

“A renewed trade policy for a stronger Europe”

FIDH input to EU trade policy review consultation

November 2020

Question 1:

How can trade policy help to improve the EU’s resilience and build a model of open strategic autonomy ?

1. FIDH, although recognising the progress made and reflected in the “Trade for All” strategy adopted in 2015, still deplores the lack of a systematic and principled approach to human rights. FIDH regrets the persistent trend to rely more on the “promotion” of “values” to be exported, rather than on the respect and protection of international norms and obligations that apply both abroad and to the EU itself.
2. Except for labour rights, human rights remain reflected only incidentally. The EU failed to adopt a human rights based approach of its trade policy. More efforts are needed, not only to promote human rights but to improve its activities and processes in order to respect and protect human rights, to prevent harms, and to efficiently participate in their realisation when designing and implementing its trade activities, agreements and policies.
3. When dealing with trade **resilience**, the EU must above all ensure that trade policies do not hamper efforts that have yet to be made to ensure future recovery investments efforts are directed to sustainable, inclusive and human rights based ones. Also, it is a priority that trade does not hamper the measures that have to be taken to adopt a transition that reinforces the security nets for the populations. Affordable and accessible essential services and goods for all should be a priority. Inclusiveness and non-discrimination among citizens regarding the benefit of trade should shape the policies. Access to education, housing, food, water, health, medicine, and participation have to be at the core of all policies;
4. To be stronger the EU has to position itself as an attractive alternative and a sustainable proposal. It should frame its policies in order to leave no one behind, putting the respect of human rights at the core of its own trade policy and investments, being responsible and accountable. That means human rights should be central to the trade policy, an imperative in itself and not simply as an additional objective that the EU will promote when it thinks it is politically achievable at lower cost. The relevant objectives of trade policy are set in the founding treaties of the EU (articles 2, 3, 6, 21 TEU and 205-207 TFEU)¹. As constitutional principles and binding commitments, democracy,

¹ « The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities » (Article 2 TEU) « 1. The Union's aim is to promote peace, its values and the well-being of its peoples. 3. The Union shall establish an internal market. It shall work for the sustainable development of Europe [...] aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. [...] It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations [...] 5. In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, **eradication of poverty and the protection of human rights**, in particular the rights of the child, as well as to the **strict observance and the development of international law**, including respect for the principles of the United Nations Charter ». (Article 3 TEU). « 3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law (Article 6 TEU) « 1. The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: **democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms**, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.[...]. « 2. The Union shall define and pursue common policies and actions [...] in order to: (a) safeguard its values [...](b) consolidate and support democracy, the rule of law, human rights and the principles of international law;[...] (d) foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty; (Article 21 TEU). All these last

the rule of law, the universality and indivisibility of human rights and fundamental freedoms should be better respected protected and realised by the EU, and its trade policy should be better designed and implemented to that end.

5. To improve resilience and the ability of trade policy to achieve all its objectives, it a matter of priority to:
 - a. Better protect human rights in trade policies, trade agreements, investments protection agreements. (see below question 8).
 - b. Foster a responsible business conduct. Ensuring that free trade agreements (FTAs) investment protection agreements (IPAs), trade defence instruments, Foreign Direct instruments (FDIs) screenings, preferences schemes, as well as import and export controls, will all work together to secure a level playing field and help provide efficient tools to fight back against unfair and distortive practices (see below questions 9 and 12).
 - c. Protect and empower civil society and human rights defenders, enhancing transparency and access to information, enhancing participative processes and ensuring better access to remedies (see below question 8, 9, 12, 13)
 - d. Develop a human rights based approach of digitalisation of the economy or investment in digital technology.

6. Presented both as a key actor and a competitor, **China** is expressly quoted in the consultation note as being a strategic partner. China is however also a school case. It is a matter of priority to coordinate more across the EU's institutions and competencies to build a comprehensive strategy with the best interplay of policies and instrument at the EU's disposal regarding China. It is high risk to consider this country as a key partner in the current context that fails to protect human rights; it is especially true in some sectors, such as digital issues and digital technologies for example.

Question 8:

How can trade policy facilitate the transition to a greener, fairer and more responsible economy at home and abroad? How can trade policy further promote the UN Sustainable Development Goals (SDGs)? How should implementation and enforcement support these objectives?

Question 2: What initiatives should the EU take – alone or with other trading partners - to support businesses, including SMEs, to assess risks as well as solidifying and diversifying supply chains?

Question 4: How can we use our broad network of existing FTAs or new FTAs to improve market access for EU exporters and investors, and promote international regulatory cooperation – particularly in relation to digital and green technologies and standards in order to maximise their potential?

7. At this stage, not only do trade policy, trade and investment agreements fail to protect human rights, but they remain, as currently framed, an actual obstacle to their realisation and to an effective access to remedies in many ways. It is a brake then for the realisation of SDGs, a risk for the international regulatory cooperation and it weakens European companies and destabilises their supply chain. The EU should in consequence better use the instruments at its disposal to adequately shape its policies, and among them, the human rights impacts assessments (HRIA), FTAs and IPAs.

funding obligations regarding EU's aim have been expressly set as specific objectives to be pursued in the trade policy as per Article 205 and 207 TFEU.

