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# **Implementation and enforcement of sustainable development provisions in free trade agreements – options for improvement**

## **Executive summary**

Contemporary FTAs increasingly include provisions pertaining to sustainable development. Although these provisions vary in form and scope, a growing number of FTAs contain substantive sustainability commitments, which gives rise to questions about their effective implementation and enforcement. Addressing these questions is the main objective of this paper. The paper contains three major components. Firstly, it provides a mapping of available implementation mechanisms applicable to sustainability provisions in FTAs, which include inter alia institutional arrangements, public participation, monitoring, consultations, conditionality and dispute resolution. Each individual mechanism is shortly described and analysed, providing, where applicable, comments and lessons learned based on their application. Secondly, the paper presents examples of implementation and enforcement mechanisms used with regard to sustainability provisions in international agreements of non-trade character. To this end, the enforcement system under the Kyoto Protocol as well as the ILO implementation scheme are presented and analysed from the point of view of their potential applicability to sustainability provisions in FTAs. Thirdly and finally, a concluding section provides an evaluation of existing practices and a number of recommendations. The recommendations suggest that the implementation and enforcement effort should concentrate on positive incentivising rather than non-compliance. Along those lines, improvements or alternative solutions are suggested, which could potentially increase the effectiveness of implementation of sustainability provisions in FTAs. Those pertain to the use of incentive-based reform programs, strengthening the role of TSD committees and

possibility of establishing a new type of committees. Recommendations are also made with regard to the involvement of social partners, the private sector and international organisations. Finally, there are recommendations pertaining to the monitoring and assessment of the effectiveness of the sustainability measures as well as of the aggregate sustainability impact of the FTA.

## **1 Introduction: objective and scope**

In recent years, trade negotiations have increasingly been accompanied by demands to take greater account of sustainability consequences of the negotiated free trade agreements (FTAs). For example, the incidence of substantive environmental provisions in FTAs rose from 30 % in 2010 to nearly 70 % in 2012.<sup>1</sup> Similarly, the amount of labour provisions in FTAs multiplied from 4 in 1995 to 37 out of 186 FTAs in force notified to the WTO in 2009.<sup>2</sup> Having thereby established the inclusion of sustainability provisions in FTAs as a norm rather than an exception, current debate turns towards inquiry of effectiveness of these sustainability provisions and their actual impact on labour and environment in the partner countries. With the ambitious role as driver of sustainable development assigned to trade by the Sustainable Development Goals and the European Commission's "Trade for All" strategy, these questions gain increasing political significance.

The objective of this paper is threefold. The first aim is to provide a mapping of available tools for implementation and enforcement of sustainability provisions, which are used in contemporary FTAs. The second aim is to shortly analyse and comment the most relevant of these tools and assess the lessons learned from their application so far. The third objective is to look for alternative solutions beyond trade regulation and examine implementation and enforcement tools used in other international agreements which contain sustainability provisions. Here, selected examples of international labour rules and multinational environmental agreements will be provided and discussed in order to see to what extent they can serve as guidelines for improvements within the trade regulatory field. The overarching goal of this threefold analysis is

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<sup>1</sup> The term "substantive environmental provisions" refers to the provisions going beyond a mere confirmation of existing commitments such as: 1) a reference in the preamble; 2) general or specific exceptions based on GATT Article XX or GATS Article XIV for protection of human, animal and plant life; and 3) a commitment to uphold environmental/labour law and not to weaken it to attract trade or investment; see more in C.George, "Environment and regional trade agreements. Emerging trends and policy drivers", OECD Trade and Environment Working Papers 2014/02, p.9.

<sup>2</sup> ILO, "World work report 2009: The global jobs crisis and beyond", International Institute for Labour Studies, 2009, p.63.

to come up with conclusions and policy recommendations regarding possibilities of improving implementation and enforcement mechanisms applicable to sustainability provisions in FTAs.

## **2 The specificity of sustainable development provisions in free trade agreements**

In terms of incorporation of sustainability provisions in FTAs, a variety of approaches has been applied. In some, particularly the early ones, sustainability is merely mentioned in the preamble to the agreements. Some FTAs use separate side-agreements to address environmental or labour issues. An increasing number of FTAs, however, devote individual sections to sustainable development. The latter can take a form of separate articles or separate chapters on environment and labour, or in the case of the latest EU FTAs<sup>3</sup>, one joint chapter on “Trade and Sustainable Development”, TSD chapter, which combines both environmental and labour provisions with common horizontal provisions.

Sustainability provisions in FTAs also vary significantly in terms of substance, ranging from declaratory clauses, through cooperation provisions, to actual commitments. It is primarily the latter that give rise to an implementation and enforcement discussion, although one shall not undermine the interpretative relevance of the softer alternates either.<sup>4</sup>

Last, but not least, sustainability provisions are of significantly different character than other provisions of FTAs, which have an objective of trade liberalisation. Unlike the core FTA provisions, sustainability articles do not have the same primary objective of trade liberalisation, and consequently do not follow the same logic as the core trade liberalisation provisions of the agreement. Moreover, the commitments they lay down, do not always resemble these of the other FTA provisions. As a result, the implementation as well as monitoring and evaluation of compliance with sustainability provisions can be more challenging and may require specific tailor-made enforcement structures.

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<sup>3</sup> All trade agreements since EU-CARIFORUM 2008 include a trade and sustainable development chapter.

<sup>4</sup> In some circumstances even a preambular statement of objectives may influence interpretation of provisions and thereby determine the scope of a dispute settlement action. See for example P.Gallagher & Y.Serret, “Implementing Regional Trade Agreements with Environmental Provisions. A Framework for Evaluation”, OECD Trade and Environment Working Papers 2011/06.

### 3 Implementation and enforcement in the contexts of international law

The concepts of implementation and enforcement carry a specific significance in the international law context. The concept of enforcement may be defined as the act of compelling compliance with the law.<sup>5</sup> Historically, enforcement on international law was primarily state-centred, where the state carries the main responsibility for *implementing* an international norm at the domestic level.<sup>6</sup> Such national implementation can be divided into three phases: first adoption of national legal measures; second, enforcing these measures; third, reporting on the implemented measures. Domestic implementation measures need to be appropriate for the purpose of meeting obligations under the international agreement in order to achieve compliance. While contemporary international law is still state-centred in fundamental respects, the traditional conception of enforcement has broadened and transformed, extending the scope of actors involved and opening for collective enforcement mechanisms.<sup>7</sup>

In the context of international law *enforcement*, the compliance scholarship has been divided between proponents of two models: the managerial model and the sanction-oriented model. The **managerial model** advocates a cooperative, problem solving approach to promoting compliance with international law.<sup>8</sup> Compliance strategies should, here, focus on actual causes of non-compliance and “manage” these through positive means, consisting of a blend of transparency, dispute settlement and capacity building.<sup>9</sup> Departing from an assumption of growing international interdependence, the theory argues that states can now only realise their sovereignty through participation in various international regimes, which makes them rationally prone to comply in order to retain a good standing as a member of the international system.<sup>10</sup> The **sanction model**, is based on the assumption that in cases where treaties require

<sup>5</sup> *Balck's Law Dictionary*, 8<sup>th</sup> edition, 2004, p.569.

<sup>6</sup> G.L.Rose, “Gaps in the implementation of environmental law at the national, regional and global level”, UNEP, 2011, p.8.

<sup>7</sup> T.Stein, “Decentralized international law enforcement: the changing role of the state as law enforcement agent,” in: J. Delbrück, (ed.), *Allocation of Law Enforcement Authority in the International System*, Duncker & Humbolt, 1995, pp.107-126.

<sup>8</sup> A.Chayes, A.Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements*, Harvard University Press, 1998.

<sup>9</sup> *Ibid*, pp.22-25.

