

POSITION PAPER ON THE ENFORCEABILITY OF TRADE AND SUSTAINABLE DEVELOPMENT CHAPTERS IN EU TRADE AND INVESTMENT AGREEMENTS

Amsterdam, June 2017

This position paper responds to the civil society consultation initiated by the Dutch ministry for Foreign Affairs, Trade and Development Cooperation on strengthening the Trade and Sustainable Development (TSD) chapters in European trade and investment agreements. The paper looks at the short-comings of current TSD chapters and offers recommendations for improvement and enhancing enforceability. It also takes a longer view, questioning the continued lack of binding responsibilities for foreign investors and other core imbalances in EU trade agreements and arguing in favour of a 'reset' that prioritises human rights and environmental protection over unsustainable and inequitable trade liberalisation, deregulation and investor protection.

EU core values require addressing gaps in human rights and environmental law

The European Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights.

The Lisbon Treaty states that 'in its relations with the wider world, the Union shall, inter alia, contribute to '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'.¹ The extraterritorial obligations that the EU has signed on to, include the obligation not to conclude trade and investment agreements that potentially conflict with human, economic, social and cultural rights.

So according to its own core values, the EU is bound to address the gaps in the protection of human rights and the environment in the context of globalization. This includes addressing the lack of human rights regulation and accountability of transnational corporations and ensuring the effective application of human rights and environmental law to investment and trade laws and agreements the EU signs.

¹ <http://www.lisbon-treaty.org/wcm/the-lisbon-treaty/treaty-on-european-union-and-comments/title-1-common-provisions/4-article-3.html>

Recommendation:

- ❖ We need a new trade model, that will not lower tariffs across the board without looking at the social, environmental and climate footprint of traded goods; will not include investment protection that can act as a brake on policy measures to ensure basic livelihoods, enhance social protection, conserve the environment or mitigate climate change; will not undermine the provision of universally accessible and affordable public services; will not allow IPR protection to undermine access to affordable generic medicines; does not automatically liberalise all capital movements with potentially highly destabilizing effects; will not undermine equitable and sustainable development, particularly in the global South.

Towards better trade and sustainable development chapters

The inclusion by the EU of ‘trade and sustainable development’ (TSD) chapters in FTAs concluded with its partners is intended to ensure that trade and investment liberalisation does not lead to a deterioration in environmental and labour conditions. The Netherlands are looking for an approach to give stakeholders such as trade unions, NGOs and other civil society organisations an actionable right to signal cases of human rights violations or environmental abuse in the field of trade and foreign investment.

² For an extensive list of international treaties on human rights, labour and the environment, see Krajewski en Hoffman http://reinhardbuetikofer.eu/wp-content/uploads/2016/08/Model-SD-Chapter-TTIP-Second-Draft-July_final.pdf

Recommendations:

- ❖ In order to be meaningful, the sustainability chapters in the EU’s trade and investment agreements should govern the entire agreement and firmly establish the primacy of human rights and environmental law; its stipulations should be fully applicable to all their chapters, including the investment chapter.
- ❖ TSD chapters should require both partners to ratify and implement the core human rights charters, i.e. the International Bill of Rights (UDHR, ICCPR, and ICESCR and its two optional protocols) and other human rights treaties and conventions; ILO core conventions, the Paris climate agreement and international environmental agreements; ² in line with the recommendations issued by the European Parliament.³
- ❖ Any government measures taken to implement and/or ensure compliance with the comprehensive (but non-exhaustive list) of international human rights, labour, climate and environmental agreements would be presumed consistent with the trade agreement, i.e. not a disguised restriction on trade and not actionable under ISDS. For greater certainty, the investment chapter should contain a clause reaffirming the supremacy of the sustainability chapter.

³

http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/595894_EU.pdf

Ensure policy coherence between UNGPs and trade & investment policy

The EU and its Member States have repeatedly expressed their commitment to the UN Guiding Principles on Business and Human Rights (UNGPs; 2011), which include the state duties to protect human rights from corporate abuse and to ensure accountability and effective remedy when abuses occur. However, with the exception of a few states, the EU Member States have so far failed to take legislative or other meaningful action to ensure effective prevention of, and accountability and remedy for, corporate human rights abuses. There remain significant gaps in access to justice for human rights abuses related to business operations.

