

## **Trade and Sustainable Development (TSD) Chapters in EU Trade Agreements**

### **Experiences and Analysis from Domestic Advisory Group Members and Academics (draft)**

<b>TSD Chapters in EU Trade Agreements – An Overview</b>	<b>3</b>
(James Harrison, University of Warwick)	
<b>EU-Korea Free Trade Agreement (FTA)</b>	<b>5</b>
(Georgios Altzinis, ITUC)	
<b>EU-Peru FTA</b>	<b>7</b>
(Marc Maes, 11.11.11)	
<b>EU-Ukraine DCFTA</b>	<b>9</b>
(Stephanie Ghislain, Eurogroup for Animals)	
<b>EU Mercosur Trade Agreement</b>	<b>11</b>
(James Harrison, Univ. Warwick and Clotilde Henriot, Client Earth)	
<b>EU-Vietnam FTA</b>	<b>14</b>
(Gaelle Dusepulchre, FIDH)	

These materials were produced by the trade and sustainable development group (t&sd group). The t&sd group is a group of NGOs and academics who seek to improve and enhance EU trade policymaking from a sustainable development perspective. The Group consists of:

- Civil society organisations with direct experience of participating in the civil society mechanisms contained in TSD chapters, and other relevant EU trade policy-mechanisms.
- Academics who have conducted research into TSD chapters and broader issues of trade and sustainable development in EU policymaking.

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## Trade and Sustainable Development (TSD) Chapters in EU FTAs – An Overview

### A. TSD Chapters: Key Elements

- Commitments to international labour conventions and environmental treaties.
- A framework of dialogue and cooperation around labour and environmental issues
- Officials from the EU and each trade partner forming a committee to oversee the overall implementation of the chapter.
- Creating (or using existing) civil society mechanisms known as Domestic Advisory Groups and conducting joint meetings which are viewed as key to the process of dialogue and co-operation between the Parties.
- A panel of experts nominated by the Parties which can be called upon to examine and make recommendations on matters not addressed satisfactorily by other mechanisms in the TSD chapter.

### B. TSD chapters: Failings and Limitations

Widespread recognition that TSD Chapters not working well. Academic studies have identified eight key failings:<sup>1</sup>

1. Limited ownership of the TSD agenda by key EU officials and government officials in trade partners.
2. Civil society involvement undermined by serious operational failings (e.g. lack of resources) and unclear purposes and functions
3. Cooperative activities not systematically implemented
4. Dispute resolution provisions inadequate and not acting as a sufficient incentive
5. Insufficient attention paid to diverse contexts of trade partners
6. Monitoring of the 'sustainability' impacts of the agreement have not been properly operationalised
7. Failure to adequately take action to promote responsible supply chains - action limited to encouraging voluntary corporate social responsibility initiatives.
8. Scant evidence of consideration of trade and sustainability issues *within* the EU

### C. What has been done to address these issues so far?

The Commission has recently committed to 'revamping' its TSD chapters. But this has not adequately addressed the issues identified above. Calls for a stronger enforcement process have been rejected. Other problems remain. These include lack of a meaningful role for civil society and limitations in the scope of the TSD chapter, in relation to co-operative activities, monitoring processes and action towards responsible supply chains.

### D. What action is required in the future?

#### 1. Monitoring how TSD Chapters are currently performing

The Commission has argued that the test of success for TSD chapters is 'real and lasting change on the ground, through the effective application of enhanced social and environmental standards'. It promises to 'continuously analyse the effectiveness of the implementation of the TSD chapters' and to examine whether further measures are necessary to ensure 'full and effective implementation'.

External stakeholders (e.g. the European Parliament) should be monitoring the performance of TSD chapters in practice and whether 'real and lasting change' is actually occurring. Some of the key questions that need to be asked in that monitoring process are:

1. What action has been taken on sustainability issues before trade agreements are signed (pre-ratification conditionality)?
2. Have tailored action plans on sustainability issues been produced with regard to each trade agreement, and what concrete actions are they giving rise to?
3. How and when is the dispute resolution process being utilised and what are the results?
4. What resources are being made available for the implementation of TSD chapters, what activities are being funded, which organisations are involved (DGs and external orgs.) and what are the outcomes from a sustainable development perspective?
5. Do civil society actors perceive that they have a meaningful role in relation to implementing the trade agreement, including any environmental and labour issues arising?
6. Are the sustainability impacts of trade agreements themselves being monitored, are appropriate benchmarks for monitoring being created, and is action being taken to address issues arising?

