



**Delhi Policy Group**

Advancing India's Rise as a Leading Power



# DPG POLICY BRIEF

## India's Approach towards Inclusion of New Areas in Future FTAs

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**Delhi Policy Group**

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Union Minister for Commerce and Industry, Shri. Piyush Goyal and former UK Secretary of State for International Trade Anne Trevelyan at the launch of India-UK Free Trade Agreement Negotiations in New Delhi on January 13, 2022- Source: @CimGol|Twitter

Union Minister for Commerce and Industry, Shri. Piyush Goyal and Executive Vice President of the European Commission Mr. Valdis Dombrovskis relaunch India-European Union Trade Negotiations at Brussels on June 17, 2022- Source: @PiyushGoyal|Twitter

Union Minister for Commerce & Industry, Shri Piyush Goyal at the Virtual Signing Ceremony of India-Australia Comprehensive Economic Cooperation on April 2, 2022- Source: @PiyushGoyal|Twitter

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**India's Approach towards Inclusion of New Areas in Future FTAs**

by  
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## India's Approach towards Inclusion of New Areas in Future FTAs

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### Introduction

This brief is about the approaches that may be needed and the pitfalls to be avoided in negotiating relatively newer areas, in particular relating to labour standards and environment issues, as part of concluding new FTAs that India is currently engaged in. India has generally tried to avoid including disciplines on such largely non-trade issues in trade agreements either bilaterally or multilaterally. India's FTAs with Korea, ASEAN and Malaysia did not dwell on them and the CEPA with Japan dwelt upon environmental protection in a limited way<sup>1</sup>. RCEP, in whose negotiations India participated almost till the end before it decided not to join, has no such provision. Among India's two new FTAs already signed earlier this year, the interim India-Australia economic cooperation and trade agreement (ECTA), does not venture into such areas but the India-UAE CEPA has some provisions on environmental cooperation under the chapter on 'Economic Cooperation' which are themselves however not subject to dispute settlement provisions of the agreement<sup>2</sup>.

There is however a recognition in the Commerce Ministry that if India has to conclude FTAs with developed country partners such as Canada, EU and the UK then there is not much of a choice but to engage with them more substantively on these topics. It has further been mentioned<sup>3</sup> that while India did not have much experience or capacity in these areas, negotiating bilateral deals on these 21st century issues could provide the necessary experience if they get to be considered multilaterally.

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<sup>1</sup> Article 8 of India Japan CEPA does refer to environmental protection but somewhat generally in terms of adequacy of protection by the parties while encouraging trade and investment. The two parties also reaffirm their obligations and rights under any international agreement to which both are parties. Similarly in Article 99 of India-Japan CEPA the two parties recognise that it would be inappropriate to encourage investment activities by relaxing environmental measures.

<sup>2</sup> In certain ways however the formulations in the India-UAE FTA indicate a somewhat higher level of commitment than the India-Japan CEPA. Article 14.5.3 in the former talks of both parties striving to ensure that its environmental laws and policies provide for and encourage high levels of protection (going beyond adequate). In Article 14.5.5 each party also affirms not only commitments to the MEAs to which it is a party but also to implement them.

<sup>3</sup> See the newsitem [https://www.business-standard.com/article/economy-policy/commerce-ministry-likely-to-soften-stance-on-21st-century-issues-at-wto-121121601476\\_1.html](https://www.business-standard.com/article/economy-policy/commerce-ministry-likely-to-soften-stance-on-21st-century-issues-at-wto-121121601476_1.html)

## Nature of clauses included on labour and environment in some FTAs

What is the nature of disciplines included under such topics and why do we hesitate to have such clauses in trade agreements? Typically such provisions require the parties to abide by ILO's core labour standards and these can be a narrow list of core labour standards as agreed in the ILO 1998 declaration on Fundamental Principles and Rights at Work, and cover right to form association and engage in collective bargaining, prohibit forced and child labour and ensure non-discrimination or it can be more expansive and cover measures in respect of wages, hours of work, occupational health and safety issues, labour inspection system and so on. Certain more recent FTAs also refer specifically to the Decent Work Agenda advanced by the ILO Declaration on Social Justice for a fair globalisation of 2008 that inter alia called for decent work conditions with regard to wages and earnings, working hours, social protection and other conditions of work.

On environment, they could relate to effective implementation of the multilateral environment agreements (MEAs) that have been agreed upon by the parties. These agreements cover a range of areas including climate change, biodiversity, ozone layer depletion, marine land and air pollution and illegal trade in endangered species. Here again the list can be short and specific or it could be expansive and could include all the MEAs to which they are parties.

Additionally, the chapters on these topics could specify that each party should effectively adhere to its national laws on environment and labour adding that there should not be any backsliding from these laws either in terms of the law itself or in its implementation to encourage greater trade or investment. They could also seek to cover other areas of particular interest to either parties like deforestation or exhort specific measures that are climate friendly or promote gender non-discrimination.

Another important aspect in these chapters could be about monitoring, review and enforcement of the provisions. They could range from leaving it on a 'best endeavour' basis to a more sanctions based dispute settlement approach in case of non-compliance. Monitoring could be government to government or they could also include NGOs and civil society.

