

1 Details

International Federation for Human Rights (FIDH)
17 Passage de la Main d'Or, 75011 Paris, France;
15 rue de la Linière, 1060 Brussels, Belgium
Tel.: +32 479.19.59
Fax: +32 2 6094433
E-mail: gdusepulchre@fidh.org

Vietnam Committee on Human Rights (VCHR)
48 rue Parmentier, 94450 Limeil Brevannes, France
Tel.: + 33 1 45 98 30 85
Email: vietnam.committee@gmail.com

2 Against which EU institutions or body do you wish to complain?

The European Commission

3 What is the decision or matter about which you complain? When did you become aware of it?

FIDH and VCHR complain about the refusal of the European Commission DG Trade to conduct an impact assessment that adequately encompasses human rights (hereafter referred to as human rights impact assessment or HRIA) in relation to the currently negotiated EU-Vietnam Free Trade Agreement. This HRIA should examine the human rights situation, the risks that a trade agreement may exacerbate current human rights concerns, and the potential negative human rights impacts.

The Commission's refusal was notified to FIDH and its member organisation, the Vietnam Committee on Human Rights (VCHR), in a letter dated 26 June 2013 (see Annex 2). This refusal was confirmed to FIDH and VCHR in a second letter dated 23 July 2014 (see Annex 4).

We would like to see our complaint dealt with as a matter of priority (article 10.2 of the implementing provisions). Indeed the negotiations are tending to their end. On 27 June, the EU and Vietnam completed the eighth round of talks for a Free Trade Agreement (FTA). The next round of talks will be held before the end of September with smaller meetings being held during the summer. The HRIA, which has to be conducted to inform the parties about the needed adjustments of the agreement in order to comply with their human rights obligations, should be made before the conclusion of the agreement.

4 What do you consider that the EU institution or body has done wrong?

We consider that, by refusing to assess the potential effects on human rights of the free trade and investment treaty being negotiated with Vietnam in order to ensure the adequate design of relevant clauses, safeguards and adding measures, the European Commission fails to respect its human rights obligations, legal rules, and principles, including those related to good administration (see hereunder).

Having launched region-to-region FTA agreement negotiations with the Association of South East Asian Nations (ASEAN), DG Trade mandated on 20 December 2007 a consulting team (led by ECORYS) to make a Trade Sustainability Impact Assessment (SIA) of the future FTA. Following the guidelines laid down in the “Handbook for Trade Sustainability Impact Assessment”, adopted in 2006,¹ which makes no reference to human rights, on June 2009 ECORYS presented its SIA final report without studying the FTAs’ potential impacts on human rights. Postponed in March 2009, the negotiation process with ASEAN was subsequently dropped and the EU launched bilateral negotiations with some individual ASEAN countries. One of them is Vietnam and the bilateral negotiation process began in June 2012.

On 14 March 2013, during a civil society meeting organised by DG Trade about the state of play of the EU-ASEAN countries trade relations, FIDH raised its concerns and asked the Commission if it planned to conduct an HRIA, but did not received any answer ². In an open letter dated 30 April 2013, FIDH and its member organisation, the Vietnam Committee on Human Rights (VCHR), argued that the 2009 SIA report, which referred only to economic, social and environmental impact, failed to address human rights. FIDH and VCHR asked the Commission to conduct an impact assessment that adequately encompasses human rights before continuing the negotiations of the FTA with Vietnam (Annex 1). The Commission’s refusal was notified to FIDH and VCHR in a letter dated 26 June 2013 (Annex 2). Since then, FIDH has engaged with DG Trade and relevant stakeholders to raise the HRIA issue including by sending, together with VCHR, another open letter on 4 July 2014 in which our organisations called on the Commission to reconsider its position (Annex 3). The Commission reiterated its refusal in a letter dated 23 July 2014 (Annex 4).

1. The European Commission wrongfully argues that the negotiating mandate with Vietnam preexisted to its human rights obligations

To justify its refusal, the European Commission argued that the sustainability impact assessment (SIA) carried out by ECORYS in 2009 for all ASEAN countries remained valid, despite the fact that it did not integrate any human rights analysis. We are given to understand that the European Commission considers this lack of a human rights component to be justified because “*the negotiations with Vietnam are taking place under the legal framework established in 2007 for FTA*” and the EU has only committed itself to including human rights in its assessments in 2011 and 2012, after the EU Charter of fundamental rights entered into force, and after the adoption of the EU action plan on human rights and democracy (argument raised in both letters dated 26 June 2013 and 23 July 2014).