The Netherlands are among the few states who have devised a National Action Plan. However, this has been criticized as incomplete,⁴ among other things for failing to establish a process for policy coherence to bring trade and investment agreements in line with the UNGPs. Policy coherence at the international level is hampered by the separation of negotiating tables on trade on the one hand, and human rights in the accompanying political cooperation agreement (PCA): trade agreements are negotiated by the European Commission, while PCAs are negotiated by the EU's External Action Service (EEAS).⁵

Recommendations:

- ❖ An integrated policy process is needed to ensure the human rights and sustainable development is, as required by the Lisbon

Treaty, comprehensively taken into account in trade and investment agreements.

- ❖ The legal relationship between a trade and investment agreement and the accompanying PCA must be shaped to ensure the primacy of human rights and environmental protection over and above trade and investment policy; inclusion of human rights and environmental protection as essential elements in a PCA should lead to the inclusion of specific human right and environmental clauses in trade and investment agreements, ensuring that these principles are not subordinated to economic objectives.

The Dutch NAP does refer to TSD chapters being included in trade and investment agreements. However, these pertain to the human rights obligations of states. A serious omission is the failure to address the responsibility to respect human rights for transnational companies and investors.

Recommendation:

- ❖ TSD chapters should contain a specific reference to the corporate 'responsibility to respect human rights' and should include a duty for the signatories to perform Sustainability Impact Assessments, as well as dedicated Human Rights Impact Assessments based on the Guidelines formulated by UN Special Rapporteur Olivier de Schutter⁶, prior to the ratification and provisional implementation of the treaty.

⁴ Zie: <https://www.somo.nl/nl/nationaal-actie-plan-is-onvolledig/>

⁵ Sicurelli, D. (2015). 'The EU as a Promoter of Human Rights in Bilateral Trade Agreements: The Case of the Negotiations with Vietnam', *Journal of Contemporary European Research*. 11 (2), pp. 230-245. <http://www.jcer.net/index.php/jcer/article/view/655>

⁶

http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-59-Add5_en.pdf

Foreseen negative impacts must be addressed, by flanking measures and/or amendment of the treaty, before the treaty can be ratified or implemented. The signatory Parties also commit to dedicated SIAs and HRIAs periodically ex post, and a commitment to promptly and collaboratively address any negative impacts identified, including, if necessary, by amending the underlying FTA.

Include concrete commitments and access to remedy for affected parties

TSD chapters currently generally lack concrete commitments, but merely voice intentions to engage in state-to-state dialogues. The trade and sustainable development chapters are excluded from the scope of the state-to-state dispute settlement (SSDS) procedure. In case of disputes over sustainability and development issues, these are to be resolved through mutually agreed solutions. TSD chapters contain no binding obligations on the transnationally operating companies and investor benefiting from the treaty and contain no sanction mechanisms. This means that, in stark contrast to the highly enforceable rights for foreign investors established by trade and investment treaties, human rights, environmental protection and the protection of labour standards continue to be enshrined in soft law. Obligations and commitments in the TSD chapter remain essentially voluntary and there is no effective complaints mechanism for affected communities to call home and host countries to account in case of violations.

Recommendations:

- ❖ *TSD chapters should specifically confirm the responsibility to protect of the signatory states in relation to human rights,*

sustainable development, environmental protection and conservation and climate change, and the duty of care and product chain responsibility for transnational corporations in those same areas.

- ❖ *Complementary to the investment chapter which lays down enforceable rights for investors, the sustainability chapters in trade agreements should contain binding and actionable obligations on investors in relation to their social responsibility and human rights and environmental due diligence.*
- ❖ *In a first step towards articulating and enforcing extraterritorial human and social rights, environmental and climate obligations for (transnational) business actors, the signatory governments should take it upon themselves to proactively monitor the conduct of their companies when they work in other countries and to investigate credible allegations of human rights abuse and environmental harm linked to those operations.*
- ❖ *TSD chapters should provide trade unions/NGOs/affected communities with access to remedy – e.g. a complaint mechanism, whereby an independent panel of experts (not only trade lawyers, but labour/climate/human rights experts) investigates the complaint; if the panel finds violations of the TSD chapter and declares a complaint eligible, this should automatically trigger a treaty's state-to-state dispute settlement mechanism, with possibilities for financial penalties or sanctions, and remedy for the affected society/individuals/group(s).*

Towards binding commitments for transnational corporate actors

While the investment chapter in trade and investment agreements guarantees often far-reaching and highly enforceable rights for transnational investors and companies, immediate and binding obligations on these same actors in relation to corporate social responsibility, human rights due diligence and environmental prudence are not included either in the investment chapter itself, or in the TSD chapter.

This has led to an imbalance where there is a lack of enforceable corporate obligations in relation to human rights and the environment. Even where third parties do have the legal possibility to bring a case against a company for violating human rights or environmental regulations, they are often faced with insurmountable obstacles to accessing remedy, including the so-called ‘corporate veil’, lack of transparency (disclosure), and jurisdictional challenges.

