

Annexe: main takeaways from the discussion with stakeholders

Policy context

The SEP was launched as part of a broader set of actions to strengthen enforcement of trade agreements and of TSD provisions specifically. This mechanism allows stakeholders to file complaints about potential breaches of TSD provisions in existing agreements between the EU and third countries. Its introduction therefore triggered a discussion about the follow-up of potential breaches and the mechanisms the Commission has at its disposal to enforce TSD commitments. Some civil society organisations who participated in the discussion are critical of the current EU approach to TSD provisions in trade agreements. The two main points of criticism concern the enforceability of TSD commitments and the access of stakeholders to enforcement mechanisms. With regard to the first point, the question is whether the current enforcement mechanism for TSD commitments is sufficient to bring about the desired change in third countries. Some participants doubt that this is the case. According to those organisations, the outcomes of TSD enforcement procedures are not on a par with the outcomes of market access or investment procedures. Secondly, some participants are strong proponents of making it possible for civil society organisations to start an enforcement procedure in cases of potential TSD breaches under an intergovernmental trade agreement. This should resolve the perceived imbalance vis-à-vis businesses which, in the eyes of some stakeholders, have more rights under EU trade and investment agreements than civil society organisations. The SEP, which provides the possibility to file complaints about potential breaches, is viewed very much in this broader policy context. To some stakeholders, establishing the SEP represents only a small improvement, while much of their broader criticisms remain unaddressed.

Accessibility of the SEP

Civil society organisations showed great interest in the accessibility of the SEP. They endorse the Commission's intention to make the SEP accessible to organisations regardless of size. Some would prefer it to be accessible to entities regardless of their location, which would mean that non-EU organisations operating on their own could also file complaints. They believe it should be possible for non-EU organisations to independently file complaints on potential breaches with the Commission. Another organisation stressed in hindsight that there should be a nexus between and EU interest if non-EU parties wish to file a complaint. At the first session, the CTEO clarified that non-EU entities can file complaints under the SEP if they collaborate with EU-based organisations. It was pointed out that similar complaint mechanisms in other countries, such as Canada, are also only accessible to entities based in that country.¹ Some civil society organisations argued, nevertheless, that organisations based outside

¹ A study commissioned by the Dutch government also illustrates that typically any person from a party's territory or any interested party can initiate a complaint, depending on the specific trade agreement (p. 77).

the EU might find it difficult to access the SEP due to lack of knowledge and resources, even if they collaborate with an EU organisation. Moreover, some organisations argued that it should be possible to file complaints against the EU and its member states should they not comply with the TSD commitments in trade agreements, while others disputed this. In response, the Dutch government clarified that the EU and national legislation provide strong safeguards when it comes to the protection of labour rights and the environment and that in such cases recourse can be had to procedures applicable within the EU, based on EU and national legislation are in place.

Many stakeholders expressed concerns that the requirements for filing a complaint are very demanding. This could lessen the accessibility of the SEP, as not all potential complainants would be able to comply with them. Some organisations question whether the amount of information requested by the Commission – in order to act upon a complaint – is justified. The CTEO explained that the information requested helps the Commission to assess the likelihood of success and build a strong case with regard to potential breaches. Many stakeholders still feel the requirements will be difficult to meet. They also want clarification on the treatment of a complaint if some of the information is lacking. The question was raised as to whether the Commission will consider an incomplete complaint as inadmissible or if the entity filing the complaint will be contacted to provide additional information. It was also notified by some civil society organizations that the vast majority of businesses do not have the means and options to investigate if the trade partner of the EU with whom a Trade Agreement with TSD conditions has been concluded is really complying with its commitments. It would almost require an own investigative force to trace non-compliance and such a unit is depending upon the cooperation and willingness within the trade partners domestic environment.

Participants suggested that the Commission could overcome the problem of limited accessibility to the SEP by providing support to domestic and foreign organisations so as to help them to collaborate. In addition, it was deemed useful if the Commission were to allocate a single contact person to the complainants during the pre-notification phase and the steps thereafter. Entities might share additional information via this contact person during the processing of a complaint. This would ensure some level of support to entities when preparing and further substantiating their complaints. It would not only make the SEP more accessible but also improve the quality of complaints. Some civil society organisations suggested that it should be possible to signal potential breaches of TSD commitments, rather than filing a fully fledged complaint with the Commission. These 'signals' would have a different status and would thus be treated differently from a complaint. The potential benefit of a signalling function is that it lowers the threshold to contacting the Commission. It would also ensure that no warning signs of potential breaches are missed, so that if the Commission receives similar signals from various stakeholders about a particular topic, the Commission can launch an investigation on its own initiative.