We consider these arguments unfounded for the following reasons:

¹ European Commission, External Trade, *Handbook for Trade Sustainability Impact Assessment*, March 2006, p. 7, available at: http://trade.ec.europa.eu/doclib/docs/2006/march/tradoc_127974.pdf.

² See the minutes of the meeting http://trade.ec.europa.eu/doclib/docs/2013/may/tradoc_151116.pdf DG trade answered “that the annex on Vietnam of the Commission services position paper on the SIA would be presented at a meeting with civil society. The date for such meeting would be communicated in due course”. This annex to the position paper was issued on May 2013. Without referring to the human rights problem, it states that “While the SIA deals with the impacts of the EU-ASEAN FTA, these findings remain valid and relevant in relation to the EU’s ultimate goal of an agreement in the regional framework with ASEAN, despite the intermediate focus on bilateral agreements”: see EU commission website, « Vietnam position paper » May 2013, http://trade.ec.europa.eu/doclib/docs/2013/may/tradoc_151230.pdf. This decision was brought to the attention when the Commissioner of trade answered to our first open letter, in a letter dated of 26 June 2013.

- The EU has an obligation to ensure that the trade agreements it concludes do not lead and/or contribute to human rights violations in the EU and the countries where they are implemented. In order to do so, the EU should conduct HRIAs and take all necessary measures to prevent trade and investment agreements from impeding the enjoyment of human rights in Europe and in other countries. Such an obligation is grounded in both international and EU law. As the UN Special Rapporteur on the Right to Food stated, *“there is a duty to identify any potential inconsistency between pre-existing human rights treaties and subsequent trade or investment agreements, and to refrain from entering into such agreements where such inconsistencies are found to exist”*. *“By preparing human rights impact assessments prior to the conclusion of trade and investment agreements, States are addressing their obligations under the human rights treaties”*.³

This applies from a European legal perspective, as respect for human rights has become *“a requirement of the lawfulness of European acts”*. The European Court of Justice recognises its role in protecting fundamental rights referring to *“international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories”*. The Treaty on European Union (TUE), which confirms that the EU is founded on respect for human rights, requires respect for the Charter of Fundamental Rights of the EU. In addition, Articles 21 of the TUE and 207 of the TFUE (Treaty on the Functioning of the European Union) specify that the EU’s external action in the field of commercial policy shall seek *“to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law”*, and that the EU *“shall define and pursue common policies and actions [...] in order to [...] (b) consolidate and support democracy, the rule of law, human rights and the principles of international law”*. Article 21 §3 specifies that *“The Union shall respect the principles and pursue the objectives set out in paragraphs 1 and 2 in the development and implementation of the different areas of the Union’s external action [...] and of the external aspects of its other policies”*. These provisions