<sup>10</sup> *Ibid*, p.28 as well as J.Brunnee, “Enforcement Mechanisms in International Law and International Environmental Law”, in: U.Beyerlin, P.T.Stoll and R.Wolfrum, *Ensuring Compliance with Multilateral Environmental Agreements. A Dialogue between Practitioners and Academia*, Brill, 2006, pp.1-23.

states to depart significantly from what they would have done in the absence of the treaty, there exists a strong incentive for non-compliance, and cooperation can only be ensured by sanctions that encompass a broad range of measures which create costs and remove benefits.<sup>11</sup>

Concluding, it is interesting to point out that some countries and organisations have built their traditions regarding the type of enforcement systems applicable to sustainability provisions in FTAs on the managerial model (e.g. the EU)<sup>12</sup> while other on the sanctions model (e.g. the US).

## **4 Mapping of available implementation mechanisms in free trade agreements and “lessons learned”**

The overview of possible mechanisms for implementation presented in this chapter is based on the “Checklist for negotiators of environmental provisions in RTAs”<sup>13</sup> developed by the OECD.<sup>14</sup> The list was adjusted and complemented in order to take proper account of non-environmental aspects of sustainability, and to retain broader relevance.

### **4.1 Institutional arrangements**

The majority of FTAs containing sustainability provisions which commit partners to cooperation, provide for development of an institutional infrastructure in order to facilitate the coordinated activities, to exercise management and oversight over the development of their relations. Forms and functions of such bodies vary depending on the number of parties and on nature and purpose of the relevant engagement. Contemporary FTAs typically establish the following types of institutions:

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<sup>11</sup> G.W.Downs, D.M.Rocke, P.N. Barsoom, “Is the good news about compliance good news about cooperation?” *International Organisation*, Vol.50, 1996, pp.379-406 as well as G.W.Downs, “Enforcement and the evolution of cooperation”, *Michigan Journal of International Law*, Vol.19, 1998, pp.319-344.

<sup>12</sup> It may be interesting to point out here that even in the only EU FTA in which sustainability provisions are linked to the agreement’s general dispute settlement mechanism, namely the EU-CARIFORUM, the possibility of applying trade sanctions in form of suspension if trade concessions, in disputes arisen under the sustainability provisions was explicitly excluded, see Article 213(2) of the agreement.

<sup>13</sup> OECD, “Checklist for Negotiators of Environmental Provisions in Regional Trade Agreements”, OECD Trade and Environment Working Papers 2008-02.

<sup>14</sup> P.Gallagher & Y.Serret, “Implementing Regional Trade Agreements with Environmental Provisions. A Framework for Evaluation”, OECD Trade and Environment Working Papers 2011/06, p.7. The initial list includes additionally “capacity building” as well as “environmental goods and services”, but these elements have been omitted in this analysis due to their selective or sectoral relevance.

#### 4.1.1 Contact points

Contact points are typically designated within relevant authorities within a prescribed time period from the entry into force of the agreement and notified to the other party/ies. Their main purpose is to facilitate communication between the parties in the implementation of the environment and labour chapters or subchapters. Contact points have a particular role in dialogue and consultations on matters which arise between the parties in the implementation of the chapter.

#### 4.1.2 Committees

Each party establishes also environment and labour committees composed of senior government representatives of the relevant national authorities (trade, labour and environment) responsible for the implementation of the relevant sustainability provisions. The purpose of the committees is to oversee the implementation of the relevant chapters, in particular to:

- provide a forum to discuss and review the implementation of relevant chapters,
- provide periodic reports regarding the implementation to the parties to the agreement and/or the commission established by the agreement,
- provide a forum to discuss and review cooperative activities under the chapter(s),
- coordinate with other committees established under the agreement,
- consider and resolve matters submitted to it under a “second instance” consultative procedure in case of matters which could not be resolved by consultations via contact points.

Committees established under environment and labour chapters shall meet within a prescribed period of the date of entry into force of the agreement (typically one year) and shall thereafter meet regularly (typically every second year).<sup>15</sup> There are usually certain requirements as to transparency and public consultation in the operation of the committees. In some FTAs, there is a special review obligations, typically during the fifth year from the entry into force of the agreement, where the committee reviews the implementation of the relevant chapter, and issues a report with recommendations to the parties and the commission established by the agreement.<sup>16</sup>

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<sup>15</sup> See for example Article 20.19 TPP.

<sup>16</sup> See for example Article 20.19.7 TPP.

Empirical experiences with the actual functioning of TSD committees under the FTAs concluded by the EU have so far been limited. This is primarily due to the relatively short history of the TSD chapters in the EU. TSD committees have so far been established under the EU-Korea in 2012, the EU-Colombia/Peru in 2014 and the EU-Central America agreement in 2014. According to the Commission, the outcome of those meetings demonstrates that the provisions are having a positive impact to promote sustainable development.<sup>17</sup> As an illustration of possible activities of the committees, during the last meeting of the EU-Korea in September 2015 the parties have agreed to launch a project under the Partnership Instrument to look into the implementation of the ILO Convention 111 on Non-Discrimination, with the aim of better understanding the state of play if implementation in Korea and in EU Member States, and identifying obstacles, lessons learned and best practices in order to enhance compliance.<sup>18</sup>

## 4.2 Co-operation activities

### 4.2.1 Cooperation between the parties

Most free trade agreements foresee various forms of cooperation between the parties with an aim of achieving the objectives of the agreement, including these relevant to sustainability. This cooperation can include development of common actions, exchange of information and experts, joint organisation of events as well as facilitation of partnership, including with the private sector.

### 4.2.2 Cooperation in the framework of other multinational agreements

Some countries have used FTAs as an opportunity to establish enhanced cooperation under other international agreements, such as Multilateral Environmental Agreements (MEAs). For example, the trade agreement between Japan and Mexico, refers to “promotion of capacity and institutional building to foster activities related with the Clean Development Mechanisms under the Kyoto Protocol”.<sup>19</sup>

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<sup>17</sup> <http://ec.europa.eu/trade/policy/policy-making/sustainable-development/>.

<sup>18</sup> Joint statement of the 4<sup>th</sup> meeting of the Committee on Trade and Sustainable Development under the Korea-EU FTA, 9 September 2016.

<sup>19</sup> Art. 147.1 (b) of the Agreement between Japan and the United Mexican States for the Strengthening of the Economic Partnership (2004).

### 4.2.3 Cooperation in the framework of international organisations

Following the same logic, some FTAs foresee the possibility to, under the scope of implementation of the agreement's sustainability provisions develop closer cooperation with international institutions with acknowledged expertise and experience in the specific sustainability area. The Labour chapter in TPP, for example, encourages the parties to liaise with relevant regional or international organisations, such as the ILO and APEC, on matters related to that chapter. This includes the possibility for the Labour Council, established under that chapter, to develop joint proposals or collaborate with these organisations.<sup>20</sup>

## 4.3 Public participation

Several FTAs provide for public participation in the implementation processes of sustainability provisions. The degree of such participation, however, varies significantly, ranging from access to information,<sup>21</sup> through consultation,<sup>22</sup> to *de facto* monitoring with a right to make submissions. A number of systems provide for involvement of stakeholders at an even earlier stage, namely before the agreement is concluded, through participation in the *ex-ante* impact assessment process (e.g. EU, US and Canada). Some contemporary FTAs go as far as creating specific institutional structure for public participation, such as Domestic Advisory Groups or Civil Society Dialogue Mechanism, the latter involving civil society organisations from both parties.<sup>23</sup> Hence, the civil society's involvement alternatives under FTAs can include both domestic as well as transnational mechanisms.

Empirical experiences with civil society involvement in implementation of FTAs is rather scarce, as the practice is fairly recent. With regard to labour provisions, the EU has been introducing mechanisms for involvement of civil society since 2003 (EU-Korea), and the US for only about a decade longer, since the beginning of the 1990s (NAALC<sup>24</sup>). Despite it being a recent practice, available research suggests that the dialogue and consultation mechanisms in EU trade agreements yield positive results and contribute to improvement of labour standards in partner countries, e.g. through the learning process on advocacy which

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<sup>20</sup> Art. 19.12.9 TPP.