Human rights and environmental obligations ought to be binding upon corporate actors, with effective enforcement mechanisms in place. Such obligations might be enshrined either in trade and investment agreements themselves, and/or in a separate legal framework. Effective mechanisms need to have the mandate to monitor compliance, and give adequate access to effective remedy for those adversely affected by corporate violations. . The process launched at the UN, for developing an internationally binding instrument to regulate – in human rights law - the activities of corporations, is an important current multilateral initiative that demands positive engagement from the EU and its Member States.

Recommendation:

- ❖ *The EU and its Member States should, in recognition of the existing governance gap for transnational economic actors, engage positively with the process towards a binding instrument on business and human rights at the UN.*

Corporate obligations and responsibilities

The UN Guiding Principles on Business and Human Rights clarify the roles that governments and companies are expected to play in terms of protecting and respecting human rights. An important principle under the corporate responsibility to respect human rights is for companies to act with due diligence. ‘Due diligence’ is understood as a process through which enterprises actively identify, prevent, mitigate and account for how they address and manage the actual and potential adverse impacts of their operations, including in the value chain and through other business relationships.

The UN Guiding Principles also specify that businesses have a responsibility to address the impacts on human rights that occur through their own activities or as a result of their business relationships with other parties, including in their value chains.

However, trade and investment agreements currently contain no binding obligations on corporate actors to give shape to this responsibility.

Recommendations:

- ❖ *The sustainability chapter in trade and investment agreements should include a stipulation that foreign investors, in order to meet their due diligence obligations, must carry out a periodical human rights impact assessment of their operations, including in*

the value chain and through their business relationships and devise a plan for addressing actual and potential adverse impacts of their business operations. Transnational investors should publish progress reports in relation to its implementation. These, in turn, should feed into the periodical HRIAs and SIAs that the signatory states must commit to.

- ❖ *Both home and host states of foreign investors covered by the agreement must be required to ensure a full investigation in cases of (alleged) violations of human rights, environmental or sustainable development/climate obligations; if a party to the agreement is found in breach, this should ultimately lead to trade sanctions; If a company has failed in its due diligence in relation to the human rights or environmental impacts of its operations, this should – in addition to reparative measures - automatically lead to a denial of the benefits of the treaty.*
- ❖ *Sustainability chapters should establish a permanent, independent human rights and sustainability mechanism with a mandate to investigate complaints from civil society/individuals/groups affected by shortcomings in the state's duty to protect and corporate industry's duty to respect human rights and environmental protection. Warranted complaints should trigger immediate action by the signatories to agreement. This mechanism should include possibilities to receive and investigate complaints, and make findings regarding violations of human rights and environmental protection provisions. Where violations have been found, the mechanism should have the mandate to impose effective*

and proportionate sanctions, with the aim to hold the violating party – including transnational investors - accountable, and provide adequate remedy to the affected society/individual(s)/group(s).

- ❖ *TSD chapters should contain an assumption of parent company liability: Corporate headquarters should be held ultimately accountable for the conduct of their subsidiaries in relation to human rights; social, economic and cultural rights; environmental conservation and protection; climate-friendly business processes and activities; and tax compliance.*
- ❖ *Parties affected human rights and environmental transgressions by transnational investors should not only be able to hold these actors to account in the host state, but should also have access to home state courts. As the burden of proof that rests on affected communities often results in insurmountable obstacles to justice, the burden of proof in particular aspects of legal cases should be reversed and placed upon the foreign operator or investor.*
- ❖ *Prima facie well-founded complaints from affected communities should lead to preventive halting of projects in order to protect communities from potentially harmful impacts.*

Provide for effective monitoring and enforcement

Together with the United Nations Guiding Principles on Business and Human Rights and the International Labour Organization's (ILO) Conventions, the United Nations Global Compact and ISO 26000 Guidance on Social Responsibility, the Organisation for Economic

Co-operation and Development (OECD) Guidelines for Multinational Enterprises are often referred to as the ‘core set of internationally recognised principles and guidelines regarding Corporate Social Responsibility (CSR).⁷ These frameworks include, among other things, commitments on HR, labour, environment and tax compliance.