³ A/HRC/19/59/5, Report of the Special Rapporteur on the Right to Food, Olivier De Schutter, *Addendum, Guiding Principles On Human Rights Impact Assessments of Trade and Investment Agreements*, December 2011, p. 7 ; see also CESCR, concluding observations on the fourth periodic report of Austria, 23 november 2013, E/C.12/AUT/CO/4: *“The Committee calls upon the State party to adopt a human rights based approach to its policies on official development assistance and on agriculture and trade, by (a) undertaking a systematic and independent human rights impact assessment prior to making funding decisions; (b) establishing an effective monitoring mechanism to regularly assess the human rights impact of its policies and projects in the receiving countries and to take remedial measures; and (c) ensuring that there is an accessible complaint mechanism if violations of economic, social and cultural rights occur in the receiving countries”*. In relation to Belgium, the Committee expressed concern about State policies promoting agrofuels leading to extensive cultivation of such in third countries where Belgian companies operate, with potential negative consequences for local farmers' human rights. It called on the Belgian State to conduct systematic human rights impact assessments to ensure that projects promoting agrofuels do not lead to infringements of economic, social and cultural rights in third countries : CESCR, concluding observations on the fourth periodic report of Belgium, 29 november 2013, E/C.12/BEL/CO/4 and on Norway, <http://www.etoconsortium.org/en/news/detail/un-committee-urges-austria-belgium-and-norway-to-comply-with-their-extraterritorial-obligations-36>; See also the Maastricht Principles on Extraterritorial obligations for ESC rights no.14 [http://www.etoconsortium.org/nc/en/library/maastricht-principles/?tx_drblob_pi1\[downloadUid\]=23](http://www.etoconsortium.org/nc/en/library/maastricht-principles/?tx_drblob_pi1[downloadUid]=23); In addition, under international law, *“States cannot release themselves from these obligations simply by delegating powers relevant to their implementation to the EU”*. Member States have the responsibility to ensure that their human rights obligations *“will receive an equivalent protection”* even if they have delegated power to international organisation. *“Member States remain bound by these obligations and will incur international responsibility to the extent that the EU does not fulfil those duties.”* They *“remain responsible for breaches of human rights obligations resulting from any acts or omissions required by the laws of the intergovernmental organisations (IGO)”* and this remains true *“irrespective of the degree of control exercised by the States in question over the impugned action”*; UN, Human Rights Office of the High Commissioner, *The European Union and International Human Rights Law*, p. 50. Tawhida Ahmed and Israel de Jesús Butler, *“The European Union and Human Rights: An International Law Perspective”*, *Eur J Int Law* (2006) 17 (4): 782 and numerous jurisprudence cited, including: *Heinz v. the Contracting States party to the European Patent Convention* insofar as they are High Contracting Parties to the European Convention on Human Rights, European Commission of Human Rights Decision, App. No. 21090/92, 15 Oct. 1992; *Matthews v. UK*, European Court of Human Rights (ECtHR), App. No. 24833/94, 18 Feb.1999, para. 3; *Capital Bank Ad v. Bulgaria*, ECtHR, App. No. 49429/99, 24 Nov. 2005, para. 111; *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi v. Ireland*, ECtHR, App. No. 45036/98, 30 June 2005.

contained in the primary law of the EU have been formulated to be binding (using shall instead of should), and impose an obligation on the EU to respect human rights in the different areas of the Union's external action and of the external aspect of its other policies. They oblige the EU not to take any action that would prevent or make more difficult the realisation of human rights and to take all measures available to facilitate the respect, protection, and fulfilment of human rights in the EU and partner countries. Such measures must be "appropriate" and "sufficient",⁴ and concern the implementation of the EU's external activities as well as the planning and design of those activities.⁵

As a result, the commitment made in 2011⁶/2012⁷ to include human rights in impact assessments and to take human rights into consideration when negotiating trade and investment agreements is fully applicable to the current negotiation with Vietnam. This commitment is founded upon binding and pre-existing human rights obligations, it is the official interpretation given to them⁸ and it ensures compliance with the principle of good administration. It applies irrespectively of the date the negotiations were launched, as human rights impact assessments aim to **prevent non-compliance of the future agreement** and its implementation activities **with existing human rights obligations**.

- The current negotiating mandate has expanded in 2013 to encompass an investment component. In addition an Investor-State Dispute Settlement (ISDS) mechanism is under consideration. Consequently, we can no longer consider that the negotiation mandate has remained the same as in 2009, when the SIA was carried out, and the impacts of these new components should be assessed.
- The fact that the negotiating mandate was initially established for region-to-region agreements has also consequences. The SIA made in relation to an entire region (i.e. ASEAN) may fail to identify and address possible impacts in specific countries, such as Vietnam. ECORYS itself indicated that this regional assessment could at most be considered as a framework and a "starting point" for a more detailed national-level analysis.⁹

2. The European Commission argues in favor of an "integrated approach"

In its 26 June letter to FIDH and VCHR, the European Commission stated that it would not carry out an HRIA, but prefer to follow "*an integrated approach [...] convinced that such an approach ensures that all relevant potential economic, social, environmental, and human rights impacts in terms of benefit and costs are analysed and presented together in one single document.*"

In that regard, it must be noted that:

⁴ UN Human Rights Committee, *Concluding Observations on the Sixth Periodic Report of Germany*, (n14), § 16

⁵ Article 21, Treaty on European Union.