## Why the concern on their inclusion in FTAs?

While it can be argued at one level that no one should generally be opposed to protecting reasonable environment and labour standards, the issue really is about their inclusion, through leveraging, in a trade agreement. Firstly, the concern is whether they could be an attempt, now or later, to veer towards

harmonisation of these standards between two partners who may be at very different levels of development<sup>4</sup>. Secondly, they may invariably result in pressuring the less developed party to reset inter se domestic prioritisation both in terms of the standards themselves and the allocation of resources for their implementation. A country that could benefit more from addressing clean air and clean water or recycling as urgent priorities may instead be forced to look at other transboundary or longer term issues. Thirdly the concern is whether the real attempt at emphasising protection is to scale up the costs of production and undermine the benefits of comparative advantage that a trade agreement is intended to deliver. Fourthly there may also be an expectation that such chapters could in turn spur demand for environment friendly goods, technologies and services particularly from the more developed partner. Professor Jagdish Bhagwati has dwelt in some detail<sup>5</sup> on how flawed is the demand to include these issues in a trade treaty even as free trade agreements between developed countries and weaker nations may be seen as the best way of (pushing to) getting these demands accepted.

Yet another aspect that needs flagging particularly in relation to MEAs is that it is also a process in each area, like biodiversity or depletion of ozone layer or climate change, whereby a convention or a framework convention gets agreed among global the partners depending on the science available then and the global consensus that can be mobilised at that stage. As further evidence emerges and consensus ensues further agreements or protocols follow. Thus the UN Framework convention on climate change (UNFCCC) has been followed by the Paris agreement, the Vienna Convention on Ozone layer by the Montreal protocol and the Convention on Biodiversity by its Cartagena and Nagoya protocols. Generally therefore it is observed that it is not a onetime effort but a process and irrespective of their binding or non-binding nature of obligations they do have a gradual and pervasive regulatory effect on the state behaviour<sup>6</sup>. This in turn enables significant inroads into the domestic policy and law making process. The key question is how would including them in a trade agreement influence or affect this process that has been taking place autonomously driven by expert knowledge and evidence available, world

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<sup>4</sup> This concern no longer seems far fetched after the renegotiated US-Mexico Cannada agreement which in its rule of origin for automobiles not only hiked the North American content but also added that 40-45% of such content be made by workers earning at least US\$ 16 per hour, that is far higher than the average Mexican wages.

<sup>5</sup> See Chapter 3 titled " Why PTAs are a pox on the World Trading System" in the book " Termites in the trading system", by Jagdish Bhagwati, Oxford University Press, 2008

<sup>6</sup> See the article by Bharat N Desai on 'Creeping Institutionalisation : MEA and Human Security' published by UNU University for environment and human security No.4/2006.

public opinion and civil society pressure and the level of consensus that can be mustered.

Finally there is also the issue of balance and reciprocity in several of these agreements that have technical cooperation and financing provisions to be extended by developed countries in order to help developing countries meet some of the obligations in the agreements. For example if we look at climate change or depletion of ozone layer, for which the developed countries should take particular responsibility in view of the far larger share in being the cause for the problem, the pledges made for financing remain unfulfilled. At the UN climate summit in Copenhagen, developed nations made a significant pledge to channel US\$100 billion a year to developing nations by 2020, to help them adapt to climate change and mitigate further rises in temperature. But the actual reality has been far lower with much of the finance also in the form of loans and not grants<sup>7</sup>. The financing commitment is also made at a collective level of developed nations with no formal deal on what each should pay. On the other hand the obligations of countries in terms of reaching targets are at the country level. It is far from clear when the parties to an FTA affirm their commitment to an MEA and to implement it in a TSD chapter of the FTA, the developed partner in the MEA would also be affirming its commitment to financing, technology development and transfer and capacity building that may be present in an MEA as for example in Articles 9,10 and 11 of the Paris agreement.

### **Where does India stand vis-a-vis these labour standards or MEAs?**

India has ratified six of the eight ILO labour conventions that relate to the four core labour standards in the ILO Declaration on Fundamental Principles and rights at work, 1998.

- a) Forced labour convention;
- b) Abolition of forced labour convention;
- c) Minimum Age convention;
- d) Worst forms of Child labour convention;
- e) Equal Remuneration convention; and
- f) Discrimination (Employment and Occupation) convention.

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<sup>7</sup> See for example the article "The broken \$100-billion promise of climate finance – and how to fix it: At Glasgow's COP26 summit, countries will argue for more money to mitigate and adapt to the effects of climate change" by Jocelyn Timperley, 20 October 2021, in Nature accessible at <https://www.nature.com/articles/d41586-021-02846-3>

India has however not ratified the following two conventions relating to right of association and collective bargaining.

- a) Freedom of Association and Protection of the Right to organise convention; and
- b) Right to organise and collective bargaining convention.

It is understood that the main reason for non-ratification of these two conventions arises from their getting applicable to government servants. But the latter are not permitted to strike work, openly criticise government policies, freely accept financial contributions and so on. Apparently the government has been taking steps in examining the prospects of ratifying these conventions including holding regular discussions with the stakeholders<sup>8</sup>.