² EU-Vietnam: FIDH and VCHR submit a Complaint to EU Ombudsperson <https://www.fidh.org/en/region/asia/vietnam/eu-vietnam-fidh-and-vchr-submit-a-complaint-to-eu-ombudsperson>

³ § 24 <https://www.ombudsman.europa.eu/en/decision/en/64308>

On impacts assessments

8. Historically focused on environment, development and labour issues we faced huge resistance to see the SIA of trade and investment agreements also assess their human rights impacts. FIDH and its member organisation for human rights in Vietnam the VCHR filed, in august 2014, a complaint before the EU Ombudsman against the European Commission². The final decision published on 26 February 2016, concluded that the Commission's refusal to carry out a human rights impact assessment constituted maladministration. The Ombudsman stated that "In the Ombudsman's view, the Commission should do its utmost to assure [...] that it has thoroughly analysed the measures negotiated in the Free Trade Agreement in order to prevent or mitigate its negative impact on the human rights situation in Vietnam"³ "Its role is preventive in the first place because **when negative impacts are identified, either the negotiated provisions need to be modified or mitigation measures have to be decided before the agreement is entered into**"⁴ "The Commission's approach involves concluding the Free Trade agreement whatever its impact may be, promoting human rights by using traditional policies and tools, and then, where human rights have been negatively affected, carrying out a retrospective human rights impact assessment. Clearly, prior impact assessments are aimed at anticipating and eliminating or avoiding such negative effects on human rights. [...] The Ombudsman does not believe that it is sufficient to develop a range of general policies and instruments to promote human rights compliance while at the same time concluding a Free Trade Agreement which may, in fact, result in non-compliance with human rights requirements"⁵. In the context of this procedure, mid-2015 and early 2016, the EU adopted new guidelines to enhance the quality of its human rights impact assessments⁶. All EU institutions underlined the importance of the issue (the Council of the European Union⁷, the European parliament⁸ and the European Commission⁹). However, though on paper the guidelines are not so bad, in practice a lot remains to be done. Indeed, impact assessments are still far from achieving their objectives¹⁰. They are far from duly serving the concrete design of the policies and the concrete clauses of the agreements. They fail to efficiently ensure the prevention of negative impacts and to set-up useful tools, clauses and procedures to secure remedies should these negative impacts on human rights eventually occur. For HRIAs to be effective, for trade to effectively advance human rights and for the EU to ensure its agreements are in line with its founding treaties, the following improvements have still to be made:

9. **The quality of HRIAs has to be reinforced, all policy options have to be duly assessed, they have to be more precise and based on the real text, the wording and the alternative clauses that are or should be negotiated; Their analysis and conclusion have to be credible and they have to concretely and effectively shape**

² EU-Vietnam: FIDH and VCHR submit a Complaint to EU Ombudsperson <https://www.fidh.org/en/region/asia/vietnam/eu-vietnam-fidh-and-vchr-submit-a-complaint-to-eu-ombudsperson>

³ § 24 <https://www.ombudsman.europa.eu/en/decision/en/64308>

⁴ § 25 <https://www.ombudsman.europa.eu/en/decision/en/64308>

⁵ § 27 <https://www.ombudsman.europa.eu/en/decision/en/64308>

⁶ The "Guidelines on the analysis of human rights impacts in impact assessment for trade-related policy initiatives" adopted in July 2015 European Commission, DG Trade, "Guidelines on the analysis of human rights impacts in impact assessment for trade-related policy initiatives", 2 July 2015 http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153591.pdf and The New "Handbook for Sustainability Impact Assessment", 27 April 2016 http://trade.ec.europa.eu/doclib/docs/2016/april/tradoc_154464.PDF

⁷ Council Conclusions on Business and Human Rights, 20 June 2016, http://www.consilium.europa.eu/en/press/press-releases/2016/06/20-fac-business-human-rights-conclusions/?utm_source=dsms-auto&utm_medium=email&utm_campaign=Council+conclusions+on+business+and+human+rights ; Council Conclusions on the Action Plan on Human Rights and Democracy 2015 -2019, 20 July 2015, <http://data.consilium.europa.eu/doc/document/ST-10897-2015-INIT/en/pdf>

⁸ See for example European Parliament, Resolution on Social and environmental standards, human rights and corporate responsibility, 5 July 2016, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2016-0298+0+DOC+PDF+V0//EN>; European Parliament resolution of 5 July 2016 on a new forward-looking and innovative future strategy for trade and investment, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2F%2fEP%2F%2fTEXT%2bTA%2bP8-TA-2016-0299%2b0%2bDOC%2bXML%2bV0%2F%2fEN&language=EN>; European Parliament resolution of 17 December 2015 on the Annual Report on Human Rights and Democracy in the World 2014 and the European Union's policy on the matter <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2F%2fEP%2F%2fTEXT%2bTA%2bP8-TA-2015-0470%2b0%2bDOC%2bXML%2bV0%2F%2fEN&language=EN>

⁹ European Commission, Communication, "Trade for All", October 2015, http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf

¹⁰ see previous recommendations : FIDH, Building trade's consistency with human rights: 15 recommendations to the eu on impact assessments, 2014 ; <https://www.fidh.org/en/international-advocacy/european-union/building-trade-s-consistency-with-human-rights-15-recommendations-to> ; Open letter to EU Commissioner for Trade, Cecilia Malmström, regarding the EU-Myanmar/Burma Investment Agreement and its Sustainability Impact Assessment - concerns on the way human rights are taken into account, 2015 ; <https://www.fidh.org/en/international-advocacy/european-union/eu-myanmar-burma-investment-agreement-and-its-sustainability-impact> ; See ClientEarth, Fern, Veblen Institute, La Fondation Nicolas Hulot pour la Nature et l'Homme and International Federation for Human Rights, Formal Complaint submitted to the European Ombudsman, 16 June 2020 <https://www.fidh.org/en/international-advocacy/european-union/eu-failed-to-consider-environmental-and-social-impacts-of-south>

the wording of the clauses of the agreements and the effective design of the policies; HRIAs should apply to all trade instruments. Objectivity and due human rights expertise should be guaranteed. They should be more participative, inclusive and be better monitored.