⁶ See letter from EU commission stating 26/06/2013 « In 2011, further to the entry into force of the EU Charter of Fundamental Rights, the Commission has started to introduce in its IAs – as well as in the SIAs carried out for trade agreements- explicit requirements for the analysis of human rights impacts », indeed see for IAs : SEC(2011) 567 final, *Operational Guidance on Taking Account of Fundamental Rights in Commission Impact Assessments* which provides for a methodology and precises that "Respect for fundamental rights is a legal requirement, subject to the scrutiny of the European Court of Justice. Respect for fundamental rights is a condition of the lawfulness of EU acts... The Court requires EU institutions to prove — in the light of the fundamental rights protected by the Charter — that they have carefully considered different policy options and have chosen the most proportionate response to a given problem."

⁷ EU strategic framework and action plan on human rights and democracy, June 2012, pt. 1 & 11

⁸ http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/131181.pdf in this document the EU commits to

⁸ See also in that sense 1. SEC(2009)92, Impact assessment guidelines, 15 January 2009; http://ec.europa.eu/governance/impact/commission_guidelines/docs/iag_2009_en.pdf saying that impact assessments "*helps to [...] to ensure coherence ... and consistency with Treaty objectives such as the respect for Fundamental Rights*" ((2009)p. 6)" See also the jurisprudence of the Court of Justice that applied the EU charter of fundamental rights before its integration in the founding treaties;

⁹ Ecorys, Trade Sustainability Impact Assessment of the FTA between the EU and ASEAN - FR Volume I , p. xxiv, <http://www.tsia.ecorys.com/images/ASEAN/Final%20Report%20Volume%20I%20-%20201.6.pdf>

- The “integrated approach” that encompass human rights impacts, to which the Commission refers, has been integrated in EU practice only from 2012. It did not apply to “the Vietnam” case, where the SIA was launched in 2007 and made no reference to human rights but only to economic, social, and environmental impacts.
- Beyond this, we consider important to raise that human rights impacts assessments “should be based explicitly on the normative content of human rights, as clarified by the judicial and quasi-judicial bodies that are tasked with monitoring compliance with human rights obligations. References done in SIAs to development goals or to poverty, therefore, are not a substitute for a reference to the normative components of human rights”¹⁰. Even SIAs made since 2012, which are supposed to have a human rights component, do not adequately refer to the normative content of human rights. In addition they do not properly proceed to consultations of rights holders, including affected groups and their representatives. The “integrated approach” adopted fails to address potential incompatibilities with human rights before the conclusion of trade and investment agreements.¹¹

3. The European Commission defers addressing human rights through other tools and policies which may serve to promote human rights and react to violations in Vietnam

The European Commission finally refers to other EU instruments and policies to justify its position: “*The EU has other effective tools that allow it to contribute to the enhancement of respect for human rights in Vietnam*”. The Commission said these tools include the partnership and cooperation agreement (PCA) - concluded in June 2012 but not yet ratified - the human rights dialogue, public statements, diplomatic action, interaction with human rights defenders, and projects such as those funded through the European Instrument for Democracy and Human Rights (EIDHR). The Commission added that a “*linkage clause*” (which consists in linking the future FTA to the human rights clause that exists in the PCA) “*would insure that human rights, democracy and rule of law are essential elements of [EU-Vietnam] bilateral relations also when it comes to trade between the parties*” and “*would also provide for the rights to apply all appropriate measures should there be a breach of these essential element clause*”.

We consider that neither the potential contributions of external policies to human rights nor the

¹⁰ A/HRC/19/59/&dd.5, Report of the Special Rapporteur on the Right to Food, Olivier De Schutter, *Addendum, Guiding Principles On Human Rights Impact Assessments of Trade and Investment Agreements*, December 2011, p. 11

