 November 2016 [online] <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1498641277121&uri=CELEX:52016DC0739> (accessed 5 August 2018).
- 20 *Trade and Sustainable Development (TSD) Chapters in EU Free Trade Agreements (FTAs)*, Non-Paper of the Commission Services, Brussels, 10 July 2017 (*Non-paper of 2017*), p.1 [online] [http://trade.ec.europa.eu/doclib/docs/2017/july/tradoc\\_155686.pdf](http://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155686.pdf) (accessed 5 August 2018).
- 21 *Non-paper of 2017*, p.2.
- 22 Bartels, L. (2013) 'Human rights and sustainable development obligations in EU free trade agreements', *Legal Issues of Economic Integration*, Vol. 40, pp.297–314, p.306; Orbie, J., Van den Putte, L. and Martens, D. (2017) 'The impact of labour rights commitments in EU trade agreements: the case of Peru', *Politics and Governance*, Vol. 5, No. 4, pp.6–18.
- 23 *Non-Paper of 2017*, pp.7–8.
- 24 *Non-Paper of 2017*. This was followed up in November 2017 by the Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on *Implementation of Free Trade Agreements 1 January 2016 to 31 December 2016*, COM/2017/0654 final (*FTA Implementation Report of 2016*) and the accompanying detailed Commission Staff Working Document entitled *Country Reports and Info Sheets on Implementation of EU Free Trade Agreements*, SWD(2017) 364 final, Brussels 9 November 2017 [online] <http://data.consilium.europa.eu/doc/document/ST-14111-2017-ADD-1/en/pdf> (accessed 5 August).
- 25 *Feedback and Way Forward on Improving the Implementation and Enforcement of Trade and Sustainable Development Chapters in EU Free Trade Agreements*, Non-paper of the Commission services, 26 February 2018 [online] [http://trade.ec.europa.eu/doclib/docs/2018/february/tradoc\\_156618.pdf](http://trade.ec.europa.eu/doclib/docs/2018/february/tradoc_156618.pdf) (accessed 5 August 2018). This was followed up in October 2018 by the Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on *Implementation of Free Trade Agreements 1 January 2017 to 31 December 2017*, COM/2018/0728/FINAL (*FTA Implementation Report of 2017*) [online] <https://publications.europa.eu/en/publication-detail/-/publication/ac38d35d-dcfa-11e8-afb3-01aa75ed71a1/language-en/format-PDF/source-search> (accessed 27 February 2019) and the accompanying detailed Commission Staff Working Document entitled *Individual Reports and Info Sheets on Implementation of EU Free Trade Agreements 1 January 2017 to 31 December 2017*, SWD(2018)454 final/2, Brussels 12 November 2018 [online] <https://publications.europa.eu/en/publication-detail/-/publication/267b933b-e68d-11e8-b690-01aa75ed71a1/language-en/format-PDF/source-search> (accessed 27 February 2019).
- 26 *Non-paper of 2018*, pp.2–3. For an interesting assessment of the proposals in this Non-paper see Harrison, J. et al. (2018a) 'Labour standards provisions in EU free trade agreements: reflections on the european commission's reform agenda', *World Trade Review*, pp.1–23, doi:10.1017/S1474745618000204.