## 2. Thinking beyond the current model

One reform that has been widely discussed is to strengthen the dispute settlement process. Such discussions should move beyond an either/or US versus EU approach. Rather, they should consider a range of design issues for how a more effective enforcement process would function including:

1. How (and by whom) a dispute is initiated.
2. Who the complaint targets (corporations could be targeted as well as states).
3. What types of sustainability issues could be the subject of a dispute.
4. Who investigates the allegations that are made
5. Who adjudicates on any complaints that come to dispute settlement.
6. The nature of the legal test for proving a violation has occurred and what form of sanctions or fines are available to those who are adjudicating

At the same time, ideas could be developed for different ways of thinking about how to promote sustainable development through EU trade agreements. This should include extending the concept of 'sustainable development' in EU policymaking to include human rights issues. It would also need to move beyond seeing TSD chapters in isolation and thinking about (1) how the TSD agenda can be connected to the rest of the trade agreement and (2) connecting it to other sustainable development initiatives beyond trade agreements. Ideas might include:

1. Using obligations in trade agreements and other trade-related policies to create incentives for action on sustainability issues (e.g. more relaxed rules of origin on strategic product lines for companies that demonstrate adherence to key environmental or labour standards).
2. Supporting and reinforcing certification initiatives which aim to foster compliance with sustainability issues at the level of the producer and their supply chain

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<sup>1</sup> Harrison, Barbu, Campling, Ebert, Martens, Marx, Orbie, Richardson, Smith, '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 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.

## **The Trade and Sustainable Development (TSD) Chapter in the Korea-EU FTA – Eight year process of engagement over Korean labour issues raises serious concerns**

### **A. Domestic Advisory Groups and the Dispute Settlement in the TSD Chapter**

The EU trade agreement with the Republic of Korea was signed in 2009, provisionally applied in 2011 and entered into force formally in December 2015. Since its provisional application, the EU and Korea established the Trade and Sustainable Development Committee (TSDC), an intergovernmental body to monitor, apply and enforce the provisions of Article 13, on Trade and Sustainable Development. The two Parties also established two Domestic Advisory Groups (DAGs) and a Civil Society Forum (CSF), which is the annual convention of the two DAGs.

Article 13 is excluded from the scope of the Dispute Settlement Article and instead another procedure is created within Article 13 for the amicable resolution of disputes which lacks sanctions and the detailed due process which the Dispute Settlement Article establishes for the commercial articles of the agreement. That is, the Parties have constructed a lesser form of dispute settlement for the protection of labour rights and the environment than they have reserved for commercial disputes. The Dispute settlement process within Article 13 provides for the possibility of Consultations which, if not successfully concluded is followed by an invitation to a Panel of Experts that would *“provide its expertise in implementing this Chapter”*.

The EU DAG was originally constituted with representatives of civil society, trade unions, and employers’ organisations by one third of membership each, a structure that it retains still today. The Korean DAG, on the other hand, had a less representative constituency with many academics, including a former negotiator of the agreement, the initial self-exclusion of the largest Korean trade union confederation (the KCTU), and the omission of the largest Korean employers’ federation (the KEF). This was largely corrected in the following two years and the Korean DAG included more representative groups while it shed some experts and individuals who did not represent constituencies or political interests.

### **B. What labour issues were raised by the DAGs and how did the Commission Respond (2011-18)?**

After a couple years of members’ appointments, deliberations on the mandate and its interpretation, and the acquaintance of the members with their duties, in February 2013, the EU DAG adopted the [“Opinion on Fundamental rights at work in the Republic of Korea, identification of areas for action”](#). The document detailed a deteriorating state of labour rights in practice and in law and reiterated numerous ILO bodies’ decisions calling on the Republic of Korea to proceed with legislative and behavioural changes. Further to this, Korea has not ratified four out of the eight ILO fundamental conventions.<sup>2</sup>

In January 2014, the EU Domestic Advisory Group (DAG) wrote a letter to Trade Commissioner Karel De Gucht concerning serious and widespread violations of the right to freedom of association and to bargain collectively in South Korea. The EU DAG explained that these violations were a breach of Article 13.4 commitments and requested that the Commissioner invoke Consultations. Commissioner De Gucht replied in February 2014 declining to initiate Consultations. Instead, he announced his intention to continue using dialogue.

The following year, the EU-Korea Civil Society Forum issued a statement expressing *“its disappointment with the lack of progress [...] regarding ratification and effective implementation of the ILO fundamental conventions and urge[d] the Parties to renew their efforts in that direction”*. At the same time, the Republic of Korea intensified its attack on the trade union movement by sentencing the President of the Korean Confederation of Trade Unions, Sang-gyun

Han, to five years in prison for his participation in strikes and demonstrations in 2015 opposing government policy aimed at abrogating collective bargaining agreements and significantly weakening labour law. The demonstrations were met with excessive use of police force, including the use of water cannons that resulted in the death of one protestor. No one in the police force faced any criminal or even disciplinary action.

No EU-Korea Civil Society Forum was held in 2016 due to complications involving the Korean government and the Korean DAG. In June 2016, the UN Special Rapporteur on Freedom of Assembly and Association and the UN Working Group on Business and Human Rights issued critical reports noting that Korea was failing to protect basic labour rights. Meanwhile, the government attempted to proceed with further deregulation in the labour market that would undermine collective bargaining.

