



November 2017  
AK Position Paper

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

## About us

**The Austrian Federal Chamber of Labour is by law representing the interests of about 3.6 million employees and consumers in Austria. It acts for the interests of its members in fields of social-, educational-, economical-, and consumer issues both on the national and on the EU-level in Brussels. Furthermore the Austrian Federal Chamber of Labour is a part of the Austrian social partnership. The Austrian Federal Chamber of Labour is registered at the EU Transparency Register under the number 23869471911-54.**

**The AK EUROPA office in Brussels was established in 1991 to bring forward the interests of all its members directly vis-à-vis the European Institutions.**

### **Organisation and Tasks of the Austrian Federal Chamber of Labour**

The Austrian Federal Chamber of Labour is the umbrella organisation of the nine regional Chambers of Labour in Austria, which have together the statutory mandate to represent the interests of their members.

The Chambers of Labour provide their members a broad range of services, including for instance advice on matters of labour law, consumer rights, social insurance and educational matters.

Rudi Kaske  
President

More than three quarters of the 2 million member-consultations carried out each year concern labour-, social insurance- and insolvency law. Furthermore the Austrian Federal Chamber of Labour makes use of its vested right to state its opinion in the legislation process of the European Union and in Austria in order to shape the interests of the employees and consumers towards the legislator.

All Austrian employees are subject to compulsory membership. The member fee is determined by law and is amounting to 0.5% of the members' gross wages or salaries (up to the social security payroll tax cap maximum). 816.000 - amongst others unemployed, persons on maternity (paternity) leave, community and military service - of the 3.6 million members are exempt from subscription payment, but are entitled to all services provided by the Austrian Federal Chambers of Labour.

Christoph Klein  
Director

## Executive Summary

- The Austrian Federal Chamber of Labour (Bundesarbeitskammer, BAK) supports the proposals of the European Commission regarding a more assertive partnership on TSD in **option 1** in principle. However, they remain statements of intent – mostly without concrete measures suggested.
- **Option 2: US-American and Canadian Trade Agreements are not a topical example** for sanctions-based sustainability chapters. NAFTA is currently under revision. Its sanction mechanism has proved ineffective as there was no political will to impose sanctions and recommendations were issued instead.
- Therefore, the BAK suggests **concretising** the proposals in **option 1, to extend them by additional elements (see AK demands), and in particular to add effective enforcement measures based on sanctions.**
- The BAK **opposes conducting bilateral trade negotiations, particularly on TSD chapters**, as long as the reform process on effective TSD chapters is not concluded successfully.

In its non-paper, the Commission evaluates existing TSD chapters and puts two options for their further development up for discussion. This opened an EU-wide discussion for the upcoming months. In

our view, the elaboration of TSD chapters in free trade agreements (FTAs) currently under negotiation should be put on hold until this process is concluded and a consensus is found on the design of future TSD chapters.

The BAK recognises the intention of the Commission to improve the effectiveness of the chapter (strengthened role of civil society, improved reaction to non-adherence to/infringements of labour standards, improved monitoring and follow-up processes, effectiveness of dispute settlement, etc.). But to truly increase the effectiveness of TSD chapters, infringements of minimum labour standards and environmental protection standards should – after the exhaustion of other remedies – be sanctionable.

We welcome the Commission's contribution to the discussion and its desire to learn from the experiences thus far. We share its aim of ambitious commitments to labour rights, environmental protection and the inclusion of civil society. A trade policy fit for the 21st century must aim to achieve high labour and environmental standards next to positive trade gains.

# The AK's position in detail

## Current TSD Chapters

In its deliberations, the Commission overwhelmingly refers to the most comprehensive of its agreements, the recently concluded Comprehensive Economic and Trade Agreement with Canada (CETA). The TSD chapters in its other agreements, concluded or still under negotiation, **vary in scope and characteristics** (CARIFORUM, Georgia, Colombia/Peru, Moldavia, Ukraine, SADC, Singapore, South Korea, Viet Nam, Central America). For example, the scope of International Labour Organisation (ILO) norms to be implemented (eight ILO core standards,<sup>1</sup> the decent work agenda, up to date ILO conventions) varies per agreement. But also the extent and quality of the inclusion of civil society varies per agreement.

