

Public consultation on the review of the Trade and Sustainable Development (TSD) 15 Point Plan

COMMENTS BY AFEP (FRENCH ASSOCIATION OF LARGE COMPANIES)

Large French companies welcome the launch of a public consultation by the European Commission on the review of current approach on trade and sustainable development in EU FTAs. They support a better inclusion of sustainable development objectives into EU trade policy as spelt out in [Afep contribution to the trade policy review \(November 2020\)](#) and regard the so-called TSD 15-point action plan as a significant pillar of this inclusion, while stressing the need to upgrade the existing action plan.

AFEP would like to share the **following comments** with respect to the **main features to be considered for the review of the TSD 15 Point Action Plan**, in addition to formal replies to the questions of the public consultation:

- **Adopt a holistic approach taking into plurilateral fora and EU unilateral instruments in the making**

As reflected in AFEP's contribution to the EU trade policy review, it is of utmost importance that the review of the TSD 15 Point Action takes into account the possibility that **sustainable development objectives are also promoted within the WTO and/or plurilateral agreements** and that the fact the Green Deal has come along with **a new string of legislative initiatives on EU unilateral instruments in the field of sustainable development** (carbon border adjustment mechanism, EU secondary legislation on due diligence, strengthening of TSD conditionalities under the General Scheme of Preferences -GSP- regulation). Large French companies insist that the review seeks **consistency, complementarity, and subsidiarity** between the TSD commitments and enforcement mechanisms on the one hand and these unilateral instruments in the making on the other hand.

A good way to foster complementary is probably to assess to which extent TSD existing and/or additional commitments as well enforcement mechanisms proposed to EU FTA partners **bring an added value in comparison with TSD commitments and enforcement provisions included in that instruments**. AFEP suggests in this respect taking **the objective of level playing between EU and non-EU companies** as one of these criteria for added value to be balanced with the possible negotiating costs for the EU (trading partners being reluctant to engage on other aspects of a trade deal).

A relevant study case for this approach is the legal and trade effects of a binding reference to due diligence obligations within TSD chapters in comparison with a future EU legislation in this area. Regardless of the European Commission proposal(s) and the content of the instrument(s) adopted at the end of the legislative process, **it remains unlikely that these tools could impose due diligence requirements directly on companies neither incorporated in the EU nor operating within the internal market**. These companies would be of course impacted by EU requirements on supply chains and incentivised to partially abide with due diligence standards to serve final consumers in the EU, but **it is not clear whether this effect is likely to establish a complete level-playing between them and EU companies on third countries markets**. This can make the case for **combining the two options** (EU legislation plus due diligence requirements in EU FTAs) at least until there is a full clarity on the effects of EU legislation.

- **Set priorities among TSD commitments and modulate the level of obligations pending on trading partners accordingly**

Current “standard” TSD commitments in the EU FTAs address three types of considerations: human rights protection, environment and climate protection and labour protection, due diligence considerations pertaining to these three areas altogether. The European Commission has suggested and/or started to expand TSD commitments in especially in the field of environment considerations (climate and circular economy), labour-related provisions (decent work agenda) and is now moving toward other types of social considerations such as gender and trade.

Such expansion reflects EU legitimate willingness to promote a value-based trade policy and to seek consistency within the Green Deal between internal and external policies (notably on climate change mitigation). **Large French companies can agree on this notion to bridge the gaps between trade policy and other policy objectives, to the extent such consistency exercise also comes along with a more efficient trade policy notably in terms of level playing field.** As detailed in replies to question 12 or 13, **it makes sense to seek additional commitments on climate change, biodiversity, and ILO decent work agenda (working conditions, labour inspection, hygiene, and safety)** since that they will benefit to the environment, foreign workers and, additionally, would induce less trade distortions based in social and environmental regulatory dumping.