- a. To ensure that the EU complies with its obligations, the European Court of Justice (ECJ) actually requires that the EU institutions demonstrate “that the measures it proposes are necessary [...] that they have carefully considered different policy options and have chosen the most proportionate response to a given problem”¹¹. The European Commission equally recognised that human rights impact assessments must “support sound policy-making” by analysing “the advantages and disadvantages of available solutions”, leading to the “insertion of safeguards in the agreement” when needed and being transparent and convincing in their thinking¹². The EU Ombudsman, Ms O’Reilly, also clearly recalled these principles in her decision dated 26 February 2016 related to the EU-Vietnam free trade agreement¹³. In that context we deplore that most options available to improve IPAs for example (see some of the proposals below) have never been assessed. In any case, we can no longer have SIAs (as it was the case for Myanmar for example) renounce recommendations considered at the first stage of the draft report as essential to prevent negative impacts on human rights (like having “effective enforcement measures, as well as mechanisms to address the impacts of investment agreements on human rights, including a Human Rights Committee”¹⁴), on the grounds that “neither Party is likely to agree to binding implementation and enforcement measures for human rights”¹⁵. The EU cannot divert from concrete recommendations on necessary safeguards simply because it is negotiating with a partner country that does not want to respect human rights and because human rights are not perceived yet as a priority for the EU. That kind of excuse is not acceptable. It is an obligation for the EU to prevent negative impact. To assess a plurality of options is key in that context. History has shown that when the EU adopts a clear and principled approach to the negotiations, the EU is able to obtain specific clauses and qualify them as essential elements of the agreements. This principled position was key to the introduction of human rights clauses in external agreements. In the same vein, the EU is succeeding today in concluding agreements that are shaped on a new EU model of TSD chapter and obtained TRIPs/WTO+ engagements.
- b. The credibility and quality of the legal analysis based on the text and the exact wording of the clauses negotiated, or that should be negotiated in the specific context of local situations, should become a priority. We need to avoid general assertions like “an increase in FDI from the EU could promote economic stability and growth, increase employment and as a result lead to better living standards and less poverty” or assertions like “the agreement will have positive impacts because” the EU investors “are usually expected to value and protect human rights more than their [local] counterparts”¹⁶. HRIAs cannot rely on simplistic judgments, beliefs and reasoning. HRIAs have to duly document and scientifically argue the potential effects of the clauses negotiated, considering the real human rights situation on the ground, the state of legislations, the state of the rule of law and the effective access to domestic courts and remedies. They have to discuss the concrete clauses and procedures because the

¹¹ ECJ, C-310/04, Spain v Council ECR I-7318, paras 133-5 ; Commission Staff Working Paper, “Operational Guidance on taking account of Fundamental Rights in Commission Impact Assessments”, SEC(2011)567, 6 May 2011, http://ec.europa.eu/justice/fundamental-rights/files/operational-guidance_en.pdf; COM(2010) 543 final, Smart Regulation in the European Union, 8 October 2010, p. 6, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0543:FIN:EN:PDF>

¹² Commission Staff Working Paper, “Operational Guidance on taking account of Fundamental Rights in Commission Impact Assessments”, SEC(2011)567, 6 May 2011, http://ec.europa.eu/justice/fundamental-rights/files/operational-guidance_en.pdf; Commission Staff Working Document, “Better Regulation Guidelines”, SWD(2015) 111 final, 19 May 2015, http://ec.europa.eu/smart-regulation/guidelines/docs/swd_br_guidelines_en.pdf; European Commission, DG Trade, “Guidelines on the analysis of human rights impacts in impact assessment for trade-related policy initiatives”, 2 July 2015 http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153591.pdf ; Handbook for Trade Sustainability Impact Assessment, Draft 2015 ; A/HRC/19/59/ddd.5, Report of the Special Rapporteur on the Right to Food, Olivier De Schutter, Addendum, Guiding Principles On Human Rights Impact Assessments of Trade and Investment Agreements, December 2011

¹³ EU Ombudsman, Decision in case 1409/2014/MHZ on the European Commission's failure to carry out a prior human rights impact assessment of the EU-Vietnam free trade agreement, 26 February 2016, <http://www.ombudsman.europa.eu/cases/decision.faces/en/64308/html.bookmark>

¹⁴ DEVELOPMENT Solutions, Sustainability Impact Assessment (SIA) in support of an investment protection agreement between the European Union and the Republic of the Union of Myanmar, Draft Final Report, March 2016, <http://www.eu-myanmarsia.com/data/info/201607050052175278pic.pdf> 150 & 156

¹⁵ DEVELOPMENT Solutions, Sustainability Impact Assessment (SIA) in support of an investment protection agreement between the European Union and the Republic of the Union of Myanmar, Final Report, July 2016, <http://www.eu-myanmarsia.com/data/info/201607080324172956pic.pdf> p. 154, compared to draft 148

¹⁶ Draft report p. 146

clauses themselves and their concrete legal wording necessarily have an impact on the obligations of the parties, and in consequence on the effective respect of rights and the quality and effectiveness of the human rights safeguards provided. HRIAs have moreover to be based on a « do not harm » approach of the agreement in preparation, instead of relying on an artificial baseline scenario. Otherwise the HRIAs cannot address the responsibility of the EU and cannot help the EU to respect its obligations. The HRIAs cannot continue to be vaguely founded on the simple perception that the EU is doing better than the others and that the new model of agreements at least are along the most advanced regarding sustainability objectives. They have to address the problematic of enforcement, the comprehensiveness of the safeguards, their potential effectiveness in the local context of the trade partners.

