

Non-paper: Strengthening and Improving the Functioning of EU Trade Domestic Advisory Groups

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Introduction

The EU Single Market encompasses 450 million consumers and is an attractive market for third countries. This puts the EU in a good position to shape the conditions needed to deepen trade relations with its partners, for example by focusing on sustainable development. The EU has entered into a number of trade agreements with similar features, as well as some differences and developments.

The EU's longstanding support for civil society actors by institutionalising their participation in trade agreements is unparalleled. The aim is to provide a broad support base to enable civil society representatives to operate as policy actors. The role of civil society in trade agreements has also evolved significantly. The 'new generation' trade agreements provide for a 'trade and sustainable development chapter' (TSD) in which to lay down provisions on labour and environmental conditions. Domestic Advisory Groups (DAG) were created as a civil society mechanism for monitoring sustainable development in EU trade agreements.

These DAGs provide civil society with an institutionalised basis to monitor the implementation and enforcement the provisions of TSD chapters. Recently, there has been movement on providing DAGs with a broader scope of competence to monitor agreements, beyond the TSD chapters. This approach is contained in the EU–UK Trade and Cooperation Agreement (TCA). The European Commission has also prioritised the EU–Mexico and EU–Mercosur Free Trade Agreements (FTAs) to roll out this approach. It has been almost a decade since the first meeting of the first Domestic Advisory Group. Since then, DAGs have been developed, reviewed and evaluated at several instances, identifying significant room for further improvement.¹

The issue remains, however, whether DAGs can effectively do what they were introduced for. Several reasons have been identified for the limited effectiveness of the monitoring and dialogue mechanisms, leading to criticisms of the European Commission. At the same time, there has undeniably been progress and a willingness to continue reforming and strengthening civil society dialogue in EU trade policy with regard to responsible and sustainable trade.

As the number of DAGs grows, as does the expertise of DAG members, especially those sitting on more than one DAG. This non-paper is thus based on research, workshops and feedback from DAG members across sectors (private sector, trade unions, NGOs). It also incorporates

¹ This paper is based mainly on FES (2020) 'Domestic Advisory Groups in EU Trade Agreements' – available at <http://library.fes.de/pdf-files/iez/17135.pdf> – as a reference, although this issue has been studied more broadly. See, for example, 'The European Parliament's role in relation to Human Rights in Trade and Investment Agreements', available at: <https://www.europarl.europa.eu/cmsdata/86031/Study.pdf>; and D. Prévost and I. Alexovičová (2019) 'Mind the compliance gap: managing trustworthy partnerships for sustainable development in the European Union's free trade agreements', *International Journal of Public Law and Policy* 6(3).

recommendations of the first All DAGs meeting organised by the EESC on 5 July 2021, bringing together all members of the 11 EU DAGs. It aims to serve as a basis for discussion for a comprehensive yet practical approach to improvement. The non-paper covers proposals that are relatively easy to achieve, as well as broader proposals requiring a more institutional overhaul. This paper aims to share recommendations with EU and partner countries' DAG members, trade partners, the European Economic and Social Committee (EESC), the Chief Trade Enforcement Officer (CTEO), the European Commission, the European Parliament and Member States.

Composition of DAGs

DAGs should be composed of independent civil society organisations, based on a balanced representation of the different stakeholders. However, FTAs do not establish procedures on how to appoint members of DAGs, and as a consequence each FTA party appoints members through its own procedures. The EU has some procedural experience in appointing civil society organisations to DAGs, with transparent criteria. The nomination of DAG members by some counterparts, however, often happens in a non-transparent way, sometimes excluding important (especially, critical) civil society voices. For example, the Peruvian authorities use a previously existing body as a DAG. In 2017, several Peruvian organisations established their own DAG, but it remains unrecognised by the Peruvian government and is thus known as a 'shadow DAG'.²

In South Korea, for example, one of the main labour federations and a business federation were initially excluded from the Korean DAG, and only included after strong pressure from the European Commission and the EU DAG. In many other cases, however, the EU has exerted little pressure to solve problems with DAG composition, citing the sovereignty of the FTA partner. For example, the Georgian DAG continues to include the American Chamber of Commerce among its members, despite repeated criticisms from European DAG members.