In December 2016, the EU DAG addressed a letter to Commissioner Malmstrom calling for the EU to initiate Consultations stressing that *“failure of the EU to act in this case, in light of the overwhelming evidence of the breach of Article 13, would undermine the effectiveness of Sustainable Development chapters in EU’s trade agreements.”* The Commissioner responded in February 2017 that the EU is committed to solutions based on dialogue and cooperation with Korea and that the Commission remained determined to *“encourage Korea to improve the situation on labour rights”*. At the same time, the Korean President was impeached and found guilty for corruption involving the Samsung corporation.

In April 2017, the European Parliament intervened aiming at shaking the Commission out of its idleness with a [motion for a resolution](#) that urged the Commission to take up formal consultations. In May 2017, a new government took over in Korea led by human rights lawyer Moon Jae-in who promised to bring ILO Conventions 87 and 98 for ratification and correct the government’s behaviour so as to respect labour rights in practice. The Commission felt that it would be appropriate to give the new government time to act. However, in the beginning of 2018, a court condemned KCTU General Secretary, Lee Young-joo, to prison terms for her role in the 2015 demonstrations.

The April 2018 CSF failed to adopt outcomes due to the Korean employers walking out of the meeting because they disagreed with conclusions calling directly for the release of the two trade union leaders from jail. Instead, the CSF adopted a ‘Joint Co-Chair Statement’ effectively calling for their release. Before the CSF, both the ILO governing body and the UN Council on Human Rights had adopted resolutions calling for the release of the two leaders. The government effectively released the two leaders in June 2018.

### **C. The Setting up of the Panel of Experts and concerns about the report they will produce**

In 2019, the EU Commission finally launched formal Consultations and after a few months, the Parties are proceeding with the establishment of a Panel of Experts. However, the Panel does not include a labour expert and there is serious concern that the outcome will be a politically negotiated report that sets the bar lower than relevant ILO standards.

It took the European Commission eight years to initiate Consultations in the face of a demonstrably deteriorating state of labour standards in Korea and with an aggressive government that actively sought the imprisonment of unionists and impeded the enjoyment of even the most basic labour rights. The risk now is that the EU’s approach through the TSD chapter will produce a report that is weak in substance and unenforceable in practice.

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<sup>2</sup> There are eight ILO Conventions that constitute the Fundamental Principles and Rights at Work – a floor of labour protection that, under ILO norms, every country must respect, irrespective of having ratified or not the actual Conventions.

## The Trade and Sustainable Development (TSD) Chapter in the EU-Peru FTA<sup>1</sup>

### A. The EU-Colombia/Peru TSD Chapter and civil society

- The EU Colombia/Peru Trade Agreement has been provisionally applied with Peru since 1 March 2013
- According to the Agreement Each Party shall consult existing domestic labour and environment or sustainable development committees or groups, or create such committees or groups when they do not exist.  
In the practice of the implementation of EU trade agreements such committees are called Domestic Advisory Groups (or DAGs).
- The Agreement says that these committees or groups may submit opinions and make recommendations on the implementation of the TSD Chapter including on their own initiative, through the respective internal channels of the Parties.
- Every year when the official joint EU-Peru/Colombia/Ecuador Sub-committees on Trade and Sustainable Development meet, the Parties organise a session (aka Forum) with civil society organisations and the public at large, in order to carry out a dialogue on matters related to the implementation of the TSD Chapter.
- The representatives of the EU Domestic Advisory Groups and of the Andean national mechanisms agreed to hold annual joint meetings organised back-to-back with the open Forum.

### B. Peruvian practice

In Peru the government decided not to create a new domestic advisory committee to deal with matters related to the TSD Chapter. Instead it decided to work with the four existing bodies tasked with labour issues and five dealing with environmental issues:

However, although these bodies include civil society actors they do not allow effective participation: either because they work with consensus only (so that no critical remarks will appear in conclusions), or they do not have the right to vote, or they are only observers. The existing bodies also lack independence, since they are led by government officials who set the agenda and, many times, make meetings inquorate with their non-attendance. In addition to this, several of these spaces are very weak institutionally, while some, due to being very specialist in nature, are not optimal for broader dialogue on the issues covered by the TSD chapter.

### C. What has been done to address these issues so far?

Peruvian civil society wrote letters to the Peruvian government and the EU about failures to implement the TSD chapter but did not get much response. In view of this situation EU civil society delivered an extensive report to the European Commission that was put together by Peruvian civil society organisations making a complaint (or Queja in Spanish) against the Peruvian government. The Queja provided evidence on the failure to respect the labour and environmental standards mentioned in the TSD chapter and questioned the functioning of the bodies designated by the Peruvian government as the consultative committees mentioned in the TSD chapter.

As a result the EU Trade Commissioner Malmström has written to the Peruvian Minister of Foreign Trade and Tourism in 2018 expressing serious concerns about the implementation of the TSD chapter and the Convention listed therein, mentioning that *'in absence of sufficient progress, we will consider using existing mechanisms, including the enforcement procedure'*.