10. **We recommend** to expressly require that **impact assessments** specifically **argue** on why the text of the agreement/policy is in line with human rights standards; that their recommendations find concrete solutions to the human rights risks raised and identified during the negotiations; that they analyse deeply the efficiency of the safeguards proposed or put in place in case the negative impact should nevertheless occur. We recommend in addition to enhance the **scrutiny and monitoring** of the HRIAs by designating in the steering committee and advisory board independent human rights experts that can monitor the process, the methodology and the respect of the guidelines and that can enter in a constructive dialogue, with civil society and stakeholders, on the human rights parts of the impact assessments. This could also participate in enhancing the quality of the consultative process.

On FTAs and IPAs

11. The potential harmful effects of FTAs and investment protection treaties on human rights are clearly condemned by the Special Rapporteurs of the United Nations and the monitoring bodies of the international conventions for the protection of human rights who denounce the violations of fundamental rights and the "manifestly harmful consequences" they have on human rights¹⁷. When focusing on investment agreements UN Special Rapporteurs and human rights protection bodies point out that investment protection regimes have serious and systemic flaws, which may have an impact on the human rights protection offered to populations. The right of indigenous peoples, the rights to health, water, food, non-discrimination, the right to sufficient means of subsistence, of access to basic services for the poor and most vulnerable have come to the attention of the UN as being particularly affected. So too is the impact of treaties concluded by developing countries on debt and poverty. Land grabbing and violations of related rights were also particularly denounced, as was the impact on the right to an effective remedy for populations whose fundamental rights are violated by the investor or the host state¹⁸. The EU should review its policy and develop a new model of agreements to remedy the following shortcomings:

The chapter on "trade and sustainable development"

12. The TSD chapter focuses only on core labour standards and the environment. It therefore misses the opportunity to provide specific guarantees to ensure that trade and investments are made in conformity with human rights international obligations. The TSD is therefore absolutely no help in most situations related to human rights beyond labour rights. It is a matter of priority to negotiate "a comprehensive chapter on human rights, in addition to

¹⁷ A/60/350, Rapport du Rapporteur spécial de la Commission des droits de l'homme sur le droit à l'alimentation, Jean Ziegler, 12 septembre 2005, §41. Commentary to Principle 9 of the UN Guiding Principles on Business and Human Rights; HCHR report Human rights, trade and investment (E/CN.4/Sub.2/2003/9), 2 July 2003, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G03/148/47/PDF/G0314847.pdf?OpenElement>; EPRS briefing, Investor-State Dispute Settlement (ISDS) State of play and prospects for reform, 21 January 2014, http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2014/130710/LDM_BRI%282014%29130710_REV2_EN.pdf; OECD, « Investment treaty law, sustainable development and responsible business conduct : a fact finding survey », June 2014 <http://www.oecd.org/daf/inv/mne/2014RBCMinisterial-TreatyRBC.pdf>

¹⁸ A/70/301, rapport sur les incidences des investissements internationaux et du libre-échange sur les droits de l'homme des peuples autochtones, 2015, §20; A/60/350, Rapport du Rapporteur spécial de la Commission des droits de l'homme sur le droit à l'alimentation, Jean Ziegler, 12 septembre 2005, §37§41; A/HRC/33/42, Report of the Special Rapporteur on the rights of indigenous peoples - International investment agreements, §28. ; OL CHE 1/2019, lettre des détenteurs de mandats des procédures spéciales de l'ONU à la Commission des Nations unies pour le droit commercial international (CNUDCI), 11 mars 2019; Columbia Center on Sustainable Investment (CCSI) et le Groupe de Travail de l'ONU sur la question des droits de l'homme et des entreprises transnationales et autres entreprises, "Impacts of the International Investment Regime on Access to Justice" (Septembre 2018), p 6 & 7;

the social and environmental chapters, in all future free trade agreements"¹⁹, thus "reaffirming the **principle of the indivisibility** of human rights and condemning any attempt to consider any right or ground of discrimination less important than others"²⁰ as asked by the European Parliament.

13. The TSD chapter makes a vague mention of corporate social responsibility. It refers in general to voluntary initiatives in ethical, social and environmental matters and promotional activities such as the exchange of information, training or advice. It thus clearly falls short of international standards. Indeed, it makes no express mention of human rights or the responsibility of companies to respect international human rights standards, and makes no mention of the obligation of States to take appropriate measures, in particular to adopt laws that allow companies and investors guilty of violations to be prosecuted and be held liable. Such kind of provision is therefore inconsistent with the objective of consolidating the rule of law set out in the European Union treaties, and even entails encouragement not to regulate too quickly. One could not have imagined a more counterproductive clause in dealing with investor or companies' liability and the obligations of States in this area. The TSD chapter should recognise the obligations of States and the responsibilities of corporations and investors under the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises, requiring the provisions of the agreement to be read in consistency with these international instruments, in addition to further international instruments detailing the specific obligations of States under international human rights law, as well as any future treaties or instruments relating to human rights and business enterprises²¹. The TSD chapter should moreover contain **clauses that reaffirm the obligations of States parties to protect human rights, as set in international law, and this including by regulating companies and by providing effective access to remedies and tribunals when they violate human rights or cause or contribute to harm**. It should provide concrete commitments regarding human rights due diligence to be made by businesses, it should commit to document positive and negative impacts of business behaviour on the implementation of the agreement and realisation of human rights.

