FIDH's Input to the Trade Sustainability Impact Assessment of the EU-India trade and investment agreements

March 2023

The EU has made progress in streamlining human rights into its trade agreements, notably within the TSD chapters. However, the effectiveness and actionable nature of human rights components fall short of expectations. As such, a number of recommendations and points highlighted by the EU ombudsperson[1] in response to complaints of maladministration submitted by FIDH remain unaddressed.

A more robust and actionable answer appears necessary, to ensure human rights are effectively taken in consideration, in particular considering the human rights situation in India.

The quality of the ex-ante and ex-post **sustainability impact assessments** (SIAs) in the context of the Free Trade Agreements (FTA) being negotiated by the EU with India should be dramatically enhanced. When conducting an impact assessment 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. A clause should be introduced that commits the EU to conduct Ex-post assessments of human rights impacts. This clause should be detailed, and require in depth assessment of the impacts of the agreement on human rights, labour rights and the environment, avoiding clauses that allow simple listing of activities without assessing seriously the impacts on the ground. Ex-ante and ex-post SIAs could serve to identify country-specific challenges and needs, including the amendment of domestic laws, procedures and practices that are not compliant with international human rights law. Technical and financial support should aim to prevent environmental degradation and infringements on labour and human rights. 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 FTA.

While we acknowledge the effort made at the EU level to conduct extensive consultations with civil society, it essential that the same is done **in India**. We deplore that at this stage it seems that civil society in India is not being duly consulted nor really informed of the content of the

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; 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; https://www.ombudsman.europa.eu/en/doc/correspondence/en/158519?utm_source=some_EO&utm_medium=twitter_organic&utm_campaign=trade_humanrights

negotiations and the impact the agreement may have on their human rights. This **transparency and consultations** must be organized before the EU reaches an agreement with the government of India on the content of the FTA.

The **ratification of the main human, labour rights and environmental international conventions should be required before ending FTA negotiations**. It is during the negotiations that the EU has more leverage to demand efforts from India. The ratification, implementation and enforcement of the fundamental International Labour Organisation (ILO) conventions, as well as international environmental 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 FTA are genuine, to ensure trade fits with the contemporary challenges and to ensure trade is done in respect of international standards. It is a key condition to ensure trade occurs in a context of sustainable development and occurs in conditions ensuring that trade benefits everyone; ratification and respect of these conventions should thus be **elevated to an essential element of the FTA and dedicated clauses should be agreed to**. **Here, India should be asked to ratify ILO conventions 87, 98, 155, 187, 169,** the **Optional Protocol to the International Covenant on Economic, Social and Cultural Rights,** and the **International Convention for the Protection of All Persons from Enforced Disappearance.** If, during the negotiation phase, it appears that the counterpart faces some difficulties in ratifying human rights conventions and amending its domestic laws accordingly, a time-bound, public and enforceable road-map should be agreed to and referred in a protocol annexed to the agreement.

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, customary law and the international conventions to which they are party. Those should also expressly state that investors and companies must 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 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. Moreover, agreements must go beyond the commitment to "encourage" and "promote" Corporate Social Responsibility (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 the United Nation Guiding Principles on Business and Human Rights. **Explicit reference should be made to *due diligence* in the supply chain**. As regularly requested by the European Parliament and civil society, human rights should be fully part of the TSD Chapter, along with labour rights. **An independent human rights secretariat or monitoring committee** should be put in place to monitor transnational human rights issues under the 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. 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", and "parties will promote".

In the case of India, where fundamental freedoms are increasingly under threat and the rule of law (including access to remedies), particularly for minorities and marginalized groups, is being considerably weakened, the EU must provide a dedicated **complaints mechanism** to deal with the negative impacts of the FTAs on human rights and environment. This should be part of a more responsible policy from the EU, that does 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 chapter should foresee a procedure and body 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 India. It could raise issues related to the EU's and India's behaviour. It could be problem 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). The set-up of complaint mechanism is broadly supported and requested, including by the EU ombudsman[2], the European Parliament[3] and academic studies[4]

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 processes that are adapted to the situation, or the promotion of tripartite dialogue etc.

[2]EU Ombudsman, Closing note on the Strategic Initiative concerning how the European Commission ensures respect for human rights in the context of international trade agreements, July 2022 https://www.ombudsman.europa.eu/en/doc/correspondence/en/158519?utm_source=some_EO&utm_medium=twitter_organic&utm_campaign=trade_humanrights

[3] European Parliament resolution of 18 January 2023 on human rights and democracy in the world and the European Union's policy on the matter – annual report 2022 (2022/2049(INI)); European Parliament resolution of 17 February 2022 on human rights and democracy in the world and the European Union's policy on the matter – annual report 2021 (2021/2181(INI))

[4] Lorand BARTELS, Assessment of the implementation of the human rights clause in international and sectoral agreements, May 2023, https://www.europarl.europa.eu/RegData/etudes/IDAN/2023/702586/EXPO_IDA(2023)702586_EN.pdf

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. Reparation should be guaranteed for the Human rights and environmental negative impacts, so, if needed, awards or compensations provided to an investor protected by the agreement should be reduced to the extent of HR damage or environmental damage. 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** 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, including in India

The collaboration between the European Commission (EC) 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** 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.

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. In the context of the EU-India FTA, the role of the DAG should be strengthened by:

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

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 DAG;

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

iv. Ensuring the **independence and the institutionalisation** of the DAG – including by avoiding vague wording or reference to pre-existing domestic institutions. The Agreement should specify more precisely that its parties are committing to set up a 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.

Under existing FTAs, 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 Chapters or human rights clauses and the reluctance of the Commission to address specific cases should be ended. **The CTEO/SEP** 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**, as an accompanying measure. 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 India, **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 Agreement 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).

We welcome the creation of the Chief Trade Enforcement Officer (CTEO) and the Single Entry Point (SEP). However, 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. 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 added value:

i. The TSD chapter 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 FTA 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 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.
iv. The possibility to apply sanctions and the concrete relation with the DSM should also be clarified.
v. The relevant DAGs should be associated in the pre-notification and following phases of the procedure, equipping them with procedural rights.
vi. 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.

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 in existing FTAs already allows the suspension of trade benefits. As the clause allows all necessary measures in the case of serious violations, 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.

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.