Even as this is the status on the four core labour standards/principles, the 110th International Labour Conference has on 10 June this year adopted a resolution to add the principle of 'a safe and a healthy working environment' as the fifth core labour principle. This would in effect mean addition of Occupational Safety and health convention (1981) and Promotional framework for occupational health and safety convention (2006) to the ILO's core conventions and India has not ratified either of them. India ratifies an ILO convention only when its laws are brought fully in conformity with the provisions of the convention. India has not ratified the former because two of the largest employing sectors, namely agriculture and MSMEs, are not regulated by any law in this regard. The latter convention also requires, among other requirements, a national policy and a national system for occupational safety and health to be in place. So, as per an expert, it is going to be a tough ask for India to ratify these two ILO Core conventions even as he considers them desirable<sup>9</sup>.

On the environment side, India's record has remained very positive and it has become a party to the several of the MEAs that have evolved over the years. India has ratified the UNFCCC and the Paris agreement on climate change, the Convention on Biodiversity and its Cartagena and Nagoya protocols as well as the Vienna Convention and the Montreal Protocol on the ozone layer. India is also a party to the MEAs in the area of chemicals and hazardous wastes such as the Basel, Rotterdam and Stockholm conventions. In some cases, while India

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<sup>8</sup> See the newsitem [https://www.business-standard.com/article/government-press-release/ilo-fundamental-conventions-india-ratified-six-out-of-the-eight-core-117072400725\\_1.html](https://www.business-standard.com/article/government-press-release/ilo-fundamental-conventions-india-ratified-six-out-of-the-eight-core-117072400725_1.html)

<sup>9</sup> See the article 'Occupational safety and health: Next best moves for India' by Professor K.R.Shyam Sundar of XLRI Management Institute accessible at <https://www.impriindia.com/insights/occupation-safety-health-move/> 27 July 2022.



ratifies the convention it may place a part reservation that gets lifted over time. For example in the case of the Stockholm convention on persistent organic pollutants (POPs) that has till date listed 26 chemicals as POPs India has ratified only 19 so far. India is also a party to the Convention on trade in endangered species (CITES) as well as those relating to marine pollution apart from others.

India's ambitious announcement of reaching net zero economy by 2070 is another significant milestone in contributing towards world climate goals. Of recent note, is also the approval<sup>10</sup> given by the Union Cabinet on 3rd August this year for updating India's nationally defined contribution (NDC) under the Paris agreement that would include reducing the emissions intensity of its GDP by 45% compared to 2005 levels (this is higher than the 33 to 35% range mentioned in the first NDC submitted in October 2015) and to achieve 50% cumulative electric power installed capacity (as against 40% earlier) from non-fossil fuel based energy resources by the year 2030. The Lok Sabha has also passed an energy conservation amendment bill 2022 on 9th August which provides the legal framework for making these happen<sup>11</sup>. The provisions could inter alia enable the government to prescribe minimum consumption levels of non-fossil energy sources as energy or feedstock by designated consumers, set energy conservation code for buildings and establish a carbon market for incentivising actions for emission reductions.

## Current status of FTA negotiations with some developed countries

Having obtained some idea on what inclusion of labour and environment standards in trade agreements really may imply and what is the current status of India in respect of each of them, we now turn to the current status of India's FTA negotiations with the developed country partners who may be seeking inclusion of such standards. So far, three rounds of negotiations have been held in respect of the India-UK FTA and a fourth round is due to be held soon. The first round of the revived negotiations on an India -EU FTA was held from 18th June to 2nd July this year which had 52 technical sessions covering 18 policy areas<sup>12</sup>. Similarly the India-Canada FTA negotiations have also got revived and

<sup>10</sup> See <https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1847812>

<sup>11</sup> <https://prsindia.org/billtrack/the-energy-conservation-amendment-bill-2022>

<sup>12</sup> See PIB Press Release dated 2nd July 2022 titled "India-EU conclude 1st round of negotiations for India-EU Trade and Investment Agreements; 2nd round of negotiations scheduled to take place in September 2022 at Brussels"

three rounds have reportedly been held with a fourth round expected in September.<sup>13</sup>

While there is no definite information on whether these FTAs will address labour and environment, but considering the numbers of envisaged chapters and policy areas that were discussed, they appear very likely. This becomes evident if we also look at the most recent FTAs signed by these countries. The UK Australia FTA signed in December 2021 and the EU-New Zealand agreement signed on 30 June this year both have them. The EU also describes its latest FTA with New Zealand as a new generation trade deal containing the most ambitious sustainability commitments in any trade agreement ever. It inter alia provides for sanctions as a last resort in case of non-conformance with the Paris climate agreement and core labour standards. Similarly Australia explains that the environment chapter in its FTA with the UK as subject to a robust enforcement mechanism that includes a multi-stage consultation process failing which the dispute settlement provisions of the FTA may be used. The Australia-UK FTA is also the first FTA signed by the UK after Brexit which has been negotiated from scratch and not a rollover of an earlier agreement with the EU when UK was part of EU. Could it therefore reflect a post Brexit UK's independent approach?

Canada too has developed an 'inclusive trade policy' and its recent FTAs including with the EU cover a range of issues including labour rights and environmental protection, women's rights, indigenous rights etc., The EU also frames these topics under the broader rubric of trade and sustainable development (TSD).

### **How would these developed partners approach TSD issues with India?**

What is however of particular relevance is how would these developed countries approach these issues while negotiating with an emerging economy like India. A related aspect is whether they have shown flexibilities in their earlier FTAs with other developing/emerging economies. The second issue is, taking into account the negotiation and implementation experiences of third country developing economies on these matters, what are possible alerts that Indian negotiators may need to keep in view in negotiating such clauses. The third aspect to consider is how should we be strategising to achieve the desired results. As a measure of reciprocity, should India also make some demands on these states? Here we also look at Australia since the negotiations for upgrading

<sup>13</sup> See <https://www.livemint.com/economy/indiacanada-fta-4th-round-of-negotiations-from-september-11661790751400.html>

the already signed interim ECTA with them to an enhanced comprehensive economic cooperation agreement are also to commence soon.