¹¹ When compared to SIAs conducted before 2012 (e.g. the ASEAN or ANDEAN region), the principle achievement of these later SIAs (e.g. for Tunisia in November 2013), has been to recommend the insertion of provisions to ensure the “effective implementation of HR treaties” and “monitoring mechanisms of the social (including human rights) impact of the DCFTA” within the FTA itself. Whilst constituting noteworthy progress, such recommendations remain largely symbolic. Progress here lies in the fact that human rights recommendations were not previously posited as such and doing so undoubtedly constitutes a step forward. However, the mere symbolism of these recommendations is evident in the fact that they are not founded on any actual human rights impact assessment or country-specific analysis, and are too vague to be considered operational recommendations. Although human rights were raised in the post 2012 SIA on Tunisia, this reference represented mere window-dressing. The report concludes that the “overall effect of the DCFTA on the human rights situation in Tunisia is likely to be small but positive”, but fails to develop or document this position, or to pay specific attention to any potentially negative impacts. Most notably, the report placed human rights out with the scope of in-depth analysis. Moreover, a general conclusion on the “overall effect” of a given policy represents an approach that cannot apply to human rights impact assessment, which must “avoid adding together impacts of various kinds, which could lead to a distorting result. For example, if it has been established that a given policy option would have such a negative impact that it would violate (i.e. restrict without justification) the rights of the child (Article 24 Charter), this negative impact cannot be counterbalanced by a positive impact regarding another fundamental right or other impacts. This is a legal consequence of the obligation to comply with fundamental rights” : see SEC(2011) 567 final, Operational Guidance on Taking Account of Fundamental Rights in Commission Impact Assessments, p.20. “Where an incompatibility is found, such incompatibility should be removed before the agreement can be signed or ratified by the State”. “Removing the incompatibility can be achieved either by the adoption of measures at the domestic level that ensure that the agreement will be consistent with the human rights obligations of the State, for example, by the introduction of measures that will ensure an adequate level of protection of vulnerable groups that may be harmed by the agreement [...], or by introducing within the agreement itself clauses, such as flexibilities or exceptions, that will allow the State to comply with its human rights obligations” A/HRC/19/59/&dd.5, Report of the Special Rapporteur on the Right to Food, Olivier De Schutter, *Addendum, Guiding Principles On Human Rights Impact Assessments of Trade and Investment Agreements*, December 2011, p.8 §3.2

linkage clause, can be considered as *a priori* sufficient to address potential negative human rights impacts.

- It is the role of the HRIA to identify measures and provisions required to ensure that the agreement will be consistent with the parties' human rights obligations and that the parties will be able to comply with their human rights obligations. And, the fact that other EU policies can theoretically contribute to enhance human rights abroad, does not exempt the EU to comply with its obligations regarding its trade and investment policy.
- Past experience showed that human rights clauses are rarely used. The EU's determination to rapidly conclude PCA and FTA agreements with Vietnam despite the serious ongoing human rights violations in the country¹² gives indication that it will not use the clause in the next future, once the agreements are signed.
- More importantly, studies have shown that the linkage clause is in fact insufficient to provide efficient tools to enable the parties to respect, protect, and fulfil human rights, or to ensure remedies to rights-holders affected by the FTA and investment agreements. The linkage clause is only conceived to allow one party to unilaterally and immediately suspend the agreement in the event that the other party violates human rights. It fails to allow the parties to exempt themselves from the treaty obligations when incompatible with their human rights duties, it fails to recognize the right to regulate in order protect, respect, and fulfil their human rights obligations, it does not oblige businesses and investors to respect human rights and does not offer any enforcement mechanism to ensure respect for human rights while granting important protections to investors. In short, it is important not to confuse sanctions with effective ways to comply with human rights obligations.

We consider that the HRIA is the appropriate tool to assess the potential impacts of the clauses being negotiated, to provide for independent recommendations in that regard, and to pave the way for better consideration of human rights in future trade and investment agreements. The HRIA should also assess the potential effects of the highly contested ISDS mechanism, which has not been assessed at all until now.

4. The European Commission does not take into account the recommendations made recently by other EU institutions

Finally the Commission did not respond to our request to accept the recommendations made by other EU institutions:

- The resolution adopted by the European Parliament on 17 April 2014 on the state of play of the EU-Vietnam Free Trade Agreement (FTA), which urged the Commission to carry out a human rights impact assessment “in line with the guiding principles of the UN Special Rapporteur on the right to food”.
- The Council conclusions on a rights-based approach to development cooperation, encompassing all human rights, adopted on 19 May 2014, which insisted on policy coherence and underlined the importance for the Commission to carry out “human rights impact assessments for trade and investment agreements” in that regard.

