



**Call for Papers "Geopolitics & Values: what
is the real power of the EU?"**

**OPERATIONALIZING TRADE AND SUSTAINABLE DEVELOPMENT CHAPTERS OF
EU TRADE AGREEMENTS**

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EXECUTIVE SUMMARY

Following the introduction of sustainable development chapters in European Union (EU) free trade agreements (FTAs) over a decade ago, questions linger about their efficacy. While they are certainly clear statements of the EU's aspirational standards in the fields of labour rights, environmental standards and human rights, there are concerns that they are not effective in certain instances. Further, there is no mechanism to ensure that these standards are respected within the free trade agreement. I argue that the forthcoming EU-Mercosur Trade Agreement puts an acute focus on the need to improve the actionability of sustainable development chapters of EU trade agreements. I propose two solutions. First, the EU should strengthen the way it engages on *ex-ante* provisions by agreeing implementation plans, with clear oversight mechanisms. Second, the EU should allow the dispute resolution mechanism to apply to sustainable development chapters, in a limited fashion.

Short bio

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List of Abbreviations

CETA Comprehensive Economic and Trade Agreement

CO₂ Carbon Dioxide

EU European Union

FTA Free Trade Agreement

ILO International Labour Organisation

NDCs Nationally Determined Contributions of the Paris Climate Treaty

TSD Trade and Sustainable Development

UK United Kingdom



2 Introduction

European Union (EU) trade policy has come under increasing scrutiny in recent years. Trade agreements no longer just about making trade easier between the EU and its partner countries. Nowadays, trade agreements are concerned with ensuring that when trade barriers are lower, EU domestic industries are protected from lower standard goods and services and that partner countries raise their labour, human rights, and environmental standards to those of EU countries.

The EU's trade policy has developed over time to incorporate these standards. Trade and sustainable development (TSD) chapters have been a part of EU trade agreements since 2009. In 2017, the EU Commission launched its *Trade-For-All* policy which has further developed the operation of sustainable development standards in EU trade agreements.

The focus of this research paper is the operation of TSD chapters rather than the substantive aims of the chapters. Specifically, consideration is given to current concerns that these TSD chapters are not enforceable once the trade agreement enters into force and how such concerns could be addressed.

Such consideration is centrally concerned with how the EU can use its economic strength to ensure its values are upheld in its trade relationships and to make recommendations in this regard. The recommendations offered by this paper are two-fold: first, the EU should strengthen the way it engages on *ex-ante* provisions and second, the EU should allow the dispute resolution mechanism to apply to TSD chapters.

3 Current position of TSD chapters

Trade and sustainable development chapters are wide-ranging in their concerns. Most relevant for this paper is the requirement to ratify and abide by a number of international agreements on labour and the environment.

The central problem is that there are no enforcement provisions. While a party can raise issues in regard to the implementation of TSD chapters, the process is exempt from the dispute resolution mechanism that applies to the rest of the trade agreement. Whereas the dispute resolution mechanism is binding on the parties, in TSD chapters the process is that the parties to the agreement consult. If the matter is not settled at this stage, the parties defer to experts who prepare a report for publication.¹

Thus, the EU does not have the ability either to sanction or withdraw the benefits of trade agreements if elements of the TSD Chapter are breached. As a result, the material components of TSD chapters operate primarily through *ex-ante* conditions that require parties to agree to ratify

¹ See, for example, Art. 15-18 Trade and Sustainable Development Chapter, Agreement in principle EU-Mercosur Trade Agreement. In particular, Art. 15 (5) "No Party shall have recourse to dispute settlement under Title VIII (Dispute Settlement) for any matter arising under this Chapter"



certain international agreements, such as, the Paris Climate Treaty and the ILO Core Labour Standards. (European Parliament, 2018, pg. 24) Once an agreement is in force, the only tools available to the EU to attain compliance is through diplomatic and public pressure.

