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**SESSION 3: AN INCLUSIVE PROCESS FOR TRADE POLICYMAKING**

***HUMAN RIGHTS IMPACT ASSESSMENTS  
IN FREE-TRADE AGREEMENTS***

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## **UNCTAD policy dialogue**

### **« An inclusive process for trade policy- making»**

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### **Human rights impact assessments in free-trade agreements**

Alliance Sud - the coalition of the largest Swiss development NGOs – believes that in order for the trade policy-making process to be as inclusive as possible, Switzerland – and countries in general – should conduct a human rights impact assessment (HRIA) before starting to negotiate free trade agreements (FTA). This is valid for investment treaties too.

The main reason is that governments should be coherent in their foreign policy and too often, when human rights clash with trade commitments, they tend to give precedence to the latter. Breaches of trade agreements can entail penalties; investment agreements have dispute settlement mechanisms; but human rights agreements are "toothless." And trade and investment agreements can strongly influence the ability of a government to guarantee human rights, particularly social and economic ones, such as the right to food, to health, to housing or employment.

For example, the liberalization of agricultural trade has benefited net exporting countries, but it has weakened small producers in developing countries. Agreements that contain clauses to protect intellectual property can hamper access by the population to essential medicines, or make seeds more expensive. Trade and investment agreements also afford foreign investors greater protection, particularly against expropriation. This makes it very difficult to return land to indigenous people, for example. A recent study by the ILO and the EU has showed that the restructuring of labour from import – competing to export competing sectors has worked very badly in low income countries and in the informal sector.

Trade liberalization creates winners and losers and the human rights framework can help a government arbitrate between these trade-offs. It can help governments make sure that the weakest and most vulnerable groups in society are taken account of. It will help governments anticipate the impact of the agreement on the most vulnerable sectors of the population, particularly in developing countries that cannot afford expensive trade adjustment programs after the agreement is in place.

Also, in negotiating an agreement a government is not necessarily representing all its country's interests, but those of the most powerful lobbies. Therefore, we must open the "black boxes" of countries: the more inequality there is in a country, the greater the risk that liberalization will benefit only a tiny elite. National redistribution mechanisms too often don't take care of the losers. Although the parliaments of the

industrialized countries are increasingly aware of the importance of compensation within their borders, they ought not to forget that their countries also have extra-territorial obligations. They must ensure that human rights are not being infringed in the developing countries with which the government negotiates an agreement.

Let me give two examples of such studies. Together with other Swiss NGOs, we have mandated the Swiss Competence Centre for Human Rights to undertake a short study on the link between trade and human rights in the FTA that Switzerland is negotiating with China. This independent body has come to the conclusion that the agreement could violate the right to health and to food of the Chinese population, because of stricter provisions on intellectual property. And it could discriminate even more against minorities.

TRIPS + provisions on patents threaten the production of generics and therefore the right to health. This is a particularly strong problem in the negotiations of the FTA with India. Switzerland (and the EU) has first asked India for patent term extension (more than 20 years, the usual TRIPS length) and data exclusivity. Because of the opposition of the Indian government, it may have gone back on both, but we are not sure since these negotiations are secret.

The term data exclusivity refers to the results of clinical trials and other data submitted by companies when applying for marketing approval for a drug. Exclusivity means that for a period of 5 years (USA) to 10 years (EU) third parties may not use the data to seek approval of a generic product.

Data exclusivity, plainly stated, prevents generic drugs from being approved during a period of 5 – 10 years, or it delays them and makes them considerably more expensive because the clinical tests must be repeated. This applies even to drugs that are not patented in the country concerned.

For people in developing countries most of whom cannot afford the expensive original products, data exclusivity therefore jeopardizes health care. This is why the UN Special Rapporteur on the Right to Health, Anand Grover, as well as many health organizations, have expressly urged the EU to drop its demand, especially since it goes beyond the existing rules of the World Trade Organization (WTO) on intellectual property.

The UN programme on HIV/AIDS (UNAIDS) too has welcomed India's refusal against the EU, pointing out that India produces some 85 per cent of first line anti-retroviral drugs and that the cost of this therapy has fallen from USD 15,000 originally to USD 86 per person per year. Indian civil society has also hailed their government's decision as a success. For years, networks such as «People living with HIV/AIDS» have been militating in that country against restrictions on generic drug production.