## Nature of TSD provisions in existing FTAs of these developed country partners with third country developing/emerging economies

### The case of Australia

A survey of Australia's FTAs suggests that labour and environment dedicated chapters have found inclusion only in select number of them<sup>14</sup>. Indeed the Australia-China FTA (came into force in December 2015) and the more recent Australia-Indonesia FTA (July 2020) did not include any such specific chapters. Considering that the ECTA signed between India and Australia earlier this year did not also refer to the possible inclusion of environment or labour rights chapters, it may be best if India should be able to persuade Australia in not including such disciplines in the eventual CECA that the two countries are negotiating, notwithstanding what Australia may have concluded with the UK or with certain other partners.

### The case of UK

UK's negotiating history on FTAs post BREXIT is rather brief and does not include any emerging economy (except in the form of rollover of some of the FTAs in which it was a party by virtue of being a EU member). However, considering that the number of chapters in its FTA with India will number 26, TSD issues will most certainly figure in it. But whether it will be guided more by the EU practice or could the UK show greater flexibility remains to be seen. As per the strategic approach paper<sup>15</sup> put out by the Department of international trade of the UK for its negotiations with India, the FTA could include promoting cooperation across a wide range of environmental issues; reaffirming commitments to multilateral environmental agreements; preventing derogation from environmental laws to secure a trade advantage; and preserving the UK's right to regulate to meet its climate commitments. Similarly, on labour standards, it has been stated that that the UK will seek to ensure that the agreement allows it to protect its regulatory sovereignty, protect against labour rights being reduced to gain a trade advantage, and provide for

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<sup>14</sup> See also pages 67-68 of the LSE document titled 'Comparative analysis of trade and sustainable provisions in free trade agreements' February 2022, The London School of Economics and Political Science.

<sup>15</sup> See [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1046839/uk-india-free-trade-agreement-the-uks-strategic-approach.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1046839/uk-india-free-trade-agreement-the-uks-strategic-approach.pdf)

appropriate mechanisms for the implementation, monitoring and dispute resolution of labour provisions.

### The case with Canada

As for Canada, its government report 'State of Trade 2022: The Benefits of Free Trade Agreements' has pointed out that environmental protection and the advancement of international standards are pillars of Canada's policy agenda. Its bilateral FTAs with Peru (2009), Colombia (2011), Panama (2013), Honduras (2014) and Ukraine (2017) all have both environment and labour rights provisions. From the foregoing, it can be expected chapters on the two topics will be sought to be included by Canada in its negotiations with India. Further, if we take the latest Canada-Ukraine FTA as the immediate precedent, the environment chapter would require that the parties to effectively enforce their environment laws and also affirm the MEAs to which each is a party. It is however not seen as prescriptive about what each country's environment laws must necessarily cover or about what MEAs each country should necessarily be party to, including those relating to climate change. The coverage however is more prescriptive in the labour chapter that requires each party to provide for protection to not only the four core labour principles and rights as in the ILO 1998 declaration but also those that relate to wages, health and safety as in the ILO's Decent Work agenda of 2008. Both these chapters however provide for Canada to be able to notify that certain of its provinces be excluded from their application even as the government will make best efforts to have as many provinces added as possible.

On the enforcement aspect the focus in both these chapters is about non-derogation to encourage trade and investment and for each party to provide in its domestic laws legal avenues for any of its persons to launch proceedings aimed at enforcement of the law and to secure remedies for violation. There are also provisions relating to dispute resolution among the two parties to the FTA in case of perceived non-compliance by one or the other through the establishment of an independent review panel. While the environment chapter has no provision for further sanctions or remedies if the party complained against does not implement the findings of the review panel, the labour chapter provides for an additional step for the complaining party to request the review panel to provide a monetary assessment to remedy the non-compliance. Should the party complained against does not address the monetary assessment it is then deemed to be in violation of the agreement.

### **Box 1 EU's evolving approach towards including TSD provisions in its FTAs**

The European Union has been including sustainable development provisions in the FTAs to which it is a party for several years now starting with the FTA with Republic of Korea which came into force in 2011. Broadly, these disciplines in a TSD chapter in each of its FTAs could be classified under three broad heads:

- a) Disciplines based on existing international agreements relating to protection of environment and labour rights : The TSD chapter could typically require existing multilateral environment agreements (MEAs) or ILO conventions on core labour standards to be i) ratified by the parties, if not already done; or ii) respect, promote and realise fundamental principles in them; and/or iii) effective implementation of those already ratified .
- b) Obligations that arise from existing domestic legislation on labour, environment or other issues relating to sustainable development in the FTA parties : The TSD chapter could seek effective national implementation of these laws by each party and to prohibit non-regression from them in a manner affecting trade and investment and/or as a means to encourage trade and investment; and
- c) Obligations towards higher level of protection in a range of other areas not covered by a) and b). Over the years gender related issues and aspects related to human rights have also begun to find entry in the TSD chapter.