Prioritisation, assessment and follow-up of complaints

Participants expressed their concerns about the assessment and effective follow-up of complaints. Participants perceive a need for the Commission to reaffirm its commitment to deal seriously with submissions and address potential non-compliance. A broadly shared view from civil society organisations is that the procedures followed by the Commission are not sufficiently transparent. Entities who submit a complaint wish to be informed about the status of their complaint, the rationale for certain steps and

timelines for the process ahead. If this information is kept from them, they do not know whether – and, if so, how – the Commission is handling their submission, a state of affairs which may give rise to doubts as to whether the complaint is being taken seriously.

Providing insight into the Commission's prioritisation, timelines and evaluation of complaints improves overall transparency. Civil society organisations voice four main points of criticism about the current arrangements. Firstly, some organisations point out that it is unclear whether – and, if so, how – entities will be informed about the admissibility of their complaints. Civil society organisations fear there is a risk of a large proportion of complaints being considered inadmissible. One of the participants wonders how the Commission will deal with complaints that are not substantiated. Secondly, criteria used for the prioritisation of complaints are unclear. One of the organisations raised the question whether relatively straightforward market access issues will be prioritised over complex TSD issues, which would be undesirable. Thirdly, although the operating guidelines clarify that complainants will be informed about whether their submission will be followed up, stakeholders wonder in this respect whether the Commission will thoroughly explain its decision as well as the decision to resort to specific enforcement actions. Finally, participants drew a parallel between the procedures for TSD complaints and those for market access. Market access issues can be submitted on the basis of the Trade Barrier Regulation (TBR), which sets out clear procedures and timelines. With respect to the SEP procedure, however, the Commission refers to the general Code of Conduct, which to stakeholders does not immediately provide for a clear procedure and timelines. Some participants suggest that the Commission apply the TBR procedures when dealing with TSD complaints. According to those participants this would lead to equal treatment of two types of complaints in terms of the process that is foreseen with regard to trade agreements. This conclusion was drawn despite the explanation by the CTEO that the TBR has a considerably higher threshold for substantiating complaints.

Participants would like to be informed about the criteria the Commission applies when prioritising complaints. Moreover, participants suggest that processes could be more streamlined, and timelines for dealing with a complaint could be set and communicated. The Commission should inform stakeholders within a certain timeframe whether – and, if so, how – complaints will be followed up, so that stakeholders have an indication of how long specific steps in the process take. Stakeholders propose that entities should also be informed about the rationale for certain steps that are taken in the process, and for follow-up actions. Moreover, participants request that – at any given time – the status of a complaint should be made clear, at least to the entity that submitted it. The Commission could strive to maximise transparency about what particular follow-up actions are being taken and why, taking into account confidentiality requirements.

The role of Domestic Advisory Groups (DAGs) in connection with the SEP was discussed on various occasions. Participants wonder whether the SEP affects the role played by DAGs and if DAGs have a part to play during the input, prioritisation and follow-up phases of complaints. DAGs can currently make recommendations about the implementation of TSD provisions in a particular agreement, and parties can ask for

their advice about TSD consultations. Some participants would like DAGs to have a role in prioritising complaints with regard to a particular trade agreement. In response to questions from participants, the CTEO clarified that the SEP is open to all EU-based stakeholders and that the Commission engages with the DAGs in its implementation efforts on all matters falling within their remit, including those related to the new enforcement measures, but it also noted that they are independent and set their own agenda.

In relation to the role of DAGs, some participants suggested making the prioritisation of complaints more transparent and involving stakeholders in this process. Others foresee a potential conflict of interest in involving DAGs in the prioritisation of complaints. Some civil society organisations argued that DAGs should be informed about complaints filed with the SEP with regard to the particular trade agreement they are involved in. They should also give advice to the Commission about dealing with complaints under relevant agreements. This should not lead to a change in the formal advisory role that DAGs have under EU trade agreements; rather, it is merely intended to provide additional means to safeguard the proper functioning of the SEP.