14. The TSD chapter is largely non-binding in language (the parties "reaffirm their determination", "make efforts", aim to "promote", undertake to cooperate, dialogue etc.)²², or is framed in a way that only refers to national standards and provides no obligation to respect them but requires not to neglect them in any recurring way "to attract investment"²³ or « in order to gain an economic advantage ». It creates an excessive burden of proof and renders the commitments globally inefficient. TSD chapters should have clauses that are more assertive and create concrete obligations that parties may require to be implemented.

15. The TSD chapter lacks enforceability. TSD chapters are not covered by the general dispute settlement mechanism of the Agreement. It belongs instead to Panels of experts who cannot impose sanctions for non-compliance to examine disputes. This is not seen as a credible enforcement mechanism²⁴. Thresholds and triggering

¹⁹ European Parliament resolution of 18 April 2012 on the Annual Report on Human Rights in the World and the European Union's policy on the matter, including implications for the EU's strategic human rights policy (2011/2185(INI)) <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2F%2fEP%2F%2fTEXT%2bT A%2bP7-T A-2012-0126%2b0%2bDOC%2bXML%2bV0%2f%2fEN&language=EN>

²⁰ European Parliament resolution of 16 December 2010 on the Annual Report on Human Rights in the World 2009 and the European Union's policy on the matter (2010/2202(INI)), <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2F%2fEP%2F%2fTEXT%2bT A%2bP7-T A-2010-0489%2b0%2bDOC%2bXML%2bV0%2f%2fEN&language=EN>

²¹ Dr Joshua Curtis and Dr John Reynolds, "TTIP, ISDS and the Implications for Irish Public Health Policy", *opcit.*, p. 150

²² Dans l'accord avec le Vietnam Les seules clauses libellées en termes comminatoires sont celle relatives au maintien des niveaux de protection établis par la législation nationale (non par les conventions internationales), et plus particulièrement l'engagement de ne pas omettre de les appliquer (quoi qu'il puisse les changer, ce qui serait seulement inapproprié - art 13.3.1 ALE) dans le but spécifique d'encourager le commerce et l'investissement (13.3.2 ALE), ou d'appliquer leur législation en matière de travail d'une manière qui constituerait une restriction déguisée au commerce (art 13.3.3 ALE)

²³ L'article 13.3 de l'accord avec le Vietnam relatif au maintien des niveaux de protection sociale établis par la législation nationale est une des rares dispositions libellées en termes comminatoires. Les parties s'y engagent à ne pas « omettre d'assurer le respect effectif de ses lois en matière d'environnement et de travail en agissant ou en s'abstenant d'agir de façon durable ou récurrente, dans le but d'encourager le commerce ou l'investissement ». L'approche adoptée révèle toutefois le prisme de l'accord ALE. Ainsi, l'article 13.3 ne vise que le **droit national** (quand il vise les conventions internationales, le chapitre stipule seulement que chacune des parties « réaffirme sa *détermination* à mettre effectivement en œuvre, dans ses lois, réglementations et pratiques internes, les conventions de l'OIT ratifiée ». A comparer avec le CETA, Art. 23.3. « 1. Chaque Partie **fait en sorte** que son droit et ses pratiques en matière de travail **incorporent et protègent** les principes et les droits fondamentaux au travail, qui sont énumérés ci-après. Les Parties affirment leur engagement à respecter, promouvoir et appliquer ces principes et ces droits conformément aux obligations des membres de l'Organisation internationale du Travail (OIT) et aux engagements énoncés dans la Déclaration de l'OIT relative aux principes et droits fondamentaux au travail et son suivi (1998), adoptée par la Conférence internationale du Travail à sa 86^e session, à savoir [...] »

²⁴ Harrison et al, 'Labour Standards Provisions in EU Free Trade Agreements: Reflections on the European Commission's Reform Agenda', *World Trade Review* (2018a) DOI: <https://doi.org/10.1017/S1474745618000204>. This article summarises the findings of multiple previous

mechanisms are not transparent or efficient. For Korea, it took the European Commission eight years to initiate Consultations, despite the arbitrary arrests of trade unionists and other violations of ILO standards. Civil society and DAG members were precluded from assisting to the hearing that took place behind closed doors. The **enforceability of the TSD chapter must be significantly improved**, in the first place through consideration of, among various enforcement methods, a sanction-based mechanism, and the application of the State-to-State dispute settlement mechanism that apply to the other chapters of the FTAs. Like the European parliament, we call in addition for the "inclusion of a **complaint procedure** open to the social partners and civil society, the establishment of an independent body to settle relevant disputes and the possibility of using a dispute settlement mechanism providing for **finances and suspension of trade benefits**[...] equivalent to mechanisms providing for market access provisions"²⁵.

16. Civil society is expected to play a central role. But many civil society actors have argued they are unable to play a meaningful role. **DAGs** should be expressly provided with the task of monitoring the implementation of the **entirety of the agreement** and should be expressly be tasked with dealing with **specific and individual cases**. Their **rapid instatement and independence** should be guaranteed. The civil society organisations should be free and diverse and should include human rights defenders. DAGs should be provided with **adequate resources to investigate** issues. They should have the power to **bring their own complaints** before an independent adjudicatory body²⁶.