On enforcement of the TSD chapters in its FTAs, the EU followed what it regarded as a more cooperative rather than a coercive or sanctions based approach, and the dispute settlement provisions of the FTA themselves were made non-applicable to the TSD chapter. But it provisioned a greater role for private involvement and civil society in monitoring and raising issues relating to implementation of the TSD chapter. Furthermore, the TSD chapter provided for consultations among the parties for resolving differences or disputes relating to compliance. If these consultations, that were also mandated to take place at different levels, failed to resolve the matter, the TSD chapter also provided for an independent expert panel to be set up that could look into the matter and come out with findings.

Both in terms of depth of commitment on each aspect as well as in terms of coverage of issues in the TSD chapters, EU's FTAs have steadily expanded. On environment issues for example the EU-South Korea deal covered climate change, renewable energy, biodiversity, fisheries, forest conservation and access to genetic resources. EU's FTA with Japan additionally covered illegal trade in endangered species and enforcement of Paris climate deal. The most recent FTA with New Zealand further includes fossil fuel subsidy reform and gender equality.

Similarly on enforcement too the EU-NZ FTA makes a departure to a more sanctions based approach with the dispute settlement provisions in the FTA itself becoming also applicable to the TSD chapter.

The EU-New Zealand FTA is the first FTA signed by the EU which accords with its improved approach to TSD as set out in the EU Commission's communication of 22nd June 2022 outlining the new orientations for sustainable development in trade agreements. Arrived at after a detailed three year review with a view to improving implementation and enforcement of trade and sustainable development (TSD) chapters in EU's trade agreements, the communication lists 20 action points under the following six broad headings that the EU Commission will follow in future trade negotiations:

- \* A comprehensive TSD approach anchored in multilateral agreements and cooperation;
- \* Identification of country specific implementation priorities;
- \* Mainstreaming sustainability throughout the entire trade agreement;
- \* Collective monitoring of the implementation of TSD outcomes;
- \* Reinforcing the role of civil society; and
- \* More assertive enforcement including through sanctions.

At the release of the Communication, EU Commission Vice President Valdis Dombrovskis also stated 'Our trade agreements give us clout on the world stage and support economic growth and sustainable development - but as of now we want to make them an even bigger driver of positive change. We will engage and support our partners to make this happen. We will step up our enforcement and we will resort to sanctions if key labour and climate commitments are not met'.

## The case with the European Union

The negotiations with the EU can in any case be expected to cover TSD issues. It has also steadily sought to expand the scope of commitments and their enforceability since the first FTA with such provisions that it concluded with South Korea in 2010 (see Box 1 for more details on the evolution of TSD provisions in EU's FTAs). Most recently, on 22nd June 2022, the EU Commission has also published a communication on 'Sustainability provisions in EU FTAs' after a detailed three year review with a view to improving implementation and enforcement of trade and sustainable development (TSD) chapters in EU's trade agreements. An aspect that is seen particular to this EU approach is its usage of trade agreements to be supportive of its own sustainable development initiatives as in respect of deforestation or about introducing a carbon border adjustment mechanism for import of certain products whose production is energy intensive. (see Box 2)

The EU-New Zealand FTA we referred to earlier is the first FTA signed by the EU (apart from the EU-UK trade cooperation agreement signed in the context of BREXIT) that is known to accord with this new approach. The question is would the EU follow a more cooperative and less sanctions based approach with a developing economy like India. In this regard EU's FTAs with Vietnam and the MERCOSUR form ready recent examples of the more cooperative approach (they do have a dedicated dispute settlement mechanism however but distinct from the general dispute settlement mechanism of the FTA that involves sanctions as remedies) but even they differ between them in the level of TSD commitments and implementation requirements. Both of them have also had ratification issues. Indian negotiators need to be aware of these details.

### **Box 2 EU's recent initiatives on Deforestation and Carbon border adjustment mechanism**

EU has recently launched several new initiatives as part of its Green Deal. Two of them launched for promoting environmental conservation and sustainable development have particular global implications for trade. One relates to combating deforestation and forest degradation on which EU commission put forward a legislative proposal on 17 November 2021. The second is the proposal by the EU Commission to launch a Carbon Border Adjustment Mechanism which was announced on 14 July 2021. Ostensibly mooted to promote climate objectives and conserve biodiversity they could also have protectionist intent.

#### **EU proposal to combat deforestation and forest degradation**

The proposal is intended to introduce rules that would guarantee that products that EU citizens buy, use or consume on the EU market do not contribute to global deforestation and forest degradation. The main reasons for deforestation happening have been determined as expansion of agricultural land linked to commodities such as **soya, beef, palm oil, wood, cocoa and coffee** and some of their derived products. So, the idea is for EU to come forward with regulation that will require mandatory due diligence for companies which seek to place these items on the EU market. It will be ensured that only deforestation free and legally produced items will be allowed to enter the EU market. Operators will be required to submit traceability details and where the commodities they place on the market were produced. A benchmarking system will also assess exporting countries as presenting a low, standard or high risk of producing commodities or products that are not deforestation free.

EU also works to ensure that its trade agreements seek to safeguard and build support for its approach and initiatives on sustainable development and its recent FTAs do carry provisions on deforestation. The TSD chapter in the most recent EU-New Zealand FTA for example carries commitments by the parties to combat illegal logging and related trade and to promote trade in forest harvested products in accordance with the law of the country of harvests and from sustainably managed forests.

