sanctions in a target-oriented manner and not to disadvantage employees who have already suffered damages because of the non-compliance. The sample chapters therefore specify that payments have to be made in cases of non-compliance, which benefit a fund for promoting standards and capacity-building. Only if these payments are not made, sanctions will be used by withdrawing trade benefits. It should also be pointed out that positive incentives such as increasing trade benefits have shown positive results in making progress with regard to implementing labour standards following the example of the USA - Cambodia Textile Agreement. As a result, this mechanism has been included in Sample Chapter 1 (EU - Developing Country).

5. Basic elements of social standards of a Sustainability Chapter

The following provisions represent the essential elements of social standards in bilateral Free Trade Agreements. The trading partners have a certain scope for formulating, that is to say it is possible in individual cases to adapt the concrete contents of the clauses to the current stage of development of the contracting states. The subsequent chapter outlines an optimal variant for the content of social standards in a Sustainability Chapter, which should be elaborated in accordance with the classification of the respective contractual partner in industrial resp. developing countries. An absolute minimum standard, however, must remain unaffected. The different text components in the sample texts have been coloured to show these variants.

**Normative framework**

The social orientation of a bilateral Free Trade Agreement should not only and not exclusively be expressed in the social part of the Sustainability Chapter, but already in its preamble. This forms the normative reference in general and is an essential component for the interpretation of the following chapters of the agreement. The preamble text must express the commitment of the contractual parties to take account of the requirements of economic and social coherence.

Due to the fact that the preamble has an interpretative function only, the general commitment to democracy and the rule of law, including the respect for human rights and the essential elements of decent work, has to be embedded as a central component at the beginning of the text of the agreement. To achieve this, a number of international standards, above all of the ILO and the UNO, exist, which determine general principles, rights and practical procedures and thereby define the normative framework. These include the international human rights documents, which also contain the fundamental social rights essential for the social dimension of sustainable development (e.g. the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, etc.), and the substantial declarations of the International Labour Organisation (ILO), i.e. the ILO Declaration on the Fundamental Principles and Rights at Work (Core Labour Standards)\(^\text{17}\), the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy ("ILO Tripartite Declaration")\(^\text{18}\) as well as the ILO Declaration on Social Justice for a Fair Globalization ("Social Justice Declaration")\(^\text{19}\) from 2008. The eight Core Labour Standards refer to the freedom of association and the right to collective bargaining, the abolition of forced and child labour and the prohibition of discrimination in the field of employment and occupation. In an Annex, the Tripartite Declaration especially mentions conventions and recommendations that are tailored to the problems of multinational enterprises, and

\(^{17}\) See Annex to relevant international standards, I.  
\(^{18}\) Supra, II.  
\(^{19}\) Supra, III.
the ILO Declaration on Social Justice makes clear that the violation of Core Labour Standards must not legitimize comparative advantages.\textsuperscript{20}

The legal framework is complemented in the social standards of the Sustainability Chapter by additional work-related fundamental rights, which, depending on the state of development of the contracting states, have to be reflected in their national laws and policies. All 183 ILO member states are obliged to comply with the Core Labour Standards in any case. It would be, however, desirable to integrate further significant standards in the text of the agreement. These include standards on employment policy, labour inspection and on tripartite consultation ("ILO Priority Conventions")\textsuperscript{21}, which have been designated as priority instruments by the ILO Governing Body in 1994, as well as other important conventions and recommendations, the ratification, effective implementation and practical application of which must be expressly declared by the contractual parties. Among others these are the ILO Conventions No. 155 on Occupational Safety and Health, No. 102 on Social Security, No. 103 on Maternity Protection and No. 135 on Workers’ Representatives as well as the Recommendations No. 193 on the Promotion of Cooperatives (2002), No. 195 on Human Resources Development (2004) and No. 198 on the Employment Relationship (2006). Their contents is partly also covered by the concept of decent work ("Decent Work Agenda")\textsuperscript{22}, which has been propagated by the ILO since 1999, comprising the four main elements - rights in the workplace (including the Core Labour Standards), full productive and freely chosen employment, social protection and safety as well as social dialogue. Additionally, the equality aspect pertains to all four areas. In spite of its long existence and its respectable contentual significance, the Decent Work Agenda has only attracted due attention since the European Union in 2006\textsuperscript{23} set the same course and it should therefore be a core element of future EU Trade Agreements.\textsuperscript{24}