<sup>21</sup> For example Article 23.6 and Article 24.7 CETA.

<sup>22</sup> For example Art. 187 EU-CARIFORUM

<sup>23</sup> See for Example EU-Korea FTA, Art. 13.12.4-5 and 13.13, as well as Article 22.5 CETA on Civil Society Forum.

<sup>24</sup> North America Agreement on Labour Cooperation (NAALC), is a side agreement to the North American Free Trade Agreement (NAFTA).

such involvement facilitates.<sup>25</sup> Those observations are supported by international organisations active in the field. The ILO, for example, sees inclusion of civil society in implementation of labour provisions of FTAs as a possible avenue to increase their effectiveness.<sup>26</sup> Similarly, the European Commission perceives the close involvement of civil society as central to the successful implementation of FTA's sustainability provisions, helping to identify issues and future areas of action. The ambition of maximizing potential of civil society involvement is confirmed in the Commission's "Trade for All" strategy.<sup>27</sup>

#### 4.4 Commitments, environmental laws and standards

Contemporary FTAs increasingly often use sustainability provisions that include concrete commitments or obligations, which require parties to recognise or implement certain rules, or abstain from certain actions. For example a provision where the parties commit not to weaken their environmental laws in order to secure trade advantage<sup>28</sup> or a commitment not to use environmental standards as disguised barriers to trade.<sup>29</sup>

Moreover, FTAs commonly contain commitments to implement multilateral agreements in the field of environment or labour, often specifying concrete agreement or addressing specific issues.<sup>30</sup>

Apart from these general provisions, more detailed commitments to raise environmental or labour standard or to harmonise standards can be found in some FTAs.<sup>31</sup> The latter is specifically to be found in FTAs with an objective of achieving regional integration, such as MERCOSUR or COMESA.

#### 4.5 Monitoring and assessment

Assessment of FTAs' sustainability implications has so far primarily focused on the *ex-ante* assessment for the purpose of facilitating

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<sup>25</sup> E.Postnikov, I.Bastiaens, "Does dialogue work? The effectiveness of labour standards in EU preferential trade agreements" *Journal of European Public Policy*, Vol.21, No.6, 2014, PP.923-940; L. Van den Putte, "Involving civil society in social clauses and the decent work agenda", *Global Labour Journal*, Vo.6, No.2, 2015, pp.221-235.

<sup>26</sup> ILO& International Institute of Labour Studies, "Social Dimensions of Free Trade Agreements," Studies on Growth and Equity, 2013, revised 2015.

<sup>27</sup> European Commission, "Trade for All. Towards a more responsible trade and investment policy", 2015, part 4.2.2, p.23.

<sup>28</sup> See for example Art. 13.7 EU-Korea, or Art. 19.4 TPP.

<sup>29</sup> See for example, Art. 20.2.3 TPP.

<sup>30</sup> For example Art. 13.5 EU-Korea.

<sup>31</sup> For example Art. 20.3.3 TPP.

preparation of the agreement. Examples include the Sustainability Impact Assessment (SIA) performed by the EU, as well as environmental impact reviews, as performed by the US, Canada or New Zealand. Less attention, however, has so far been addressed to the *ex-post* assessment of FTAs' sustainability impacts. This is true even for these FTAs which contain concrete and evaluable commitments. Only a number of FTAs contain explicit provisions on *ex-post* monitoring.<sup>32</sup> Further discussion on sustainability impact assessment, both *ex-ante* and *ex-post*, will be developed in part 6.5 below.

## 4.6 Promotion of voluntary and private action

In additions to the commitments to enforce environmental or labour laws, some FTAs include provisions on promoting voluntary instruments and schemes that have an objective of enhancing sustainability performance.<sup>33</sup> This may include voluntary auditing and reporting, market-based incentives, voluntary sharing of information and expertise, and public-private partnerships, which can contribute to the achievement and maintenance of high levels of protection and complement domestic regulatory measures. Such mechanisms shall be designed in a manner that maximises their environmental benefit and avoids the creation of unnecessary barriers to trade. For that reason, some FTAs include specific criteria that such mechanisms shall fulfil.<sup>34</sup>

Similarly, increasingly more FTAs contain provisions mobilising the parties to encourage enterprises to voluntarily adopt corporate social responsibility (CSR) initiatives addressing labour and environmental issues.<sup>35</sup> Such provisions gradually more often contain references to internationally recognised standards and guidelines in the field of CSR, either in general, or with references to concrete international schemes.<sup>36</sup>

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<sup>32</sup> See for example, Art. 13.10 of EU-Korea FTA.

<sup>33</sup> See for example Art. 20.11 TPP.

<sup>34</sup> Art.20.11.2 and 3 TPP.

<sup>35</sup> For example Art.19.7. and 20.10 TPP

<sup>36</sup> Article 20.10 TPP contains a general reference and requires that the CSR practices shall be "consistent with intentionally recognised standards and guidelines that have been endorsed or are supported by the party". EU proposal for Trade and Sustainable Development chapter in TTIP contains, in Article 20, a list of references to specific internationally recognised instruments: the OECD Guidelines for Multinational Enterprises, the UN Global Compact, the UN Guiding Principles on Business and Human Rights as well as ISO 26000 and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy.

## 4.7 Consultation and resolution of differences

FTAs containing chapters with sustainability provisions (either separate chapters for labour and environment or joint sustainability chapters) contain often rules and mechanisms on resolution of conflicts between the parties, which pertain to sustainability provisions. These mechanisms are primarily based on consultations, conciliatory activities and non-binding institutional arrangements, as well as on recourse to expertise, for example through engagement of a panel of experts.

## 4.8 Conditionality

Trade agreements have applied conditionality with regard to labour provisions, in two different ways: either in form of “pre-ratification conditionality” where the entry into force of a trade agreement is made conditional on improvement of certain labour standards, or as “post-ratification conditionality” where the trade agreement has already been concluded and it includes conditional labour provisions.<sup>37</sup> Application of the latter, “post-ratification” form is based on the mechanisms of complaint and dispute settlement, which can lead to the withdrawal of trade benefits or monetary sanctions in the event of non-compliance.<sup>38</sup>

According to recent evaluations, pre-ratification conditionality has mostly had effects on labour *legislation*, leading in some cases to significant changes in the national legal system.<sup>39</sup> On the other hand, conditional labour provisions valid after the agreement has been concluded play a greater role with regard to *compliance* with the existing domestic labour rules. One may, thus, say that a certain form of complementarity exists between the two forms of conditionality. Both have also proven to be dependent on the existence of political will of the country concerned, and to benefit from accompanying advocacy measures, for example by the civil society.<sup>40</sup>

Empirically, it has been observed that pre-ratification conditionality has triggered more fundamental changes in terms of labour standards, leading to improvement or adoption of legal guarantees for workers which had not previously existed. This turned out to be the case for example in cases of US FTAs with Bahrain, Colombia, Morocco, Oman, Panama

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<sup>37</sup> ILO & International Institute of Labour Studies, “Social Dimensions of Free Trade Agreements,” *Studies on Growth and Equity*, 2013, revised 2015, pp.29-66.

<sup>38</sup> *Ibid*, p.30.

<sup>39</sup> *Ibid*.

<sup>40</sup> *Ibid*, p.56.

and Peru.<sup>41</sup> It has to borne in mind, however, that all those cases have involved a situation of agreement between parties of significantly unequal economic and political standing, where one party has disproportionately stronger negotiation position and can to a larger extent influence the commitments of the other party. One should, therefore, be careful with generalisation of these experiences, and with drawing conclusions for situations where both negotiating parties are developed countries of similar economic position.

