Open public consultation on the Trade and Sustainable Development (TSD) Review

Question 1: The EU addresses sustainability challenges with cross-border implications in dedicated multilateral fora (e.g. on climate change and biological diversity) and via its autonomous measures (including legislative ones). Against this background, what should be the contribution of the EU trade policy to promote the transition to a greener, fairer and more sustainable economy? How should the implementation and enforcement of TSD chapters in FTAs complement and support the EU's multilateral and autonomous initiatives?

The EU has made progress in streamlining human rights into its trade agreements, notably within the TSD chapters. However, while the EU has a legal obligation (see art 21 TEU) to design and implement its external policies in order "to advance … democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms", the effectiveness and actionable nature of human rights components fall short.

As such, a number of recommendations and points highlighted by the EU ombusdsperson in response to complaints of maladministration regarding the Vietnam[1] and Mercosur[2] draft agreements remain unaddressed.

A more robust and actionable policy appears necessary, to ensure human rights are effectively taken in consideration. Consequently, the TSD should be reviewed along the following lines:

i. The ratification of the main human, labour rights and environmental conventions should be **required before ending FTA negotiations**. It is during the negotiations that the EU has more leverage to demand efforts from third countries. The ratification, implementation and enforcement of the fundamental International Labour Organisation (ILO) as well as environmental international conventions such as the Paris Agreement, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) constitute a key condition to ensure commitments made in the FTAs are genuine, to ensure trade fit with the contemporary challenges and to ensure trade is done in respect of the international standards. It is a key condition to ensure trade deploys in a sustainable development and occurs in conditions ensuring that trade benefits everyone; ratification and respect of these conventions should thus be **elevated to essential elements of FTAs and dedicated clauses should be agreed**. When, during the negotiation phase, it appears that the counterpart faces some difficulties in ratifying human rights conventions and putting its domestic laws in line, a time-bound, public and enforceable road-map should be agreed and referred in a protocol annexed to the

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1 The Commission's failure to carry out a human rights impact assessment of the envisaged EU-Vietnam free trade agreement, Case 1409/2014/MHZ, decision February 2016, https://www.ombudsman.europa.eu/en/opening-summary/en/54682

2 Ombudsman inquires into why Commission did not finalise sustainability assessment before Mercosur-EU trade agreement concluded, **Case** 1026/2020/MAS, decision March 2021, https://www.ombudsman.europa.eu/en/news-document/en/130053

agreement. A focus on CCPR, CESR, ILO core conventions should be considered at minima.

ii. **Substantive clauses** of the FTA should recognize that States Parties must respect, protect and realise human rights as stated in the Universal Declaration of Human Rights, the customary law and the international conventions to which they are part. Those should also expressly state that investors and companies have to respect international human rights law and domestic law that is not in contradiction to international standards. This would be important so as to ensure that international law does not become more fragmented, meaning having legal regimes ruling independently, and contradicting themselves, putting States in situations where they would face the risk of contravening one of their human rights obligations to comply with another legal obligation (such as an FTA or IPA obligation). Beyond the efforts made to promote human and labour rights and the protection of the environment, more should be done to ensure that FTAs do not serve as an obstacle to respect and protect human and labour rights and do not damage the environment. Also, agreements must go beyond the commitment to "encourage" and "promote" CSR. They should state the State's obligation to protect human rights, including by ensuring the private sector under its jurisdiction respect the International Bill of human rights. This should put the FTAs in line with OECD Guidelines for Multinational Enterprises and United Nation Guiding Principles. Explicit reference should be done to *due diligence* in the supply chain. As regularly called by the European Parliament and civil society, human rights should be fully part of the TSD Chapter, along labour rights. An independent human rights secretariat should be put in place to monitor transnational human rights issues under an FTA, including human rights impacts, and to monitor and investigate compliance of its human rights chapter, and a complaint mechanism should complement enforcement of TSD chapters.

iii. The quality of the ex-ante and ex-post sustainability **impacts assessments** (SIA) should be dramatically enhanced. When deploying impact assessments on human rights, the objective should be less to identify a baseline scenario (that could highlight weak governance, lack of access to remedies and lack of access to information) upon which the EU agreement would serve to promote human rights, but rather to ensure that the agreement being negotiated, in its detailed worded clauses, actually provides sufficient tools to avoid negative impacts on human rights.