\textbf{“Non-Lowering of Standards” Clause}

This principle, which is also articulated in the ILO Declaration 2008 on Social Justice for a Fair Globalization, expressly obliges the parties to maintain all existing labour and social legal standards comprehensively and under all circumstances. This will prevent the dilution or even suspension of labour and social standards for the purpose of attracting foreign direct investment. The indication that it applies to the entire national territory avoids that the FTA results in an increase in production in so-called free export zones. As companies in these zones regularly abolish even the most fundamental labour rights, they have to be rejected in general, or the remark has to be added that they also apply in FTA. The prohibition of “retrogression” from the legal level of protection is also known as “Upholding Levels of Protection” clause resp. as principle of “Non-Retrogression” and does also apply to the environmental aspects of the Sustainability Chapter.\textsuperscript{25}


\textsuperscript{21} See Annex on relevant international standards, IV.

\textsuperscript{22} Supra, V.

\textsuperscript{23} In its Communication from 24.May 2006 [COM(2006) 249, the EU Commission has finally developed an integrated strategy, with which it wants to achieve that the promotion of decent work in all domestic and foreign policy areas, including trade, will be considered. See European Commission, Employment, Social Affairs and Equal Opportunities, http://ec.europa.eu/social/main.jsp?catId=323&langId=de (29.03.2010).

\textsuperscript{24} See AK Position Paper, page 4f; ETUC/ITUC Declaration.

\textsuperscript{25} See AK Position Paper, page. 5; ETUC/ITUC Declaration.
Shield Function

The “Shield Function” is a human rights principle, which gives priority to human rights as universally recognized (minimum) standards. According to this, a state, when implementing trade law provisions which infringe upon its human rights obligations stemming from the conventions ratified by it, may postpone the implementation of the commercial law provision by referring to this obligation.26 Similar to this, even though stipulated as a last resort provision, are exemption clauses in trade agreements, which have been used for example in the case of South Africa with regard to TRIPS concerning the issue of generic drugs to combat HIV/AIDS.

Sustainability Impact Assessment

Social standards in FTAs should contain provisions on carrying out a sustainability impact assessment and already specify those measures, which can be taken based on the result of these assessments (follow-up process). These assessments must consider all aspects of the social and economic impact of the agreement, such as access opportunities to high-quality public services or the various strategies for achieving industrial development. Employee and employer representatives as well as NGOs have to be involved in assessing the impact of the agreement. The results and the recommendations of the sustainability impact assessment must be available prior to the start of negotiations and must flow into the negotiation process. A continuous, repeated review of the impact of the agreement is also required.

Monitoring: Implementation and Control27

The following implementation mechanisms and organs should be provided for the effective implementation of the agreement and for monitoring compliance with the obligations following from it - in particular duties within the scope of the ILO Declaration on Fundamental Principles and Rights at Work, of the Tripartite Declaration of Principles and the Declaration on Social Justice as well as in the additional agreements explicitly stated:

a. Reporting on the stage of implementation of labour and social standards by an independent committee of experts;

b. Evaluation of complaints and development of recommendations by experts;

c. Consultative forum for the exchange of information between governments, social partners and other important stakeholders.

a. The governments of both contractual parties shall carefully document and regularly report on the progress of implementation of all obligations specified in the agreement. To undertake this task, an independent committee of qualified experts has to be set up, which consists of at least one ILO member in a consultative capacity. The reports will be prepared on the basis of information made available by the government, and on statements provided by trade unions and employers of both contractual parties on the issues of trade and social affairs. Apart from that, special reports should be prepared on special subjects or problems (see also b.).

b. The committee of experts shall also be responsible for complaints concerning social problems. Its recommendations must be part of a determined process for the reasonably speedy handling of the issues addressed, in order to be able to take effective action against the tolerance of

27 See AK Position Paper, Page 5f; ETUC/ITUC Declaration.
labour law violations by the contracting governments. If complaints of one government cannot be satisfactorily addressed or clarified within a reasonable period of time (e.g. within 2 months) by the other contractual party, the matter will be submitted to the independent experts for evaluation. Apart from reports and recommendations, the results of the committee should also contain concrete requirements for follow-up and control. Only in doing so it can be ensured that governments effectively deal with any objections raised. The same applies with regard to officially submitted complaints of the social partners. These should be embedded in an equally binding mechanism, which provides the recognised employee and employer as well as some civil society organisations (NGOs) on both sides of a FTA with the opportunity to submit such requests for action. Any review, appeal or complaint procedures with the ILO as well as other control or complaint procedures in accordance with international law remain unaffected by these mechanisms.