Nonetheless, a continuous and unprioritized enlargement of TSD commitments proposed to trading partners **might make trade negotiations more complex and lengthier and incentivise our trading partners to be less ambitious on market access and/or regulatory disciplines on other areas of interest for the EU**, especially when the EU is requesting TSD commitments touching upon domestic social preferences going beyond human rights, environment, or labour protection.

Large French companies therefore **suggest streamlining the negotiations of TSD commitments based on a clear priority given to:**

- (1) the **promotion of core or essential universal values (human rights protection**, including labour-related rights such as protection against forced labour and child labour, **ratification and participation to the implementation of overarching agreements relating to environmental “common goods”** in the field of **climate change mitigation and biodiversity** such as the Paris Agreement or CITES conventions, including derived commitments such as **adopting climate neutrality targets** and **submitting updated national determined contributions** within the Paris Agreement) and
- (2) other **environmental and labour-related commitments contributing to ensuring a level-playing with non-EU companies** (observance of international environmental standards including circular economy, achievements in terms of quantitative commitments on climate change mitigation or biodiversity adopted under the overarching agreements above-mentioned, labour rules on safe working conditions, due diligence on individual companies, non-regression clauses for instance).

Consequently, the EU should systematically **seek legal binding commitments from trading partners in these priority areas**, going much further than “best endeavour clauses” on the ratification of corresponding trading agreements or on non-regression of domestic environmental or labour legislation. **Such a clarification has already partially been made by the EU with the elevation of human rights protection clauses and the ratification of the Paris Agreement on climate change as essential clauses in EU Partnership Agreements.** It is proposed to extend this logic to all priority TSD commitments identified above although most of them do not require to be granted the status of essential clauses: **the EU could simply provide for a mandatory ratification and implementation under the TSD chapter.**

By contrast, AFEP recommends being **less demanding on other types of TSD provisions in EU FTAs**, especially if objectives pursued can be achieved through unilateral legislations (being of course WTO compatible) and/or commitments under multilateral forum or bilateral dialogues with targeted countries (for instance People to People or civil society dialogues under EU partnership agreements).

- **Strengthen enforcement mechanisms based on the nature of TSD commitments being infringed**

Large French companies have long insisted that **existing dispute settlement mechanisms for the TSD chapters are not entirely fit for their purpose** even though they has brought some achievements in the case of the ratification of core ILO conventions by South Korea. The absence of more effective remedies can be even more difficult to understand in a next future **if the EU strengthens in the meantime procedures for the withdrawal of unilateral preferences in case GSP beneficiaries do not comply with TSD requirements set forth in the regulation** as proposed by the European Commission.

AFEP therefore suggests a **vast reshuffling of the TSD chapter enforcement mechanisms while considering the nature of TSD commitments and the seriousness of breach being ascertained**, in line with the priority among **TSD commitments proposed above** (see the paragraph: “**Set priorities among TSD commitments and modulate the level of obligations pending on trading partners accordingly**”):

- (1) The **breach of the first set of priority TSD commitments** (core values and “common goods” key commitments) should **give way to countermeasures taking the shape of suspension or withdrawal of trade and investment commitments to reflect the seriousness of the breaches in question**. For TSD commitments that have not been yet elevated to essential clauses, **AFEP proposes that a more granular approach than the entire suspension of trade concessions is taken such as the suspension/withdrawal of only specific trade and investment commitments**. For legal certainty, the breach of commitments could be ascertained by an expert panel.
- (2) The **breach of the second set of priority TSD commitments** (environmental and labour-related provisions that could result in providing third countries an undue competitive edge) could give way to **compensating/rebalancing measures** also consisting in suspension/withdrawal of commitments or financial penalties but **subject to a “competitiveness test” by which the dispute settlement arbitrators would verify that the alleged breaches have conferred a competitive advantage to businesses of the FTA partner**. Arbitrators would also be **entitled to recommend the level of concessions to withdrawn in compensation**. Such mechanism has been already adopted under several United States and Canada FTAs as well as under the Trade and Cooperation Agreement (TCA) concluded with the United Kingdom for the enforcement of “level-playing field” provisions including on environment and labour matters.
- (3) The breach of other TSD commitments would be subject to **current dispute settlement mechanisms provided for TSD chapters, with the possibility that the expert panel system is extended to all environment and labour-related provisions in cause**. Given their closer connection to domestic social preferences, it seems **more appropriate to engage FTA partners on consultation and dialogues with domestic advisory groups** established under TSD chapters, while **the intervention of expert panel helps confronting parties with objective findings**.