An FTA can also designate existing national bodies as DAGs. This may lead to a situation in which civil society organisations that are not already part of those existing national bodies are excluded from participating in discussion of the TSD chapters of EU FTAs. Furthermore, participants in the existing national bodies are not always aware that they have the additional responsibility of discussing the sustainable development aspects of the EU FTA.

Recommendation 1: The role of civil society in monitoring and enforcing agreements should start as early as possible, preferably during the negotiation of the FTA. The European Commission should strengthen the provisions in future agreements on the establishment and nomination of independent, representative and balanced civil society representation in DAGs. These provisions should apply to both trading partners. However, they also need to take account of trading partners in circumstances in which civil society may not enjoy the same

² From FES (2020): the Peruvian case demonstrates the importance of having strong treaty provisions that are able to enforce civil society participation in a dedicated, empowered and independent setting, as well as political accountability regarding sustainable development. The ambiguous provisions in the current agreement (the legal text does not stipulate that the DAG members have to be independent) have enabled the Peruvian government to offer merely tokenistic participation, managed by state representatives. In addition, it shows the need for greater flexibility on the part of the EU when dealing with grassroots civil society initiatives. For instance, at the moment, the EU does not finance the participation of 'shadow DAG' members in transnational meetings and does not include them in official communications unless they are delegated by an officially designated body. As the officially designated mechanisms do not meaningfully discuss the FTA, it leaves a consultation vacuum.

political space or does not have an equally established architecture for appointing members and running the DAG. Hence, rules should be binding, clear and precise to ensure representativeness, independence and balance, and additional support for independent civil society should be provided.

Recommendation 2: The European Commission should develop guidelines on the establishment, composition and functions of the DAG (including in partner countries). The practice of raising these issues with partner countries, notably through the TSD Committee meetings, should be strengthened. This would include issues related to the (non-)inclusion of legitimate and independent civil society organisations and should happen ex officio or in the event of complaints.

Recommendation 3: To obtain a balanced representation of independent DAG members, the European Commission should make DAGs more appealing to NGOs and offer ad hoc support for organisations in partner countries to be active in DAGs. Further on, the exclusion of EESC members in other DAGs when they represent their own civil society organisation, and also UK nationals who might represent EU organisations in EU DAGs, should be reconsidered.

Organisation of DAGs

Procedural issues, such as the lack of procedural rules, late communication of dates and information on the agenda, limit effective preparation by civil society organisations and reduce the effectiveness and impact of DAGs. According to some DAG members, the frequency of meetings – twice a year, on average lasting half a day – is insufficient to provide for meaningful dialogue across a variety of topics. In addition, a lot of time is spent on procedural and logistical matters.

Secretarial support is also considered one of the most important aspects determining DAGs' proper operations. Non-EU DAGs, for example, tend to suffer from the lack of a functioning secretariat providing sufficient support. While EU DAGs, as well as several non-EU DAGs are supported by the EESC and this support is comparatively stronger than that enjoyed by other non-EU DAGs, there is still room for improvement.

It can be challenging for DAG members to agree on joint statements, due to conflicts of interest between members. There is no mechanism for mediating in conflicts and reaching a consensual statement. These statements could be an important means by which DAGs can communicate formally with parties to an agreement.

More can be done also to foster closer exchanges between the EU and non-EU DAGs to prepare the joint civil society forum and to foster common statements there.

Recommendation 4: DAGs should be able to meet on a (more) regular basis – when the need arises – including virtually, with dates and draft agendas set well in advance. While this can already happen, and some DAGs have asked to do so, it would be good to insert strengthened provisions for meeting and work between DAGs in future FTAs. Such measures should also be adequately budgeted for by the European Commission.