- 27 This characterisation of the EU's approach to compliance was made in a 2016 report of the Swedish National Board of Trade, see Swedish National Board of Trade (2016) *Implementation and Enforcement of Sustainable Development Provisions in Free Trade Agreements – Options for Improvement*, p.13 [online] <http://www.kommers.se/In-English/Publications/2016/Implementation-and-enforcement-of-sustainable-development-provisions-in-free-trade-agreements-options-for-improvement/> (accessed 5 August 2018).
- 28 Von Stein, J. (2017) 'Compliance with international law', in *Oxford Research Encyclopedia of International Studies*, Oxford University Press, Oxford [online] <http://internationalstudies.oxfordre.com/view/10.1093/acrefore/9780190846626.001.0001/acrefore-9780190846626-e-81?print=pdf> (accessed 5 August 2018). See also Chayes, A and Chayes, A.H. (1995) *The New Sovereignty: Compliance with International Regulatory Agreements*, Harvard University Press, p.17, who argue that 'compliance is not an on-off phenomenon'.
- 29 While mechanisms incorporated in TSD chapters of EU's FTAs are available to promote compliance with TSD commitments by both parties to the agreement, thus also the EU (and its member states), this paper focuses on their effectiveness to promote compliance by EU's trading partners. This is in line with the premise of this paper that the EU uses its market power to govern through trade and promote global governance in the area of sustainable development in partner countries. It is this strategy that led to the incorporation of TSD chapters in EU FTAs. That said, the EU's compliance with ILO Conventions or MEAs is also not free of problems. Harrison et al. (2018a, p.12), supra note 26, note that "there is scant evidence that they have been operationalized in a way that considers labour issues within the EU. This raises questions about whether the EU's model is actually designed to be a two-way process of dialogue, or if it rather represents a form of 'sophisticated unilateralism' wherein more powerful states negotiate provisions that reflect their own unilateral agenda, embedding them within a formally reciprocal structure". There is however at least one example of an issue of labour standards raised by an EU trading partner. At the most recent meeting of the TSD Committee under the EU-South Korea FTA held in April 2018, Korea requested information about a pending case at the ILO Committee of Freedom of Association and a case of alleged forced labour of North Korean workers in Poland and the Commission admitted the existence of problems with compliance with ILO Conventions in some of its member states – *Summary of Discussions of the 6th Committee on Trade and Sustainable Development under the Korea-EU FTA*, Seoul, Republic of Korea, April 13 2018, p.3 [online] [http://trade.ec.europa.eu/doclib/docs/2018/july/tradoc\\_157105.PDF](http://trade.ec.europa.eu/doclib/docs/2018/july/tradoc_157105.PDF) (accessed 3 March 2019).
- 30 *Non-Paper of 2017*, p.8.
- 31 As noted by Von Stein, compliance implies more than just 'adherence to rules'. Instead 'attitudinal alignment is what we should care about', Von Stein, J. (2013) 'IL/IR symposium: the engines of compliance', in *Opinio Juris*, 19 September [online] <http://opiniojuris.org/2013/09/19/ilir-book-symposium-engines-compliance> (accessed 5 August 2018).
- 32 This approach builds on the assessment of Van den Putte of mechanisms for civil society participation in effecting compliance with the labour provisions of EU and US FTAs, against the conditions of institutionalisation, scope and accountability. Our article adapts this analysis by adjusting the criteria and applies it to the specific situation of TSD Chapters in EU FTAs. See Van den Putte, L. (2015) 'Involving civil society in the implementation of social provisions in trade agreements: comparing the US and EU approach in the case of South Korea', *Global Labour Journal*, Vol. 6, No. 2, pp.221–235.
- 33 EU-Central America FTA, Art. 285; EU-CARIFORUM FTA, Art 184.1.
- 34 EU-Central America FTA, Art 291. See also EU-CARIFORUM, Art. 188 (in respect of environmental protection) and Art. 193 (in respect of labour standards); and CETA, Art. 23.4 (in respect of labour standards) and Art. 24.5 (in respect of environmental protection).
- 35 EU-Vietnam FTA, Art. 13.2; EU-Central America FTA, Art 285(1).
- 36 Bartels notes that the non-derogation obligation is strong, but limited to where trade or investment is affected, whereas by contrast the best endeavour obligation to improve domestic environmental and labour standards is weak but broader in scope, not limited to situations where trade or investment is affected. Bartels, L. (2013, p.307), supra note 22.

- 37 *Non-Paper of 2017*, p.8.
- 38 Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), Right to Organise and Collective Bargaining Convention, 1949 (No. 98); Forced Labour Convention, 1930 (No. 29); Abolition of Forced Labour Convention, 1957(No. 105); Minimum Age Convention, 1973 (No. 138); Worst Forms of Child Labour Convention, 1999 (No. 182); Equal Remuneration Convention, 1951 (No. 100); Discrimination (Employment and Occupation) Convention, 1958 (No. 111).
- 39 These include for instance: Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES Convention); Minamata Convention on Mercury (Minamata Convention); Convention on Persistent Organic Pollutants (Stockholm Convention); Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (Rotterdam Convention); Convention on the Control of Transboundary Movements of Hazardous Wastes and their disposal (Basel Convention); Framework Convention on Climate Change (UNFCCC); Kyoto Protocol, The Paris Agreement; Convention on Biological Diversity (UN) (CBD) and its Protocol on Biosafety to the Biodiversity Convention (Cartagena Protocol), Protocol on Liability and Redress to the Cartagena Protocol on Biosafety (Nagoya – Kuala Lumpur Supplementary Protocol) and Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of the Benefits Arising from their Utilization to the Convention on Biological Diversity (Nagoya Protocol); Protocol to the Convention for the Protection of the Ozone Layer on Substances that deplete the Ozone Layer (Montreal Protocol).
- 40 CETA, Artt. 23.3 and 24.4(2).
- 41 *Non-Paper of 2017*, p.4.
- 42 EU-Georgia FTA, Artt. 233.2(c) and 234(f); EU-Central America FTA, Artt. 289 and 290; CETA Art. 24.10 and 24.11.
- 43 While a comprehensive analysis on the implementation (or lack thereof) of the TSD Chapters has not been undertaken, several studies have established the existence of a compliance gap, particularly in the area of labour standards, including through empirical examination of case studies, for example, Marx, A., Lein, B. and Brando, N. (2016) 'The protection of labour rights in trade agreements. The case of the EU-Colombia agreement', *Journal of World Trade*, Vol 50, No. 4, pp.587–610; Harrison, J., Barbu, M., Campling, L., Richardson, B. and Smith, A. (2018b) 'Governing labour standards through free trade agreements: limits of the european union's trade and sustainable development chapters', *Journal of Common Market Studies* [online] <https://doi.org/10.1111/jcms.12715> (accessed 26 June 2018); Orbiem et al. (2017), supra note 22; Vogt, J.S. (2015) 'The evolution of labor rights and trade – a transatlantic comparison and lessons for the transatlantic trade and investment partnership', *Journal of International Economic Law*, Vol. 18, No. 4, pp.855–858; Marx, A., Ebert, F., Hachez, N. and Wouters, J. (2017a) *Dispute Settlement in the Trade and Sustainable Development Chapters of EU Trade Agreements*, Leuven Centre for Global Governance Studies; Campling, L., Harrison, J., Richardson, B. and Smith, A. (2016) 'Working beyond the border? A new research agenda for the evaluation of labour standards EU trade agreements' *International Labour Review*, Vol. 155, No. 3, pp.357–382. In addition, the *FTA Implementation Reports and Country Reports of 2016 and 2017* (supra notes 24 and 25) refer to a number of areas where implementation challenges exist with respect to TSD commitments, although they report that progress is being made.
- 44 Marx et al. (2017b), *ibid.*; Marx, A., Ebert, F. and Hachez, N. (2017b) 'Dispute settlement for labour provisions in EU free trade agreements: rethinking current approaches', *Politics and Governance*, Vol. 5, No. 4, pp.49–59; Vogt (2015, p.859), supra note 43; Harrison et al. (2018a, p.11), supra note 26; Bartels (2013, p.312), supra note 22.
- 45 Swedish National Board of Trade (2016, p.22), supra note 27; Van den Putte (2015, p.223) supra note 32; ILO and International Institute of Labour Studies, *Social Dimensions of Free Trade Agreements*, Studies on Growth and Equity, 2013, revised 2015, p.57; Postnikov, E. and Bastiaens, I. (2014) 'Does dialogue work? The effectiveness of labour standards in EU preferential trade agreements', *Journal of European Public Policy*, Vol. 21, pp.923–940, pp.935–936; Orbie, J. et al. (2016) *Civil Society Meetings in European Union Trade*