What all EU TSD chapters have in common is that they demand no new commitments in labour rights and environment standards for the implementation of the trade agreement. Instead, obligations from already ratified ILO conventions and multilateral environmental agreements are merely being confirmed. The EU's approach is to only incentivise the accession to and ratification of more obligations. The **ratification of further obligations is therefore not obligatory**, even if that concerns ILO core labour standards (minimum norms and recognised human rights).

Since ILO core labour standards are internationally recognised **human rights**, they do not only fall under the TSD chapter, but also the human rights clause in

FTAs. This could lead to opposing interpretations concerning the applicable dispute settlement mechanism and – even more so – the consequences resulting from an infringement of these norms. For example, government interventions against collective bargaining (ILO Convention on the Right to Organise and Collective Bargaining (No. 98)), currently happening under the Troika in Greece, could lead to sanctions via a human rights clause but not the TSD chapter.

The Commission describes its current **incentive mechanism** in existing TSD chapters as *“comprehensive, binding and subject to dispute settlement”* regarding multilateral standards (ILO conventions and Multilateral Environmental Agreements (MEAs)). But in practice, it can be observed that an incentive system is not appropriate for – or successful in – reaching minimum standards. Binding, but merely incentive provisions and a dispute settlement mechanism without the possibility of economic sanctions have not led to improvements in the past.

The Commission's approach to promoting environmental and labour standards so far is focused on effective implementation. However, besides their **implementation**, the European Trade Union Confederation (ETUC) demands the **ratification** of ILO core standards.<sup>2</sup> The reason for insisting on ratification is that this is more binding in the respective contracting state. Whereas the transposition into national law is an important domestic measure, its ratifi-

ation has a binding effect under international law. The BAK shares the view that the main emphasis should be put on the ratification of international labour and environmental standards (ILO conventions and MEAs).

The **representativeness of the composition of domestic advisory groups** (DAGs) has been viewed critically. It is decisive that societal interests are adequately reflected; i.e. by social partners but also by human rights and environmental interest groups. However, initial reflections on the DAGs indicate that the European groups tend to meet more frequently than their counterparts in partner countries. The civil society fora are meeting infrequently. The Commission too sees the problem of **limited capacity** of civil society organisations in the EU and its partner countries, which is why the potential **of civil society structures** in TSD chapters (Domestic Advisory Groups, Civil Society Fora) cannot be fully realised.

Experiences in the context of the **EU-South Korea FTA** show that the inclusion of civil society and its concerns still leave a lot to be desired. The main points of criticism are the continued human rights violations, particularly infringements on core labour standards such as the freedom of association and the right to organise. For example, the South Korean government dissolved the teacher's union and blankly refuses to recognise the union of public servants. Moreover, mass lay-offs, incarcerations of rail unionists and illegal attacks on offices of the Korean Confederation of Trade Unions (KCTU) have been pointed out. The President of the KCTU Han Sang-Gyun and several other activists have been imprisoned on unwarranted charges since 2015. The South Korean government refuses to have

the infringements of union rights tabled during meetings of the Joint Committee on Trade and Sustainable Development (CTSD). The Commission made efforts to promote exchange between the actors (the ILO, civil society in the EU and South Korea, letter of Commissioner Malmström from January 2017), but despite continuous and ongoing human rights infringements, it still has not initiated consultations at government level (following Art. 13.14 of the FTA).

In its non-paper, the Commission suggested two options to improve the current approach to sustainable development: Option 1 suggests improvements to the existing chapter structure, option 2 discusses sanctions.