    1. civil society organisations should be part of the Steering Committees,

    2. Assessments should be conducted by human and labour rights experts, with a proven track record, and inputs from civil society should be better reflected. Framework partnership agreements, that lead to hire the same consultants that copy paste their conclusions from one SIA to another should be revised.

Ex-post assessment should be more detailed, and go more in depth into the impacts of the agreement on human rights, labour rights and environment, instead of listing activities without assessing seriously the impacts on the ground.

iv. For countries known for lacking fundamental freedoms and the rule of law (incl. lack of access to remedies), FTAs should provide dedicated **complaints mechanisms** to deal with the negative impacts of the FTAs. This should be part of a more responsible policy from the EU, that do not only retain a discretionary power to decide how and which human rights it will promote externally, but set up the necessary process to deal with its own responsibility to ensure trade takes place in compliance with the obligations that stem from human rights, labour rights and environmental international agreements. In general the TSD chapters should foresee procedures and bodies that enable a continuous involvement of civil society and all stakeholders on the ground, including the establishment of independent complaint mechanisms. Populations, individuals, CSOs, and Human Rights Defenders (HRDs) should be provided with a procedure that allows them to file complaints when states parties do not respect their obligations or when the agreement impacts negatively on the enjoyment of their human rights. The complaint should be open not only to EU stakeholders but also stakeholders based in the partner country. It could raise issues related to the EU and the partner country's behaviour. It could be problems solving oriented, by agreeing on negotiated plans. The procedural disciplines of the mechanism should be detailed and offer specific guarantees to the petitioners (time-bound answers, in depth investigation, access to judicial review of the legal assessment).

v. The **human rights clause or essential elements clause** should be activated in a more creative and targeted fashion. As it stands, the human rights clause only leads the EU to envisage suspension of part of the agreement when a violation occurs. It should instead be more flexible to provide and enable other types of measures such as the creation of dedicated mechanisms and problem solving processed that are adapted to the situation, or the promotion of tripartite dialogue etc.

vi. **Clean hands should be required in investments protection agreement and their Dispute settlement mechanisms in investment agreements should be reframed and revised.** The non-involvement in human rights violations as defined in international and domestic law (provided it is in accordance with international law), should be put as a precondition which would overrule the protection of an investor by the agreement. The exhaustion of domestic remedies should be required before an investor is allowed to activate the dispute settlement mechanism (DSM). The DSM should be a state-to state one, not an Investor-State Dispute Settlement.

In its action plan on human rights and democracy 2020-2024 (point 3.5) the EU committed to "*Strengthen engagement […] with partner countries to actively promote and support global efforts to implement the UN Guiding Principles on Business and Human Rights*" In that regard more should be done to **support human rights defenders** in trade policy as recommended by UN Working Group on the issue of human rights and transnational corporations and other business enterprises, in the report issued in June 2021 (The Guiding Principles on Business and Human Rights: guidance on ensuring respect for human rights defenders – on the issue of human rights and transnational corporations and other business enterprises) As the WG rightly point out :

"As businesses, often in collaboration with the State, seek access to natural resources and land, for example, they may engage in economic activity that adversely impacts the rights of communities, including water, environmental and land rights. Historical issues relating to racism and marginalisation of vulnerable groups, and indigenous peoples, also means that certain groups maybe disproportionately affected by business-related human rights abuses. The role of human rights defenders is intrinsically linked to underlying patterns of human rights abuses arising from business conduct. Thus, it is important to address and prevent such underlying abuses as part of a holistic approach to securing sustainable and rights-respecting business models".

We support in consequence the proposal of the UNWG that recommended States to address risks to human rights defenders in their trade policies and to

i. Undertake assessments of the impact of existing and future trade and investment agreements on human rights defenders
ii. ensure that existing and future trade and investment agreements include adequate safeguards to protect the environment, human rights and labour rights, including the rights of human rights defenders, and that they contain an obligation on investors to respect human rights defenders
iii. ensure the effective participation of human rights defenders before and during the negotiation of trade and investment agreements.