- Agreements: Features, Purposes, and Evaluation*, Centre for the Law of EU External Relations, CLEERPaper 2016/3, p.11; Hradilová, K. and Svoboda, O. (2018) 'Sustainable development chapters in the EU free trade agreements: searching for effectiveness', *Journal of World Trade*, Vol. 52, No. 6, pp.1019–1042; BusinessEurope (2017) *Trade and Sustainable Development Chapters in EU FTAs*, Position Paper, pp.5–6 [online] [http://www.busseurope.eu/sites/buseur/files/media/position\\_papers/rex/2017-11-06\\_sustainability\\_and\\_ftas.pdf](http://www.busseurope.eu/sites/buseur/files/media/position_papers/rex/2017-11-06_sustainability_and_ftas.pdf) (accessed 25 February 2019); Manners, I. (2009) 'The social dimension of EU trade policies: reflections from a normative power perspective', *European Foreign Affairs Review*, Vol. 14, No. 4, pp.785–803, p.793.
- 46 Swedish National Board of Trade (2016, p.4), *supra* note 27.
- 47 Guzman, A.T. (2002) 'A compliance-based theory of international law', *California Law Review*, Vol. 90, No. 6, pp.1826–1887.
- 48 Chayes and Chayes (1995, pp.22–25), *supra* note 28.
- 49 For a case study identifying a lack of capacity to deal with sustainability challenges as a reason for non-compliance, see Marx, A. et al. (2017c) 'Strengthening labour rights provisions in bilateral trade agreements. The case of voluntary sustainability standards', *Global Policy*, Vol. 8, Supplement 3, pp.78–88.
- 50 Von Stein (2017), *supra* note 28.
- 51 Chayes and Chayes (1991, p.328), *supra* note 1.
- 52 *Ibid.*
- 53 Chayes, A. and Chayes, A.H. (1998) *The New Sovereignty: Compliance with International Regulatory Agreements*, Harvard University Press, p.17.
- 54 *Ibid.*, p.25.
- 55 Guzman (2002), p.1870, p.1886), *supra* note 47.
- 56 *Non-Paper of 2017*, p.9.
- 57 *Non-Paper of 2018*, p.2. One example is the position paper of BusinessEurope (p.3), *supra* note 45, which argues that 'an approach based on dialogue and a deep cooperation mechanism is the best suited for complex and intertwined issues such as labour rights and environmental protection, where sensitivity to context and flexibility are required to find intelligent solutions that are acceptable to all parties involved'.
- 58 *Non-Paper of 2018*, p.3.
- 59 *Ibid.*
- 60 This case concerned a complaint by the US against Guatemala for failure to enforce its labour laws in violation of the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR). The final report of the dispute settlement panel was delivered on 14 June 2017. See [https://www.trade.gov/industry/tas/Guatemala%20%20E2%80%9320Obligations%20Under%20Article%2016-2-1\(a\)%20of%20the%20CAFTA-DR%20%20June%2014%202017.pdf](https://www.trade.gov/industry/tas/Guatemala%20%20E2%80%9320Obligations%20Under%20Article%2016-2-1(a)%20of%20the%20CAFTA-DR%20%20June%2014%202017.pdf) (accessed 5 August 2018).
- 61 *Ibid.*, pp.432–444, pp.455–465, pp.488–491, pp.495–507 and pp.590–593.
- 62 Sagar, J.V. (2004) 'The labor and environment chapters of the United States-Chile free trade agreement: an improvement over the weak enforcement provisions of the NAFTA side agreements on labor and the environment?', *Arizona Journal of International & Comparative Law*, Vol. 21, No. 3, pp.913–949, p.948.
- 63 *Non-Paper of 2017*, p.8.
- 64 The EU temporarily suspended GSP+ preferences for Sri Lanka in 2010–2017. Preferences under the regular GSP scheme were also temporarily suspended for Belarus and Myanmar. See Report from the Commission to the European Parliament and the Council on the Generalised Scheme of Preferences covering the period 2016–2017, COM(2018) 36 final, Brussels, 19.1.2018 (GSP Report of 2018).