#### **EU proposal to introduce a carbon border adjustment mechanism (CBAM)**

This proposal is intended to equalise the price of carbon between domestic products and imports and ensure that EU's climate objectives are not undermined by production relocating to countries with less ambitious climate policies. This mechanism will initially apply to select number of goods assessed as carrying high risk of carbon leakage viz., Iron and Steel, Cement, Fertilisers, Aluminium and Electricity generation. EU importers of these items will have to buy carbon certificates corresponding to the carbon price that would have been paid as per EU rules. The CBAM system will begin 2026 but the transition phase will begin in 2023 when importers will start reporting on emissions embedded in their goods. By the end of the transitional phase the Commission will review and consider whether its scope should be extended to cover more products.

This proposal which has been in the making for some time can again be seen getting covered in some measure in recent EU's trade agreements. In the TSD chapter of the EU-New Zealand FTA the article relating to climate for example calls upon the parties to promote the mutual supportiveness of trade and climate policies and measures thereby contributing to the transition to a low greenhouse emission, resource efficient and circular economy and to climate resilient development. The article further endorses emissions trading as an effective policy tool for reducing greenhouse emissions.

#### **Protectionist motivations?**

Both the foregoing proposals could have been motivated not only for promoting environmental objectives but also for protectionist interests. Jeffrey McNeil, referred to also elsewhere in this brief, has stated that meeting the requirements set by the EU in its deforestation proposal raises the entry level for otherwise cheaper timber from tropical sources that could threaten more expensive EU forestry. Similarly, the CBAM proposal could be seen a more sophisticated way of restricting imports of items like steel and aluminium for which President Trump had used the more questionable route of economic security. As per an UNCTAD study\* (July 2021) that has examined the implications of EU's CBAM for developing countries, apart from Russia, China and Turkey, the developing countries most exposed to the CBAM would be India, Brazil and South Africa.

There is also the question of compatibility of these proposals with WTO law which is far from certain at this stage. It can perhaps be really known only if a WTO dispute is raised and a panel makes its findings.

\* A European Union Carbon Border Adjustment Mechanism: Implications for developing countries, July 2021, published by UNCTAD accessible at [https://unctad.org/system/files/official-document/osginf2021d2\\_en.pdf](https://unctad.org/system/files/official-document/osginf2021d2_en.pdf)

## Differences between EU-Vietnam FTA and EU-MERCOSUR FTA on TSD provisions

In both the agreements the parties reaffirm their commitments to effectively implement the four core principles in the ILO Declaration on fundamental principles and rights at work<sup>16</sup>, 1998 and to make continued and sustained efforts towards ratifying the relevant fundamental conventions related to them. EU's FTA with MERCOSUR however also goes beyond and carries a commitment to promote decent work as provided by the Declaration on Social Justice for Fair Globalisation of 2008 and requires particular attention to be paid to measures regarding occupational health and safety issues as well as about wages, earnings and working hours.

On MEAs the commitments in the two FTAs are almost identical in that they reaffirm to effectively implement in their respective domestic laws and practice to effectively implement the MEAs to which each is a party. As for climate change issues again the two FTAs are similar in that they carry reaffirmation of commitments of the parties to effectively implement the UN Framework on Climate Change (UNFCCC) and the Paris Agreement. Here however it is the EU-Vietnam FTA that also adds Kyoto Protocol to the list whereas the FTA with Mercosur does not carry this reference.

The TSD chapter in both the FTAs also carry commitments, but couched more in best endeavour terms, on a range of topics including bio-diversity, sustainable forest management and trade in forest products, long term conservation management and sustainable exploitation of marine living resources.

## Ratification issues faced by EU FTAs relating to Vietnam and MERCOSUR and their possible relevance to India

In the case of EU, ratification is a layered process where the agreement needs approvals at different levels, including by the European Parliament. Some agreements also require ratification by the national legislative assemblies of EU member countries depending on the topics covered by the agreement and their respective competence.

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<sup>16</sup> These are the rights of freedom of association and the effective right to collective bargaining, the elimination of all forms of forced or compulsory labour, the effective abolition of child labour and the elimination of discrimination in respect of employment and occupation.



The EU-Vietnam FTA was approved by the EU Parliament in February 2020 despite initial reservations among some in the European Parliament. This came through mainly because Vietnam ratified the ILO Convention on collective bargaining in June 2019 and adopted a revised national labour code in December 2019 that apparently ensured that the decent work agenda was implemented in Vietnam. Furthermore it confirmed the timelines for the ratification of the remaining two fundamental ILO conventions on freedom of association (2023) and forced labour (2020) as apparently requested by the European Parliament.

The EU-Mercosur Trade Agreement however faced difficulties that are still unresolved even as the text was agreed in principle by end June 2019. In this case, the agreement being part of the overall EU-Mercosur Association Agreement, also required ratification from EU member states. But Members of Parliament in some states, Austria<sup>17</sup>, France and Ireland for example, pointed to the weak language in the TSD chapter and warned that they would oppose the ratification unless Brazil undertook to do more to curb fires in the Amazon rain forests. The ostensible reason given was that the extensive forest fires in the Amazon region in combination with intensive agro-industrial mode of agricultural production in Mercosur countries will exacerbate global warming but there could also have been other motivations<sup>18</sup>. The trade agreement therefore still remains unfinalised<sup>19</sup> even as there were indications by EU environment commissioner Sinkevicious earlier this year that if a "side letter" or addendum to the free trade agreement to address the missing environmental safeguards gets agreed the trade deal may get approved<sup>20</sup>.