So, where does the EU Commission stand on the matter of enforcing TSD Chapters? In October 2020, the then candidate for the Trade Commissioner position, Valdis Dombrovskis, gave the following response to a written question from the European Parliament's Trade Committee:

I will continue to pursue ambitious trade and sustainable development chapters with binding commitments on labour and the environment. I will make the fullest use possible of the various mechanisms and opportunities afforded by our bilateral agreements to enhance cooperation to ensure the respect of sustainability standards both in the EU and in partner countries.

The Trade Commissioner's response seems *prima facie* substantive, but in reality, it reflects a continuation of the EU's policy. A non-paper by the Commission services in 2017, presented the ways the EU would increase engagement with trade partners in order to improve the implementation of TSD Chapters (Commission Services, 2017). In 2018, the Commission published a second non-paper in response to feedback on its 2017 publication. It noted that while there were calls for a sanctions-based model, owing to lack of consensus it could not proceed. (Commission Services, 2018)

The EU TSD chapters are significantly weaker than what the European Parliament and civil society groups have called for. (European Parliament Research Service, 2017, pg. 2-3). As Lowe notes, the Commission has continued to resist calls for a sanctions-based model. (Lowe, 2019) In the 2018 non-paper, the Commission lists a number of practical reasons regarding why an enforcement mechanism would not be suitable. I will address these concerns in Section 4.2.

There are indications that the current approach to TSD is longer sufficient. A 2020 joint non-paper from the Netherlands and France presents a set of actions the EU should take to ensure that its trade is sustainable. The paper focuses on a number of measures, however for the purpose of bilateral trade agreements, it states trade partners should be a party to, and live up to, the Paris Treaty, including Nationally Determined Contributions (NDCs). (Netherlands and France, 2020)

In regards to the demands that EU states now have of trade, it has been recognised in the EU-United Kingdom (UK) trade negotiations that maintaining a regulatory level-playing field is crucial to allowing the UK to access the single market. (European Commission, 2020) The EU has proposed several mechanisms so that the UK will not be able to access the single market without maintaining "dynamic alignment" with EU regulations. (Giles, Beattie and Brunsdan, 2020)

Moreover, there are real concerns around whether the EU-Mercosur Agreement will support sustainable trade and, in particular, whether Brazil is fully complying with its Paris Treaty obligations in good faith. *The Irish Times* reported in October 2020 that Irish Tánaiste, Leo Varadkar referred to growing scepticism among governments, specifically Mr Varadkar



questioned “whether we can approve and ratify and implement Mercosur when Brazil was not fully honouring its obligations under the Paris climate agreement”(O’Sullivan, 2020).

Similarly, Kehoe and others, have argued that the agreement will not deliver sustainable economic development and is in contradiction with stated goals of the European Green Deal (Kehoe & others, 2020, pg. 272). In fact, when looking at the emissions projections of two Mercosur members (Brazil and Argentina), it is clear that their emissions are likely to rise slightly over the next ten years.

