

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



Issues at stake

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

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

The [Ombudsman, in February 2016](#), concluded that the refusal of the European Commission to conduct a HRIA in the context of EU-Vietnam Free Trade Agreement negotiation was in contravention with art 21 of the TUE and constituted maladministration. She added: *The Ombudsman does not believe that it is sufficient to develop a range of general policies and instruments to promote human rights compliance while at the same time concluding a Free Trade Agreement which may, in fact, result in non-compliance with human rights requirements.* **More than two years later, on October 17, 2018, and despite the Ombudsman's position, the Commission still relies on its traditional tools and its position remains unchanged.** The two agreements proposed by the Commission still fail to provide sufficient human rights guarantees.

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

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

3. EU prefers to use traditional, weak and inefficient tools

The chapter on "trade and sustainable development"

- Focuses only on core labour standards and the environment. There is therefore absolutely no help in dealing with situations denounced by the UN. The European Parliament is also of that opinion, "reaffirming the principle of the indivisibility of human rights and condemning any attempt to consider any right or ground of discrimination less important than others"; In April 2012, even before the start of negotiations with Vietnam, the EP already advocated "a comprehensive chapter on human rights, in addition to the social and environmental chapters, in all future free trade agreements".
- The chapter also fails to impose obligations on investors, referring only voluntary initiatives and promotional activities and falling short of international standards, despite the European Parliament having expressly requested that the objectives of corporate

responsibility "be binding on European companies operating in countries with institutional weaknesses".

- The Chapter is also formulated in a largely non-binding language (the parties "reaffirm their determination", "make efforts", aim to "promote", undertake to cooperate, dialogue etc) and lacks an enforceable mechanism. Once again, the European Parliament recognised these weaknesses and called for the "inclusion of a complaint procedure open to the social partners and civil society, the establishment of an independent body to settle relevant disputes and the possibility of using a dispute settlement mechanism providing for fines and suspension of trade benefits[...] equivalent to mechanisms providing for market access provisions".

Regarding
the **human rights clause**:

- By the European Commission's own admission, the EU mobilised the clause only in exceptional circumstances such as a coup d'état.
- Since it is left to the sole discretion of the parties to activate it, the clause must be regarded as an ineffective remedy for the benefit of the populations that would be affected by the agreements.
- By instituting a dialogue, they (the clause?) fails to effectively compel the parties to implement the agreements in a manner that respects human rights. In that it allows suspension, the clause offers an extreme solution mobilised only after a political decision in extreme cases. It lacks the capacity to deal with the day-to-day impacts of agreements, to provide useful corrective measures as they occur, and above all to be able to enforce the implementation of agreements. It fails to provide a means of redress for populations affected by the agreement and fails to provide guarantees of non-repetition in the event of a violation of fundamental rights. On this topic, the parliament also concluded: "*the current clauses have had a limited impact on the fulfilment of human rights obligations and commitments; therefore calls on the Commission and the Council to implement*

the following adjustments: (a) incorporate safeguard clauses [...] (b) establish a thorough and regular monitoring of the implementation of human rights clauses in trade and association agreements, (c) consider the inclusion of a human rights committee in all EU trade agreements in order to ensure rigorous and systematic monitoring of human rights issues under the agreement... (d) ensure that the European Union has a system of internal remedies to lodge complaints of non-compliance with trade agreements and human rights clauses;

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

4.

What to do

FIDH

and VCHR have submitted a new complaint to the Ombudsman to denounce maladministration. **The Commission must improve the agreements and the guarantees provided. It must assess the many proposals on the table** (incl. enriching the investment treaties themselves, improving impact assessments, effectively regulating European companies, adopting mandatory human rights due diligence regulation and improving access to legal remedies). In the meantime, the Union has an immediate **obligation to establish a monitoring and complaints mechanism that can monitor the human rights impacts of the agreement**, facilitate people's access to appropriate remedies, and provide guarantees of non-repetition. With regard to guarantees of

non-repetition, the monitoring and complaint mechanism should be empowered to make recommendations to the various committees set up by the agreements, with a view to adopting appropriate interpretations which may effectively influence the implementation of the agreement. The monitoring and complaint mechanism must offer procedural guarantees, effectively decide on the requests submitted to it and give reasons for its decisions.

Role

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