- 65 The Special Incentive Arrangement for Sustainable Development and Good Governance for vulnerable countries provided under the Generalised System of Preferences (GSP+ scheme), is contained in Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008, OJ L 303, 31.10.2012, pp.1–82.
- 66 The EU recognises that ‘GSP+ beneficiaries’ challenges to implementation are often underpinned by long-term and complex problems which cannot be solved overnight and which require major reforms and sustained government action over time’. It notes the capacity constraints that beneficiaries face and the importance. Consequently monitoring reports are ‘the result of two years of close collaboration between the beneficiaries and the EU during which shortcomings and remedial action have been extensively discussed,’ including with civil society organisations, and the Commission looks for ways to ‘support[] beneficiaries through expertise, technical assistance and specific projects on capacity-building’, See <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1783> (accessed 4 March 2019) and the GSP Report of 2018, supra note 64.
- 67 *Non-Paper of 2018*, p.2.
- 68 These three conditions are drawn from an insightful analysis by Van den Putte of mechanisms for civil society participation in labour provisions of FTAs. Van den Putte (2015, p.225), supra note 32.
- 69 Hovell, D. (2009) ‘The deliberative deficit: transparency, access to information and UN Sanctions’, in Farral, J. and Rubenstein, K. (Eds.): *Sanctions Accountability and Governance in a Globalized World*, p.92, 97Cambridge University Press, Cambridge.
- 70 Bianchi, A. (2013) ‘on power and illusion: the concept of transparency in international law’, in Bianchi, A. and Peters, A. (Eds.): *Transparency in International Law*, pp.1–20, p.7, Cambridge University Press, Cambridge.
- 71 Ibid.
- 72 Chayes and Chayes (1991, p.321), supra note 1.
- 73 For this definition of institutionalisation and its two components, see ibid p.225.
- 74 an den Putte (2015, p.225), supra note 32.
- 75 bid; andOrbie et al. (2016, pp.45–46), supra note 45.
- 76 Insausti Muguruza, M. (2002) *Civil Society and Trade Diplomacy in the ‘Global Age’: The European Case: Trade Policy Dialogue between Civil Society and the European Commission*, Inter-American Development Bank, Document for the Fourth Meeting of the Trade and Integration Network, p.14 [online] <https://publications.iadb.org/handle/11319/5717?locale-attribute=en> (accessed 5 August 2018).
- 77 Supra notes 24 and 25.
- 78 For example, very useful information is contained in Van den Putte (2015), supra note 32; Orbie et al. (2016), supra note 45; Postnikov and Bastiaens (2014, pp.923–940), supra note 45; and ILO and International Institute of Labour Studies, (2013, revised 2015) supra note 45.
- 79 *Non-Paper of 2017*, p.3.
- 80 Ibid.
- 81 Postnikov and Bastiaens (2014, p.925), supra note 45. See also Manners, I. (2002) ‘Normative power Europe: a contradiction in terms?’, *Journal of Common Market Studies*, Vol. 40, No. 2, pp.235–58.
- 82 *Non-Paper of 2017*, p.3.
- 83 This approach was also put forward by the Commission in the (now stalled) TTIP negotiations with the US. *EU-US Transatlantic Trade and Investment Partnership: Trade and Sustainable Development: Initial EU Position Paper*, European Commission, p.4 [online] [http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc\\_151626.pdf](http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151626.pdf) (accessed 5 August 2018).

- 84 See for example, the EU-South Korea FTA, Art. 13.12(1) and the EU-Central America FTA, Art. 294(1). Under CETA, separate contact points are envisaged for matters covered by Chapter 23 (Trade and Labour) and by Chapter 24 (Trade and Environment), under Art. 23.8(1) and 24.13(1), respectively.
- 85 EU-Georgia FTA, Art. 240(1) and CETA, Art. 23.8(1). Unlike CETA, most FTAs do not provide for a list of tasks of contact points, although some specific tasks (such as a receipt of other party's requests or submissions) are mentioned in provisions concerning other matters, such as government consultations.
- 86 Section 3.
- 87 Typically, the provision setting up a contact point reads as follows: 'Each party shall designate an office within its administration that shall serve as the contact point with the other Party for the purposes of the implementation of this Chapter',- EU-Moldova FTA, Art. 376(1).
- 88 There is some diversity in the name of this intergovernmental organ under the FTAs concerned, including 'Specialized Committee on TSD', 'TSD Sub-committee' and 'Board on TSD'. For simplicity reasons this paper will use the term 'TSD Committee' for all these organs.
- 89 Gruni, G. (2017) 'Labour standards in the EU-South Korea free trade agreement: pushing labour standards into global trade law?', *Korean Journal of International and Comparative Law*, Vol. 5, No. 1, pp.100–121.
- 90 EU-Vietnam FTA, Art. 13.13; EU-Singapore FTA, Art. 13.14.
- 91 *Non-Paper of 2017*, p.5.
- 92 *FTA Implementation Report*, p.27. Here the gradual progress on the implementation of the TSD Chapters is reported to have provided 'valuable ground for regular and focused dialogues with FTA partners on pertinent trade-related labour and environmental issues and for the initial identification of TSD priorities and opportunities'.
- 93 Unlike e.g., CETA, these three FTAs have been in force in 2016 and thus included in the Commission's reports.
- 94 *Non-Paper of 2017*, p.4. The Commission mentions the following examples of joint projects: a comparative study under ILO Convention 111 on non-discrimination in the work place in the EU and Korea; ILO projects in El Salvador and Guatemala focusing on fundamental conventions on freedom of association, collective bargaining and non-discrimination; a dialogue with Colombia regarding implementation of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES); projects in the field of Corporate Social Responsibility involving also the ILO and the OECD in Asia and Latin America. See also *FTA Implementation Report*, p.27 which states that a major advantage of this system is that it has led to broad support from FTA partners for the EU's ambitious TSD agenda.
- 95 *2016 FTA Implementation Report*, p.27. The report notes that among the issues discussed were labour inspection (Colombia, Peru, Honduras, Moldova, Georgia), collective bargaining (Colombia, Guatemala), violence against trade unions (Colombia), freedom of association (El Salvador, Panama), child labour (Colombia, El Salvador, Guatemala, Panama, Georgia), tripartite consultation (Georgia), and health and safety at work (Colombia, Peru, Moldova). The environmental issues discussed focused on issues under the CITES convention and climate change mitigation. Ibid. pp.27–28.
- 96 Country Reports and Info Sheets of 2017, p.29, p.50, p.68, p.80, p.95 and p.110.
- 97 As FTA Implementation Report of 2018 is not yet available, see information on the Commission website available for example at [online] <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1870>; [http://trade.ec.europa.eu/doclib/docs/2018/september/tradoc\\_157409.pdf](http://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157409.pdf) (accessed 3 March 2019).
- 98 See for example *Country Reports and Info Sheets of 2016*, with regard to the TSD Committee meetings with Georgia, Moldova and Ukraine, p.10, p.24 and p.41 respectively.