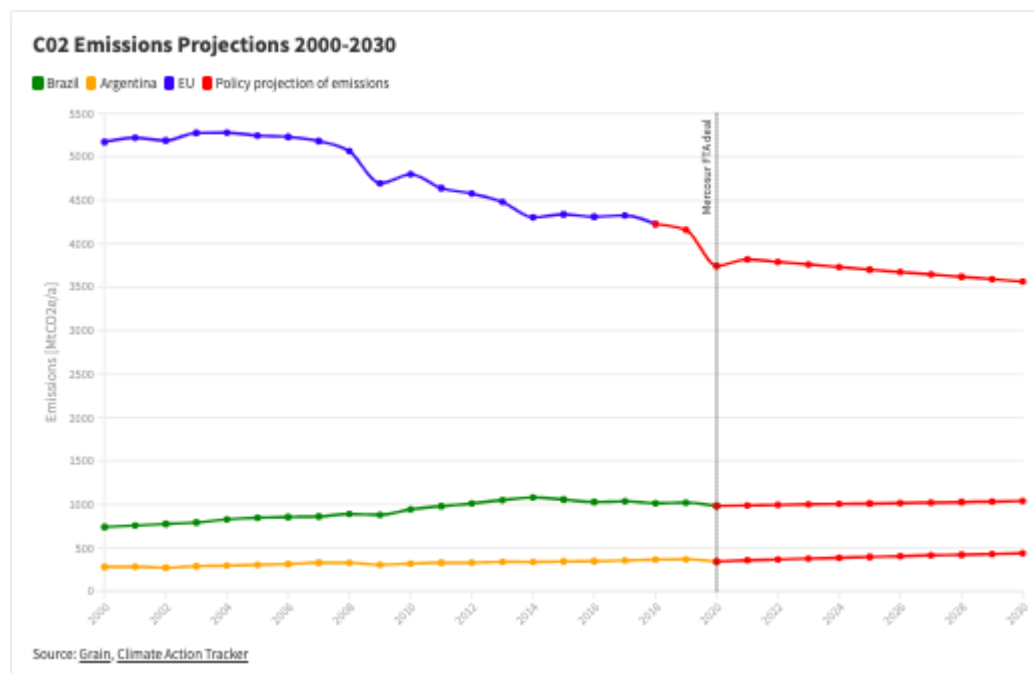


Fig. 1 - CO2 Emissions Projections 2000-2030 – source: Climate Action Tracker

Finally, although the calculation of CO2 is often done on the basis of production, there is ample evidence that a consumption-based account of CO2 emissions show that emissions are produced in emerging economies in their supply to rich economies. (European Parliament, 2020, pg. 53) As such, the environmental aspects of TSD chapters are a mechanism for mitigating the negative externality of increased CO2 production that is likely when the EU increasing trade with emerging economies.

4 Strengthening TSD chapters

This paper considers two ways of strengthening TSD chapters, first, by changing the nature of *ex-ante* conditions. Second, through developing a limited enforcement mechanism.

4.1 *Ex-ante* conditions

Ex-ante conditions in trade agreements require both parties to carry out actions before the trade agreement will be final. This involves ratifying certain international agreements on labour, the



environment, and human rights. Ratifying the agreements is not the issue, rather it is their implementation.

The EU states that these agreements are given effect through engagement with the EU's partner countries; the EU takes a hands off approach. It aims to work with civil society groups based in partner countries and the partner countries themselves rather than engage in any direct policy formulation itself.

If it is clear that there is a problem, then what is the solution? The Commission stated in its 2017 non-paper that it will conduct further annual reviews of the implementation of FTAs, as well as support EU social partners and civil society partners in partner countries. (Commission Services, 2018) However, while conducting reviews of the already concluded FTAs is a welcome step, such reviews will necessarily be based on the broad terms those international agreements are drafted in. A solution in this regard, would be for the EU to have specific *ex-ante* targets in relation to the TSD chapters. These targets would still largely be based on international agreements, it would just require the added step of making certain commitments to the implementation of these plans as well as clear mechanisms to ensure implementation of these commitments.

For instance, in the case of the EU-Mercosur deal where Brazil's commitment to the Paris Climate Treaty is a concern, including a plan for Brazil to achieve its NDCs under that agreement would be a significant step forward. Where there are concerns surrounding labour rights, a clear set of actions for achieving these rights would be effective. To a certain degree, this is already something that the EU does in the form of structured dialogues built into trade agreements, however if specific implementation plans were required as part of *ex-ante* conditionality then it would allow more concrete goals to be identified and actioned.

The justification for including these terms is clear. If the EU intends to conduct trade on a level playing field, then it is not sufficient to have *de jure* compliance with standards, it must be *de facto*. Moreover, the EU is not developing conditions to impose on trade partners, rather it bridges the gap between the agreed goals set out in TSDs and reality.