17. **Ex-Post impact assessments** are not duly required, and when done they lack transparency and quality. Agreements do not deal with the duty and rights of the parties when the time comes to address the potential conclusions of ex-post impact assessment. Clearer clauses should be provided to remedy these shortcomings.

Regarding the human rights clause:

18. Theoretically FTAs and IPAs contain or refer to a "human rights clause" that states that the respect of human rights, as set in relevant international instruments and norms, are an essential element of the agreements and relations between parties, thus allowing the parties to take appropriate measures (including the suspension of trade and investment agreements, in whole or in part) in case of violation. Practically, this clause is not used to ensure that trade and investment agreements respect human rights; it does not offer any guarantees to populations against the negative impacts of the trade and investment agreements. By instituting a dialogue, it fails to effectively compel the parties to implement the agreements in a manner that respects human rights. In that it allows suspension, the clause can only offer an extreme solution mobilised only after a political decision in extreme cases. As applied, it lacks the capacity to deal with the day-to-day impacts of agreements, to provide useful corrective measures as they occur, and above all to be able to guide the interpretation of agreements. We consider, as did the European parliament, that " the current clauses have had a limited impact on the fulfilment of human rights obligations and commitments; therefore calls on the Commission and the Council to implement the following adjustments: (a) incorporate safeguard clauses [...] (b) establish a **thorough and regular monitoring of the implementation of human rights clauses in trade and association agreements**, (c) consider the inclusion of a **human rights committee** in all EU trade agreements in order to ensure rigorous and systematic monitoring of human rights issues under the agreement... (d) ensure that the European Union has a system of internal remedies to **lodge complaints** of non-compliance with trade agreements and human rights clauses"²⁷; (see below §23 for more details)

academic studies which have examined the functioning of TSD chapters. While these studies focus on the labour standards provisions of TSD chapters, their findings are relevant to TSD chapters more generally

²⁵ Résolution du Parlement européen du 5 juillet 2016 sur la mise en œuvre des recommandations du Parlement de 2010 sur les normes sociales et environnementales, les droits de l'homme et la responsabilité des entreprises, §22 ; PE, rapport du 8 novembre 2010 sur les droits de l'homme et les normes sociales et environnementales dans les accords commerciaux internationaux (2009/2219(INI)) <https://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2010-0312+0+DOC+XML+V0//FR>, Demande réitérée en 2016 ; Résolution du Parlement européen du 5 juillet 2016 sur la mise en œuvre des recommandations du Parlement de 2010 sur les normes sociales et environnementales, les droits de l'homme et la responsabilité des entreprises § 21 https://www.europarl.europa.eu/doceo/document/TA-8-2016-0298_FR.html?redirect

²⁶ https://warwick.ac.uk/fac/soc/law/research/centres/chrp/governance/resources/trade-and-sustainable-development-issues-in-eu-trade-agreements/tsd_chapters_-_experiences_and_analysis.pdf

²⁷ Résolution du Parlement européen du 5 juillet 2016 sur la mise en œuvre des recommandations du Parlement de 2010 sur les normes sociales et environnementales, les droits de l'homme et la responsabilité des entreprises (2015/2038(INI)), <https://eur-lex.europa.eu/legal-content/FR/TXT/?uri=CELEX:52016IP0298>

Other clauses of FTAs and IPAs:

19. The clause which reaffirms the parties' **right to regulate** only aims to make clear that investors cannot legitimately expect the legal and regulatory framework to remain as it was on the day of the investment. However, it **does not derogate to the other clauses of the agreement** that set the limits to the right retained by the parties to effectively regulate when affecting investment. **Nor does it oblige the State to respect and effectively protect fundamental rights in the context of investments.** In addition and refusing, once again, to expressly refer to human rights, the agreements prefer clauses that reaffirm the "right to regulate ... with a view to achieve legitimate public policy objectives, in particular with regard to the protection of public health, safety, the environment, public morals, social protection or consumers, or promotion and protection of cultural diversity". These clauses globally fail to offer guarantees to the populations. In several partner countries, States, pretending to regulate in order to protect "public morals" or "security", actually adopt legislations that contravene international standards, and that in practice, lead more to arbitrary arrests of human rights defenders documenting business behaviour. The clause affirming the right to regulate does not provide any effective protection of human rights. In addition, the State would be immune from any condemnation as long as it regulates, acts or abstains in good faith to respect, protect and realise human rights.

20. Indeed, problematically, the investment agreements do not contain any enforceable provisions on investors' obligations. The EU's approach only excludes investments, which are not made in accordance with the applicable law at the time the investment was made (known as the "clean hands doctrine"). The Commission considers that this must "in turn reflect the international commitments of the parties reinforced by the Free Trade Agreement", which in practice does not happen. In several countries national law clearly fails to protect human rights or is in itself contrary to international standards. Clauses referring to domestic law are in consequence fundamentally insufficient. The agreement provides that the investor "may not bring proceedings [...] if his investment was made as a result of fraudulent statements, corruption ..." A similar clause has to be introduced in the event of human rights violations, and for the whole duration of the investment. We propose that the agreements clearly foresee that the investor may not contravene international human rights standards and national law if in conformity with international human rights law, nor be complicit of its violation, for the full duration of the investment. We also propose adding a provision **barring foreign investors from the protection of the investment chapter where there is sufficient evidence of direct or indirect violation of national laws and international human rights obligations and responsibilities**, both their own and those of the State in which they operate. Additionally, it should be made explicit that the tribunal is not simply allowed to refuse protection under such circumstances according to its discretion but is in fact obliged to do so

