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POSITION PAPER

Human Rights Impact Assessment of Trade and Investment Agreements concluded by the European Union

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Over the past years, the European Union has been negotiating Trade and Investments agreements with several regions and countries in the world. This strategy has been laid down in the 2006 Communication '*Global Europe: Competing in the world*' which clearly states that the EU should actively pursue markets opening: 'our external priority in this area in recent years has been to (...) liberalise international trade further, opening markets in which European companies can compete and providing new opportunities for growth and development'.

The Commission nevertheless recognizes that liberalisation could have adverse effects on developing countries: 'We will also take into account the development needs of our partners and the potential impact of any agreement on other developing countries, in particular the potential effects on poor countries' preferential access to EU markets'. This is why the EU has decided to carry out Trade Sustainability Impact Assessments before deciding to launch Free Trade Agreements negotiations. These assessments though do not include an evaluation of the potential impact of such agreements on the human rights situation in partner countries.

This note aims at explaining why FIDH considers that the European Union¹ should conduct Human Rights Impact Assessments when negotiating trade and investment agreements and which methodologies should be followed to that effect. Commendable though as they are, Sustainability Impact Assessments are not a substitute for Human Rights Impact Assessments. Trade agreements may deeply affect human rights in partner countries of the EU (I.). They correspond to obligations imposed both on the EU and on its Member States under international law (II.). And they call for specific methodologies and indicators, based on the normative content of human rights and including dimensions of participation, accountability, and non-discrimination (III.).

I. The potential impacts of trade negotiations on human rights

As the Committee on Economic, Social and Cultural Rights concluded in its statement on poverty, the absence of an equitable multilateral trade, investment and financial system – amongst other factors – is a global structural obstacle to poverty reduction.² It is also one of the main obstacles to the realization of the Millennium Development Goals agreed to by the international community in 2000. Because of the imbalance between the negotiating parties and the greater difficulty for developing countries, in comparison to multilateral negotiations, to form coalitions in order to resist certain demands of their commercial partners, the dangers of regional and bilateral trade and investment agreements are even more important than any similar dangers implicated in liberalization measures adopted at multilateral level.

This is all the more the case that the EU has decided to go further than the WTO: 'Free Trade Agreements (FTAs), if approached with care, can build on WTO and other international rules by going further and faster in promoting openness and integration, by tackling issues which are not ready for multilateral discussion', the above-mentioned Communication says, adding: 'In terms of content new competitiveness-driven FTAs would need to be comprehensive and ambitious in coverage, aiming at the highest possible degree of trade liberalization (...) We will require a sharper focus on market opening and stronger rules in new trade areas of economic importance to us, notably intellectual property (IPR), services, investment, public procurement and competition'.

¹ Under the current treaties, trade and investment agreements are concluded by the European Community, rather than by the EU itself. In this note however, reference is made to the EU in the generic sense, for the sake of facility.

² E/C.12/2001/10, para. 21.

More specifically, a range of problems have been identified. The purpose of listing these problems here is not to prejudge in any way the result of any human rights impact assessments which may be performed. Only by such HRIAs, conducted at country level and through participatory mechanisms, can the risks listed below be properly evaluated. But, in discussing the usefulness of HRIAs, it is important to keep in mind the wide range of impacts which could result for human rights from trade liberalization. :

- *Intellectual property rights*

Intellectual-property rules encourage innovation, research and development; but when they are too strict, they can end up acting as a brake on social and economic development. The TRIPS agreement contains several flexibilities in order to allow members a form of implementation suitable to their economic and social needs. Industrialized countries have nevertheless been trying to force developing countries in bilateral or regional agreements to go beyond TRIPS standards of intellectual-property rules protection.

In the field of affordable medicines for example, developing countries have the possibility, under the flexibility provided for under the TRIPs Agreement and under the 6 December 2005 Amendment to the TRIPs Agreement, to acquire generic medicines against a fair remuneration of the patent holder. Industrialised countries though are using bilateral or regional free trade agreements to push for stricter intellectual-property rules under so-called 'Trips-Plus' provisions, thereby delaying the introduction of generic medicines. These strengthened provisions also lead to a rise in the cost of medicines, often making them unaffordable for large segments of the population in developing countries. As a result, public health consequences could be dramatic.

The TRIPS agreement equally allows farmers to re-use seeds and improve them on their own while giving breeders protection of their intellectual property rights. Nevertheless, there is evidence that the EU has been trying to include TRIPS-Plus rules in some recent free trade agreements with developing countries. The bilateral agreement with Chile for example, mentions about 25 intellectual property related treaties or amendments thereof³. The EU and EFTA often insist on including provisions aiming at reinforcing the protection of patents on plants and seeds by requesting developing countries to accede the UPOV Convention for the Protection of New Plant Varieties or to the Budapest Treaty on the Deposit of Micro-organisms for the Purpose of Patent Protection, or both; or that they conform with the European Patent Convention, which allows the patenting of transgenic plants and animals; or that they conform with 'the highest international standards' of intellectual property protection. This severely restricts the re-use, selling or exchange of protected seeds. Additionally, this stricter regulation increases the prices of seeds beyond the reach of small farmers.