Both these instances, of the TSD chapters in the agreements with Vietnam and Mercosur, show how even at the ratification stage further concessions could be sought in trade negotiations with the EU. Nor can it be assumed that the 'cooperative approach' earlier adopted by the EU could be just that. This became

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<sup>17</sup> See for example page 47 of the paper titled 'Exporting environmental objectives or erecting trade barriers in recent EU FTAs by Jeffrey McNeil, Australia and New Zealand Journal of European Studies, vol 12(1), 2020

<sup>18</sup> op cit., While discussing possible motivations for Austria's objections Mcneil also hints that it could have been a way for Austrian farmers wanting to delay imports of cheap Brazilian beef.

<sup>19</sup> Another analysis regarding the TSD provisions, but a more supportive one of the EU approach, and the stalemate reached has been provided in the paper by Bronckers et al titled 'Retooling the sustainability standards in EU Free Trade Agreements' in the Journal of International Economic Law, 23 February 2021.

<sup>20</sup> See Reuters newsitem 'EU-MERCOSUR trade deal to clear environmental hurdles this year' dated 2nd May 2022, accessible at <https://www.reuters.com/business/environment/eu-mercossur-trade-deal-clear-environmental-hurdles-this-year-eu-commissioner-2022-05-02/>

evident from the EU proceeding to seek the establishment of an expert panel under the TSD chapter of the EU-South Korea FTA in July 2019 due to what it regarded as South Korea's lack of progress 'to respect and realise in their laws and practices' the fundamental principles at work, notably the freedom of association and to ratify outstanding ILO Conventions. The expert panel determined<sup>21</sup> in 2021 that South Korea should adjust its labour laws to be consistent with the TDS chapter in the agreement, which then resulted in South Korea ratifying three conventions and also launching a research project on yet another convention aimed at assisting in its ratification as well.

## How should India be strategising its negotiating approach?

Keeping all the foregoing in view, how should India approach the ongoing FTA negotiations with several developed country partners on TSD issues? Following points are suggested in this regard:

- At the outset it needs to be recognised that India has progressively worked on improving labour standards domestically including in the adoption of ILO conventions. It has also steadily strengthened its environmental commitments including by becoming a party to several MEAs.
- It should also be our national endeavour to have stronger implementation and enforcement of labour and environment standards domestically and avoid expedient measures that weaken them particularly for promoting trade and investment or for infrastructure development. This will be in India's long term interest.
- We are however looking at in this brief whether commitments towards labour and environment standards and their monitoring and enforcement should be included in bilateral FTAs under negotiations with the developed country partners. The latter are clearly leveraging access to their markets by exporting such values and standards not just based on altruistic interests<sup>22</sup>. They are also moves by them towards levelling the playing field (or more appropriately perhaps tilting the playing field in their favour) and

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<sup>21</sup> See pages 64 and 65 of the LSE study report on Comparative analysis of trade and Sustainable provisions in free trade agreements, by Velt et al, published by the London School of Economics and Political Science, February 2022.

<sup>22</sup> McNeil in his paper cites various instances where EU's higher environmental standards requirements may indeed be also protectionist motivated. He concludes by observing that EU's 'new' FTAs may indeed seek to export EU environmental policies and values bilaterally, but environmental quality may not be the only goal their environment provisions advance. Op cit,

diminishing comparative advantage, reducing scope for export of their capital looking for competitive investment destinations that FTAs may render attractive and enhancing their own markets for what are regarded as environmental friendly goods, services and technologies.

- On the one side if there is no other choice than including chapters on these topics then they need to have a far greater degree of balance and equity. Further, India needs to leverage its own large domestic market and negotiate to tailor the texts to ensure that their coverage is not unduly broad or carry commitments with overly ambitious standards at its present stage of development. External cooperation and assistance on such domestic policy issues may be seen favorably upto a point in a democratic polity like India. Some could also argue that such gentle external pressures may indeed be useful in pushing through domestic legislation and resisting domestic pulls for following easier or expedient options. However an externally induced coercive or intrusive approach or according civil societies imbalanced monitoring roles could also result in the whole exercise turning counterproductive.
- It could also be argued that when ILO core conventions or MEAs are internationally agreed instruments why should there should be an issue in committing to their implementation and enforcement particularly to those in which India is a party. However, each of these instruments also have a context and a backdrop. Certain parties, including developed countries, have also recused themselves out of some of them as it briefly happened in the case of the Paris agreement (and earlier the Kyoto protocol). Depending on evolving developments, such as in the context of the energy crunch following the Ukraine war or the economic disruptions following COVID-19, countries may also be forced to review their domestic policies that may involve temporary regressions from a labour or environment perspective. Including such standards in a trade agreement could divorce implementation and enforcement from such a context. Certain safeguards may need to be built in for taking such factors into account while evaluating implementation of commitments by a party.
- The context for implementation of certain environment agreements also involves a framework that assures necessary support in terms of financial, technical and and capacity building needs from developed countries as in the case of the UNFCCC and Paris climate agreement. On climate, for example, it is considered that free riding and climate fairness are regarded as the two main issues behind the difficulties in arriving at meaningful emissions. It would therefore appear fair that when a party is assessed as having implemented an agreement that assessment should also extend to

whether the developed trade partner has fulfilled expectations from it on both aspects. There is no doubt a difficulty here in that the commitments by countries about their nationally defined contributions (NDCs) towards emissions under, for example, the Paris agreement are individual country based while commitments on finance and technology are broad and collectively set for all developed countries. That no doubt makes holding any single developed country responsible for not meeting the overall finance and technology targets difficult. But while negotiating the FTA is it not fair to get the developed trading partner to inscribe in the TSD chapter what its own commitment will be towards meeting the commitments on finance, technology and capacity building in assisting developing countries? If trade agreements are regarded as one avenue for limiting the free rider issue what about climate fairness?