The study by Leuven University, commissioned by the Dutch trade ministry, extensively discusses the benefits and weaknesses of the compliance mechanisms associated with these frameworks, highlighting that their efficacy is hampered by the lack of adequate monitoring and enforcement mechanisms.⁸ The complaints mechanism of the OECD Guidelines relies on mediation without sanctions, and its effectiveness has been limited. The UN Global Compact contains no monitoring or enforcement mechanism at all. This underlines the key issue with all of these mechanisms, which is and remains, as civil society organisations have pointed out time and again, their reliance on voluntary adherence.

But while the OECD Guidelines contain no binding obligations for multinational corporations, OECD and adhering governments are under a legal obligation to implement them, including by establishing National Contact Points to handle complaints.

However, there are issues with accessibility for victims of corporate abuse. The lack of a sanctions mechanism also reduces the Guidelines effectiveness.

⁷ For example: European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Renewed EU Strategy 2011-14 for Corporate Social Responsibility, (Brussels, 25 October 2011), pp. 6-7 and MVO Platform, CSR Frame of Reference, (April 2012).

OECD Watch recommends, *inter alia*, to ‘attach consequences to ensure that the Guidelines are taken seriously. [...] Attaching material consequences to respect for the Guidelines will create a level playing field for business, and will ensure that companies failing to respect the Guidelines do not gain a competitive advantage over those upholding the standards.’⁹

Therefore, a mere reference to the OECD Guidelines in the sustainability chapters of the trade and investment agreements is not enough.

Recommendations:

- ❖ Companies that knowingly ignore the OECD Guidelines; engage in violations of human rights; are sullied by corruption or engaged in fraud; are found polluting the environment; fail to exert due diligence in their supply chains; engage in tax avoidance; act in contravention of the Paris climate agreement; etc. should be denied all benefits and protections of a trade and investment treaty.¹⁰
- ❖ As a first step towards establishing extra-territorial obligations for transnational corporations, states could embed the OECD Guidelines and other CSR standards into their own domestic legal framework in a binding and enforceable manner, as for example India and Italy have done.

⁸ A. Marx, et al., Dispute Settlement in the Trade and Sustainable Development Chapters of EU Trade Agreements, Leuven Centre for Global Governance Studies, 2017.

⁹ A “4x10” plan for why and how to unlock the potential of the OECD Guidelines: A briefing for policymakers, OECD Watch, June 2016

¹⁰ A “4x10” plan for why and how to unlock the potential of the OECD Guidelines: A briefing for policymakers, OECD Watch, June 2016

Overarching conditions: tax compliance

Any trade and sustainable development agenda needs to consider corporate tax avoidance because of its impact on public revenues and knock-on effects on poverty, inequality and development. Trade and investment agreements should address the harmful impact of corporate tax-dodging strategies, including through transfer-pricing abuse, profit-shifting through the strategic use of IPR and other methods.

Recommendations:

- ❖ *Corporate tax revenues are an important source of income for states to realise social and economic rights. TSD chapters should contain commitments between the signatory states to set up a process to engage in dialogues to address legal loopholes and counter tax-dodging, including by closing down options to set up artificial structures for the purpose of profit-shifting to low-tax jurisdictions. Parties should subscribe to a commitment to abolish policies and laws that allow companies to avoid tax.*
- ❖ *Signatory states should confirm their commitment to implement the internationally agreed standards to tackle tax evasion and avoidance and ensure the automatic exchange of information between their jurisdictions ensure that transnational economic actors pay tax in the jurisdictions where they operate and create their added value.*
- ❖ *Trade and investment agreements should include a denial of benefits clause expressly excluding artificial corporate structures from the benefits of the treaty; denial of benefits should also extend to tax benefits or exemptions.*

Final remarks

Including strong and enforceable TSD chapters in trade and investment agreements can only be a partial solution when the whole architecture of such agreements remains based on principles of far-reaching and progressive liberalization and deregulation of all trade goods and services, as well as enhancing unfettered market access and protections for foreign investors.

A genuine trade ‘reset’ will have to look not only at access to remedy TSD chapters (and the process of investment arbitration as in ICS). It must also examine the other substantial chapters of trade and investment agreements, as the current architecture of trade and investment agreements deprives governments of the policy instruments necessary to ensure sustainable development and hampers policy interventions to protect people and planet, mitigate climate change and ensure balanced domestic economic development, particularly in the global South.

A stronger TSD chapter alone will not address the structural imbalances of the current model.

If we are to meet internationally agreed targets regarding equitable and sustainable development (SDGs) and to mitigate climate change, we must work towards trade agreements that do not simply liberalise trade, but that regulate trade, in accordance with such overriding objectives. I.e., trade agreements that unequivocally prioritise human rights and environmental protection over trade and investment liberalization, and that hold transnational economic actors to account under basic social responsibilities.