Intellectual property rights also lead to a rise in the price of agrochemicals, which farmers in developing countries need in order to be able to compete on global markets with increased yields in industrialized countries. The costs of these inputs put them at a competitive disadvantage with large agribusiness companies, especially where they have no easy access to credit. On the other hand, an increasing dependence on pesticides could have potential adverse environmental and health implications.

³ Liebig, Klaus, *Ensuring Development Friendly Economic Partnership Agreements (EPAs) The TRIPS agenda: Access to Knowledge and Technology*, Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ), 2007.

Finally, the strengthening of intellectual property rights may represent an obstacle to the transfer of much needed technologies to developing countries, thus making it impossible for them to climb up the development ladder and diversify in manufacturing activities.

- *Services liberalization*

While, in most cases, developing countries have resisted pressures to open up their services sector in the framework of the WTO, renewed pressure is being imposed on them in the context of the negotiation of regional and bilateral free trade agreements. The comparison of FTAs concluded by the EU with third countries reveals a general trend towards liberalising trade in services⁴. While most of the included services chapters follow the legal framework set by the GATS, this is not always the case: in some of the Economic Partnership Agreements between the EU and the ACP countries for example, the EU has proposed a services chapter that is a remarkable departure from the accepted architecture under the GATS⁵. However, the opening up of the services sector to foreign companies may make it more difficult for the host country to regulate those services in the public interest.

In sectors such as water, health or education, for example, if, in the framework of liberalisation, the host country is forced to renounce regulations destined to make these basic services accessible and affordable to all – including by differential pricing taking into account the ability to pay of different segments of the population – this could prove extremely detrimental to the enjoyment of human rights, especially for the poorest segments of the population. As noted by the High Commissioner for Human Rights, ‘where investment is in previously public-owned utilities, investment could have dramatic effects – both beneficial and less so – on the enjoyment of these rights due to the differences of approach in service provision between public and private service providers and their different responsibilities towards the promotion and protection of human rights’.⁶

Similarly, the penetration of developing countries’ local markets by global retailers could make it more difficult for local producers to sell their products, since they may be unable to meet the requirements – in terms of volumes, capacity to adapt to rapidly changing demands and standards – set by these global retailers; and since they will be facing direct competition from the other products distributed by the global retailer. This could drive small retailers out of business, thereby reducing competition and extending the monopoly power of global retailers. Additionally, new local enterprises could be pre-empted from emerging in the face of the entrenched power of international companies.

Finally, in the financial sector, there is risk that it would lead to a two-tiered system, in which large foreign banks prefer the wealthy and creditworthy clients, whereas local banks are left with poorer and higher-risk customers, thereby reducing their profitability and jeopardizing their very existence. This could endanger access to credit for the poorest segments of the population, especially for small-scale farmers, as exemplified by the impact on the Mexican financial sector of the NAFTA.

⁴ *Ensuring Development Friendly Economic Partnership Agreements (EPAs) Criteria for a Chapter on Trade in Services*, Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ), 2007.

⁵ See: Mene, Wamkele, *New Generation Issues in the EPAs: development in question?*, in Trade Negotiations Insights, Volume 6. Number 8/ December 2007 & January 2008, published by the International Centre for Trade and Sustainable Development (ICTSD) and the European Centre for Development Policy Management (ECDPM).

⁶ Human rights, trade and investment. Report of the High Commissioner for Human Rights, UN doc. E/CN.4/Sub.2/2003/9, 2 July 2003, para. 12.

- *Foreign investments*

Developing countries are often entering new trade agreements in the expectation that foreign investments would increase. But there is no guarantee that this will actually be the case; or that, even if they do actually increase, they will serve development needs; or that the promised gains will outweigh the undoubted costs. The EU, for example, has signed free-trade agreements with countries like Mexico, Chile or the Mediterranean countries: why would European investors go to Africa where there are supply-side constraints like poor infrastructure or lack of skilled labour to export to Europe when they can do it from much more advanced economies?

Free trade or investment agreements including provisions protecting the investors of one party from expropriation by another party may create an obstacle to the effective regulation of foreign investors, even where such regulation would be justified by the need for the host state to comply with its human rights obligations. As a result, a host country that adopts social or environmental regulations, for example, might end up being obliged to compensate foreign investors for the economic loss incurred following the new regulations because they consider they are being denied 'fair and equitable treatment'. Additionally, these compensation costs can be very high, leaving local taxpayers to pay the bill.

Free trade and investment agreements also frequently include provisions banning the imposition of 'performance standards' on foreign investors, that require them for example to source a certain percentage of their inputs from local companies, to enter into partnerships with local companies, to share their technology or to train their workers. Or foreign investors could repatriate their gains, leaving no benefit for the host countries. As a result, few linkages are created between foreign investors and local economies, and the arrival of foreign direct investment is not as conducive to the realisation of human rights as it should be.