At the 2018 meeting of the official joint Sub-Committee on TSD, two of the bodies mentioned above were designated for monitoring the TSD chapter:

1. The National Council for Work and Employment Promotion (CNTPE) and
2. The National Commission on Climate Change (CNCC).

However, this did not lead to a satisfactory outcome: The two main trade union confederations in Peru (CGTP and CUT) have suspended their participation in the CNTPE for reasons that include, among others, the fact that a consensus agreement referring to the prior consultation of the National Plan for Competitiveness and Productivity was ignored. The Plan was eventually approved unilaterally and without consultation. The CNTPE has not met this year to look at the implementation of the FTA.

The CNCC only had one meeting in February of this year and an extraordinary session at the end of August, to fulfil its commitment to discuss the implementation of the TSD chapter as was agreed at the 2018 meeting of the joint Sub-Committee on TSD. For the extraordinary CNCC meeting other actors than the regular CNCC members had to be invited as the regular CNCC members do not follow the implementation of the trade agreement. They also questioned the CNCC as the proper forum for discussing the TSD chapter as its remit is to deal with climate change.

With regard to the failure to respect labour and environmental standards mentioned in the Peru civil society Queja, the European Commission undertook a fact finding mission after which it softened its position. After some insisting, CSO's received a disappointing letter from the Commission in April 2019. It does not make further analysis or recommendations about the issues raised and the way in which they have been discharged by the Peruvian government. Peruvian civil society is still waiting for coherent action from the European Commission which says that it is applying diplomatic, soft pressure.

#### **D. What action is required in the future?**

Peruvian civil society organisations that are concerned with the EU-Peru trade agreement and the functioning of the TSD chapter do not find a place in the existing advisory bodies. They have therefore created their own platform to monitor the implementation of the agreement and its TSD chapter, the "Grupo Consultivo Interno" or GCI. The GCI seeks to obtain recognition as official Domestic Advisory Group. Meanwhile it will continue to monitor the implementation of the FTA and to liaise with civil society organisations in the EU and in Colombia and Ecuador that are parties to the same agreement and that are also undertaking to compile Quejas about the lack of implementation of the TSD chapter in their countries.

The GCI participates in the open Forum that is organised every year in one of the three countries at the time of the joint TSD Sub-Committee meeting. The response to the contributions made at the Forum is equally disappointing as they are not even mentioned in the official reports of the Forum.

Given the fact that existing advisory bodies in EU partner countries may not function adequately, are not focussed on or equipped to deal with the implementation of the TSD chapter, and/or lack independence and inclusiveness, EU agreements need to better define domestic advisory groups, their representativeness and independence and their access to dialogue with the joint TSD committee. The European Commission also needs to be pushed to respond more adequately to issues that are raised by civil society in its partner countries.

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<sup>1</sup> This 2-pager is building on publications by the Peruvian Red Peruana por una Globalización con Equidad (or Red GE), notably: <http://www.redge.org.pe/sites/default/files/8%20%20Info%20sociedad%20civil%20%20GMI%20%282%29.pdf> and [http://www.redge.org.pe/sites/default/files/linea-de-tiempo\\_final\\_web.pdf](http://www.redge.org.pe/sites/default/files/linea-de-tiempo_final_web.pdf)

## Implementation of TSD chapters – Case-study on the EU-Ukraine DCFTA

### A. How are the Domestic Advisory Groups within the TSD chapters functioning?

The EU Domestic Advisory Group on the EU-Ukraine DCFTA has been created in November 2016 – 11 months after the agreement entered provisionally into force. The Ukrainian DAG was only formed two years later, in November 2018. Such delays are not rare with DAGs.

On the European side, as with every DAG, the group has officially 15 members and is split into 3 sub-groups:

- Employers – EESC, Business Europe, European Services Forum, Eurochambres and the European Organisation of the Sawmill industry
- Trade Unions: EESC, ETUC and ITUC
- Diverse: EESC, Eurogroup for Animals, COCERAL and Friedrich-Ebert-Stiftung.

The EU DAG was first chaired by a representative of the European Confederation of Woodworking Industry and is currently chaired by Eurogroup for Animals. Chairmanship of DAGs rotate among sub-groups. The Ukrainian DAG is composed similarly by organisations representing business, trade unions and NGOs. It is currently chaired by a representative of Living Planet, an environmental NGO.

Since the Ukrainian DAG has been formed, EU and Ukrainian members have been cooperating: providing comments on each group's priorities, in view of adopting joint statements, etc. This work is just starting as the Ukrainian DAG has only been up and running for 12 months.

### B. What are the sustainable development issues that have been raised?

The following topics were mentioned by civil society at the occasion of the latest DAG-to-DAG meeting (November 2019). The list is non-exhaustive.