In terms of the effects of post-ratification conditionality in form of a complaint mechanism, on the other hand, the empirical evidence suggests that they so far been more limited when they have occurred. Although the complaints may have helped to put the issue on the political agenda in the trade partner countries, and may even have led to political reactions, the substance of the complaints have remained unresolved in the majority of reported cases.<sup>42</sup> There is evidence, however, that in all cases, the government with which the complaint was filed, made a significant effort to avoid the dispute settlement stage. Finally, even where the sanctions foreseen by labour provisions are applied, their effects on workers vary. It is, therefore, important not to overstate the potential of a sanctions dimension to labour provisions for improving labour standards, which emphasises the importance of other dimensions of trade agreement labour provisions.<sup>43</sup>

## 4.9 Dispute resolution and trade sanctions

As mentioned in the preceding section, some trade agreements make breach of provisions under sustainability chapters subject to the regular dispute settlement mechanism in charge of resolving trade disputes under the agreement. This opens up for the possibility of using trade sanctions in cases of a party's failure to adequately implement these sustainability provisions. It has to be said, however, that even with regard to these agreements, amicable resolution of disputes is always emphasised as preferable. Consequently, recourse to a dispute settlement mechanism must be preceded by numerous stages of consultations and/or panel reviews, before any economic disincentives can be considered.<sup>44</sup>

Sanction-based sustainability provisions are a potentially powerful instrument, as they may, due to combined economic and political

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<sup>41</sup> *Ibid*, p.36.

<sup>42</sup> *Ibid*, pp.52-55. Particularly interesting examples of Peru, Bahrain and Costa-Rica.

<sup>43</sup> *Ibid*, p.57.

<sup>44</sup> Compare: F.C.Ebert, A.Posthuma, "Labour provisions in trade agreements: current trends and perspectives," International Institute for Labour Studies, 2011, p.11.

pressure, significantly influence countries' behaviour and, thus, constitute a considerable disincentive to violate sustainability standards. There are, however, a number of problems with the application of this mechanism, of substantial as well as procedural nature.

In terms of substance, as has already been indicated in the introduction, provisions pertaining to sustainability have a different objective than other core provisions of FTAs. Their overarching aim is not trade liberalisation, but rather developing cooperation and promoting sustainable development in the context of trade. The point of departure is to minimise the potential negative sustainability implications of the trade instrument in question, and at the same time to maximise the possible sustainability benefits that it may entail. Furthermore, commitments laid down in sustainability articles are phrased differently than in the core trade-liberalising FTA provisions, and consequently, they have a different impact. These differing features of sustainability provisions make it difficult to apply the same FTA logic to them, as is applied with regard to core trade-liberalising FTA articles. They also affect the way in which compliance with sustainability provisions can be monitored and enforced.

Procedurally, application of sustainability provisions in a trade instrument, as well as their enforcement to a high degree include a political dimension FTAs tend to leave a considerable discretion as to whether a disciplining measure shall be taken in case of breach of sustainability provisions, or what type of action it shall be.<sup>45</sup> Moreover, due to the specificity of sustainability questions, and the particular regulatory context in which they arise, which is different from the trade context, settlement panels under the agreement's regular dispute settlement mechanism may find the adjudication challenging. This is, firstly, because sustainability obligations are often less clear and more difficult to assess in terms of compliance. Secondly, they often refer to non-trade instruments, such as "the principles of the ILO Declaration," which are much less detailed than commercial obligations, and require systemic assessment of the transnational labour regime. Last, but not least, there are a number of practical challenges with adjudicating sustainability cases under the regular commercial dispute settlement mechanism, not the least in terms of quantification of damage,

Another procedural observation pertains to the burden of proof in a situation regarding breach of sustainability provisions in these FTAs

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<sup>45</sup> *Ibid*, p.21.

which open up for the possibility of applying the general dispute settlement system. In order to qualify for enforcement via the general dispute settlement mechanism, it must be demonstrated that the failure to effectively enforce labour laws is due to a sustained or recurring course of action or inaction. Moreover, such violation of the fundamental principles or effective enforcement of laws must occur in a manner affecting trade or investment between the parties. Hence, there is a need to demonstrate a link between the violation of a sustainability commitment in an FTA and the effect on trade between the parties.

Finally, and largely explained by the factors above, the dispute settlement mechanism has only been activated in a handful of cases, and only in a single case led to the establishment of the dispute settlement panel. In 2008, the American Federation of Labor and Congress of Industrial Organizations (AFL–CIO), which is the umbrella federation for U.S. trade unions, together with six Guatemalan labor organizations filed a public submission with the U.S. Department of Labor's Office of Trade and Labor Affairs (OTLA), under the Dominican Republic–Central America Free Trade Agreement (DR–CAFTA), documenting the failure of the government of Guatemala to comply with the labor rights chapter of that agreement. It took three years before the United States agreed to pursue formal dispute settlement, the first time a labor case has ever moved to enforcement. It took seven years for the case to be actually heard, in April 2015.<sup>46</sup> The ruling is now expected to be issued in June 2016.<sup>47</sup>

Summing up, there is no clear-cut answer to the question of the actual effectiveness of sanction-based sustainability provisions on effective implementation of sustainability commitments.<sup>48</sup> Empirical evidence is so far rather limited, referring primarily to labour provisions of the US trade arrangements, and relying mainly on qualitative rather than quantitative analysis.<sup>49</sup> In general, the literature suggests that the effects of sustainability provisions depend rather on a variety of factors, such as presence of strong domestic social partners, economic dependence of the

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<sup>46</sup> Summary of the case at the AFL-CIO website, available at: <http://www.aflcio.org/Issues/Trade/Guatemala>.

<sup>47</sup> “Finance Witness Advocate for FTA Enforcement Prior to Entry into Force”, Inside U.S. Trade, 03.04.2016.

<sup>48</sup> See discussion in: F.C.Ebert, A.Posthuma, “Labour provisions in trade agreements: current trends and perspectives,” International Institute for Labour Studies, 2011, p.23.

<sup>49</sup> J.Bourgeois, K.Dawar, S.J.Evenett, “A Comparative Analysis of selected provisions of free trade agreements”, European Commission DG Trade, 2007.

trade partner on market access, domestic technical capacity for remediation of problems, etc.<sup>50</sup>

## 5 Implementation and enforcement of sustainability provisions in international agreements of non-trade character

The objective of this section is to look beyond the scope of trade regulation, and analyse how effectiveness of sustainability provisions is secured in other international agreements regulating sustainability issues. Due to a limited scope of analysis in this paper, there is no space for a broader mapping and context assessment of a wider range of such international agreements. Instead, examples selected in accordance with their potential relevance for trade regulation, will be reviewed.

As an introductory remark, it needs to be pointed out that transnational regulatory structures in the field of labour, on the one hand, and in the field of environment, on the other, differ significantly from one another.

**The field of environment** has witnessed steady development of transnational regulatory cooperation since the 1972 UN Conference on the Human Environment in Stockholm. This cooperation has resulted in codification of legal obligations in form of an impressive array of global, regional and bilateral environmental agreements, addressing a wide range of environmental problems such as pollution of air and marine environment, waste, biodiversity protection, conservation of wildlife and natural resources, or protection of the ozone layer. The majority of these international agreements prescribe concrete obligations for states, establishing, in some cases, procedures for secondary rulemaking intended to supplement these agreements.

In **the field of labour**, a similar consensus between states as to the need for international regulation and the possible shape and content of agreements has been significantly more difficult to achieve. Consequently the area is dominated by soft law sources in form of recommendations and standards. Due to sensitivity and diversity of states' interests, international labour standards are rarely agreed in form

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<sup>50</sup> Kommerskollegium, "Genus- och jämställdhetsaspekter i regionala och bilaterala frihandels- och associationsavtal", Dnr 100-557-05, 2005; T.Greven, "Social standards in bilateral and regional trade and investment agreements: Instrument, Enforcement and Policy Options for Trade Unions", Friedrich-Ebert-Stiftung Occasional Paper No.16, 2005; J.M.Witte, "Realising core labour standards. The potential and limits of voluntary codes and social clauses, GTZ, 2008; K.A.Elliot, R.Freeman, *Can labour standards improve under globalisation?*, Institute for International Economics, 2003.

of intentional agreements, but are instead primarily developed under the auspices of the International Labour Organisation (ILO), which is a United Nations agency assigned to deal with labour issues.