- *Tariff liberalization*

Under regional and bilateral trade agreements, developing countries are frequently asked to lower or eliminate their tariffs on agricultural or manufactured goods and to freeze their tariffs on other products.

This makes it impossible for these countries to protect themselves from surges in imports which may threaten their local producers, not even during the period necessary to allow these local producers to adapt to the challenges faced by the arrival of competing foreign products. This is especially troubling considering that, in conformity with the Agreement on Agriculture concluded as part of the Uruguay round of trade negotiations, agricultural products are still largely subsidized – whether directly or indirectly – in certain developed countries which are trading with developing countries.

Liberalisation submits developing countries to external competition which they cannot handle; if a lack of infrastructure and poor means prevents them from reacting adequately, local industries stand to lose markets. This could eventually lead to redundancies or closures, hence to an increase in unemployment and poverty figures. Additionally, with industrial tariffs reduced to zero and safeguards clauses not always providing for adequate protection, developing countries could be denied the right to develop and protect their nascent industries.

This problem could be particularly dramatic in the agricultural sector: agriculture is the primary activity of 60% of the population in sub-Saharan Africa and accounts for over half of the GDP in

some countries⁷. Additionally, small-scale farmers account for most of Africa's agriculture production, particularly staple food. The almost complete elimination of tariffs leaving agriculture from African countries unsheltered from the arrival of cheaper products could drive small-scale farmers out of business with potentially severe consequences for the right to food for poor people. This would also lead to rising unemployment levels; and if small farmers are obliged to abandon their land and migrate to cities, it could further impoverish rural areas, while increasing pressure on cities.

On the other hand, the reduction in agricultural production would increase these countries' dependence on food imports; given the highly volatile commodity prices on world markets, this also entails major risks for their food security.

Developing countries also stand to lose considerably from the phasing out of import duties. A study on the potential loss in income suffered by African countries that sign an EPA with the EU has shown that parts of Eastern and Southern Africa could lose about 17% of their revenues; Angola, Seychelles and Congo D.R, about 37%, Senegal, about 45%⁸. Moreover, this would come at a time when these countries need to invest in their production capacity, infrastructure and human resources to tackle enhanced competition. This loss in fiscal resources could have severe effects on the developing countries' income for public spending, thereby undermining the role of the State in the provision of basic services such as education or healthcare. Additionally, the loss of tax revenues could lead to increased taxes on local business and service providers, as well as an increase in VAT for consumers.

The EU also insists on including in the EPAs a provision removing export taxes or banning new ones. Yet these export taxes are used by developing countries to raise revenues and to encourage more processing at home. In Ghana for example, there are export taxes on scrap metal to discourage the export of scrap metal. Namibia repeatedly said it wants to keep the freedom to use export taxes to discourage the export of raw materials and to encourage local industries to add value to their products before export. Nor does Namibia want to abolish any legislation that requires investors to use locally produced inputs, in order to support local industries⁹. These provisions could therefore end up limiting developing countries' industry growth.

Hence, international trade and investments agreements could potentially have adverse effects on the right to food, the right to water, the right to education, the right to health, the right to a decent standard of living, the right to work and the right to development.

Whether these impacts will occur, and to which extent, must be clearly identified prior to the negotiation of any trade or investment agreement by the EU. This is the primary aim of the HRIAs. It is up to the European Union to ensure that human rights are safeguarded, including in partner countries, in accordance with its international obligations.

⁷ *Economic and Partnership Agreements: A better ACP-EU trade agreement is both possible and desirable*, Policy Briefing, ActionAid International, October 2007.

⁸ Bouet, Antoine, Laborde, David & Mevel, Simon, *Searching for an alternative to Economic Partnership Agreements*, International Food Policy Research Institute, Research Brief No. 10, 2007.

⁹ Kwa, Aileen, *EU is using 'bully tactics' to push through EPAs*, Inter Press Service, 17 December 2007.

II. The legal framework under international human rights law

1. The international obligations arising in the EU context

a) The human rights obligations of the EU

We take as our departure point that the EU is bound to take into account international human rights in the negotiation and conclusion of international trade and investment agreements on behalf of its Member States. The European Court of Justice considers that the EU must comply with general principles of law which it ensures respect for, and which include at least the fundamental rights included in international treaties which all the EU Member States have ratified.¹⁰ Among these is not only the European Convention on Human Rights, but also the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child.

In addition, as a subject of international law – having been attributed competences which it can exercise as a participant in the international legal process –, the EU is bound under international law to respect general public international law, of which human rights form a part¹¹: as clearly illustrated by the case-law of the International Court of Justice,¹² human rights qualify among the ‘general principles of law recognized by civilized nations’ mentioned by Article 38(1)(c) of the Statute of the International Court of Justice.¹³

b) The impact of the human rights obligations of the individual Member States on the negotiation of trade and cooperation agreements by the EU

In addition, the EU should not adopt measures, whether in trade negotiations or otherwise, which make it impossible for the individual Member States to comply with their own pre-existing international obligations. When they have been entered into by the EU Member States prior to their accession to the EU, agreements concluded with third States are an obstacle to the imposition under EU law of obligations which would impose on the EU Member States concerned that they set aside those pre-existing undertakings. This is the result of Article 307 EC, which does no more than recognize the consequences, for the institutions of the Union, of the general public international rules on the conclusion of successive treaties:¹⁴ as recalled by the

¹⁰ See, in particular, Opinion 2/94, *Accession of the European Community to the European Convention for the Safeguard of Human Rights and Fundamental Freedoms*, [1996] ECR I-1759, para. 33; or Case C-540/03, *Parliament v Council*, [2006] ECR I-5769.