- 99 For example, the Commission notes that extensive but as-yet unsuccessful discussions were held with by the TSD Committee under the EU-South Korea FTA regarding ratification and implementation of ILO conventions and protection of labour rights by Korea. *2016 FTA Implementation Report*, p.12 and 2017 Country Report and Info Sheets, pp.29–30.
- 100 Van den Putte (2015, p.229), *supra* note 32; and Orbie et al (2017, p.15), *supra* note 22.
- 101 For example, Vogt notes that The European Commission's report on the implementation of the EU-Colombia-Peru FTA contains only cursory information, stating only that it had received information on six issues, but providing none of the information received and conducting no evaluation of any of that information. Vogt (2015, p.855), *supra* note 43.
- 102 These are EU-Singapore FTA, Art. 13.15(4); EU-Vietnam FTA, Art. 13.15(5); and CETA, Art. 22.4(3).
- 103 CETA, Art. 22.4(3). Interestingly, no such provision is present in the EU-Japan FTA.
- 104 EU-Central America FTA, Art. 294(3).
- 105 These are discussed in Section 4.2 below.
- 106 *Trade for All: Towards a more responsible trade and investment policy*, *supra* note 9.
- 107 European Economic and Social Committee (2019) *The role of Domestic Advisory Groups in Monitoring the Implementation of Free Trade Agreements*, REX 510, para. 1.3 [online] <https://www.eesc.europa.eu/en/our-work/opinions-information-reports/opinions/role-domestic-advisory-groups-monitoring-implementation-free-trade-agreements> (accessed 25 February 2019).
- 108 International Labour Office (2016) *Assessment of Labour Provisions in Trade and Investment Arrangements*, p.8 [online] [http://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms\\_498944.pdf](http://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_498944.pdf) (accessed 5 August 2018), pp.130–155. For example, in the context of the side agreements in US FTAs on labour cooperation and environmental protection, the US has established civil society advisory bodies for all US FTAs. See Van den Putte (2015), *supra* note 32.
- 109 EU-South Korea FTA, Art. 13.12(5). Note that in its *Non-Paper of 2018*, the Commission announced its decision to extend the substantive scope of DAGs' competence to sustainability implications of other parts of FTAs, such as technical barriers to trade or sanitary and phyto-sanitary measures, in its future FTAs, starting with that under negotiation with Mexico and MERCOSUR, p.8.
- 110 EU-Central America FTA, Art. 294.4.
- 111 EU-Vietnam FTA, Art. 13.15(4) or CETA, Artt. 23.8(4) and 24.13(5).
- 112 In the EU-South Korea FTA, Art. 13.12(4), parties are obliged to establish a new DAG. In later FTAs, parties have the choice to create a new DAG or to consult existing labour and environmental groups. In the EU-Central America FTA, there is an additional provision (in footnote) that if existing groups are used, these should be offered 'the opportunity to reinforce and develop their activities with the new perspectives and areas of work' provided in the TSD chapter. In some FTAs, these organs are referred to as 'Advisory Groups' e.g., Art. 294.4 of the EU-Central America FTA. Note that in case of the EU-CARIFORUM FTA, the dialogue with civil society takes place in the CARIFORUM - EC Consultative Committee (Art. 195.2), the institution for civil society participation created for the agreement as a whole and mandated to deal with all economic, social and environmental aspects of the relations between the EU and CARIFORUM parties (Art. 232).
- 113 Orbie et al. (2016), *supra* note 45.
- 114 *Non-paper of 2018*, p.5 and EESC Opinion of 2019, *supra* note 107, para 4.4.
- 115 Surprisingly, the EU-Colombia, Peru and Ecuador FTA does not require that the members of the DAGs be 'independent', which is problematic in view of the fact that the main mechanism for social dialogue in Peru is the National Council on Work and Employment, which is chaired by the Minister of Labour. Orbie et al. (2016, p.16), *supra* note 45, footnote 23. See also Orbie et al. (2017, p.13), *supra* note 22.