- All these inequities get magnified when attempts are made to enforce commitments in these chapters in a trade agreement through sanctions based dispute settlement provisions. India will need to carefully consider joining an FTA if such provisions are sought to be included. Such dispute panels, could develop their own jurisprudence over a matter of time, interpreting provisions in a totally legalistic mode without considering the societal context.
- It has been seen how in the context of the EU-South Korea FTA that even in the absence of a sanctions based dispute settlement process the expert panel could get South Korea to adjust its domestic laws.
- In the present context of India's ongoing FTA negotiations with Australia, Canada, the EU and the UK it is recommended that a CECA be sought to be concluded with Australia without any chapter on labour or environment as is the case with the Australia-Indonesia concluded in 2020. Furthermore, an attempt should also be made to keep the labour and environment chapters narrowly focused and set in a more cooperative mode in negotiating the FTA with the UK. If both these can be achieved, India may then be able to negotiate from a stronger wicket when it comes to discussions with the EU and Canada that could be more challenging. Commitments in these chapters could also be staged over a period or there could be other flexibilities used such as what Canada has done in terms of excluding certain of its provinces from being subject to the agreement at least initially. In that sense FTAs do allow room for a lot of creative possibilities that the parties to it can work out.
- EU's proposals that seek to ensure products are deforestation free or they enter its market in a carbon neutral manner under its CBAM will be new

non-tariff barriers and will increase costs for compliance for a whole range of Indian products including coffee, timber based products like furniture, leather based items, steel and aluminium. The duty advantages from the FTA may then get more than neutralised by such additional costs. It will be important, as part of the negotiations, to ensure two aspects. Firstly, the formulations relating to these matters in a TSD chapter, even if couched in best endeavour terms, should not imply according a formal recognition/acceptance by India of such proposals whose WTO compatibility is not assured. Secondly, even as this may be the case, India and the EU could establish easy compliance and facilitation systems that will enable Indian exporters to meet these requirements, including through recognitions to local certification or audit agencies. The steps being taken by India to establish a carbon trading mechanism within the country marks an opportune moment for this to be worked out in the steel and aluminium sectors. Perhaps the EU-India High Technology Council launched earlier this year could also provide support in this regard.

- Since the EU's layered ratification process can exert pressure even after the text of the agreement is signed or agreed in principle, as seen in the Vietnam or Mercosur FTAs, engaging in track 1.5 networking and exerting efforts diplomatically to diffuse such moves in a timely manner may be necessary to ensure that unacceptable demands are not made at any stage and there is a greater understanding of our concerns. It may be important for the Commerce Ministry to also use the resources of our Missions in these capitals and the ministry of external affairs in this outreach.
- For all this however there has to be clarity about what can be maximally committed from the Indian side and what are the strengths and leveraging points. With some initial negotiating rounds already held with these parties India's negotiating teams for these FTAs may already be aware of what the expectations are from the trade partners. Where required some further preparatory studies and internal consultations with stakeholders should be undertaken in better defining the issues involved as well as in obtaining a clearer understanding of the flexibilities that can be shown by us and the flexibilities that need to be demanded in return. It would be important for the ministry of commerce along with ministries of labour, environment and external affairs to come up with negotiating briefs that bring out all these aspects which also sets out the Indian context, concerns and expectations well. Such joint and coordinated efforts have to begin at as early stage of negotiations as possible rather than later. This will in turn enable the outreach effort referred to earlier to be adequately prepared and be able to articulate better in engaging with interlocutors.

- In recent weeks there have been reports<sup>23</sup> about internal reorganisation of the commerce ministry with also indications that the trade policy division dealing with WTO matters may be kept separate from the division dealing with bilateral FTA negotiations. The rationale for this division is not fully understood particularly when the level of expertise available on such new issues is still limited within the ministry and there should also be a degree of harmony between what is sought to be done multilaterally and what may be attempted through bilateral FTAs. In any case, what is essential is that a great deal more understanding of these issues is urgent. They can also be done through commissioning of studies by domestic thinktanks as well as through direct recruitment by the ministry of more subject matter specialists and those with legal skills who can quickly help develop the necessary capacities.
- Finally, aside from negotiation strategies, it needs to be clearly recognised that there are also opportunities for India itself in enhancing export of green goods and of environmental services as countries seek to move towards a decarbonised world. The time therefore is now to enhance supply side capacities in India in these areas to be able to avail of the expanded access for them with the signing of FTAs with these trade partners.

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<sup>23</sup> See the newsitem ' Commerce Department recast to bring more focus on trade policy making', by Asit Ranjan Mishra, Business Standard, 7 August 2022.



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