21. Other proposals have received broad support from civil society and academics and should be considered. An investment chapter or agreement restricted to national treatment and most-favoured nation treatment, excluding provisions on minimum standards of treatment and indirect expropriation (as does the "2015 China-Australia FTA). A clause on indirect expropriation setting out clearly that non-discriminatory measures taken in the public interest never amount to compensable expropriation.²⁸ A provision setting out clearly that the treatment to be accorded to foreign investors under the agreement cannot exceed the level of treatment afforded to domestic investors.²⁹ A provision requiring the prior exhaustion of domestic remedies³⁰ as there is no convincing argument to not require the exhaustion of local remedies as a general principle. "*Even in investment agreements with less developed legal systems, this principle should be included as it could provide an incentive for reforms and improvements of domestic judicial systems*"³¹. Provisions providing a State-to-State dispute settlement mechanism instead of Investor-State dispute settlement mechanism³²

22. Globally, the **current economy of investment agreements discourages, or even prevents in certain circumstances, States from protecting human rights**³³; The UN rapporteurs and organs have proposed several

²⁸ Dr Joshua Curtis and Dr John Reynolds, "TTIP, ISDS and the Implications for Irish Public Health Policy", *op.cit.*, p. 151

²⁹ Dr Joshua Curtis and Dr John Reynolds, "TTIP, ISDS and the Implications for Irish Public Health Policy", *op.cit.*, p. 151

³⁰ Dr Joshua Curtis and Dr John Reynolds, "TTIP, ISDS and the Implications for Irish Public Health Policy", *op.cit.*, p. 19

³¹ Markus Krajewski, "Modalities for investment protection and Investor-State Dispute Settlement (ISDS) in TTIP from a trade union perspective", Friedrich-Alexander-Universität Erlangen-Nürnberg, p. 19

³² Dr Joshua Curtis and Dr John Reynolds, "TTIP, ISDS and the Implications for Irish Public Health Policy", *op.cit.*, p. 19

³³ Dr Joshua Curtis and Dr John Reynolds, "TTIP, ISDS and the Implications for Irish Public Health Policy", *op.cit.*, p. 44; A/70/301, rapport sur les incidences des investissements internationaux et du libre-échange sur les droits de l'homme des peuples autochtones, 2015, § 16, 17, 19, 42, 46

paths to improve investment agreements. The EU has followed none. The investment treaty regime, in the absence of express contrary provisions, is considered an exceptional regime, which applies independently, regardless of the obligations that investors or the State may have in terms of human rights. Yet, in specific contexts, like in countries that are systematically violating human rights and failing to respect the rule of law, IPAs contribute to the impunity for human rights violations by investors and the lack of access to effective remedies for the populations. In situations where the populations affected by the investments do not have access to remedies in the host country, the IPAs, by creating a special regime, protecting foreign investors but referring to national law and the will of the host State (in this case failing) for the respect of human rights, are likely to aggravate the situation of the population in the host State and provide a blank cheque for investors to violate human rights. While it provides extended protection as such, the main purpose of investment treaties is thus to protect the fundamental rights of the foreign investor, including the right to an effective remedy. Still - by protecting the fundamental rights of foreign investors, without similarly protecting affected populations, the investment treaty regime affects human rights as such- by referring local populations to their failed national legal system – by breaking with equal treatment in access to legal remedies against the arbitrariness of the State or the failure to protect human rights against investors, impacts of investment agreement or interpretation provided by tribunals -, **the IPAs fail to participate meaningfully in strengthening human rights and the rule of law. They fail to comply with Article 21 TEU. They are inherently likely to affect the ability of these populations to enjoy human rights.** In these cases, and with all the other clauses of the IPAs remaining the same, the EU has no alternative but to respect its own obligations and put the ratification of international instruments protecting human rights as a precondition of entering in IPAs and, at the very least, to provide for a human rights monitoring and complaint mechanism. Legally speaking this mechanism could usefully be set as an autonomous one as called for by the European Parliament for the agreements concluded with Vietnam³⁴. This mechanism could be based on the human rights clause. It is an alternative that can be envisaged if common institutions set up by the agreement do not create it, even if this solution is not an ideal one.

23. In any case, it is a matter of priority that **monitoring and complaint mechanisms** be established that can monitor the impacts of the agreements **on human rights**, facilitate the populations' access to appropriate remedies, and offer guarantees of non-repetition. Under the **guarantees of non-repetition**, the monitoring and complaint mechanism will be empowered **to make recommendations to the various committees established by the agreements**, and specifically the Committee established by the investment protection agreement, for the useful interpretations to be adopted (see for example the Art 4.1 (4.b) for IPA concluded with Vietnam), binding to the arbitral tribunals and capable of effectively influencing the implementation of the agreement. To this end, the mechanism must be able **to be seized directly by the populations and individuals whose human rights are affected or are likely to be affected as well as by their representative (s) and the organisations whose object is to protect human rights**. The monitoring and complaint mechanism must offer procedural guarantees for its effectiveness and for the proper administration of any problems encountered. It must effectively rule on the requests submitted to it and justify its decisions. This monitoring and complaint mechanism must be able to be operational from the entry into force of the agreement and meet various criteria of efficiency and accessibility (in terms of independence, accessibility, transparency). For the review of the trade policy to achieve the objectives set out in article 207 TFEU and 21 TEU, the commitment to instate this mechanism should be set up in the agreements themselves and the mechanism be expressly tasked to make authoritative recommendations.