¹¹ International organizations have been said by the International Court of Justice to be ‘bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties’: *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion (20 December 1980), I.C.J. Reports 1980, p. 73, at pp. 89-90 (para. 37).

¹² *Hostages Case (United States v. Iran)*, ICJ Reports 1980, at 42; *Corfu Channel Case*, I.C.J. Reports 1949, p. 4, at p. 22; *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, I.C.J. Reports 1951, p. 19 (28 May 1951); *Advisory Opinion on the Legality of threat or use of nuclear weapons*, I.C.J. Reports 1996, p. 226, at p. 257 (para. 79); *Case concerning certain Military and Para-Military Activities in and against Nicaragua (Nicaragua v. United States)*, I.C.J. Reports 1986, p. 14, at pp. 113-114.

¹³ See B. Simma and Ph. Alston, ‘The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles’, cited above, at pp 102-108; H. Hannum, ‘The Status of the Universal Declaration of Human Rights in National and International Law’, 25 *Georgia Journal of International and Comparative Law* 287-395 (1995-1996), at pp. 351-352; Th. Meron, XXXcited above, at p. 88

¹⁴ This provision (adapted from what was originally Article 234 of the EEC Treaty) states:

European Court of Justice, by stipulating that the rights and obligations arising from agreements concluded with third States by the member States before the date of their accession of the European Union 'shall not be affected' by the obligations imposed on the member States under EU law, this provision sought to 'lay down, in accordance with the principles of international law, that the application of the Treaty does not affect the duty of the member State concerned to respect the rights of non-member countries under a prior agreement and to perform its obligations thereunder'.¹⁵

Article 307 EC imposes on the institutions of the Union that they avoid imposing on the EU member States obligations which conflict with their pre-existing obligations under international agreements. As emphasized by the European Court of Justice in the *Burgoa* case, while Article 307 EC refers only to the obligations the member States owe to third countries, 'it would not achieve its purpose if it did not imply a duty on the part of the institutions of the Community not to impede the performance of the obligations of member States which stem from a prior agreement'.¹⁶ Therefore, the useful effect of the rule requires that the institutions of the EU do not seek to impose on the EU member States that they comply with obligations under EU law that would run counter to other, pre-existing, international undertakings.

2. The international obligations deriving from human rights treaties or principles

The obligations referred to above cannot be ignored in the negotiation and conclusion of trade and investment agreements, or of development cooperation agreements. This is already implied by Article 28 of the Universal Declaration of Human Rights, which states that 'Everyone is entitled to a social and international order in which the rights and freedoms set forth in the Declaration can be fully realized'. Article 2(1) of the International Covenant on Economic, Social and Cultural Rights provides that the States parties to the Covenant undertake to 'take steps, individually *and through international assistance and co-operation*, especially economic and technical', to the maximum of their available resources, 'with a view to achieving progressively the full realization of the rights' recognized in the Covenant. This obligation is not limited to the provision of development aid, but includes the conclusion of international agreements.

The notion of international co-operation is mentioned in relation to the right to an adequate standard of living in Article 11(1) of the Covenant, according to which 'States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent'. The International Covenant on Economic, Social and Cultural Rights also identified the need to ensure that international trade promotes the right to food. Article 11(2) ICESCR provides that the parties to the Covenant,

'The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty.

To the extent that such agreements are not compatible with this Treaty, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.

In applying the agreements referred to in the first paragraph, Member States shall take into account the fact that the advantages accorded under this Treaty by each Member State form an integral part of the establishment of the Community and are thereby inseparably linked with the creation of common institutions, the conferring of powers upon them and the granting of the same advantages by all the other Member States.'

¹⁵ Case 10/61, *Commission v. Italy*, [1962] ECR I (judgment of 27 February 1962).

¹⁶ Case 812/79, *Attorney General v. Burgoa*, [1980] ECR 2787 (judgment of 14 October 1980), at para. 9. See also Case T-315/01, *Kadi v. Council and Commission*, judgment of 21 September 2005, para. 197; Case T-306/01, *Ali Yusuf and Al Barakaat International Foundation v. Council and Commission*, judgment of 21 September 2005, para. 247.

‘recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed, taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need’.