¹²See our letter dated 30 April 2013 (Annex 1) ; see also VCHR/FIDH, « Universal Periodic Review of Vietnam - Key Concerns on Ongoing Human Rights Violations in view of the adoption of the UPR Report at the 26th Session of the United Nations Human Rights Council, Geneva », 20 June 2014 <http://www.queame.net/eng/doc/Key-concerns-UPR-Vietnam-FIDH-VCHR.pdf> ; 3 July 2013 ; [joint submission to the Universal Periodic Review](#) submitted by FIDH and its member organisation the Vietnam Committee on Human rights, 17 June 2013; European Parliament resolution of 18 April 2013 on Vietnam, in particular freedom of expression (2013/2599(RSP)), <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2013-0189&language=EN&ring=P7-RC-2013-0166>

5 What in your view, should the institution or body do to put things right?

The EU should conduct a comprehensive and participatory HRIA to “measure the potential impact of trade or investment agreements on human rights outcomes and on the capacity of States (and non-State actors, where relevant) to meet their human rights obligations, as well as on the capacity of individuals to enjoy their rights”;¹³ The HRIA should seek human rights expertise from recognized and independent experts and should be based on meaningful consultation with rights holders, civil society representatives, and potentially affected individuals and communities.¹⁴ It should be “prepared by a body or group of experts that is independent from the Executive which is negotiating, or has negotiated, the trade or investment agreement.”¹⁵ It should “be based explicitly on the normative content of human rights, as clarified by the judicial and non-judicial bodies that are tasked with monitoring compliance with human rights obligations.”¹⁶ Based on the results of the HRIA, the EU should ensure that any potential incompatibility be removed before opening an agreement to signature or ratification.¹⁷ The EU should also adopt relevant clauses and accompanying measures¹⁸ to ensure respect, protection, and fulfilment of human rights obligations by both parties, taking into account constraints on the ground and lessons learned from the past.

6 Have you already contacted the EU institution or body concerned in order to obtain redress?

Yes, notably via an open letter dated 30 April 2013 (Annex 1), and 4 July 2014 (Annex 3).

7 If the complaint concerns work relationships with the EU institutions and bodies: have you used all the possibilities for internal administrative requests and complaints provided for in the Staff Regulation? If so, have the time limits for replies by the institutions already expired?

Not applicable

8 Has the object of your complaint already been settled by a court or is pending before court?

No, it hasn't been settled by a court and is not pending before a court.

9 Please select one of the following two options after having read the information in the box below:

Please treat our complaint publicly.

¹³ A/HRC/19/59/¶5, *Guiding Principles on Human Rights Impact Assessments of Trade And Investment Agreements*, p. 6§2.1.

¹⁴ European Commission, *Handbook for Trade Sustainability Impact Assessment*, pp. 8, 24, 25, 39, 40)

¹⁵ A/HRC/19/59/¶5, *Guiding Principles on Human Rights Impact Assessments of Trade And Investment Agreements*, p.10 § 4.3;

¹⁶ *ibid.*, p. 11 § 5.1.

¹⁷ *ibid.*, p. 8 § 3.2; see also SEC(2011) 567 final, Operational Guidance on taking account of Fundamental Rights in Commission Impact Assessments, 6 May 2011, p. 18: « identify which safeguards might be necessary to ensure that the negative impact would not amount to a violation of these fundamental rights”

¹⁸ European Commission, *Handbook for Trade Sustainability Impact Assessment*, p. 7.

10 Do you agree that your complaint may be passed on to another institution or body (European or national) if the European Ombudsman decides that he is not entitled to deal with it?

Yes.

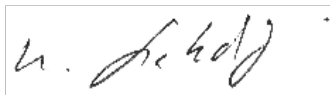
Date and Signature

7 august 2014

Karim Lahidji

President

International Federation for Human Rights (FIDH)

A rectangular box containing a handwritten signature in black ink, which appears to be "K. Lahidji".

Vo Van Ai

President

Vietnam Committee on Human Rights (VCHR)

A handwritten signature in blue ink, which appears to be "Vo Van Ai", with a long horizontal underline below it.