Question 2: What have been the main benefits of closer collaboration of the European Commission with the European Parliament, with the Member States, other relevant EU institutions and bodies and international organizations on the implementation and enforcement of TSD chapters? How should these partnerships be shaped going forward?

The collaboration between the European Commission and the European Parliament can still be improved significantly. On a number of occasions, significant requests expressed by the European Parliament that relate to the human rights implications of specific TSD chapters were ignored. For example, the European Commission did not **consider the recommendations made by the European parliament** - see European Parliament non-legislative resolution of 12 February 2020 on the draft Council decision on the conclusion of the Free Trade Agreement between the European Union and the Socialist Republic of Viet Nam. This resolution calls for the EU and Vietnam to set up an independent monitoring mechanism on human rights and an independent complaints mechanism, providing affected citizens and local stakeholders with effective recourse to remedy, and a tool to address potential negative impacts on human rights, notably through the application of the state-to-state dispute settlement mechanism to the TSD chapter. Other similar resolutions calling for the inclusion of a dedicated chapter on human rights in the agreements and a more efficient dispute settlement mechanism were regretfully ignored.

ILO, UN special procedures and **UN treaties monitoring bodies** as the recognised international institutions of reference, should hold a more important role in **monitoring the implementation** of the human rights obligations in FTAs. Furthermore, TSD chapters must develop deeper links with the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy

(MNE Declaration), promoting the ratification of its Conventions, and with the Organisation for Economic and Co-operation Development (OECD) Guidelines for Multinational Enterprises and UN guiding principles on Business and Human rights.

Question 3: How do you see the role and contribution of DAGs and/or other representatives of employers, trade unions, environmental and other non-governmental organisations in the monitoring of the implementation of TSD chapters? How can they better contribute to the monitoring of the implementation of TSD chapters?

Civil society and social partners have played an important role in pressing for changes, such as the setting up of the CTEO, the initiation of the South Korea complaint, and the current consultation.

DAGs were established with the primary function to monitor the implementation of TSD Chapter's commitments. It should be made clearer that DAGs have the **competence to monitor all FTA elements**, that can have an impact on the labour, environment and human rights.

The role of DAGs should be strengthened by:

i. Reinforcing information sharing on the impacts of agreement on human rights, labour rights and environmental issues and Involving the DAGs in ex-post impact assessments and ;

ii. Reinforcing transparency, publishing reports of the TSD Committee and other committees, and by publishing all the letters notes, recommendation and statements made by the DAGs ;

iii. Setting up feedback procedures in which the Commission and the CTEO officially respond to concerns and recommendations raised by DAGs. DAGs should be able to provide clear recommendations to the EC and to partner countries, and both should respond to those recommendations;

iv. Ensuring the **independence and the institutionalisation** of DAGs – avoiding vague wording or reference to pre-existing domestic institutions. Agreements should specify more precisely that its parties are committing to set up Domestic Advisory group, composed of independent civil society representatives of employers, workers, and other human rights and environmental interests, designated to be part of the DAG, for 3 renewable years, in charge of
   - monitoring the implementation and the respect of the TSD chapter (including the impact of the agreement on the realisation of the human rights and TSD commitments),
   - issuing recommendations,
   - asking for clarification and raising concerns to the parties,
   - addressing requests to the CTEO if needed,
   - meeting back to back on the same day than the TSD Committee,
   - and participating to the setting up of the agenda of an annual Forum, which should be open to civil society without undue restriction.

FIDH further shares the recommendations of the non-paper of the EU DAGs.

Question 4: In the last years the EU has focused its implementation efforts on specific priorities/partner countries. What would you highlight as the main achievements and/or shortcomings and what improvements could be considered in this regard?

More attention should be paid to human rights, and the protection of human rights defenders. Human rights being an essential element of the relations with its trade partners, the EU should not be reluctant to raise human rights concerns that are linked to the implementation of the FTAs. A better assessment of the impacts of the agreement on human rights is also expected.