Under Part IV of the Covenant, which relates to the measures of implementation, two provisions relate to international assistance and co-operation. Article 22 states that the Economic and Social Council may bring to the attention of other UN bodies and agencies concerned with furnishing technical assistance any information arising out of the reports submitted by States under the Covenant which ‘may assist such bodies in deciding, each within its field of competence, on the advisability of international measures likely to contribute to the effective progressive implementation of the present Covenant’. Article 23 specifies the different forms international action for the achievement of the rights recognized in the Covenant may take: such international action ‘includes such methods as the conclusion of conventions, the adoption of recommendations, the furnishing of technical assistance and the holding of regional meetings and technical meetings for the purpose of consultation and study organized in conjunction with the Governments concerned’.

Taking as its departure point both Article 56 of the UN Charter, which imposes on all the Members of the United Nations to ‘take joint and separate action in co-operation with the Organization’, *inter alia*, in order to achieve universal respect for, and observance of, human rights and fundamental freedoms for all, and paragraph 34 of the Vienna Declaration and Programme of Action adopted at the Vienna World Conference on Human Rights of 14-25 June 1993,¹⁷ the UN Committee on Economic, Social and Cultural Rights has identified certain obligations the States parties to the Covenant owe to populations under the jurisdiction of other States.

In the General Comment it devoted in 2000 to the right to the highest attainable standard of health, the Committee noted that

To comply with their international obligations in relation to article 12, States parties have to respect the enjoyment of the right to health in other countries, and to prevent third parties from violating the right in other countries (...) if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law. Depending on the availability of resources, States [in particular States in a position to assist developing countries in fulfilling their core and other obligations under the Covenant] should facilitate access to essential health facilities, goods and services in other countries, wherever possible and provide the necessary aid when required. *States parties should ensure that the right to health is given due attention in international agreements and, to that end, should consider the development of further legal instruments. In relation to the conclusion of other international agreements, States parties should take steps to ensure that these instruments do not adversely impact upon the right to health.* Similarly, States parties have an obligation to ensure that their actions as members of international organizations take due account of the right to health. Accordingly, States parties which are members of international financial institutions, notably the International Monetary Fund, the World Bank, and regional development banks, should pay

¹⁷ This states: ‘Increased efforts should be made to assist countries which so request to create the conditions whereby each individual can enjoy universal human rights and fundamental freedoms. Governments, the United Nations system as well as other multilateral organizations are urged to increase considerably the resources allocated to programmes aiming at the establishment and strengthening of national legislation, national institutions and related infrastructures which uphold the rule of law and democracy, electoral assistance, human rights awareness through training, teaching and education, popular participation and civil society’ (UN Doc. A/CONF.157/23, 12 July 1993).

greater attention to the protection of the right to health in influencing the lending policies, credit agreements and international measures of these institutions.¹⁸

A similar statement may be found in the General Comment adopted in 2002 on the right to water:

To comply with their international obligations in relation to the right to water, States parties have to respect the enjoyment of the right in other countries. *International cooperation requires States parties to refrain from actions that interfere, directly or indirectly, with the enjoyment of the right to water in other countries.* Any activities undertaken within the State party's jurisdiction should not deprive another country of the ability to realize the right to water for persons in its jurisdiction. [...] *States parties should ensure that the right to water is given due attention in international agreements and, to that end, should consider the development of further legal instruments. With regard to the conclusion and implementation of other international and regional agreements, States parties should take steps to ensure that these instruments do not adversely impact upon the right to water. Agreements concerning trade liberalization should not curtail or inhibit a country's capacity to ensure the full realization of the right to water.* States parties should ensure that their actions as members of international organizations take due account of the right to water. Accordingly, States parties that are members of international financial institutions, notably the International Monetary Fund, the World Bank, and regional development banks, should take steps to ensure that the right to water is taken into account in their lending policies, credit agreements and other international measures.¹⁹

This leads to two conclusions. First, the EU and its Member States must take into account their obligations under international human rights law when negotiating and concluding international agreements. They may not, through such agreements, violate the human rights of populations abroad. Second, the obligation of international assistance and cooperation referred to in the International Covenant on Economic, Social and Cultural Rights, is not limited to the provision of development aid, under the form of finance or under other forms. It includes the conclusion of international agreements which, consistent with Article 28 of the Universal Declaration of Human Rights, should contribute to the establishment of a just and equitable social order.

3. Implications for the EU when concluding trade agreements

This has a series of implications for the EU when negotiating and concluding trade agreements. In particular:

- a) The EU must ensure that the agreements it signs have no negative impacts on the enjoyment of human rights in other countries;
- b) The EU must ensure that the agreements it signs contribute to the establishment of a just and equitable social order and the realization of human rights;
- c) The EU must ensure that the negotiation process and the formulation, implementation and monitoring of the agreements it signs are consistent with its human rights obligations.

Indeed, as emphasized by the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, while international human right law takes a position neither for nor against any particular trade rule or policy, this is subject to

¹⁸ U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 14 (2000), *The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, U.N. Doc. E/C.12/2000/4 (2000), para. 39.

¹⁹ U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 15 (2002), *The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, U.N. Doc. E/C.12/2002/11 (26 November 2002), paras. 31 and 35-36.

two conditions: first, the rule or policy in question must, in practice, actually enhance enjoyment of human rights, including for the disadvantaged and marginal; second, the process by which the rule or policy is formulated, implemented and monitored must be consistent with all human rights and democratic principles.