The analysis in this section will reflect the discrepancy between the two forms of international norms creation in the two fields, and concentrate on international agreements with regard to environment, and on the system developed by the ILO with regard to labour regulation.

## 5.1 Implementation of multilateral environmental agreements: the example of the Kyoto Protocol

During the last 40 years we have witnessed an explosion of international environmental rulemaking, and according to recent estimates, there are nowadays over 700 different international environmental agreements primarily at multilateral and regional level.<sup>51</sup> Although these multilateral environmental instruments (MEAs) embody commitments of the majority of the world's states to the global environmental agenda, and contain concrete obligations for these states to be implemented domestically, there is an acknowledged growing "implementation gap" with regard to these instruments. Since the formulation of the implementation problem in the 1990s, efforts have been made by scholars and policymakers to develop methods of making enforcement more efficient and supporting enhanced compliance with international environmental regulation.<sup>52</sup> With a view of functionality and usefulness of this analysis, as well as to facilitate comparisons, this section will concentrate on one concrete example of the compliance system established by the Kyoto Protocol.<sup>53</sup>

**The Kyoto Protocol** is an international agreement linked to the United Nations Framework Convention on Climate Change (UNFCCC), which commits its parties by setting internationally binding emission reduction targets. Recognizing that developed countries are principally responsible for the current high levels of emissions, the Protocol places a heavier

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<sup>51</sup> G.L.Rose, "Gaps in the implementation of environmental law at the national, regional and global level", UNEP, 2011, p.6.

<sup>52</sup> For overview of this discussion see U.Beyerlin, P.T.Stoll and R.Wolfrum, *Ensuring Compliance with Multilateral Environmental Agreements. A Dialogue between Practitioners and Academia*, Brill, 2006, in particular J.Brunnee, "Enforcement Mechanisms in International Law and International Environmental Law", therein, pp.1-23.

<sup>53</sup> Kyoto Protocol to the United Nations Framework Convention on Climate Change, UN, 1998.

burden on developed nations under the principle of "common but differentiated responsibilities." Under the Protocol, countries must meet their targets primarily through national measures. However, the Protocol also offers them additional means to meet their targets by way of three market-based mechanisms: International Emissions Trading, Clean Development Mechanism, and Joint implementation. Under the Protocol, countries' actual emissions have to be monitored, and precise records have to be kept of the trades carried out. The Protocol establishes a compliance system, which ensures that parties are meeting their commitments and helps them to meet these commitments if they have problems doing so.

The **compliance mechanism** is designed to facilitate, promote and enforce compliance with the commitments under the Protocol. It is among the most comprehensive and rigorous enforcement systems for a multilateral environmental agreement.<sup>54</sup> In the centre of that mechanism, the Compliance Committee was established.

The **Compliance Committee** is made up of two branches: a facilitative branch and an enforcement branch. As their names suggest, the facilitative branch aims to provide advice and assistance to Parties in order to promote compliance, whereas the enforcement branch has the responsibility to determine consequences for Parties not meeting their commitments. Through its branches, the Committee considers questions of implementation which can be raised by: expert review teams under Article 8 of the Protocol; any Party with respect to itself; or by one Party with respect to another Party. The bureau of the Committee allocates a question of implementation to the appropriate branch, based on their mandates. In addition, at any time during its consideration of a question of implementation, the enforcement branch may refer a question of implementation to the facilitative branch.

The mandate of **the facilitative branch** is to provide advice and facilitation to Parties in implementing the Protocol, and to promote compliance by Parties with their Kyoto commitments. It is responsible for addressing questions pertaining to implementation, response measures and mechanisms as "supplemental" to domestic action. Furthermore, the facilitative branch may provide "early warning" of

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<sup>54</sup> The decision on the compliance regime for the Kyoto Protocol was adopted at the seventh session, the Conference of Parties to the Convention (COP). In decision 24/CP.7 of the Marrakesh Accords, the COP adopted the text containing procedures and mechanisms relating to compliance under the Kyoto Protocol, and recognized the need to prepare for the timely operation of these procedures and mechanisms. The basis for electing members/alternates was also agreed in the same decision.

potential non-compliance with emissions targets, methodological and reporting commitments relating to greenhouse gas inventories, and commitments on reporting supplementary information in a Party's annual inventory. The facilitative branch can decide to provide advice and facilitation assistance to individual Parties regarding the implementation of the Protocol. To this end, it can for example facilitate financial and technical assistance to any Party concerned, including technology transfer and capacity building, and/or formulate recommendations to the Party concerned.

**The enforcement branch** is responsible for determining whether a Party is not in compliance with its emissions targets, the methodological and reporting requirements for greenhouse gas inventories, or the eligibility requirements under the mechanisms. In case of disagreements between a Party and an expert review team, the enforcement branch shall determine whether to apply adjustments to greenhouse gas inventories, or to correct the compilation and accounting database for the accounting of assigned amounts.

Each type of non-compliance requires a specific course of action. For instance, where the enforcement branch has determined that the emissions of a Party have exceeded its assigned amount, it must declare that that Party is in non-compliance and require the Party to make up the difference between its emissions and its assigned amount during the second commitment period. In addition, it shall require the Party to submit a compliance action plan and suspend the eligibility of the Party to make transfers under emissions trading until the Party is reinstated.

The branches of the Compliance Committee will base their deliberations on reports from expert review teams, the subsidiary bodies, Parties and other official sources. Competent intergovernmental and non-governmental organizations may submit relevant factual and technical information to the relevant branch of the Committee, after the preliminary examination.

The Kyoto Protocol, thus, provides a good illustration of the emphasis that MEAs place on transparency of parties' performance, with an important role assigned to monitoring and emissions inventory reporting requirements, as well as to expert reviews to parties' reports.<sup>55</sup> Although it does not have an explicitly sanction-oriented dimension, it does have punitive elements, which are built into prerequisites for access to

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<sup>55</sup> J. Corfee Morlot, "Ensuring compliance with the global climate change agreement", OECD Information Paper, ENV/EPOC(98), 1998, pp.22-55.

privileges. For example, under the rules on international emissions trading, eligibility for participation depends on the party's compliance with its reporting commitments.<sup>56</sup>

## 5.2 The example of ILO implementation scheme

In these instances when labour provisions are included in FTAs, it is increasingly common to base them on references to the ILO instruments, especially its 1998 Declaration, as well as the concept of “decent work”. It, thus, seems justified to, in the quest for enforcement parallels, look at the example of ILO, as not only substantially relevant, but also closely connected with trade and the sustainable development agenda.

ILO is a tripartite UN agency, which since 1919 brings together governments, employers and workers representatives of currently 187 member states, to set labour standards, develop policies and devise programmes promoting decent work. The Governing Body is ILO's executive organ responsible inter alia for developing policy, overseeing the ILO work program, and responding to complaints about inadequate implementation of the ILO conventions.

**The Regular Supervisory System.** Once a country has ratified a convention, it must file regular reports on measures put in place for its implementation. This is to be done every two years in case of core and priority conventions and every five years in case of other conventions. These reports form a basis for compliance check by the ILO, and allow monitoring of implementation progress.<sup>57</sup> In 1926, a **Committee of Experts** was established to **examine the country reports and to monitor observance** of international labour standards. The Committee formulates direct *requests*, which it communicates to relevant governments, as well as *observations*, which are gathered in an annual report presented to the Conference Committee on the Application of Standards. The Conference Committee selects the observations and states which shall be subject to particular scrutiny, and invites them to a dialogue. In many cases, the Conference Committee directly adopts

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<sup>56</sup> J.Brunnee, “Enforcement Mechanisms in International Law and International Environmental Law”, in: U.Beyerlin, P.T.Stoll and R.Wolfrum, *Ensuring Compliance with Multilateral Environmental Agreements. A Dialogue between Practitioners and Academia*, Brill, 2006, pp.1-23.