The most important and obvious improvement that is needed would be to ensure precise commitments. The EU should work to set up clear obligations when it deals with TSD and Human rights issues, instead of agreeing only on vague wording like "making their best efforts", "parties will promote".

Question 5: How can synergies between TSD implementation and development cooperation be further explored? What type of supporting measures for developing partner countries would be needed?

Ex-ante and Ex post SIA could serve identifying country-specific challenges and needs, including the revision of domestic laws, procedures and practices that are not compliant with human rights international law. Technical and financial support should aim to prevent environmental degradation and labour and human rights infringement. Specific attention should be given to human rights defenders. Technical and financial support should foster the involvement of independent civil society in monitoring and assessing the impacts of the FTAs and IPAs.

Question 6: In view of the objectives and the broad scope of the provisions of TSD chapters of EU FTAs, how do you evaluate the suitability and effectiveness of the current dedicated dispute settlement mechanism for TSD?

The process is too long for DAGs and civil society to obtain specific action from the Commission when parties fail to respect the obligations set down in the TSD Chapter or human rights clause and the reluctance of the Commission to address specific cases should be ended. The CTEO could help to improve these shortcomings, but his mandate should be extended to receive complaints from civil society based in partner countries, and it should be clear that the respect of the human rights clause also fall under its mandate. In addition, the effective participation of the DAG and civil society to dispute settlement mechanisms should be ensured, not only by allowing civil society to submit third party interventions, but by obliging the Parties to accept them and specifically answer to them, also and by guaranteeing the publicity of the debates, hearing, reports and conclusions. **Civil society, including** from the partner country, **should be allowed to trigger the dispute settlement mechanism** (if needed going by a decision of the CTEO). The Dispute settlement Mechanism should not be precluded to pronounce enforceable decision, as issuing recommendations only could not be sufficient. The Agreements should provide **enforcement tools and procedures, allowing remedies and sanctions** if the decision pronounced by the dispute settlement mechanism is finally not duly implemented by the failing parties. The procedural disciplines of the mechanism should be detailed and offer specific guarantees to the

petitioners (time-bound answers, in depth investigation, access to judicial review of the legal assessment).

Question 7: The European Commission has created the Chief Trade Enforcement Officer and the Single Entry Point in 2020. What in your opinion is their distinct contribution to the implementation and enforcement of the EU's TSD chapters?

We welcome the creation of the Chief Trade Enforcement Officer (CTEO) and the Single Entry Point. However, the focus made on the impacts for the EU operators and the requirement for the complainant to be based in the EU, raise serious concerns regarding the ability of this new mechanism to effectively serve the enforcement of all TSD Chapter commitments, and to concretely serve the protection of human rights and the environment in partner's countries. The ability of this mechanism to ensure that trade takes place in the respect of international commitments remains to be seen and it is still not clear at this stage how this new mechanism will concretely help populations of the trade partners affected by trade relations.

In addition, nothing is said on follow-up. The Commission seems to retain a discretionary power on the decision. Prioritising the treatment of complaints by analysing the likelihood of resolving the issue, the legal soundness, the economic impact for EU operators, the seriousness of the violation and the systemic impact of the broader implications of the case, could be unsatisfactory.

This new mechanism includes the possibility of leading to enforcement actions accompanied by an enforcement action plan to approach the issue at stake. If linked with the possibility to trigger the Dispute settlement Mechanism available in the FTA, it would offer an indirect way for civil society to trigger the DSM, but the concrete modalities remain unclear. Weaknesses might lay on the weaknesses of the enforcement tools, the DSM itself and the lack of precise obligations contained in the FTA. In consequence, for the CTEO to have a real adding value:

i. TSD chapters should have clauses that provide for concrete commitments instead of vague, programmatic and not enforceable actions.
ii. The international conventions on human rights should be imported in the TSD Chapter of the agreement, and the FTAs and IPAs should explicitly express the concrete obligation of having these conventions implemented and the impacts on human rights be monitored to avoid and remedy negative impacts.
iii. The right to submit a complaint to the EU CTEO should be opened up to third countries stakeholders, including HRDs.
iv. The process could be strengthened on the model of the EU Trade Barriers Regulation, with time-limited responses, in depth investigations by the Commission and a control by CJEU.
v. Priorisation of cases, when the complaint is related to human rights, could not rely on political consideration, the economic impact for EU operators or for one of the reasons listed above. The treatment of the complaint should rely on the apparent merit of the request only. CTEO should report on which complaints that are not considered, and for what reasons.
vi. The human rights clause, globally stating that human rights found the whole relation of the parties, and that their violation could lead to any appropriate measure including the

suspension of the FTA, is clearly an essential element for the respect of the TSD chapter and fall under the scrutiny of the CTEO. This should be highlighted explicitly.

vii. The possibility to apply sanctions and the concrete relation with the DSM should also be clarified.

viii. The CTEO should provide timely and detailed reports to the EU institutions (including the European Economic and Social Committee), disclosing the list of cases submitted and informing about the different steps of the process.

ix. The relevant DAGs should be associated in the pre-notification and following phases of the procedure, equipping them with procedural rights.

x. Each complaint should result in a final public report that sets out clearly if and how human rights have been breached and what action is to be expected from the business and/or government involved.

Question 8: Is the level of transparency and available information on the implementation and enforcement of TSD chapters sufficient for civil society to follow and to contribute to these processes? Where do you see gaps? Do you have suggestions to address them?

Civil society and particularly DAGs have struggled with the lack of proper information and reporting from both EU and partner countries. Hence, more reporting is necessary, specifically on the impacts of the FTAs and IPAs on human rights and environment. The annual FTA implementation report should involve DAGs in its preparation phase. Minutes of meetings should be consistently published in the relevant websites.

Question 9: Do you think EU TSD chapters need additional remedies to ensure enforcement? If so, what type of remedies would be effective in contributing to sustainable development? Would there be a need for a targeted approach (i.e. adapted to the nature of commitments or for specific sustainability priorities)?

Remedies, penalties and/or sanctions should be put in place to ensure effective enforcement of human rights and the TSD Chapter. Any DSM or complaint mechanism should lead to enforceable decision. Penalties should be foreseen. **Fines and compensations** could be part of the remedies made available in addition to the possibility to suspend temporarily **trade benefits**. **In some stances**, human rights violations could be directly linked to the implementation of the agreement. In these cases, an agreement between the parties on an **official interpretation of agreement** that is compatible with international human rights law, on a specific **monitoring mechanism** to avoid further negative impact on human rights, or on an **amendment** of the agreement might, depending on the circumstances, could serve as remedy and guarantee of non-repetition.

The human rights clause already allows the suspension of trade benefits. As the clause allows all necessary measures in case of serious violation, and not only suspension of the agreements, a more creative use of the **human rights clause** should be envisaged. This could include the setting up of a dedicated problem-solving mechanism, enhanced engagement, enhanced and independent monitoring mechanism etc.

Question 10: Do you see any disadvantages with the introduction of additional remedies for the enforcement of TSD chapters, including their impact on the cooperation and engagement on the ground?

Sanctions are only there as complementary tool. They could serve as an incentive for reaching an agreement, an incentive for enforcement. Impacts assessments could inform the decision.

Question 11: Are there remedies used by other countries that you think should be considered?

The EU and Canadian CETA DAGs flagged up the example of the USMCA Rapid Response Mechanism under which penalties include suspension of preferential tariffs based on an escalating scale of severity and repeat offence. The aim remains to encourage, wherever possible, remediation through bilateral collaboration and dialogue between parties. However, putting consequences in place deters firms from falling out of compliance. France and the Netherlands proposed also to improve and reform the Trade and Sustainable Development chapters in EU FTAs, notably the introduction of a "Progressive Implementation Mechanism". Such mechanism would consist in a staged implementation of tariff reduction linked to the effective implementation of TSD provisions and the possibility to withdraw specific tariff lines in the event of a breach of those provisions.