#### **Option 1: Commission Proposal for a more assertive TSD Chapter**

Based on several of the abovementioned weaknesses, the Commission proposes to improve the cooperation with the ILO and the institutions created within the framework of MEAs through better structured cooperation, better monitoring and implementation. It further proposes to strengthen the **response to non-implementation** through more transparency in the complaint mechanism and consideration of civil society input. It promises to give a **higher priority** to labour and environmental issues and to improve **monitoring and follow-up** on all sustainability issues brought forward at governmental level. Problems and priorities should be discussed in **regular, results-oriented dialogues** with partners. The Commission wants to use existing TSD-tools such as the **dispute settlement** (incentive based, no sanctions) more effectively. Moreover, it encourages **raising awareness** through workshops on TSD commitments or on the identifica-

tion of problems even before the trade agreement is implemented. It wants to strengthen the **cooperation** between the **EU Member States and their embassies** on the one hand and **EU delegations** on the other hand to improve the use of resources on TSD implementation (among others through strengthening of expert groups, proposals for the implementation of and adherence to standards and for cooperation activities). Lastly, it recommends improving the functioning of the DAG and the Civil Society Forum to strengthen the advisory **function of civil society**.

The BAK supports the abovementioned Commission proposals to improve the assertiveness of TSD chapters in principle. However, we fear that the measures presented in option 1 for *“better use of pressure and leverage, including during the negotiation stage”*<sup>3</sup> or the better and more timely **consideration of stakeholder complaints** (particularly from civil society) will not be sufficient on their own. The proposals of the Commission remain statements of intent, mostly without concrete measures suggested. It is therefore difficult to evaluate the outcome they could have in practice.

In this context, we would like to recall **CJEU Opinion 2/15** on the trade and investment agreement with Singapore. On sustainable development, the Court stated that the envisaged agreement will make the liberalisation of trade between the EU and Singapore conditional upon the fulfilment of contractual obligations under international law in the areas of social protection of workers and environmental protection. It is noteworthy that the Commission wants to treat labour and **environmental standards** equally, but does not give equal consideration to environmental

standards in its proposal. When referring to “early and continual engagement to ratification”, it only mentions ILO core labour standards. However, in the future, trade policy also has to consider the needs of international environment and climate policy in a comprehensive and systematic manner. Climate policy will very soon need considerably more weight. Considerable efforts by the international community are needed if the **climate goals of the Paris Agreement** from autumn 2015 (limiting global warming to below 2°C – possibly 1.5° – compared to pre-industrial levels) are to be reached. To prevent the danger of **carbon leakage** (the shift of production based on different CO2 costs), instruments need to be developed to include the carbon intensity of production in an objective manner into international trade considerations. In the interest of a *“just transition”* towards a climate-neutral society – a transition taking distributional effects and effects on the labour market into account – trade agreements need to be vetted for their climate impact. Clauses in trade agreements that go against climate ambitions should be deleted and clauses for active climate protection should be added instead. Moreover, the appropriate means need to be developed to accurately measure the negative **environmental and climate effects of trade**, particularly regarding international freight transport. Countries who have historically contributed little to climate change should have access to concrete **support measures** such as technology transfer or capacity building.

The notion of **dispute settlement** remains misleading. TSD chapters have been explicitly excluded from the regular dispute settlement mechanism of EU trade agreements. Their dispute settlement mechanisms have been devel-

oped uniquely for TSD chapters and are focused on mediation. They do not provide for sanctions. This sets the chapters apart from the regular and more effective dispute settlement mechanism, which usually provides for a suspension of concessions. The Commission proposes to use the dispute settlement more effectively, but does not provide more concrete suggestions.

It also remains unclear what **measures and consequences** the Commission envisages in dealing with implementation problems related to agreed-upon commitments to ILO or environmental agreements. It refers to identifying these problems before the entry into force of the trade agreement. Would that imply not letting the agreement enter into force if the partner country demonstrated unwillingness to live up to its commitments? If that is not the case, setting concrete **time limits** or a schedule to ensure successful implementation may be reasonable. The BAK holds the view that ratification of agreed-to international obligations should be a precondition for the entry into force of trade agreements.

### Option 2: A sanctions-based Model

In option 2, the Commission is referring to agreements the US and Canada have concluded with third countries. For example, a side agreement to NAFTA provides for sanctions if an impact on trade or investment can be attributed to an infringement of existing obligations. However, the burden of proving a direct link is very high. Experience shows that there tends to be no political will to impose sanctions, and that recommendations are issued instead. The US-American trade union confederation AFL-CIO wants to use the NAFTA reforms to develop a sanc-

tion mechanism that is anchored in the agreement itself and that can be triggered independently from the governments. For these reasons, **US and Canadian agreements do not provide an effective example** of up to date agreements worthy of a 21st century.