In the specific context of the right to health, for example, the implication is that 'if reliable evidence confirms that a particular trade policy enhances enjoyment of the right to health, including for those living in poverty and other disadvantaged groups, and that policy is delivered in a way that is consistent with all human rights and democratic principles, then it is in conformity with international human rights law. However, if reliable evidence confirms that a particular trade policy has a negative impact on the enjoyment of the right to health of those living in poverty or other disadvantaged groups, then the State has an obligation under international human rights law to revise the relevant policy. This does not necessarily mean that the particular policy has to be altogether abandoned – it might mean that it has to be revised in such a way that it begins to have a positive impact on the enjoyment of the right to health of those living in poverty and other disadvantaged groups'.²⁰ This holds, too, for other rights which may be impacted upon by trade and investment agreements, including in particular the right to food,²¹ the right to work,²² or the right to development.

III. Human Rights Impact Assessments of Trade and Investment Negotiations

1. Trade Sustainability Impact Assessments

In principle, since the practice was first inaugurated in 1999, the European Commission has committed itself to conduct Trade Sustainability Impact Assessments on a systematic basis. This practice has been more recently improved by the preparation of a Handbook for Trade Sustainability Impact Assessment, which has been presented, following a number of consultations, in October 2006. These SIAs are carried out by independent external consultants chosen by the European Commission on the basis of an open call for tender. All studies prepared for SIAs are published, which is a welcome choice by the European Commission, since it favours the implication of stakeholders in the process. A number of problems remain, however. Since these problems are well documented, there is no need to repeat them in detail.²³ It may be sufficient to point out that:

- a) In many cases, the results of the SIAs are made available at a late stage in the process of negotiation, and therefore cannot influence the results; sometimes the results are published only after the negotiations have been finalized ;

²⁰ Commission on Human Rights, The right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Report of the Special Rapporteur, Paul Hunt, Addendum: Mission to the World Trade Organization (UN doc. E/CN.4/2004/49/Add.1, 1 March 2004), para. 11.

²¹ See, for instance, Globalization and its impact on the full enjoyment of human rights. Report of the High Commissioner for Human Rights submitted in accordance with Commission on Human Rights resolution 2001/32, UN doc. E/CN.4/2002/54, 15 January 2002.

²² See UN Committee on Economic, Social and Cultural Rights, General Comment No. 18: The Right to Work (Article 6 of the International Covenant on Economic, Social and Cultural Rights), UN doc. E/C.12/GC/18, 6 February 2006, paras. 29-30.

²³ Reference is made, in particular, to the NGOs statement on the draft Handbook for Sustainability Impact Assessments (*April 2005*); and to EU Trade Sustainability Impact Assessments: A Critical View. Statement of European Civil Society Organisations (October 2006).

- b) While the European Commission has committed itself to provide responses to SIAs, these responses have not been systematic and there is no opportunity to challenge their adequacy, or their failure to address certain of the issues raised by the SIAs; nor is there any mechanism to ensure that any concerns addressed in the SIAs are taken into account by the EU negotiators in the process of negotiation;
- c) In principle, SIAs include a consultation with stakeholders both from within the EU and from the countries or regions with which it is conducting trade negotiations. However, these consultations have been selective in the choice of the stakeholders convened, and the stakeholders have not always been provided with all the information required for their participation to be effective and meaningful. In addition, the process of SIAs have not proactively sought after the relevant stakeholders ;
- d) The current SIAs are based on macro-economic analyses, which focus on certain sensitive sectors in the countries concerned. But they contain little information on issues such as the concentration rate in certain sectors and the impact of multinational corporations' presence; the impacts which are measured are not disaggregated according to gender, ethnicity, or region.

These concerns remain entirely valid today and they should be taken into consideration in the preparation of the trade sustainability impact assessments in the future. However, an additional concern is that these SIAs, as they are currently practiced, cannot be – nor do they pretend to be – substitutes for human rights impact assessments, as would be required in order to comply with international human rights law.

2) *Human Rights Impact Assessments*

Human Rights Impact Assessments (HRIAs) aim at determining the impact of policies on human rights. They have the capacity to increase policy makers' awareness for human rights and could therefore prevent potential violations. Undertaking such assessments has been considered a state obligation by treaty bodies; it is a necessary step for the implementation of human rights. The Committee of the Rights of the Child, for instance, requires States to set up a 'continuous process of child impact assessment (predicting the impact of any proposed law, policy or budgetary allocation which affects children and the enjoyment of their rights) and child impact evaluation (evaluating the actual impact of implementation)'.²⁴

The UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health remarked that a human rights assessment involves

'a transparent consideration of the likely impact of trade rules and policies on the enjoyment of the right to health and related human rights, undertaken through a participatory process with concerned individuals and groups. Such assessments should have a gender perspective and consider the real and potential effects of the proposed policy on disadvantaged and vulnerable groups'.²⁵

²⁴ See Committee on the Rights of the Child, *General Comment No. 5, General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6)*, UN Doc. CRC/GC/2003/5, 3 October 2003, at para. 45.