Recommendation 5: Non-EU DAGs should be supported by a secretariat, and logistical and organisational issues should be addressed proactively. The European Commission should encourage governments of the trading partners to provide resources to support DAGs and, in some specific cases, envisage financial help for the functioning of non-EU DAGs), especially

those with weak institutionalised support. The DAGs should also be able to develop common projects, which could benefit from (financial) support from the European Commission.

Recommendation 6: The practice of developing a work programme should be strengthened and all DAGs should make efforts in this regard. This would also be beneficial in increasing efficiency, creating an internal dynamic and enhancing dialogue among EU and non-EU DAGs so that they can agree on joint recommendations or joint statements regarding the implementation of agreements.

Recommendation 7: DAGs could consider thematic working groups to prepare more between meetings.

Recommendation 8: DAGs could consider innovative approaches to building and reaching consensus and developing statements. This may be through soliciting expert or authoritative advice (for example, from UN treaty bodies and ILO supervisory mechanisms), allowing the establishment of coalitions among DAG members to draft statements that include opposing views. In case of significant disagreement between the different members or sub-groups of a DAG, substantive comments should be passed to the intergovernmental board, including minority views of a whole sub-group, with reasoning.³

Empowering DAG Members

As each DAG works independently of the others, best practices within specific DAGs may go unnoticed. Indeed, due to the lack in funding and administrative support, which is more prominent in non-EU DAGs, horizontal information sharing can be compromised. EU and Non-EU DAGs in the same FTA cannot always interact meaningfully. Similarly, opportunities for learning between DAGs across FTAs are limited.

In order to promote best practices, there should be a structure in which they can be shared. Such sharing should go beyond ad hoc exchanges and would benefit from a form of institutionalisation. In addition to procedural and global considerations around common issues, such as the ones outlined in this paper (for example, enforcement, transparency, joint statements), such exchanges might be also structured in terms of specific thematic clusters (for example, labour rights, land rights, environmental and climate change issues, and so on).

Recommendation 9: The European Commission, in cooperation with DAG members, should develop an institutionalised structure for sharing best practices, including the organisation of a recurrent joint civil society meeting at which all EU DAG members across FTAs can participate. A number of exchanges might be structured along specific thematic clusters (such as labour rights, land rights, trade impact of organic agriculture rules). The All DAG meeting is a good start to build on.

Recommendation 10: The European Commission, should develop dedicated best practice documents in cooperation with DAG members to enable future DAG members to fulfil their tasks. This could be complemented with training.

³ The Rules of Procedure of the DAGs on the Free Trade Agreements with Canada and Japan could serve as a model to streamline this across DAGs.

Recommendation 11: DAGs can strengthen EU DAG collaboration with their non-EU DAG counterparts by exploring common topics for study. The trade partners can support by including DAG-to-DAG meetings in the FTAs themselves.

Transparency

Insufficient information-sharing can hamper DAGs' work. EU DAGs are supported by a secretariat and information concerning them is therefore centralised in the EESC. Similar information for non-EU DAG meetings is not publicly available. In addition, meeting reports prepared by the secretariat can sometimes have various shortcomings (incomplete, provided late) and do not offer the necessary transparency.

Recommendation 12: The European Commission should provide for more frequent and detailed reporting (including on the implementation of the TSD chapter and complaints under the SEP) and require the same from trade partners. Relevant information should be shared with DAGs via the secretariat throughout the year. The annual FTA implementation report (including its dedicated chapter on TSD implementation) should involve DAGs more in the preparation phase.

Recommendation 13: The European Commission should strengthen cooperation with the DAGs and the EESC. It should invite DAGs' presidencies to exchange views at the TSD Committee meetings and subsequently grant those presidencies time to consult with respective DAG members before submitting final views and extend the role and capacity of the EESC in FTAs so that it can provide timely and comprehensive information and documentation.

Recommendation 14: The European Commission should open up DG EMPL High-level meetings to the DAG presidencies and the EESC. Additionally, it should involve the DAGs and the EESC in the oversight of projects with other organisations, such as the OECD and the ILO regarding responsible business conduct.