- **Labour Pillar:** issues with freedom of association, the new labour code, labour inspections and wage arrears; the need to reinforce the social dialogue;
- **Environmental Pillar:** lack of progress in approximating EU animal welfare and SPS legislation; too narrow scope of Ukrainian approximation commitments (Ukrainian civil society pushes for more EU laws to be approximated); agreeing on a common definition of “environmentally friendly” good or service; the need to increase Ukrainian consumers’ awareness of environmentally friendly goods and services; reform needed on sustainable management of forests
- **Economic pillar:** need to promote Corporate Social Responsibility; call for Ukraine to be part of the WTO Environmental Goods Agreement process; need for capacity building project to better respect TSD commitments

### C. What has been done so far about those issues?

As a result of the 15-point plan established by the Commission to strengthen TSD chapters, the EU has defined priorities for Ukraine: (1) on Labour, they focus on labour inspections, modernisation of labour relations and legislation in the field of collective bargaining and social dialogue ; (2) on the environment, they focus on Sustainable Forest Management, (3) as an additional priority, the EU has set “renewable energy”, more specifically energy-efficient products and energy reform/sustainability. In the last year, the EU organised an EU-funded ILO project on “Enhancing the Labour Administration Capacity to Improve Working Conditions”. Civil society in Ukraine underlined the quality of the ILO project and the positive impact it has had. However, apart from that, no concrete action was taken on these priorities.

These priorities also reflect the lack of monitoring of the impact the agreement - and the trade liberalisation it triggered - can have on sustainable development. A key example is the poultry production in Ukraine. At the moment, the sector is very unsustainable - using mostly mega farms that have very detrimental consequences not only on animals and their welfare, on the environment and on the surrounding areas, but also on the workers and people living nearby. Since the provisional application of the agreement - which included trade preferences on poultry meat, Ukraine's export of this product to the EU tripled. At the moment, the agreement has thus fostered unsustainable trade and there are no systems or benchmarks in place to monitor its effects.

In the latest joint statement made by the EU and Ukraine in November 2019, the parties list the issues about which they discussed and the various projects on which they could work, in relation to sustainability, focusing thus on the positive agenda. However, further actions would be needed to effectively address such issues.

- The EU welcome that Ukraine started to modernize its labour code. However, it does not provide any comment on the criticisms raised by civil society regarding the content and the process surrounding this reform.
- The EU pushed for a reform of the forest management system in Ukraine, which is described as ongoing. More discussions are said to take place on more operational aspects of this reform in other bodies under the agreement. The EU usually discussed this jointly with the issue of the wood bans (2005 ban on sawn wood and 2015 ban on unprocessed wood) maintained by Ukraine despite the signing of the DCFTA. This underlines the problem of the silo-approach adopted by the EU: many discussions raised in committees other than the TSD one (thus linked to other parts of the agreement) relate to sustainability.
- The parties promise to enhance cooperation on sustainable biomass, without providing further details on the impact it could have.
- The Parties agreed that in the field of renewable energies, a transparent market based regulatory framework without retroactive change is needed. However, there are no further details on how to achieve this.

#### **D. What should be done in the future?**

- The priorities established by the EU for Ukraine should be genuinely discussed with the DAGs, other Civil Society Organizations and the European Parliament.
- In the field of labour, the EU's action seems more comprehensive: it looks at a project to build capacity but also to issues that are problematic. However, at this stage, the EU has only expressed negative comments regarding a few issues, and did not adopt more concrete recommendations on how to improve the situation.
- In the field of the environment, however, the accent is put on positive cooperation (like on renewable energy) and less on analyzing the impact of the trade agreement on various sectors, and thus on the environment. What kind of production models are stimulated by the agreement with Ukraine? Are sectors growing sustainably? What are the environmental or labour-related implications of such growth? Is there an impact in the EU? To look at these questions, there is a clear need to develop models, benchmarks, indicators to better analyse the impact of the modification in trade flows on sustainable development.
- More NGOs should follow the work of the DAG. Often, lack of resources are pointed out as the main issue preventing them from participating. There should be an additional budget allocated to ensure civil society can pay enough attention to the implementation of FTAs.
- Officials in charge of implementing the TSD chapter should meet more regularly with DAG members.

## The EU-Mercosur Trade Agreement – The TSD Chapter and Rhetoric vs Reality

### 1. Sustainable Development Issues

A variety of serious concerns have been raised about sustainable development in connection with the EU-Mercosur Trade Agreement:

- The conclusion of the Trade Agreement without the Sustainability Impact Assessment (SIA)
- Environmental issues including deforestation in the Amazon.<sup>1</sup>
- Human rights issues, including violations of the rights of indigenous peoples.<sup>2</sup>
- Labour rights, including failures to ratify and effectively implement ILO Core Conventions.<sup>3</sup>
- Animal Welfare issues both in relation to wildlife and farmed animals.<sup>4</sup>

### 2. Public Statements by the European Commission about the TSD Chapter

Strong statements have been made about the degree to which the TSD Chapter will address sustainable development issues. Leading EU officials and EU policy documents have made a variety of claims including:

- **Enforceable commitments:** The EU Mercosur FTA includes a commitment to effective implementation of the Paris Agreement which ‘locks countries into commitments taken on stopping deforestation in the Amazon, for example.’ (*Juncker*)<sup>5</sup>
- **Co-operative action:** The TSD chapter creates “high standards and establishes a strong framework to jointly address issues like the environment and labour rights” (*Malmström*)<sup>6</sup>
- **Civil society role:** The TSD chapter offers civil society organisations “an active role to overview the implementation of the agreement, including any human rights, social or environmental concerns”. (*European Commission Press Release*)<sup>7</sup>
- **Action against deforestation:** “The EU and Mercosur commit to effectively implement the Paris Climate Agreement and agree to cooperate on the climate aspects of trade between the two sides. The Paris Agreement includes, for example: a pledge by Brazil to reduce by 2025 its net greenhouse gas emissions by 37% compared to 2005 levels, action to stop illegal deforestation including in the Brazilian Amazon” (*Commission policy brief*)<sup>8</sup>
- **Protection of human rights and indigenous communities:** “The Association Agreement will provide a solid framework to address human rights issues, including with regard to indigenous peoples.” (*Commission policy brief*)<sup>9</sup>

### 3. Concerns about weaknesses in the SIA process and TSD chapter

But there are concerns about whether these statements match the reality of what the TSD chapters will achieve in practice, including:

- **Lack of SIA in Support of the Association Agreement Negotiations between the European Union (EU) and Mercosur:** The negotiations closed on the 28<sup>th</sup> of June 2019 and the Commission published its interim SIA only in early October.<sup>10</sup> The interim report expressly says that recommendations will be included in the final report, not yet published. This raises questions about the extent to which the (ongoing) SIA process has actually fed into the work of the negotiators. The SIA is also not based on the best available research, information and data which risks creating incorrect and/or biased results. This is particularly critical across the different parts of the environmental analysis, where the study fails to take into account for example, the latest data on the deforestation situation or the full value chain impact for certain products (e.g. beef, and the emission generated by the production of the feed). It therefore

does not appropriately draw conclusions from this data to make sure that future risk is taken into account. In addition, the SIA does not seriously consider potential impacts on animal welfare.

- **Lack of enforceability of the TSD chapter-** TSD chapters are not covered by the general dispute settlement mechanism of the EU-Mercosur Trade Agreement. Disputes are instead examined by panels of experts who cannot impose sanctions for non-compliance. This has not been seen as a credible enforcement mechanism in previous EU FTAs.<sup>11</sup> It is therefore unclear how commitments in the TSD chapter will strengthen existing international obligations (e.g. the Paris Agreement).
- **Absence of detailed commitments** and a transparent funding framework for co-operative activities raises questions about how significant those activities will be. Commitments in relation to responsible supply chains only encourage voluntary uptake by companies and have been criticised in other agreements as “restricted in scope, vigour, and potential future impact”<sup>12</sup>
- **Civil society** are expected to play a central role in the implementation of the TSD chapter. But many civil society actors have argued they are **unable to play a meaningful role** in current EU FTAs.<sup>13</sup> They have inadequate resources to investigate sustainable development issues, issues they do identify are often not acted upon by inter-governmental committees, and they have no power to bring their own complaints to an independent adjudicatory body. There is also no obligations to have Domestic Advisory Groups in place by the time the agreement enters into force. The process of setting up DAGs can take a number of years.
- **Trade and Sustainable Management of forests:** There are the same issues as for previous TSD chapters. The chapter focuses mainly on logging and sustainable management of forests. It is important that the forest clause refers not only to forest management but also includes the “use” of forests in order to apply to rules on land allocation, land use and rights of third parties. TSD chapters should be in line with the 2019 Communication to step up EU Action to Protect and Restore the World’s Forests where the Commission says that it ‘will promote trade agreements that include provisions on the conservation and sustainable management of forests and further encourage trade of agricultural and forest-based products not causing deforestation or forest degradation’.<sup>14</sup>
- **Paris Agreement and Nationally Determined Contributions (NDCs):** In its public statement, the Commission refers to the Brazilian NDCs and the commitments around forests, however there are questions about how Brazil will fulfil its NDCs if we look at the latest data on deforestation. According to the (2019) New York Declarations on Forests Five-Year Assessment Report, in June 2019 alone, deforestation rates in the Brazilian Amazon increased by 88 percent compared to the same month last year. After a change of government in 2019, deforestation in Brazil has increased due to reversals of existing legal and institutional forest protection policies and frameworks. Changes to Brazil’s mining code could open up 9.8 Mha of protected area to mining development by 2025.<sup>15</sup>
- **Deficiencies in *ex post* monitoring processes** in current EU FTAs raise questions about whether robust monitoring of the actual impact of the EU-Mercosur FTA (e.g. on deforestation in the Amazon) will occur.<sup>16</sup>
- **Limited scope of the TSD chapter:** The TSD Chapter is lacking due attention to human rights, focusing as it does on environmental and labour issues. It therefore misses the opportunity to provide guarantees that trade and investments are made in conformity with human rights international obligations, including the protection of the rights of indigenous peoples.