²⁵ Commission on Human Rights, *The right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, Report of the Special Rapporteur, Paul Hunt, Addendum: Mission to the World Trade Organization (UN doc. E/CN.4/2004/49/Add.1, 1 March 2004), para. 53.

The international law of human rights should provide the analytical framework for such impact assessments. Thus for example, as regards the right to health, ‘the assessment might consider the likely impact of the policy on the availability, accessibility (in its various forms) and quality of health goods, facilities and services. In some instances, assessments will be needed at three different stages: before, during and after the introduction of the policy or rule’. The Special Rapporteur further noted, still in the context of the right to health:

‘Any modern policy maker, unless purely driven by ideology, will wish to consider, in a balanced, objective and rational manner, the likely impact of a proposed new policy, especially on those living in poverty. Too often, ill-considered policies have had disastrous consequences, especially for the poor, who are often left out of policy-making processes even when they are among those most affected. Right to health impact assessments are an aid to equitable, inclusive, robust and sustainable policy-making’.²⁶

HRIAs differ thus from SIAs. There are at least two differences. First, in contrast to SIAs, HRIAs do not only aim at measuring the impact of trade agreements on the living conditions of populations but also the extent to which States concluding such agreements comply with their international human rights obligations.

Second, SIAs do not as a rule take into account the obligation of non-discrimination; hence they provide only a partial picture of the situation. Disaggregation – according to gender, ethnicity or region for example – is one of the most important aspects of HRIAs, since it allows us to measure the impact of trade agreements on human rights according to different categories of people.

It is important that HRIAs be performed by an independent party. Additionally, they should be carried out in conditions which guarantee the full independence of the assessments provided, i.e. not exclusively by international trade experts, but also by human rights experts, both acting in close cooperation with one another. The teams in charge of HRIAs should consult broadly within the civil society of the countries concerned, including NGOs, and work in cooperation with the agencies of the UN, in particular the OHCHR. Specialized institutions such as the ILO, UNICEF, the WHO and the FAO should also be involved, as regards, respectively, labour rights, the right to education and children rights, the right to health, and the right to food.

A participatory methodology should be used, alongside other methodologies such as modelling, cause-chain analysis, empirical studies, etc. It is crucial that HRIAs be performed at country level, even when trade agreements are negotiated between regions, since the impacts may vary considerably from country to country, even within a same region, due to differences in specialisation or in the capacity to manage the costs of transition. The results of HRIAs must further be provided, in full transparency and at the earliest stage possible, to all the participants in the negotiation, in order to guide the negotiation towards the most equitable outcome.

The benefits of HRIAs would be maximised if both ex ante and post hoc HRIAs were carried out. Ex ante HRIAs aim at evaluating the potential impact of trade agreements on human rights, i.e. before they are adopted. They are essential in order to guide the negotiations and to ensure that the parties are fully aware of the human rights implications of the commitments they are entering into. As a result, they might consider the desirability of adopting accompanying measures that would reduce adverse effects on human rights. In other words, ex ante HRIAs can prevent violations from arising.

²⁶ Ibid., para. 56.

Ex post HRIAs aim at determining the actual impact of trade agreements on human rights, i.e. after their implementation. They ensure a follow-up of the potential indirect impact of trade agreements. Ex post HRIAs should be carried out at regular intervals after the implementation of trade agreements in order to measure both their short-term and long-term impacts and, if need be, to adopt measures to remedy possible violations. To this end, trade agreements should contain a 'rendez-vous' clause allowing for revision whenever necessary.

3) Human rights indicators

It is important that HRIAs be based on human rights indicators. Human rights indicators aim at securing State accountability for human rights obligations. For the OHCHR,

'human rights indicators are specific information on the state of an event, activity or an outcome that can be related to human rights norms and standards; that address and reflect the human rights concerns and principles; and that are used to assess and monitor promotion and protection of human rights'.²⁷

For Paul Hunt, the UN Rapporteur on the right to health, an indicator relating to the right to health

'derives from, reflects and is designed to monitor the realisation or otherwise of specific right to health norms, usually with a view to holding a duty bearer to account'; it is thus characterised by '(i) its explicit derivation from specific right to health norms; and (ii) the purpose to which it is put, namely right to health monitoring with a view to holding duty-bearers to account'.²⁸

Human rights indicators date from the end of the 1990s. Treaty bodies, such as the Committee on Economic, Social and Cultural Rights and the Committee on the Rights of the Child, invited States to develop indicators in order to monitor their compliance with human rights treaties in the framework of their reporting process.²⁹ They also recommended that States establish benchmarks for progress which can be measured by the indicators. This allows treaty bodies to better examine the human rights situation of a State with a view to making recommendations. Several concrete proposals for human rights indicators have already been made: the UN Special Rapporteur on the right to health, for example, developed indicators relating to the right to health, including children's right to health; the OHCHR recently proposed to treaty bodies a framework including a list of indicators relating to four human rights and others are expected soon.