Recommendation 15: DAGs need greater visibility on the EESC, European Commission/DG Trade and the European Parliament websites.

Recommendation 16: More transparent communication should also flow from DAGs themselves. They should inform EU delegations regularly about DAG events and important information, mandating their presidencies to address the TSD Committee at their annual meeting and strengthening engagement with relevant actors in other institutions (EP rapporteurs (including INTA Committee), EESC Trade Committee, EESC rapporteurs and so on) and other stakeholders (Member State governments, EU Member State embassies in partner countries and so on).

Recommendation 17: The European Commission should commit to answering DAGs' joint recommendations and statements formally and in a reasonable timeframe.

Financial Support

Financial constraints appear to be a critical issue that hinder civil society participation in DAGs. This is mainly an issue for non-EU DAGs as the EU provides financial support to EU DAGs, such as secretariat services and travel expenses.

Recommendation 18: The European Commission should strengthen long-term funding dedicated to the functioning of DAGs, including consideration, on a case by case basis, possible financial support for members of non-EU DAGs. The three-year project to support civil society mechanisms in TSD chapters⁴ could provide a good basis to structure such support, and it is recommended that the involvement of current DAG members in the project be strengthened.

Strengthening DAGs in Implementing TSD Priorities

When defining EU priorities for the implementation of the TSD chapters, the relevant DAGs are consulted. However, DAGs' priorities are often not reflected in overall EU priorities, or suggestions from the DAGs may be reflected but lack concrete follow-up. The criteria of and decisions on the actual priorities that are translated into specific projects remain obscure and little information on their implementation is shared.

In the implementation of these priorities, the EU partnership instrument privileges projects on technical cooperation by the EC, development agencies and international organisations, leaving no room for proposals by different civil society sectors with relevant expertise on the TSD and priorities. Limited room is given to non-state actors in implementation.

Recommendation 19: The European Commission should aim to incorporate DAGs' priorities into the overall priorities of the EU for the implementation of the TSD chapter. If suggested priorities are not included, the Commission should justify its decision, as is already done in some FTAs.

Recommendation 20: The European Commission should equally consider projects that are proposed by specific non-state actors (such as trade unions, farmers' federations, private sector networks) to complement the existing portfolio of projects by international organisations and technical assistance agencies (such as the ILO).

Recommendation 21: Extend the scope of DAGs to all aspects of EU trade agreements, while maintaining a special focus on TSD implementation and the impact of trade on sustainable development more widely. This new scope will be tested first in the EU–UK TCA, and could be extended to the DAGs' scope in all existing and future FTAs by means of revised agreement texts or via harmonised practices under the DAG rules of procedure.

DAG–Government Meetings

The relations between DAGs and parties equally have room for improvement. They should be able to meet on a more regular basis. Substantively, more information should be shared in both directions. This means that the parties should also share information about the implementation of the trade agreement and the TSD chapter in particular. In general, the European Commission reacts to DAGs' input, while partner governments often lack responsiveness.

Some DAGs, as in the EU–Korea FTA, have developed good practices. These include, for example, the participation of DAG chairs in TSD committees, holding meetings back-to-back, and regular meetings of parties' representatives with DAGs to ensure follow-up to

⁴ European Commission (2018) Non-paper of Commission Services: 'Feedback and way forward on improving the implementation and enforcement of Trade and Sustainable Development chapters in EU Free Trade Agreements', available at: https://trade.ec.europa.eu/doclib/docs/2018/february/tradoc_156618.pdf

recommendations presented by civil society bodies, and discussions with ILO representatives, members of the European Parliament and representatives of several DGs in the Commission. However, there is a need to improve the efficiency of DAGs and increase the accountability of the parties (both at EU level [European Commission] and that of the governments of trade partners).⁵ To tackle this limited interaction and accountability deficit a procedural feedback loop should be established. This consists of procedures on how to provide governments with input and how to organise feedback and follow-up accordingly.