- 116 In the EU-Central America FTA, Art.294(5), not only independent civil society organisations but also regional authorities may be represented in the DAGs.
- 117 The EU-Vietnam FTA, Art. 13.15(4), explicitly states that each Party shall decide on its domestic procedures for the establishment of its domestic advisory group(s) and appoint the members.
- 118 The EU DAGs usually have up to 15 members (including three members of the European Economic and Social Committee (EESC) and a maximum of 12 representatives of non-EESC civil society organisations). Other organisations may become observers or can share the seat with one of the DAGs members.
- 119 The EESC Opinion of 2019 (supra note 107, paras 1.9 and 4.2) has stressed this concern. Orbie et al report that in Costa Rica, the government composed the list of participants of the DAGs. Orbie et al. (2016, p.19), supra note 45. Similar problems have been reported regarding the composition of the DAGs in Peru and South Korea [see Orbie et al. (2017, pp.13–14), supra note 22, (2016, p.19), supra note 45.
- 120 Orbie et al. (2016, p.19), supra note 45. It is also reported that the composition of the Korean DAG has been criticised because most of its members were supportive of the government, in particular Korean professors who are or have been affiliated with the Korean government. Van den Putte (2015, p.229), supra note 32.
- 121 Ibid.
- 122 Orbie et al. (2016, pp.20–22), supra note 45. See also *Non-paper of 2017* and *Non-paper of 2018*, in both instances p.5, and the EESC Opinion of 2019, supra note 107, paras 4.5–4.13.
- 123 This is the most often used term, though variations exist, just as with the TSD Committee and DAGs. For example, under the FTA with Japan, this forum is referred to as ‘Joint Dialogue’ (draft Art. 15). The Forum is not provided for in the EU-South Korea FTA, it only started to be included in FTAs concluded by the EU with the EU-Central America FTA (Art. 295). Interestingly, no such forum is envisaged under the relatively recent EU-Singapore FTA. Under the EU-Vietnam FTAs, this joint gathering is formally referred to as ‘the joint forum’ and it only comprises DAGs of both parties, whereas ‘other stakeholders’ (i.e., including civil society) may only be involved by joined agreement (Art. 13.15(5)).
- 124 EU-Central America FTA, Art 25.2. In the case of the EU–South Korea FTA, this dialogue between the domestic advisory groups reportedly increased awareness, helped to identify areas for further work with respect to labour rights, and initiated discussions on development cooperation projects. International Labour Office (2016), supra note 108.
- 125 Van den Putte (2015, p.225), supra note 32.
- 126 International Labour Office (2016, p.125), supra note 108.
- 127 In the Commission’s *Non-paper of 2018*, ‘time-bound response to TSD submissions’ is listed as action 15. - p.12. However, while in the introductory sentence a reference is made to submissions received from stakeholders, it is clear from the subsequent text that this action relates to citizens’ submissions, not specifically to submissions by the institutionalised civil society TSD bodies. Moreover, the action relates to the Commission’s unilateral commitment to respond to citizens queries and does not to the joint government-to-government TSD Committees.
- 128 *Non-Paper of 2017*, p.5.
- 129 Orbie et al. (2016, pp.46–48), supra note 45.
- 130 *Non-Paper of 2017*, p.5.
- 131 Van den Putte (2015, p.223), supra note 32. The concern regarding the significant flexibility of the institutional arrangements is reiterated in Orbie et al. (2017, p.9), supra note 22, with specific reference to the EU-Colombia-Peru FTA, which does not require parties to establish a new DAG, nor that DAG members be independent and gives parties much leeway regarding the organisation of meetings (Art. 281).