Having an implementation plan dovetails well with the ability to be able to withdraw the benefits of a trade agreement. If there is a clearly agreed implementation plan, with oversight mechanisms, *prior* to the conclusion of a trade agreement, then in any subsequent dispute it will be clear what exactly is at issue. Whereas in the absence of clear implementation plans, with oversight, it may be difficult to obtain evidence.

4.2 Sanction mechanism

Even where *ex-ante* conditions are strengthened, the EU would still lack policy options in the case of regression from these agreed international standards or where a trade partner decides to flagrantly ignore those agreed standards.

TSD chapters are not designed to be enforceable. As discussed above, they are not subject to the Dispute Resolution Mechanism that exists within trade agreements. Instead, they focus on a type



of structured dialogue, followed by an expert report if one party believes the other is in breach of the TSD chapter.

While it is clear there are benefits to diplomatic engagement and cooperation in this fashion, the EU will not be able to hold countries to those standards using its economic power if it does not have the ability to take action where they can demonstrate an agreement has been breached.

Such a power is one that the European Parliament Trade Committee has long advocated for. It is one that some have argued will be necessary if the EU wants its trade partners to take the TSD chapters seriously. (Lowe, 2019)

The proposed mechanism would have two purposes. First, it would serve as an indicator that the EU is only willing to conduct trade with partners who are committed to ensuring that trade is sustainable. It would allow the EU to apply greater diplomatic pressure to this end and utilise its greatest soft power – its market. Second, where the EU is dealing with a trade partner who is not committed to the TSD chapters, it could withdraw the benefits of the agreement.

There are concerns associated with a sanctions-based model. For instance, there is evidence that a sanctions-based model leads to short term change rather than long term reform. (Bastiaens & Postnikov, 2017, pp 349) On the other hand, having a sanction does not preclude the EU engaging in cooperation and dialogue, the choice needs not be black-and-white.

The aforementioned second Commission non-paper noted the idea of an enforcement mechanism; however, it ultimately dismissed the idea as unworkable. The paper stated that negotiating partners would be unwilling to accept an enforcement mechanism around obligations with such broad scope. Moreover, economic compensation is the normal means of redress and it is unclear how economic compensation would be quantified. (Commission Services, 2018, pg. 3) Further, the non-paper does not mention that the EU rejected a sanction mechanism in relation to labour and environmental regulation in the Comprehensive Economic and Trade Agreement (CETA) agreement, that the Canadian government would have been willing to include. It was rejected in this case over concerns that it may be used to prevent the introduction of regulations that were more restrictive. (European Parliament Research Service, 2017, pg. 10).

These issues are worthy of consideration, however, they are not insurmountable. First, the enforcement mechanism would not be so broadly conceived as to include anything that might be categorised as a breach of a part of the TSD chapter. It would require a wording that excluded *de minimis* breaches, in other words it should be clear that minor breaches would not engage the sanctions mechanism. Further, the scope of the sanction mechanism should be clearly defined. The sanction should only operate when there is a clear backsliding on minimum standards. This would avoid the concern that it might be used to prevent more restrictive or precautionary regulation.

Second, fines are the normal means of redress, but in this case it is possible to withdraw the benefits of the trade agreement for aspects of the agreement that are impacted by the breach. This position is not innovative and is the stated position of the European Parliament. (European Parliament Research Service, 2017, pg. 2). For instance, in the case of labour rights being breached in a given



industry, contrary to the ILO Agreement, removing the benefits of the trade agreement from those industries would suffice. Naturally, this becomes more difficult in the case of an agreement that cannot be linked to any one particular area of the agreement, such as the Paris Climate Treaty. In those cases, economic compensation may be the only appropriate remedy. Calculating the amount would be difficult as, in theory, the Paris Climate Treaty would probably cover almost every aspect of the trade agreement. However, if the TSD chapter is as important as the EU claims, then the difficulty should not be an object.