Recommendation 22: The trading partners should develop or enhance the feedback loop in which both trade partners report on implementation of the TSD chapter to the DAG. As already present in some FTAs, the DAGs should be able to provide clear recommendations, and the EC and trade partner should respond on which recommendations should be followed, as well as give reasons for which ones are not and why.

Recommendation 23: Establish an institutionalised dialogue between the DAGs and the European Parliament, so that the latter can support DAGs with their monitoring of policy impact. This can be achieved by a standing invitation to the respective DAGs presidencies to increase interaction.

Recommendation 24: DAGs should have the right to present their views in meetings of the TSD Committee and other meetings between the parties of FTAs. While this is existing practice in some DAGs, other DAGs currently not enjoying this option should request it. The European Commission should support such requests.

Enforcement of TSD Chapters

TSD obligations are often vague and may be rather aspirational and programmatic in tone, therefore making compliance more difficult to assess.⁶ In addition, DAGs' expectations can suffer from the same vagueness and confusion. Clarity on both fronts would make it easier for DAGs to set benchmarks and contribute to the implementation of TSD chapters.

TSD chapters are explicitly excluded from the general Dispute Settlement Mechanism (DSM) and provide for a specific mechanism comprising government-to-government consultations, involvement by the TSD committee and, as a last resort, a panel of experts if previous steps do not lead to any solutions. In this procedure other provisions of the FTA (even if they relate to an issue covered in the TSD chapters) are often excluded and only a limited role for civil society is provided. Given this organisational set-up, there are limited options for remedy of non-compliance with TSD chapters.

The lack of access to the DSM or a robust dedicated mechanism to enforce the TSD chapter limits DAGs' potential policy impact. To address this limitation, a procedure was recently developed through the Single Entry Point (SEP), which provides additional procedural clarity, and may improve DAGs' policy influence. Nevertheless, the Commission retains full discretion on whether to investigate complaints and the prioritisation of cases. Furthermore, the SEP does not offer similar procedural safeguards (such as time-limited responses, in-depth

⁵ See also FES (2020).

⁶ This is not unsurmountable – see Final Report of the Arbitration Panel, Restrictions Applied by Ukraine on Exports of Certain Wood Products to the European Union, adopted 11 December 2020 and Report, Panel of Experts Proceedings Constituted under 13.15 of the EU-Korea Free Trade Agreement, adopted 20 January 2021.

investigations by the Commission and judicial control by the European Courts of legal assessments), for example on the EU Trade Barriers Regulation.

In some cases, civil society entities are explicitly allowed to submit views or recommendations to governments, and the EU–Canada agreement even mandates that both sides should respond to each other. Finally, in what concerns dispute settlement, different provisions exist on whether DAGs may proactively submit recommendations, or be asked to do so, and whether they will be informed of the results or even monitor the implementation of the panel of experts’ report. In the Korean case, parties can request consultations based on DAGs’ communications. Overall, this leads to a broad variation between agreements.⁷

Recommendation 25: The EU and partner countries should provide clearer and direct obligations between partners in the TSD chapters and strengthen the enforceability of TSD chapters in future FTAs.

Recommendation 26: The CTEO should be required to investigate cases submitted by a DAG. The CTEO must disclose how it prioritises the cases that are submitted. It is important for the CTEO to be transparent on which complaints will not be considered, and for what reasons. The DAGs can provide input to such prioritisation.

Recommendation 27: In the short term, the European Commission/CTEO should adopt procedural deadlines and safeguards for the SEP for existing FTAs. This could be modelled after the timelines contained in the EU Trade Barriers Regulation, namely with time-limited responses, in-depth investigations by the Commission and judicial control by the national and European Courts of legal assessments.

Recommendation 28: DAGs should be able to submit advice in the pre-notification and following phases of the procedure. DAGs should have procedural rights in this. The codification of such rights should include the right to submit views to the panel and receive an answer with reasons.

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⁷ See also FES (2020).