<sup>57</sup> ILO, “Rules of the game. A brief introduction to international labour standards”, Revised edition 2014, p.102.

conclusions with specific recommendations, but it can also recommend missions or technical assistance from ILO.<sup>58</sup>

**Representations.** Another enforcement instrument available in the ILO system is the **representation procedure**.<sup>59</sup> It grants employers' and workers' organisations the right to make representations to the Governing Body against any member state which has failed to secure effective observance within its jurisdiction of the Convention to which it is a party. Filing a representation may lead to the establishment of a tripartite committee of the Governing Body to examine both the representation as well as the government's response. The committee reports to the Governing Body with assessment and recommendations.

**Complaint procedure.** A complaint may be filed against a member state for not complying with a ratified Convention by another member state which ratified the same Convention, by a delegate to the International Labour Conference or by the Governing Body in its own Capacity.<sup>60</sup> Upon reception of a complaint, the Governing Body may form a **Commission of Inquiry** consisting of three independent members, which assesses the case and makes recommendations on measures to be taken to address the problems raised in the complaint. A Commission of Inquiry is the ILO's highest-level investigative procedure and consequently it is only established if a member state is accused of serious and persistent violations, and has repeatedly refused to address them.<sup>61</sup> When a country refuses to fulfil the Inquiry Commission's recommendations, the Governing Body can take action under article 33 of the ILO Constitution, according to which, in the event of any member state failing to carry out within the time specified in the recommendations contained in the report of the Commission of Inquiry, the Governing Body may recommend to the Conference such action as it "may deem wise and expedient to secure compliance therewith."<sup>62</sup>

**Freedom of association.** A specialised supervisory procedure was established to ensure compliance with the principle of freedom of

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<sup>58</sup> ILO, "Rules of the game. A brief introduction to international labour standards", Revised edition 2014, p.102; P. Lazo Grandi, "Trade Agreements and their Relation to Labour Standards. The Current Situation", ICTSD Issue Paper No.3, November 2009, p.38.

<sup>59</sup> Articles 24 and 25 of the ILO Constitution.

<sup>60</sup> Articles 26-34 of the ILO Constitution.

<sup>61</sup> Until 2014 there have only been 12 occasions when a Committee of Inquiry was established. See: ILO, "Rules of the game. A brief introduction to international labour standards", Revised edition 2014, p.108.

<sup>62</sup> Article 33 was invoked in 2000 against Myanmar for "wide and systematic" use of forced labour.

association and collective bargaining, as enshrined in Conventions 87 and 98, including in countries that have not ratified these Conventions. The Committee on Freedom of Association (CFA) was established in 1951 to exercise this supervision and to review complaints brought against states by employers' and workers' organisations. If it finds that freedom of association has been violated, it issues a report through the Governing Body and makes recommendations on how the situation can be remedied. In case of countries that ratified the relevant instruments, the case can be referred to the Committee of Experts. The CFA can also choose to address the problem via direct contact missions to the government concerned, and establish direct dialogue with the government and the social partners.<sup>63</sup>

**Implications for FTAs?** The overarching conclusion is that it would rather be recommendable to establish a more structured dialogue between the ILO system and the labour-related provisions of the FTAs and the institutions it establishes, than to copy the procedural and institutional structure set up by the ILO. The ILO enforcement structure is custom-made for the system of Conventions and the international body that it represents, and it is difficult to imagine its transplantation into an FTA. It is also difficult to imagine appointing the ILO system as an “executive” of these provisions of the FTA which relate to working conditions. It is not only the question of the potential problem with varying degree of acknowledgement of the ILO authority by the trading partners. There is also a problem of the ILO system functioning in a different context than trade relations, where the balance of interests and centre of gravity are set differently. There is, however, a vast room for improvement of the current cooperation patterns and for tighter dialogue between the two systems, which could lead to better coherence and potentially strengthen the implementation of labour provisions in FTAs.

## **6 Evaluation of existing practices and recommendations for improving their effectiveness**

This concluding section, provides a list of potential options for improving implementation and enforcement of sustainability provisions in FTAs. The basis for the recommendations is twofold. Firstly, they are based on the evaluation of the existing implementation and enforcement measures, which were reviewed above in part 4. Secondly, they encompass

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<sup>63</sup> ILO, “Rules of the game. A brief introduction to international labour standards”, Revised edition 2014, p.110.

alternative solutions based on the analysis of compliance structures established under the international regimes for labour and for the environment, provided in part 5 of this paper. The analysis of both these sources was enriched by the theoretical observations on the specificity of enforcement in the context of international law, which was summarised in part 3. The recommendations listed below can be applied selectively or in conjunction. They should be seen as complementary, and their aggregate application may potentially result in their mutual supportiveness.

## 6.1 Shifting focus from non-compliance towards positive incentivising

Researchers and commentators increasingly argue that the traditional enforcement mechanisms based on negative incentives to comply are insufficient to guarantee compliance with FTAs' sustainability provisions.<sup>64</sup> There is, for example, no clear-cut answer to the question of the actual effectiveness of sanction-based sustainability provisions.<sup>65</sup> Contrarily, there is evidence to support the claim that incentive-based sustainability provisions carry encouraging results in improving sustainability standards through trade agreements, while avoiding political difficulties of "shaming" of trade partners.<sup>66</sup> Many suggest, therefore, that compliance might better be elicited through positive incentives. Empirical studies of the 1999 US-Cambodia Textile Agreement, for example, illustrate that positive incentives and capacity building can effectively support compatibility with labour standards.<sup>67</sup>

Specific suggestions have been made in the field of labour, arguing that there is a scope for ensuring that labour provisions in FTAs not only address cases of non-respect of workers' rights, but also aim at gradual improvement of labour standards. This could, for example, be done

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<sup>64</sup> See for example, C.Doumbia-Henry, E.Gravel, "Free trade agreements and labour rights: Recent developments," *International Labour Law Review*, Vol.145, Issue 3, 2006, pp.185-206.

<sup>65</sup> See discussion in: F.C.Ebert, A.Posthuma, "Labour provisions in trade agreements: current trends and perspectives," International Institute for Labour Studies, 2011, p.23.

<sup>66</sup> S.Polaski, K.Vyborny, "Labour clauses in trade agreements: Policy and practice", *Integration and Trade*, Vol.10, No.25, 2006 pp.95-124; F.C.Ebert, A.Posthuma, "Labour provisions in trade agreements: current trends and perspectives," International Institute for Labour Studies, 2011, p.29.

<sup>67</sup> G.Berik and Y.van der Meulen Rogers, "Options for enforcing labour standards: Lessons from Bangladesh and Cambodia", *Journal of International Development*, Vol.22, Issue 1, 2010, pp.56-85; S.Polaski, "Protecting Labour Rights through Trade Agreements: An Analytical Guide," *UC Davis Journal of International Law and Policy* Vol.10, 2003, pp.13-25.

through introducing labour-related development objectives supported by **labour development plans** linked to economic incentives.

### 6.1.1 The example of “labour development plans”

Such labour development plans would entail specific time-bound targets on labour standards, leading to gradual improvement both in terms of legislative reforms, as well as implementation and application of labour standards.<sup>68</sup> This would allow adjustment of the reform progress and burden to the capacity and context of a particular partner country and help avoiding shock therapies and forced targets, which will remain unimplemented. Such plans could also involve social partners or other civil society actors, as well as international organisations such as the ILO. This may help achieve a feeling of co-ownership of the reform, and co-responsibility for its implementation among the actors involved.