Further to these considerations, it is necessary that the procedure does not penalise partners who are acting in good faith, but failing to fulfil their obligations due to a lack of resources or any other reasonable excuse. Of course, it is unlikely that a dispute process will be engaged where it is clear that best endeavours have been made. However, it should be formally clear that these cases are outside the scope of the sanctions, in particular, as those countries likely to be in breach of the agreements under the international agreements may be countries that are significantly poorer than the EU. It would be counterproductive were the EU to penalise these countries.

Regarding the procedure, any enforcement process should necessarily come after all attempts at finding a solution in the above manner have been exhausted. One simple solution would be to make certain aspects of the TSD chapters of trade agreements subject to the dispute resolution mechanism. This has a process that the parties use for other parts of the trade agreement, the only further consideration is that parties should make clear which aspects of TSD chapters are subject to the mechanism.

5 Recommendations

In the foreseeable future the EU will be in a position where it will have to decide whether to ratify the EU-Mercosur Trade Agreement. This trade agreement offers substantial economic benefits to industries for both trade partners, but it also leaves the EU without recourse should, for example, Brazil continue to disregard its Paris Treaty obligations.

In order to remain consistent with its commitment to the Green New Deal and ensure that trade is sustainable, the EU will need to strengthen its TSD chapters. **(Section 3)**

Strengthening *ex-ante* conditionality (Section 4.1)

This paper proposes that the EU Commission **incorporate implementation plans** of TSD chapters as part of ***ex-ante* conditions** attached to trade agreements. The EU has the most leverage to bring about the goals of TSD chapters **prior to signing** trade agreements. Such *ex-ante* conditions would be based on **international agreements**. This should go beyond the current *ex-ante* practice which is for EU trade partners to ratify certain international agreements. Instead, this paper suggests that EU agree with its trade partners, an implementation plan for TSD and to publically make this a part of the trade agreement. For example, in the case of the Paris Climate Treaty, this paper



suggests an implementation plan for the EU trade partners' NDCs.² While currently the EU Commission engages with its trade partners on a diplomatic and administrative level, the focus is on collaboration rather than set targets for the implementation of agreements.

Introducing a sanction mechanism (Section 4.2)

This paper proposes the introduction of a limited sanction mechanism in TSD chapters, either through a **fine** or by **removal of benefits** of the trade agreement. This is in accordance with what the European Parliament and civil society groups have consistently called for, for a number of years.

During the trade negotiations between the EU and the UK, a so-called “ratchet” clause was suggested by the EU Commission in order to maintain a level-playing field on regulation. It was one of several mechanisms suggested by the EU, that would be acceptable for it. The “ratchet” clause would allow the EU to implement tariffs against the UK should their standards diverge. (Giles, Beattie and Brunnsden, 2020) If a “ratchet” clause is considered necessary to maintain a level-playing field between a proximate trade partner to the EU, then it would seem reasonable that a more limited type of trade mechanism would be necessary for trade partners who are not so proximate to the EU.

The EU has previously argued that trade partners would not accept such an impingement on their sovereignty, but a far more onerous mechanism has been required by the EU in the EU-UK trade negotiations. Similarly, as addressed earlier, it was the EU that rejected the inclusion of enforcement mechanism for labour and environmental regulation in the CETA negotiations.

In order to address the concern that such a mechanism might be used against the EU or used as a tool for deregulation, the author suggests that the scope of the mechanism should be defined narrowly. The mechanism would be confined to a **backsliding on international agreements** included in TSD chapters. This would require careful drafting to make clear exactly what the expectations are in regard to the TSD chapters and what would fall within the scope of the mechanism. It is envisaged that it would operate in tandem with the first recommendation of this paper: strengthening *ex-ante* conditionality. Moreover, the mechanism should include a *de minimis* standard for its use such that minor or inadvertent breaches that are not material to trade, would not be included.

² In the case of a trade bloc, this would apply to their members.



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