²⁷ OHCHR, *Report on Indicators for Monitoring Compliance with International Human Rights Instruments* (Report presented at the 18th meeting of chairpersons of the human rights treaty bodies and the fifth inter-committee of the human rights treaty bodies), 2006, HRI/MC/2006/7, para. 7.

²⁸ P. Hunt, *Interim Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, 2003, A/58/427, para. 10.

²⁹ See Committee on Economic, Social and Cultural Rights, *General Comment No 18, The right to work* (art. 6), 2005, E/C.12/GC/18, paras. 31 (c) and 46-47; Committee on Economic, Social and Cultural Rights, *General Comment No 15, The right to water* (art. 11-12), 2002, E/C.12/2002/11, para. 54; Committee on Economic, Social and Cultural Rights, *General Comment No 14, The right to the highest attainable standard of health* (art. 12), 2000, E/C.12/2000/4, paras. 57-58; Committee on Economic, Social and Cultural Rights, *General Comment No 13, The rights to education* (art. 13), 1999, E/C.12/1999/10, para. 52; Committee on Economic, Social and Cultural Rights, *General Comment No 12, The Right to adequate food* (art. 11), 1999, E/C.12/1999/5, para. 29; Committee on the Rights of the Child, *General Comment No 7, Implementing child rights in early childhood* 2006, CRC/C/GC/7, para. 39; Committee on the Rights of the Child General, *General Comment No 5, General measures of implementation of the Convention on the Rights of the Child* (arts. 4, 42 and 44, para. 6), 2003, CRC/GC/2003/5, para. 48.

Human rights indicators can be divided into structural, process and outcome indicators. *Structural indicators* show the intention of a state to comply with the international law of human rights. They primarily concern the ratification of human rights treaties and their incorporation into domestic legislation. With respect to trade agreements, they may be relevant insofar as such agreements may make it impossible for a State to comply with its obligations under human rights treaties or to accede to further human rights treaties. Structural indicators also measure the extent to which trade agreements contribute to the creation of institutional structures which aim at ensuring that human rights are not violated.

Process indicators measure the efforts undertaken by States in the implementation of human rights; they determine their willingness to comply with their international obligations and reinforce their accountability. Process indicators also measure compliance with human rights principles in policymaking. They could evaluate whether participatory rights have been respected during trade negotiations; and whether accountability mechanisms have been created to allow victims to make their claims.

Outcome indicators examine the changes brought by policies in the population's enjoyment of human rights. They thus assess the performance of States. Regarding trade agreements, outcome indicators evaluate the impact of trade agreements on human rights.

As already mentioned, it is important to disaggregate indicators according to the different categories of people that could be affected by the agreements.

HRIAs need human rights indicators, because they can measure the extent to which human rights are – or could be – enjoyed in a particular situation. In the framework of *ex ante* HRIAs, human rights indicators could be used to examine human rights situations that could potentially be affected by trade agreements and thus identify the necessary changes to introduce in these agreements. As already mentioned, they also measure the extent to which trade negotiations respected participatory rights and whether accountability mechanisms have been created for victims. Regarding *ex post* HRIAs, human rights indicators could be used to evaluate the actual impact of trade agreements on human rights. They could be used to compare the human rights situation after the implementation of a trade agreement with the one prevailing before the adoption of the agreement. This would allow negotiators to determine the actual human rights impact of the trade agreement in question and to review it should this impact be found to be negative.

IV. Conclusion

If properly conceived, the conduct of human rights impact assessments would present the following advantages. First, it would ensure improved compliance with the obligations of both the EU and its Member States under international human rights law. The EU Member States, especially, since they are parties to a number of international human rights treaties – including in particular the International Covenant on Economic, Social and Cultural Rights –, would benefit from being able to present to the relevant Committee the results of human rights impact assessments of ongoing trade negotiations, in order to reassure the Committee that they are paying the required attention to this aspect of their obligations under the Covenant. This, in turn, would enhance the credibility of the EU when it insists that commercial partners, or other States, comply with their obligations under international law.

Second, the conduct of HRIAs has the potential to significantly improve the content of the trade and/or investment agreements negotiated, in particular by helping negotiators to identify possible accompanying measures that would be needed to ensure the agreement actually contributes to human development. Such measures may include, for instance, the setting up of funds to facilitate transition, retraining of workers, compensatory payments to producers in sectors that have to adapt to new conditions, etc.

Third, by basing impact assessments on human rights, we provide them with a sound, and universally agreed, analytical framework.

FIDH is therefore of the opinion that carrying out HRIAs would be in the interest not only of people that could potentially be affected by the implementation of trade and/or investment agreements, but also the European Union itself, as well as its trading partners.

FIDH is ready to contribute to defining a methodology for HRIAs to be included in the negotiation of free trade agreements by the European Union, as well as to identify the relevant partners for a discussion on this methodology. An important aspect in this regard is that these HRIAs be prepared jointly by all partners to the trade and/or investment agreements, rather than unilaterally by the EU only.