- 132 Interestingly, under the EU-CARIFORUM FTA, the last FTA concluded by the EU without a fully-fledged TSD chapter, the regular DSM applies also to the sustainability provisions in chapters on Environment and Social Aspects, except that suspension of concessions is not available as a remedy for non-compliance. It is clear that once a decision was made to include a TSD chapter in EU FTAs, it was done with the understanding that, given the distinctive nature of such chapter, a special enforcement mechanism was necessary.
- 133 Swedish National Board of Trade (2016, p.13), *supra* note 27.
- 134 Under CETA, the parties are also permitted to have recourse to informal dispute settlement mechanisms like good offices, conciliation or mediation in order to resolve their dispute in a mutually acceptable manner. CETA, Artt. 23.11(2) and 24.16(2).
- 135 In the US, the US Department of Labor (USDOL) reviews submissions filed and issues a report recommending formal consultations. In Canada, such review and decision are taken by the National Administration Office (NAO). – International Labour Office (2016, p.45, p.49), *supra* note 108.
- 136 Criticism has been expressed about the reluctance of the EU Commission to react to complaints against Korea that were brought to its attention by the relevant DAG. Van den Putte (2015, p.229), *supra* note 32. See also the International Labour Office (2016, p.147), *supra* note 108.
- 137 See for example Marx et al. (2017a, pp.49–59), *supra* note 43.
- 138 EU-Central America FTA, Art. 296(1).
- 139 EU-Georgia FTA, Art. 243(4) and (5).
- 140 EU-South Korea FTA, Art. 13.14.
- 141 For example, under EU-Moldova FTA Art. 379(1), this period is 90 days.
- 142 EU-South Korea FTA, Art. 13.15. Note that under the EU-Colombia, Peru and Ecuador FTA (Art. 284) and the EU-Ukraine FTA (Art. 301), this body is referred to as ‘Group of Experts’.
- 143 Members of this Panel are selected by the FTA parties, usually from pre-established list of persons with specific expertise in the areas of environment and labour standards, thus facilitating their assessment of matters under the TSD chapters.
- 144 The EU-South Korea FTA, Art. 13.15(1). *Amicus curiae* submissions are allowed in the FTAs concluded with Colombia, Peru and Ecuador (Art. 284.5), Georgia (Art. 243.6), Moldova (Art. 379.6), Singapore (Art.13.17.7) and Canada (Art. 23.10(10) and footnote to Article 24.15(9) referring to Rule 42 of Annex 29 – A on Arbitration).
- 145 CETA (Art. 23.10(11)) explicitly requires the Panel of Experts to include in its findings the determinations of (in)consistency of the responding FTA party’s actions with its obligations under the TSD chapter. Such determination is implicitly expected in all reports issued by Panels of Experts under TSD chapters.
- 146 Reports must include the basic rationale for the Panel’s findings (EU-Singapore FTA, Art. 13.17(8)).
- 147 Under more recent FTAs (e.g., EU-South Korea FTA, Art. 13.15(2)), certain provisions applicable to the regular dispute settlement system are even explicitly said to apply *mutatis mutandis* to the proceedings before the Panel of Experts acting under the TSD chapters, including the rules of procedures and the code of conduct of arbitrators.
- 148 EU-Georgia FTA, Art. 243(4) and (5). In earlier FTAs with TSD chapters, only the protection of confidential information was subject to the provisions developed for the regular dispute settlement under that FTA (EU-South Korea FTA, Art. 13.15(2)).
- 149 CETA, Artt. 23.10(12) and 24.15(12). Under FTAs concluded before CETA, it is the responsibility of the responding FTA party to present an action plan, but the discussion with the other FTA party / parties about appropriate measures to be taken is included in the FTA concluded with Central America and all subsequent FTAs, with the notable exception of the FTA with Ukraine.
- 150 EU-Central America FTA, Art. 301(3).



- 151 Under the regular DSM, Joint (or Trade Committees) are merely kept informed of all steps in proceedings, including implementation, and not required to monitor implementation of Panel reports. See e.g., EU-South Korea FTA, Chapter Fourteen.
- 152 E.g., EU-Georgia FTA, Art. 243(8) and EU-Central America Art. 301.
- 153 E.g., EU-South Korea FTA, Art. 13.12(3). Under the EU-Ukraine FTA (Art. 300(1)), the TSD Sub-committee is explicitly required to meet 'at least once a year'.
- 154 Hillman, J. (2017) 'Enforceability of trade and investment rules that support sustainability: the case of dispute settlement', Presented at *Trade and Sustainable Development Symposium*, 11–13 December 2017, Buenos Aires [online] <http://tsds.ictsd.org/agenda/rta-exchange> (accessed 5 August 2018).
- 155 EESC Opinion of 2019, supra note 107, para. 3.7.
- 156 EU-Georgia FTA, Art. 243(8). Such opportunity is however not granted to other stakeholders, not represented in DAGs, or the general public.
- 157 EU-South Korea FTA, Art. 13.14(3). Under some FTAs, the TSD Committee may decide not to publish its decision. The unqualified publication of the report is mandated under the FTAs concluded with Central America (Art. 301(1)), Georgia (Art. 243(7)), Moldova (Art. 379(7)), Canada (Arts. 23.10(11) and 24.15(10)) and Japan (Art. 17(5)). Under the EU-South Korea FTA but also relatively recent EU-Ukraine FTA, the report is only to be communicated to the DAGs, not to the public as such (Art. 301(2) and 13.15(2), respectively). Under the EU-Colombia, Peru and Ecuador FTA, only a non-confidential version of the final report is to be published (Art.285(2)). Lastly, under the FTAs with Singapore (Art. 13.17(8)) and Vietnam (Chapter 15, Art. 17(8)), while publication of the report is envisaged in principle, the parties may decide not to do so.
- 158 For example, Bartels, L. (2013, p.306), supra note 22. See also Commission's *Non-paper of 2017*, p.5.
- 159 *Non-paper of 2018*, pp.7–8.
- 160 Republic of Korea – compliance with obligations under Chapter 13 of the EU – Korea Free Trade Agreement: Request for Consultations by the European Union, 17 December 2018, TRADOC 157586.
- 161 Letter by Commissioner Cecilia Malmstrom to Minister Rogers Valencia [online] <http://ec.europa.eu/carol/index.cfm?fuseaction=download&documentId=090166e5bc8e0c93&title=letter.pdf> (accessed on 25 February 2019). The letter identifies a list of concrete points regarding which Peru is expected to submit an action plan. In the absence of sufficient progress, the letter indicates that the EU will consider using existing mechanisms, including the enforcement procedure, under the TSD chapter.
- 162 Vogt (2015), supra note 43; Marx et al. (2017c), supra note 49; Xu, J. (2016) *The Role of Civil Society in EU Preferential Trade Agreements*, ESIL Conference Paper Series No. 17/2016, pp.1–18.
- 163 *Non-Paper of 2017*, pp.7–9.
- 164 *Non-paper of 2018*, pp.2–3. The envisaged actions are divided into four categories:
  - a working together
  - b enabling civil society including the social partners to play a greater role in implementation
  - c delivering
  - d transparency and communication.
- 165 *Non-Paper of 2018*, p.1.
- 166 *Non-Paper of 2017*, p.8.
- 167 Postnikov and Bastiaens (2014, p.929), supra note 45.
- 168 Vogt (2015, p.855), supra note 43.
- 169 See the discussion on these bodies in Section 4.2.
- 170 *Non-paper of 2018*, p.5; EESC Opinion of 2019, supra note 107, para. 1.14.