51; UN Independent expert Alfred Maurice de Zayas, Report, 14 July 2015, A/HRC/30/44; A/69/299, Rapport du Rapporteur spécial sur le droit qu'a toute personne de jouir du meilleur état de santé physique et mentale, §56, 64,

³⁴ 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 (06050/2019 – C9-0023/2019 – 2018/0356M(NLE)) https://www.europarl.europa.eu/doceo/document/TA-9-2020-0027_EN.html ; European Parliament non-legislative resolution of 12 February 2020 on the draft Council decision on the conclusion, on behalf of the Union, of the Investment Protection Agreement between the European Union and its Member States, of the one part, and the Socialist Republic of Viet Nam, of the other part (05931/2019 – C9-0020/2019 – 2018/0358M(NLE)) https://www.europarl.europa.eu/doceo/document/TA-9-2020-0029_EN.html “*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*”

Question 9

How can trade policy help to foster more responsible business conduct? What role should trade policy play in promoting transparent, responsible and sustainable supply chains?

Question 12

Addressing the level playing field

In addition to existing instruments, such as trade defence, how should the EU address coercive, distortive and unfair trading practices by third countries? Should existing instruments be further improved or additional instruments be considered?

24. To promote responsible business conduct the EU trade policy should **rely first on an EU mandatory human rights due diligence legislation**. This legislation should cover the whole value chain and provide for liability of EU companies both for having failed to comply to human rights due diligence requirements and for human rights negative impacts and damages they have caused or contributed to.

25. In consequence, and in line with the previous commitments made by the Commission to promote transparent, responsible and sustainable supply chain, the EU should support the Commission's proposal for new mandatory due diligence legislation for companies that obliges EU companies to respect human rights.

26. The legislation should require companies to undertake full and effective due diligence, across the whole of a company's value chain. To be effective and because all businesses have to comply to human rights law, all business enterprises, no matter their size or corporate structure, including SMEs must be covered by the legislation; The legislation must foresee administrative sanctions in cases of abuse and establish civil liability of European corporations for damages when these companies cause or contribute to human rights violations that are foreseeable and avoidable. The legislation must provide for joint liability for harms caused or contributed to by entities under their control or economically dependent.

27. As a concomitant positive contribution to both responsible business conduct effectiveness and level playing field, the EU should in parallel step up its efforts for the adoption of a **UN binding treaty on Transnational Companies and Human rights**. The European Commission, with the support of EU trade Commissioner should ask for a dedicate mandate to negotiate this treaty.

28. The proposals made on **FTAs and IPAs** (especially the ones on State obligations to protect human rights including against irresponsible conduct of businesses, those providing more tools to ensure the investors respect human rights, and the ones reinforcing the enforcement mechanisms - see above §§ 12, 13, 15, 16, 23), will allow trade policy to directly contribute to more responsible business conduct and will contribute to the transparency and sustainability of the supply chain. As FTAs and IPAs are reciprocal, these improvements will also benefit to the level playing field. And as the first duty bearers remain the States, they will provide in addition effective tools to address distortive and unfair trading practices of third countries. Trade partners violating human rights and the rule of law or denying access to remedies for affected populations whose human rights are negatively impacted by trade and investment, benefit, indeed, from unfair advantage and distortion of trade.

29. The EU should in addition work on legislation to ban the import of goods produced using child or forced labour or goods produced in blatant violation of human rights.

30. The EU should legislate and better monitor practices and legislations adopted in order to exclude companies violating human rights from public markets and public procurement procedures;

31. As human rights violations may amount to distortive and unfair trading practice, **trade defence instruments and FDI screening should encompass human rights considerations**. The **review of the Generalised**

Scheme of Preferences (GSP) regulation is also a good opportunity to contribute to a more impactful regulation. The new GSP regulation should improve the monitoring processes, enhance transparency, adopt a more positive and progressive approach, and provide for a formal “enforcement and compliance mechanism”. (See the recommendations of the GSP Platform in light of the discussion for the new Regulation of the Generalised System of Preferences of the European Union, dated June 2020 for more information on recommendations³⁵)

Question 13

What other important topics not covered by the questions above should the Trade Policy Review address?

32. It is a priority to recognise the **role that human rights defenders** provide in fostering responsible business conduct and in ensuring better transparency in order to fight back against violations of human rights by trade partners. There is an urgent need to adopt a zero-tolerance policy against reprisals and SLAPPs against human rights defenders who are documenting the impact of trade investments and the behaviour of companies. To address this, the EU should develop a **comprehensive handbook** to pull together practical guidance. This policy should be comprehensive. It should provide guidance to **ensure the EU is using all the tools at its disposal to ensure the best interplay between its instruments and policies. It should encompass trade policy and instruments.**

33. In the meanwhile, **trade policy** should address this concern, knowing that since the murder of Berta Caceres in Honduras, more than 720 human rights defenders have been killed for documenting land grabbing, environmental disasters and violations of indigenous rights in the context of investments. These assassinations aim to silence the populations who are suffering, who are violated in their rights, for whom investment means exclusion, deterioration of living conditions, violation of fundamental rights. Some of the proposals made above may help to address this issue (like improving business conduct, having DAGs dealing with specific and individual cases and improving enforcement of human rights commitments) but a **specific strategy dedicated to the matter** might dramatically change the fate of human rights defenders, enhance transparency in the supply chain, and enhance the benefit of trade.

³⁵ https://www.fidh.org/IMG/pdf/final_gsp_platform_public_consultation_gsp_platform.pdf