c. With regard to the implementation of the agreement, the bi-regional exchange and dialogue should also be institutionalised. The coordination and exchange of information between the governments of the partner countries on the one hand and employee and employer organisations as well as NGOs on the other hand, may take place within the scope of a Forum for Trade and Sustainable Development. The so-called Consultative Forum should meet at least twice a year and provide its members with the opportunity to publicly discuss social issues and concerns. There must be a clearly defined, adequate balance between the three member groups. In order to achieve the further integration of civil society, the contractual parties should also be obliged to engage in technical cooperation in social matters, including consultation, exchange of information and setting up of a joint data basis as well as monitoring centres.

“Non-Execution” Clause

It has to be made explicitly clear that in connection with the implemention of the social standards of the Sustainability Chapter the same provisions apply as for all other elements of the agreement. This applies in particular with regard to dispute resolution, which means that the same standard mechanisms are to be used for solving conflicts on labour and social matters as for all other points of the agreement.

Sanctions

Ideally, it should be possible to eliminate non-compliance with labour and social obligations of the agreement by one of the contractual parties, or at least to achieve a positive change within a reasonable period of time, by means of the above-mentioned implementation mechanisms (consultations between the governments, social partners and non-governmental organisations, recommendations of the independent committee of experts). If this is not the case, sanctions in form of substantial fines should be imposed after the general dispute resolution mechanisms has been exhausted, like the agreements between Canada and Chile, Canada and Peru, or the NAALC provide for. At the same time, these fines should be allocated to those sectors and areas where the relevant problems have emerged in order to sustainably improve the local social standards and working conditions by technical and administrative support. Cooperation with international organisations, in particular the ILO, should be aimed at.
Incentives

Apart from that, the agreement should provide for technical and developmental support, which – if appropriate – is linked to cooperation with multilateral agencies and in particular the ILO. Additional incentives including trade incentives could also be included.

6. Sample texts for social standards of a Sustainability Chapter

This chapter presents two sample texts: one for EU negotiations with developing countries, another for EU negotiations with industrial countries. Both sample texts have been compiled from relevant elements of existing agreements. The changes made by the authors are marked by square brackets and footnote references. The differentiation in two sample chapters has been made to meet the different requirements and capacities with regard to standardization and implementation of these country groups. The possible negotiating scope of the EU has also been taken into account. A traffic light system has been used with regard to standards and implementation mechanisms to show minimum requirements (red), average requirements (yellow) and maximum requirements (green). The following diagram depicts the range, which is presented by the coloured text elements:

<table>
<thead>
<tr>
<th>Standards</th>
<th>EL</th>
<th>IL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Core Labour Standards</td>
<td>Core Labour Standards + Priority Conventions</td>
<td></td>
</tr>
<tr>
<td>Priority Conventions</td>
<td>Minimum wage, working hours, health &amp; safety in the workplace, non-discrimination of migrants</td>
<td></td>
</tr>
<tr>
<td>Decent Work Agenda</td>
<td>Decent Work Agenda</td>
<td></td>
</tr>
<tr>
<td>Implementation mechanisms</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Social standards part of dispute resolution</td>
<td>Social standards part of dispute resolution</td>
<td></td>
</tr>
<tr>
<td>Programme for improving working conditions</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

The non-coloured text represents standard formulations in Sustainability Chapters, which in the present form - neutral resp. undisputed - are included in a large number of existing agreements. It should also be pointed out here that not the complete, largest possible extent of a subchapter in FTAs has been depicted, but exclusively those social standards, which have been included by the authors of the study as central, integrated components of such a chapter.

28 See also the USA - Cambodia Textile Agreement.
29 See also ITUC/ETUC Statement of trade union demands relating to key social elements of "sustainable development" chapters in EU negotiations on free trade agreements" (FTA), http://www.ituc-csi.org/IMG/pdf/TLC_DE.pdf (25.02.2010).
30 Certain regions or individual countries were not categorized to make the sample chapters manageable and practicable on the one hand, and to avoid a fragmentation of standards and implementation mechanisms on the other, which would be problematic from both a theoretical and a practical point of view.