171 *Non-Paper of 2018*, p.11.

172 *Ibid.*

173 It should be noted that EU Commission's website on trade and sustainable development still leaves much to be desired. It provides basic information on relevant EU policies and links to FTAs containing TSD Chapters and many related documents but without user-friendly tools to find a specific document, such as an agenda or minutes of meetings of one of the bodies established by these TSD Chapters. See <http://ec.europa.eu/trade/policy/policy-making/sustainable-development/> (accessed 3 March 2019).

174 EESC Opinion of 2019, *supra* note 107, para. 4.11.

175 Guzman (2002, p.1886), *supra* note 47.

176 The EESC Opinion of 2019 (*supra* note 107, para. 4.13) proposes that the text of TSD chapters 'should explicitly provide for the commitment to adequately finance and politically and logistically support the envisaged civil society bodies, also by the counterpart governments'.

177 Van den Putte (2015, p.225), *supra* note 32.

178 International Labour Office (2016, p.153), *supra* note 108.

179 Marx et al. (2017c, pp.49–59), *supra* note 49.

180 In the EU, while there are guidelines for stakeholder consultations in the Commission Communication *Trade for All: towards more responsible trade and investment policy* of 2015, it has been noted that in practice feedback provided to stakeholders is too general, not providing civil society with information sufficient to determine the outcome of their submissions. - International Labour Office (2016, p.138), *supra* note 108. For criticism on the lack of a formal complaints mechanism, see also Marx et al. (2017c, pp.49–59), *supra* note 49.

181 *Non-Paper of 2017*, p.6.

182 The *2017 Implementation Report* (*supra* note 24, p.39) reports that the stronger EU engagement with its trading partners with respect to compliance with TSD chapters 'is starting to deliver results', although progress in implementation 'proceeds at different speeds reflecting the nature of the challenges faced by each partner'.

183 Montoute, A. (2011) *Civil Society Participation in EPA Implementation*, European Centre for Development Policy Management, Discussion Paper 119, pp.1–8; and Xu (2016, p.3), *supra* note 162.

184 The European Code of Good Administrative Behaviour is to guide EU institutions and their officials towards greater effectiveness, transparency and accountability vis-à-vis EU citizens. While endorsed by the European Parliament, it is not a legally binding document; rather a reference point for the European Ombudsman when dealing with complaints of maladministration filed against EU institutions. See the website of the European Ombudsman [online] <https://www.ombudsman.europa.eu/nl/publication/en/3510> (accessed on 5 August 2018).

185 In particular, the Commission indicates that it will acknowledge receipt of a complaint within 15 working days, indicating the Commission services responsible for dealing with the matter and providing an opportunity to submit additional information. Within two months of receipt of the complaint the Commission will respond, with information on any follow up that has occurred and the justification for the action taken. If more time is needed (e.g., because of the complexity of the matter), the complainant will be informed within the time limit, with an indication of the extra time needed. *Non-Paper of 2018*, p.12. This proposal has been welcomed by the EESC Opinion of 2019, *supra* note 107, para. 1.14.

186 BusinessEurope (p.6), *supra* note 45, calls for a 'streamlined complaint mechanism' with clear timelines and institutional arrangements. In addition, interesting proposals have been made by others for developing detailed institutional arrangements for claims of non-compliance with TSD chapters to be brought and assessed on national level. See for example Shaffer, G.C. (2019) *Retooling Trade Agreements for Social Inclusion*, UC Irvine School of Law Research Paper No. 2019-54, pp.137–143; and Bronkers, M. and Gruni, G. (2018) 'Improving the enforcement of labour standards in the EU's free trade agreements', in Prévost, D., Alexovičová, I. and Hillebrand Pohl, J. (Eds.): *Restoring Trust in Trade: Liber Amicorum in*

*Honour of Peter Van den Bossche*, pp.158–167, Hart Publishing, Oxford. Shaffer proposes the incorporation of ‘strict procedural, substantive, and injury requirements’ for a national investigation procedure based on the current WTO anti-dumping regime, for assessing labour rights violations under FTAs. Bronkers and Gruni propose a private complaints procedure with detailed procedural rules, modeled on the EU’s Trade Barrier Regulation. In both cases, however, unlike this article, the proposals incorporate penalties to sanction non-compliance with labour provisions in the form of tariff increases (Shaffer) or fines and trade sanctions (Bronkers and Gruni).

187 For such proposals see Marx et al. (2017a, *supra* note 43, p.80). *Contra* see BusinessEurope (p.6), *supra* note 45.

188 Sagar (2004, p.948), *supra* note 62.

189 Marx et al. (2017c, p.56), *supra* note 49.