Labour development plans could be supported by providing additional economic incentives, such as development assistance, in form of financial support or/and capacity building. Focusing on economic incentives rather than sanctions places regulatory focus of labour provisions on positive rather than on negative conditionality. Previous examples of incentive-based labour provisions under trade instruments are very promising in that respect. For example, incentive-based labour provisions under the EU Generalised System of Preferences have been a significant factor in El Salvador’s ratification of ILO<sup>69</sup> Conventions No.87 and 98. Similarly, incentive-based labour provisions of US-Cambodia Textile Agreement, were by many considered to have contributed to improving labour conditions in the Cambodian textile sector.<sup>70</sup>

It is argued that, while such labour development plans can be adopted as stand-alone instruments, trade negotiations may provide the necessary political momentum and leverage for comprehensive commitments, as

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<sup>68</sup> K.Banks, “Trade, labour and international governance: An inquiry into the potential effectiveness of the new international labour law,” *Berkeley Journal of Employment and Labour Law*, Vol.31, No.1, 2011, pp.45-142; K.Kolben, “Integrative linkage: Combining public and private regulatory approaches in the design of trade and labour regimes,” *Harvard International Law Journal*, Vol.48, No.1, 2007, pp.203-256.

<sup>69</sup> J.Orbie, L.Tortell, “The new GSP-Plus beneficiaries: Ticking the box or truly consistent with ILO findings?” *European Foreign Affairs Review*, Vo.14, 2009, pp.663-681.

<sup>70</sup> K.Kolben, “Trade, monitoring and the ILO: Working to improve conditions in Cambodia’s garment factories,” *Yale Human Rights and Development Law Journal*, Vo.7, 2004, pp.79-107; S.Polaski, “Harnessing global forces to create Decent Work in Cambodia”, ILO Research Series, 2009.

well as an institutional framework for their implementation.<sup>71</sup> It also opens the possibility of creating synergies between labour provisions of different trade agreements.<sup>72</sup>

## 6.2 Strengthening the role of the committees

The majority of modern FTAs which include substantial sustainability provisions provide for development of an institutional infrastructure to facilitate coordination of activities, and to exercise management and oversight over the development of their relations. These institutions, in particular the specialised TSD committees could potentially play a much more important role in the implementation and enforcement of sustainability provisions than what is the case today. It needs to be reminded that, as mentioned above in part 4.1, establishment of TSD committees under the EU FTAs is a rather recent practice and empirical material about their functioning is still rather scarce. The lessons learned so far, however, raise a number of possible improvement suggestions.

### 6.2.1 Improving functioning of existing committees

The process leading to the establishment of structured cooperation on sustainability issues could potentially begin much earlier than it does today, even as early as in the negotiations phase. For example, an early dialogue could be established in connection to the sustainability impact assessment process. As a primary objective of SIAs is to identify the priority areas where either the highest risk for negative impact or the biggest opportunity for positive effects can be predicted, it could serve as a natural point of departure for a dialogue between the parties, as well as for identification of relevant stakeholders to be engaged in the implementation of the future agreement's sustainability provisions. This could lead to earlier achievement of mutual understanding and trust around the issues at stake. Such pre-agreement cooperation could potentially provide the future TSD cooperation committees with a more solid foundation, and facilitate the commencement of their operation, leading to a more structured and efficient implementation process.

Moreover, even though they are admittedly limited, it would be advisable to gather experiences from the existing TSD committees established under the FTAs currently in force and use them to develop guidelines and best practices for rules of operation of such bodies. This would facilitate

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<sup>71</sup> ILO & International Institute of Labour Studies, "Social Dimensions of Free Trade Agreements," *Studies on Growth and Equity*, 2013, revised 2015, p.100.

<sup>72</sup> *Ibid*, p.97.

efficient establishment and functioning of new committees and potentially even improve the operation of the existing ones.

## 6.2.2 Establishment of compliance committees

In its work with FTAs, the National Board of Trade developed a proposal for alternative compliance model centered on the creation of compliance committees on environmental and labour issues.<sup>73</sup> This proposal is to a large extent based on the structure established under the Kyoto Protocol compliance system. Similarly to the Kyoto mechanism, compliance committees would have a double facilitative and enforcement function and function through respective branches. The committees would be assisted by a panel on technical and economic issues, whose members serve in their individual capacities and have recognised competence in environment, respectively labour issues. The panel would assist the committee with analysis of technical and economic issues related to non-compliance and with recommendations as to how to achieve compliance.

In its **facilitative role**, the committee would be responsible for providing advice and support to participating states in implementing environmental/labour provisions. In its **enforcement role**, the committee would be responsible for determining whether a participating state is not in compliance with the environmental or labour provisions. Accordingly, upon reception of a question regarding implementation of sustainability provisions by a participating state, raised with respect to itself or another participating state, the facilitative branch would decide on provision of advice or facilitation assistance and/or formulate recommendations to the state concerned. Where the enforcement branch has determined that a participating state is not in compliance with environment/labour provisions, it may, depending on the cause, type, degree and frequency of non-compliance either withhold or withdraw cooperation assistance.

There are obvious synergies to be found between the work of the proposed compliance committees and the cooperation committees, which are commonly established under contemporary sustainability chapters, in particular in terms of evaluating compliance, proposing compliance measures and providing analysis on technical issues.

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<sup>73</sup> National Board of Trade, “Proposals for addressing environmental standards in future EU regional free trade agreements”, No. 120-2194-2004.

### 6.3 Enhancing involvement of social partners

Another possibility of strengthening the existing system is through greater involvement of social partners and civil society in the negotiation and implementation of sustainability provisions. It has been suggested that a more formalised and institutionalised role of stakeholders throughout all phases of an agreement's negotiation and implementation would facilitate the identification of problems regarding sustainability standards, as well as of potential areas of cooperation.<sup>74</sup> Stakeholders' expertise could, for example, be used to design cooperative activities aiming at improving compliance with sustainability standards. More extensive use of social partners' and civil society's inputs could also be made in the monitoring of implementation of sustainability provisions.<sup>75</sup>

Moreover, allowing private parties to have a meaningful role in enforcement would also put more pressure on governments to seriously address sustainability commitments.

### 6.4 Using FTAs to promote compliance with labour standards among companies

Labour provisions in trade agreements are directed almost exclusively to governments of the countries that are parties to the agreement. It has been suggested that, in particular with regard to countries with limited enforcement capacity, engaging private actors in the implementation of labour provisions may be essential for compliance.<sup>76</sup> This could, for example, take the form of monitoring arrangements to supervise application of labour standards in particular sectors.<sup>77</sup> Such private sector engagement could also be combined with capacity-building activities

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<sup>74</sup> Corresponding examples include involvement of social partners in the development of the Sustainability Impact Assessment (SIA) in the EU, or, even more explicitly, the Labour Advisory Committee for Trade Negotiation and Trade Policy providing a forum for tared unions and workers organisation to deliver advice on trade agreements in the US.

<sup>75</sup> ILO& International Institute of Labour Studies, "Social Dimensions of Free Trade Agreements," Studies on Growth and Equity, 2013, revised 2015, p.97.

<sup>76</sup> K.Kolben, "A development approach to trade and labour regimes," *Wake Forest Law Review*, Vol.45, 2010, pp355-389; A.Posthuma, "Beyond 'regulatory enclaves': Challenges and opportunities to promote decent work in global production networks", in: A.Posthuma, D.Nathan (eds.), *Labour in Global Production Networks in India*, OUP 2010, pp.57-80.

<sup>77</sup> Here, inspiration may be drawn from the experience with the US-Cambodia Textile Agreement, where company-level monitoring was used to determine trade benefits. See also: ILO& International Institute of Labour Studies, "Social Dimensions of Free Trade Agreements," Studies on Growth and Equity, 2013, revised 2015, p.106.

aiming at gradual phasing in of the public authorities and strengthening the public sector in its enforcement capacity.