Another example is the impact assessment on the right to food of the EU – India FTA that was conducted recently by five international and Indian NGOs. They focussed on the most exposed sectors in India: dairy and poultry that employ a very large number of small farmers.

They have estimated that given that dairy provides 90 millions jobs, slashing tariffs to 0 will likely result in a repeat performance of the 1999 milk crisis, when EU imports of skimmed milk powder rose from 600 to 25'000 tonnes, effectively destroying the country's white revolution for milk self-sufficiency.

The poultry sector - that consists of 96 million small, landless agricultural households that manage 85% of the poultry stock and that is currently guaranteed by a 100% tariff - would also be devastated.

The retail sector, the 2<sup>nd</sup> largest employer in India after agriculture, would also be very much affected.

The requests to conduct HRIA have come from several UN bodies. For example, the UN Committee on Economic, social and cultural rights has asked Switzerland to conduct HRIA before negotiating FTAs. Other treaty bodies like CEDAW and the Committee on the rights on the child have asked the same to other countries.

The UN Special Rapporteur on the right to food, Olivier de Schutter, has prepared guidelines for the HRIA that were discussed by the Human Rights Council at its last session.

Thailand has suspended the negotiations of the FTA with the US (and possibly also with Switzerland) after having carried out a HRIA. Malaysia may decide to do one too before starting to negotiate with the US. When Canada has ratified the FTA with Colombia, a clause was introduced into the agreement stating that a HRIA would be carried out by both parties one year after its entry into force.

Finally, it is in the interest of governments to conduct a HRIA. For developing countries, because it strengthens their bargaining position. And for developed ones because an agreement that benefits only the elite of the other country is not very profitable. A wider distribution of the benefits and gains favours economic growth, reduces poverty, and fosters development.

### **How do we go about to lobby for our concerns?**

We try to include the parliament. Switzerland has negotiated free trade agreements with developing countries for the past ten years. The first one was with Mexico in 2001.

Till a couple of years ago, the parliament used to ratify these agreements without any discussion. But thanks to the lobbying of a large coalition of NGOs, among which Alliance Sud, on the occasion of the ratification of the FTA with Colombia (September 2009), a debate took place for the very first time. Colombia was a particularly sensitive country because of the human rights violations that take place there, particularly against trade unionists. And Switzerland was the first country to ratify an agreement with Bogota compared to its traditional "competitors". We lobbied the parliament to ask for a suspension of the ratification till a significant improvement of the situation of labor rights in the country. One third of the parliamentarians took up our suggestion. Even though there was no majority, it was the first time that a discussion was taking place.

Since then, Switzerland has ratified an agreement with Peru and, again, a minority of the parliament has voted against it because it did not include a chapter on sustainable development.

Since the launching of the negotiations with China, in December 2010, we have adopted standard requests:

**1. Human Rights impact assessment ex ante**

Our government doesn't even make a sustainability impact assessment, like the EU (that comprises a chapter on human rights)

**2. Introduce human rights clauses**

The European Union, but also the US, insert human rights clauses in their trade agreements, but not Switzerland. The European Free Trade Association (EFTA) that comprises Switzerland, Norway, Iceland and Liechtenstein only proposes a non-binding chapter on sustainable development (environment and labour standards) to its trading partners – a novelty that was presented like a big push. For us, it is a step in the right direction, but it is not enough. A parliamentary commission has asked the Federal Council (Swiss government) to insert a chapter on sustainable development in the FTAs with China, Malaysia and the Central American States. For us, this chapter must be binding and not voluntary. And it has asked it to take human rights into consideration in the FTA with the Central American States.

**3. Associate closer civil society and the parliament to the negotiations**

The negotiations of FTAs lack transparency, consultation and participation. Contrary to the WTO, the texts are not open to the public, which violates the right to information and participation. The parliament does not have much to say either: once it has approved the negotiation mandate, it can only say yes or no at the time of ratification. It is a take it or leave it exercise and, de facto, it never refuses an agreement. The parliament must be much better informed and included during the negotiations, not only at the end.

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