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<sup>1</sup> Seattles to Brussels Network, *340+ organisations call on the EU to immediately halt trade negotiations with Brazil* available at <http://s2bnetwork.org/letter-brasil-bolsonaro-eu-mercosur/>

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<sup>2</sup> See note 1

<sup>3</sup> CCSCS and ETUC, *Joint statement on negotiations for a bi-regional partnership agreement between the European Union and Mercosur*, available at <https://www.etuc.org/en/publication/joint-statement-negotiations-bi-regional-partnership-agreement-between-european-union>

<sup>4</sup> See Eurogroup for Animals, *Animal Welfare in EU-Mercosur trade negotiations*, available at [https://warwick.ac.uk/fac/soc/law/research/centres/chrp/governance/resources/sustainable-development-issues-in-the-eu-mercotur-free-trade-agreement/20180315\\_mercotur\\_-\\_position\\_paper.pdf](https://warwick.ac.uk/fac/soc/law/research/centres/chrp/governance/resources/sustainable-development-issues-in-the-eu-mercotur-free-trade-agreement/20180315_mercotur_-_position_paper.pdf)

<sup>5</sup> “Trade policy has become a tool for climate policy... In the agreement, each of the parties ... commits itself to the effective implementation of the Paris agreement. This locks countries into commitments taken on stopping deforestation in the Amazon for example.” European Commission, *Remarks by President Juncker at the joint press conference with President Macri in the presence of EU and Mercosur leaders*, available at [https://ec.europa.eu/commission/presscorner/detail/ro/speech\\_19\\_3468](https://ec.europa.eu/commission/presscorner/detail/ro/speech_19_3468)

<sup>6</sup> “[The EU-Mercosur trade agreement] sets high standards and establishes a strong framework to jointly address issues like the environment and labour rights, as well as reinforcing sustainable development commitments we have already made, for example under the Paris Agreement.”

Comment by Commissioner for Trade Cecilia Malmström in European Commission, *EU and Mercosur reach agreement on trade* available at <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2039>

<sup>7</sup> European Commission, *EU and Mercosur reach agreement on trade* available at <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2039>

<sup>8</sup> European Commission, *EU-Mercosur Trade Agreement, Briefing on Trade and Sustainable Development*, available at [https://trade.ec.europa.eu/doclib/docs/2019/june/tradoc\\_157957.pdf](https://trade.ec.europa.eu/doclib/docs/2019/june/tradoc_157957.pdf)

<sup>9</sup> Ibid

<sup>10</sup> Sustainability Impact Assessment in Support of the Association Agreement Negotiations between the European Union and Mercosur, 3 October 2019 available at

[http://www.eumercosursia.com/uploads/4/0/7/2/40728425/final\\_interim\\_report\\_publication\\_03oct2019.pdf](http://www.eumercosursia.com/uploads/4/0/7/2/40728425/final_interim_report_publication_03oct2019.pdf)

<sup>11</sup> 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 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.

<sup>12</sup> See Harrison et al, Above which argues “...despite the focus on cooperative activities in the text of the TSD chapters, such provisions have not been systematically implemented through relevant EU instruments. Further, no systematic evaluation of the cooperative activities conducted under the TSD chapters has taken place.” It goes on to argue that “Activities [to promote responsible supply chains] have largely focused on encouraging voluntary corporate social responsibility initiatives, which are restricted in scope, vigor, and potential future impact.”

<sup>13</sup> See e.g. J. Orbie, D. Martens, M. Oehri, and L. Van den Putte ‘Promoting Sustainable Development or Legitimising Free Trade? Civil Society Mechanisms in EU Trade Agreements’, *Third World Thematics*, 1(4) (2016); J. Orbie, D. Martens, and L. Van den Putte, *Civil Society Meetings in European Union Trade, Agreements: Features, Purposes, and Evaluation*, *CLEER Papers* (2016/3), [www.asser.nl/media/3044/cleer16-3\\_web.pdf](http://www.asser.nl/media/3044/cleer16-3_web.pdf) (accessed 9 October 2017); Harrison, Barbu, Campling, Richardson, and Smith (lead author) ‘Governing Labour Standards through Free Trade Agreements: Limits of the European Union’s Trade and Sustainable Development Chapters’ *Journal of Common Market Studies*, (2018b) DOI: <https://doi.org/10.1111/jcms.12715>. 57:2. March 2019, Pages 260-277

<sup>14</sup> Communication from the European Commission, *Stepping up EU Action to Protect and Restore the World’s Forests*, Brussels, 23.7.2019 COM(2019) 352 final, available at

[https://ec.europa.eu/info/sites/info/files/communication-eu-action-protect-restore-forests\\_en.pdf](https://ec.europa.eu/info/sites/info/files/communication-eu-action-protect-restore-forests_en.pdf)

<sup>15</sup> NYDF Assessment Partners. (2019). *Protecting and Restoring Forests: A Story of Large Commitments yet Limited Progress*. New York Declaration on Forests Five-Year Assessment Report. Climate Focus (coordinator and editor). Accessible at [forestdeclaration.org](http://forestdeclaration.org).