Only legally binding, sanctionable provisions with effective legal protection and enforcement mechanisms can ensure the adherence to labour and environmental standards at member state and EU level. Therefore, the BAK advocates for the possibility of imposing sanctions after all other avenues (monitoring, complaint mechanism, mediation and consulting) have been exhausted.

### The BAK recommends

A 21st century trade policy must aim to reach high standards in labour and environmental protection on equal footing to gains from trade. That is why violations of core labour standards and environmental commitments – after the exhaustion of all other foreseen remedies – should be responded to with trade sanctions. Therefore, next to improving the assertiveness of TSD chapters under option 1, the BAK recommends considering the following elements.

### BAK Demands for TSD Chapters in Trade Agreements

- Before the start of trade negotiations, but at the latest with the provisional application of the agreement or respectively its entry into force, **all eight ILO core labour conventions** must be **ratified** by all parties, implemented into national law, and **applied** in practice. The conventions refer to the freedom

of association, the right to organise and to collective bargaining, to the abolition of forced and child labour and discrimination in employment and occupation.<sup>4</sup>

- The **application** of the so-called **up-to-date conventions and recommendations** should be another precondition to the start of trade negotiations. They cover the following issues, among others: Labour inspections, employment policy, labour inspection in agriculture, tripartite consultations, social security, migrant workers, occupational health and safety, minimum wage fixing, weekly rest and maternity protection.<sup>5</sup>
- Besides the ILO standards, **Multilateral Environmental Agreements (MEAs)** should be **ratified, implemented and applied** in practice. The agreements considered within the EU's GSP+ system would be a good starting point from an environmental perspective. They cover the following issues, amongst others: the protection of the ozone layer, hazardous waste treatment, persistent organic pollutants, trade in endangered species, biodiversity protection and harmful chemicals and pesticides.<sup>6</sup>
- **Mandatory reporting on the progress of implementation of labour standards and environment and climate commitments:** The governments of both contracting parties should report regularly on their progress in implementing their obligations under the TSD chapter. This should include the national goals set in the context of the 2015 Paris Climate Agreement.
- **Upholding the level of protection clause:** Such a clause should guarantee that existing social- and environmental standards will not be lowered to attract trade or investment. However, it should also be excluded that standards are lowered for other motives. For example for budgetary reasons, as was the case in Greece and which resulted in a violation against the ILO convention on collective bargaining. The compliance with and adherence to standards should be documented at regular intervals.
- **Establishment of a forum to exchange information between governments, social partners and civil society actors:** The forum should enable an exchange on the implementation of an agreement between government representatives of partner countries, employer- and employee-representatives and other civil society organisations dealing with environmental issues, human rights, consumer rights, etc. This forum should keep a balance between the different interests based on societal preferences; the Commission should provide adequate resources. The forum should convene at least twice per year and enable its members to cooperatively develop solutions.
- **Government reactions to complaints made by social partners or civil society organisations:** It is vital to commit governments to react with adequate measures to official complaints by social partners or civil society organisations. Complaints should be dealt with by the respective government within an appropriate timeframe, e.g. one to three months and subsequently become

part of its monitoring and reporting process. Such a mechanism would ensure that governments effectively deal with complaints.