As clarified under AFEP reply to question 10, this move toward strengthened remedies in case of breach of priority TSD commitments would not **preclude preliminary steps under the dispute settlement procedure such as bilateral consultations and attempts to find amicable solutions** with the country in cause. It is expected that the proposed shift could **incentivise trading partners to make progresses on environmental and labour domestic policies before being subject to dispute settlement proceedings**.

- **Combining TSD chapters with a larger green trade agenda**

As AFEP has exemplified it under its reply to question 14 on sustainable and resilient supply chains, **TSD chapters commitments should be considered in conjunction with other FTA commitments and other plurilateral agreements relating to green trade and green economy such as trade facilitation/liberalisation measures for environmental goods and services or recycled goods or provisions on energy and raw material trade, with the promotion of recycled raw materials and rules on industrial and/or fossil subsidies.**

Such combination is likely to be more appealing for trading partners as they would link up **the adoption of more stringent environmental and social standards with commitments likely to result for both parties in increased market access and business opportunities.** Additionally, based on [Afep study on trade and climate change](#), rules on the limitation of industrial subsidies and to a lesser extent on fossil fuel subsidies could have **a large positive impact on the reduction of greenhouse gas emissions, growth and trade and ensure a level playing while liberalising trade in environmental goods.**

This is the reason why French large companies support, in addition to green goods and services annexes in EU FTAs, **the launch of plurilateral initiatives on trade and Environnement under the WTO**, if possible, as soon as during the twelve ministerial conference in Geneva (MC12) **starting with work programs on the basic requirements for such negotiations (see [French large companies priorities for the MC12](#)).**

Annex: Table on TSD commitments to be considered and matching enforcement mechanisms

About AFEP

Since 1982, AFEP brings together large companies operating in France. The Association, based in Paris and Brussels, aims to foster a business-friendly environment and to present the company members' vision to French public authorities, European institutions, and international organisations. Restoring business competitiveness to achieve growth and sustainable employment in Europe and tackle the challenges of globalisation is AFEP's core priority. AFEP has around 113 members. More than 8 million people are employed by AFEP companies and their annual combined turnover amounts to €2,600 billion.

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Annex: TSD commitments to be considered and corresponding enforcement mechanisms

TSD commitments	Enforcement mechanisms in case of breach of TSD commitments
Priority TSD commitments	
<p>First category of priority commitments:</p> <p>Human rights protection (including some labour-related rights) and ratification and “sincere” implementation of “common goods” overarching agreements (Climate change and biodiversity)</p>	<p>Suspension and/or withdrawal of trade and investment concessions after due bilateral consultations and amical solution have proven unsuccessful – the breach of commitments could be ascertained by an expert panel.</p>
<p>Second category of priority commitments:</p> <p>environmental and labour-related commitments contributing to ensuring a level-playing with non-EU companies (observance of international environmental standards including circular economy, achievements in terms of quantitative commitments on climate change mitigation or biodiversity, labour rules on safe working conditions, due diligence on individual companies, non-regression clauses for instance)</p>	<p>Suspension and/or withdrawal of trade and investment concessions after due bilateral consultations and amical solution have proven unsuccessful and a “competitiveness test” conducted by an arbitrators panel also in charge of recommending the level of rebalancing measures</p>
<p>Other TSD commitments</p>	<p>bilateral consultations and report by an expert panel</p>