<sup>16</sup> See Harrison et al, Above, “the provisions contained in TSD chapters regarding the monitoring and assessing of the ‘sustainability’ impacts of the agreement itself, ... have not been properly operationalized”

## EU-Vietnam Free trade agreement (FTA) & Investment protection agreement (IPA): Art 21TUE

### A. Issues at stake

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- Lack of Ex-ante human rights impact assessment - lack of guaranties regarding ex-post assessment
- One of the weaker TSD Chapter compared to other agreements
- lack of human rights guarantees

### B. Lack of *ex ante* Human rights impact assessment (HRIA)

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The [Ombudsman, in February 2016](#), concluded that the refusal of the European Commission to conduct an HRIA in the context of the EU-Vietnam Free Trade Agreement negotiation was in contravention with Art 21 of the TUE and constituted maladministration. She added: *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. More than two years later, on October 17, 2018, and despite the Ombudsman's position, the Commission still relies on its traditional tools and its position remains unchanged.* The two agreements proposed by the Commission still fail to provide sufficient human rights guarantees.

### C. Obligation to prevent and remedy negative impacts, framing the text of the agreement in consequence

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**The potential impacts** of investment agreements have been documented by the UN and go **far beyond labour law**. The UN has denounced the impacts on the rights of indigenous peoples, the right to health, water, food, non-discrimination, adequate livelihoods, access to basic services for the poorest and most vulnerable populations as well as the impact in developing countries on debt and poverty, land grabbing, and the impacts on the right to an effective remedy. The UN rapporteurs and organs have proposed several tracks to improve investments agreements. None has been followed by the EU.

### D. EU prefers to use traditional, weak and inefficient tools

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#### The chapter on "trade and sustainable development"

- Focuses only on core labour standards and the environment. There is therefore absolutely no help in dealing with situations denounced by the UN. The European Parliament is also of that opinion, "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"; In April 2012, even before the start of negotiations with Vietnam, the EP already advocated "a comprehensive chapter on human rights, in addition to the social and environmental chapters, in all future free trade agreements".
- The chapter also fails to impose obligations on investors, referring only voluntary initiatives and promotional activities and falling short of international standards, despite the European Parliament having expressly requested that the objectives of corporate responsibility "be binding on European companies operating in countries with institutional weaknesses".
- The Chapter is also formulated in a largely non-binding language (the parties "reaffirm their determination", "make efforts", aim to "promote", undertake to cooperate, dialogue etc.) and lacks an enforceable mechanism. Once again, the European Parliament recognised these weaknesses and called 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 fines and suspension of trade benefits[...] equivalent to mechanisms providing for market access provisions".

Regarding the **human rights clause**:

- By the European Commission's own admission, the EU mobilised the clause only in exceptional circumstances such as a coup d'état.
- Since it is left to the sole discretion of the parties to activate it, the clause must be regarded as an ineffective remedy for the benefit of the populations that would be affected by the 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 offers an extreme solution mobilised only after a political decision in extreme cases. 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. It fails to provide a means of redress for populations affected by the agreement and fails to provide guarantees of non-repetition in the event of a violation of fundamental rights. On this topic, the parliament also concluded: "*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*;

**The investment treaty**, which offers unique, effective and exclusive protection to foreign investors, without the legislative and judicial framework protecting poor and/or particularly vulnerable populations to the same extent, is inherently likely to affect the ability of these populations to enjoy human rights, in contravention with the objectives and principles set out in Article 21 of the TEU.

## **E. What to do**

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**FIDH and VCHR have submitted** a new complaint to the Ombudsman to denounce maladministration. **The Commission must improve the agreements and the guarantees provided. It must assess the many proposals on the table** (incl. enriching the investment treaties themselves, improving impact assessments, effectively regulating European companies, adopting mandatory human rights due diligence regulation and improving access to legal remedies). In the meantime, the Union has an immediate **obligation to establish a monitoring and complaints mechanism that can monitor the human rights impacts of the agreement**, facilitate people's access to appropriate remedies, and provide guarantees of non-repetition. With regard to guarantees of non-repetition, the monitoring and complaint mechanism should be empowered to make recommendations to the various committees set up by the agreements, with a view to adopting appropriate interpretations which may effectively influence the implementation of the agreement. The monitoring and complaint mechanism must offer procedural guarantees, effectively decide on the requests submitted to it and give reasons for its decisions.

**Role of the European Parliament:** The European Parliament has an important role to play. It should dedicate efforts to monitor the due implementation of article 21 of the TEU, setting up a working group to that end, and institutionalising dialogue with Commission. The European Parliament should remain principled, pursuing in asking for due respect of its previous recommendations, but also recalling its position in due time, notably by refusing, postponing and conditioning its consent.