- **Independent experts should examine complaints and develop recommendations:** When complaints are not adequately addressed by the government responsible, there should be a mechanism for them to be evaluated by independent and qualified experts in the respective issue area (such as labour and social standards or environmental and climate standards, not trade and investment experts). The expert's recommendations should help the governments to address potential violations of human- or labour-rights or environmental protection standards and to prevent them in the future. Trade unions should be able to nominate labour- and environmental law experts and must be given a say in their selection.
- **Binding dispute settlement and the right of initiative for civil society:** the current dispute settlement mechanism, as present in CETA, is based on mediation and consultations and is insufficient. It is vital to develop a binding dispute settlement mechanism based on the regular mechanism available for other chapters of the agreement. Civil society organisations such as trade unions, environment, health, consumer and human rights organisations must have the possibility to trigger proceedings – independent of the governments of the contracting parties.
- **The BAK advocates for binding and sanctionable provisions in TSD chapters:** In case that consultations between governments, social partners and civil society organisations have not led to improvements on labour and environmental issues and cannot be mitigated by expert recommendations and have passed a certain appropriate timeframe, there should be a monetary penalty. This penalty must be sufficiently high to have a deterring effect. The proceeds could be used to improve critical human rights, labour or environmental conditions in the sector in question. A proceeding which does not yield any remedy at the end would be a wasted effort.

## Foot Notes

<sup>1</sup> The eight fundamental Conventions are: 1. Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); 2. Right to Organise and Collective Bargaining Convention, 1949 (No. 98); 3. Forced Labour Convention, 1930 (No. 29); 4. Abolition of Forced Labour Convention, 1957 (No. 105); 5. Minimum Age Convention, 1973 (No. 138); 6. Worst Forms of Child Labour Convention, 1999 (No. 182); 7. Equal Remuneration Convention, 1951 (No. 100); 8. Discrimination (Employment and Occupation) Convention, 1958 (No. 111)

<sup>2</sup> See [https://www.etuc.org/sites/www.etuc.org/files/document/files/etuc\\_resolution\\_for\\_an\\_eu\\_progressive\\_trade\\_and\\_investment\\_policy\\_en.pdf](https://www.etuc.org/sites/www.etuc.org/files/document/files/etuc_resolution_for_an_eu_progressive_trade_and_investment_policy_en.pdf)

<sup>3</sup> P. 7 of the non-paper.

<sup>4</sup> Referring to, in order: 1. Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); 2. Right to Organise and Collective Bargaining Convention, 1949 (No. 98); 3. Forced Labour Convention, 1930 (No. 29); 4. Abolition of Forced Labour Convention, 1957 (No. 105); 5. Minimum Age Convention, 1973 (No. 138); 6. Worst Forms of Child Labour Convention, 1999 (No. 182); 7. Equal Remuneration Convention, 1951 (No. 100); 8. Discrimination (Employment and Occupation) Convention, 1958 (No. 111)

<sup>5</sup> Referring to, in order: Labour Inspection Convention, 1947 (No. 81), Employment Policy Convention, 1964 (No. 122), Labour Inspection (Agriculture) Convention, 1969 (No. 129), Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144), Social Security (Minimum Standards) Convention, 1952 (No. 102), Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143), Occupational Safety and Health (Dock Work) Convention, 1979 (No. 152) and Occupational Safety and Health Convention, 1981 (No. 155), Minimum Wage Fixing Convention, 1970 (No. 131), Weekly Rest (Industry) Convention, 1921 (No. 14) and Weekly Rest (Commerce and Offices) Convention, 1957 (No. 106), Maternity Protection Convention, 2000 (No. 183).

<sup>6</sup> Referring to, in order: Montreal Protocol on Substances that Deplete the Ozone Layer (1987), Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (1989), Stockholm Convention on persistent Organic Pollutants (2001)EN L 303/60 Official Journal of the European Union 31.10.2012, Convention on International Trade in Endangered Species of Wild Fauna and Flora (1973), Convention on Biological Diversity (1992), Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (1998).

Should you have any further questions  
please do not hesitate to contact

**Eva Dessewffy**

T: +43 (0) 1 501 651 2711  
eva.dessewffy@akwien.at

**and**

**Petra Völkerer**

(in our Brussels Office)  
T +32 (0) 2 230 62 54  
petra.voelkerer@akeuropa.eu

**Bundesarbeitskammer Österreich**

Prinz-Eugen-Straße 20-22  
1040 Vienna, Austria  
T +43 (0) 1 501 65-0

**AK EUROPA**

Permanent Representation of Austria to the EU  
Avenue de Cortenbergh 30  
1040 Brussels, Belgium  
T +32 (0) 2 230 62 54  
F +32 (0) 2 230 29 73