## 6.5 Enhancing involvement of the ILO

As increasingly more trade agreements today refer to ILO instruments, in particular the 1998 Declaration on Fundamental Principles and Rights at Work, ILOs involvement in the entire life-cycle of FTAs, namely all stages from negotiation to the implementation, could be enhanced. Around two thirds of labour provisions in contemporary FTAs refer to ILO instruments, but they integrate them in a variety of ways. For reasons of clarity about the scope of labour provisions, and in order to avoid fragmented interpretation which can weaken its normative authority, there is a need to address the question of coherence in integration of ILO instruments in FTAs. There is clearly a possible role to play for the ILO in that respect.<sup>78</sup> There are a number of possible ways of involving ILO in the implementation of labour provisions, and ILO's expertise can be used to assist countries in improved implementation, including through cooperative activities.

First and foremost, the ILO has an established system of gathering information on implementation of labour provisions as well as on national application of ILO instruments referred to in labour provisions of FTAs. Secondly, ILO has the best overview of potential problems in application of their instruments, and can provide guidance in such complex cases. Thirdly, ILO could be more regularly involved in the drafting of labour provisions in FTAs in order to secure coherence already at the initial stage of creating the agreement. This would facilitate a uniform application of instruments, as well as potential engagement of ILO in supporting and monitoring implementation after the agreement has entered into force. It seems relevant to point out here, that earlier experiences of such tighter cooperation of trade partners with the ILO and its involvement in the implementation process, as well as its monitoring have been assessed as very positive.<sup>79</sup> Finally, there is a clear role for ILO expertise when the expert panels are established with the

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<sup>78</sup> ILO & International Institute of Labour Studies, "Social Dimensions of Free Trade Agreements," *Studies on Growth and Equity*, 2013, revised 2015, p.97-98.

<sup>79</sup> See for example J.Agusti-Panareda, F.C.Ebert, D.LeClercq, "Labour Provisions in Free Trade Agreements: Fostering their Consistency with the ILO Standards System," Background Paper, ILO, 2014; R.Peels, M.Fino, "Pushed out the door, back through the window: The role of the ILO in EU and US trade agreements in facilitating the Decent Work Agenda," *Global Labour Journal*, Vol.6, No.2, 2015, pp.189-202.

purpose of settling disputes which arise in relation to implementation of labour provisions in FTAs.

## 6.6 Improving the use of SIA and institutionalising *ex-post* impact assessment

Sustainability Impact Assessments (SIAs), which are conducted at the beginning of every FTA negotiation initiative by the EU, give a good overview of an agreement's potential sustainability implications, and help identify areas of particular concern. It is widely questioned, however, if SIAs outcomes are properly mirrored in the negotiation process, the drafting of the agreement and its implementation.<sup>80</sup> The new edition of European Commission's SIA handbook follows the track of linking SIA exclusively to the negotiations process.<sup>81</sup> No direct link is made between the SIA and the formulation of the agreement's sustainability provisions, and even less with their implementation. In fact, however, the findings of the SIA could be used more thoroughly and effectively throughout the entire lifecycle of the agreement. SIAs tend to gather a rich knowledge base about the sustainability challenges, which should be addressed and can, thus, be very useful in terms of priority setting for sustainability provisions as well as with regard to guiding their actual formulations. Moreover, SIA also helps identify the need for supporting reforms and flanking policies, which can help design and direct trade-related assistance, and thereby contribute to better policy coherence in the trade and development area. Finally, SIAs would make a solid point of departure for implementation of sustainability provisions, and serve as a tool for TSD committees. This could not only facilitate the start-up phase of the committee's activity, but also speed-up the process of institution building, by early identifying relevant actors and policy areas of interest. One could imagine that SIA could be a tool of engaging trade partners in a dialogue on sustainability challenges and opportunities. Engaging in such dialogue and consultations already in the negotiations phase, could significantly facilitate cooperation with regard to implementation of the agreed commitments.

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<sup>80</sup> C.Kirkpatrick, C.George, "Methodological issues in the impact assessment of trade policy: experience from the European Commission's Sustainability Impact Assessment (SIA) programme," *Impact Assessment and Project Appraisal*, Vol.24, no.4, 2006, pp.325-334, C.Kirkpatrick, C.George, "Sustainability impact assessment of trade agreements: from public dialogue to international governance", *Journal of Environmental Assessment Policy and Management*, Vol.10, Issue 1, 2008, pp.67-89.

<sup>81</sup> European Commission, "Handbook for trade sustainability impact assessment," 2<sup>nd</sup> edition, April 2016.

There is also a common understating that in order to make the best possible use of SIA instrument, a properly structured follow-up of SIA's findings in the implementation phase of the agreement would be desired.<sup>82</sup> Such *ex-post* sustainability impact assessment would naturally build on the findings of the SIA, and would entail an analysis of the agreement's factual effects on environment and labour, concentrating on areas of specific concern and evaluating effectiveness of the measures developed in the agreement in order to properly address them. It is important to bear in mind that in order for such assessment to capture the entirety of sustainability implications, it should go beyond the evaluation of application of particular sustainability provisions, and include assessment of sustainability effects of the entire agreement. The new SIA handbook does briefly mention the *ex-post* evaluation, but in a rather limited format. *Ex-post* evaluation would, in accordance with the handbook, be performed by the Commission with an aim of assessing whether specific intervention was justified and whether it worked as expected in achieving the objectives. It would also look for unintended effects, which were not anticipated by the SIA, and for evidence of causality.<sup>83</sup> There is no mention of the overall impact assessment of the sustainability provision and the FTA as a whole on the social and environmental situation in the partner countries. There is also no mention of engagement of the trade partner(s) in the assessment, which in the implementation phase of the provisions agreed in an FTA seems to be an important factor. There is neither any indication of how the outcomes of such evaluation would be integrated in the implementation process and contribute to improvement of effectiveness of the agreement's sustainability provisions. Finally, the impact of this mechanism would be significantly strengthened if it was designed in form of a credible commitment implemented at regular intervals, rather than a handbook guideline.

## 6.7 Considering aggregate effect and coherence of measures

Moreover, as has been pointed out in literature, further research should be encouraged, both qualitative and quantitative, regarding the effects of trade agreements on sustainability standards, focusing on the identification of the most effective mix of enforcement mechanisms and

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<sup>82</sup> See for example Ergon Associates, "Trade and Labour: Making effective use of trade sustainability impact assessments and monitoring mechanisms", Report to DG Employment, Social Affairs and Inclusion, European Commission, 2011.

<sup>83</sup> European Commission, "Handbook for trade sustainability impact assessment," 2nd edition, April 2016, p.8.

positive incentives for eliciting compliance.<sup>84</sup> In particular with regard to the managerial/persuasive enforcement model, where the implementation is organised as a gradual reform process based on a mutually accepted action plan, it is important that the most optimal setup and sequencing of enforcement measures is chosen. As such optimal setup can be a moving target, sufficient flexibility should be retained for implementation plans to be adjusted to accommodate the outcomes of monitoring and review in the course of implementation. Finally, when assessing the sustainability implications of FTAs, it is necessary to examine the aggregate effect of all mechanisms applied rather than the outcomes of individual instruments.

Moreover, it needs to be emphasised that when assessing sustainability implications of FTAs, one needs to look at the effects on labour and the environment of the entire agreements and not only of its sustainability provisions. Thus, internal coherence of all chapters of the agreement is necessary to safeguard, in order to avoid the situation where provisions under one chapter nullify or weaken the potential impact of provisions under another chapter. Contrarily, provisions under various chapters should mutually reinforce each other and lead to a more efficient aggregate effect.

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<sup>84</sup> See for example, S.Salem, F.Rozental, “Labour Standards and Trade: A Review of Recent Empirical Evidence”, *Journal of International Commerce and Economics*, August 2012, p.28.