



Brussels, August 10, 2015

To : Representatives of the European Commission,  
Ambassadors of the European Union's Member States,  
Members of the European Parliament,

FIDH and VCHR wish to convey their concern at the European Commission (EC) announcement on 4 August that the EU and Vietnam have reached an agreement “in principle” for a Free Trade Agreement (FTA), while a human rights impact assessment (HRIA) has not been undertaken and that the necessary human rights safeguards would not have been included, notably ensuring that :

- the EU member states and Vietnam's abilities to respect, protect and fulfill their human rights obligations are preserved and respected;
- adverse impacts on human rights are avoided
- positive impacts on human rights are enhanced.

These blatant omissions constitute a clear violation of the EU founding treaties, notably article 21 of the Treaty of the European Union. In addition should the FTA and investment agreement be concluded and ratified without the necessary safeguards, the EU could be in breach of the EU Charter on fundamental rights and EU member states could be in violation of their own human rights obligations.

The omission of these elements intervene in spite of specific recommendations of the European Parliament<sup>1</sup> of the European Ombudsperson<sup>2</sup> and of UN Human Rights Special Procedures<sup>3</sup>. The latter called, on June 2015, inter alia, for:

- All current negotiations of bilateral and multilateral trade and investment agreements to be conducted transparently with consultation and participation of all relevant stakeholders including labour unions, consumer unions, environmental protection groups and health professionals ;
- All draft treaty texts to be published so that Parliamentarians and civil society have sufficient time to review them and to weigh the pros and cons in a democratic manner ;
- *Ex ante* and *ex post* human rights impact assessments to be conducted with regard to existing and proposed BITs and FTAs ;
- The Parties to detail how they will uphold their human rights obligations if they ratify the BITs and FTA's under negotiation ;
- Given the breadth and scope of the agreements currently under negotiation, robust safeguards to be embedded to ensure full protection and enjoyment of human rights.<sup>4</sup>

The haste in concluding the EU-Vietnam FTA, while a procedure is still pending before the EU ombudsman, is problematic.

We thus urge the European Parliament, the Council of the European Union and the Parliaments of the EU's Member States, to not conclude or ratify the EU-Vietnam Free trade and Investment agreement should the necessary human rights safeguards fail to be put in place.

The following position paper includes specific recommendations to be included.

Thanking you for your attention and appropriate reaction,

Sincerely yours,

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<sup>1</sup> European Parliament resolution of 17 April 2014 on the state of play of the EU-Vietnam Free Trade Agreement <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2014-0458+0+DOC+XML+V0//EN> ; European Parliament resolution of 25 November 2010 on human rights and social and environmental standards in international trade agreements, <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2010-0434>

<sup>2</sup> EU Ombudsman, Draft recommendation of the European Ombudsman in the inquiry into complaint 1409/2014/JN against the European Commission, March 26 2015 <http://www.ombudsman.europa.eu/cases/draftrecommendation.faces/en/59398/html.bookmark> ; FIDH Press release, 14 April 2015, EU Commission's refusal to conduct a human rights impact assessment in the context of trade agreement negotiations constitutes maladministration, says EU Ombudsperson, <https://www.fidh.org/International-Federation-for-Human-Rights/asia/vietnam/eu-commission-s-refusal-to-conduct-a-human-rights-impact-assessment>

<sup>3</sup> HCHR report Human rights, trade and investment (E/CN.4/Sub.2/2003/9), 2 July 2003, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G03/148/47/PDF/G0314847.pdf?OpenElement> UN experts voice concern over adverse impact of free trade and investment agreements on human rights », 2 june 2015 press release <http://www.ohchr.org/FR/NewsEvents/Pages/DisplayNews.aspx?NewsID=16031&LangID=E#sthash.1oEjaU16.dpuf>

<sup>4</sup><http://www.ohchr.org/FR/NewsEvents/Pages/DisplayNews.aspx?NewsID=16031&LangID=E#sthash.1oEjaU16.v5bK06VZ.dpuf>

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### ***Recommendations for the FTA***

While the EU engages in human rights matters through its political dialogues (including through Human Rights Dialogues), through the human rights clauses, and in deploying development cooperation, no mechanism is in place to protect human rights or prevent human rights violations as an impact of trade and investment agreements.

Existing mechanisms are indeed insufficient. The Human rights clause is only used in response to severe human rights violations, such as *coup d'Etats*, and does not measure the impact of trade and investment agreement on human rights. The human rights dialogue with Vietnam, which has been ongoing for the past 10 years, is not conceived to measure these agreements, and has, in practice, not lead to any concrete results. The Sustainable Development Chapter does not offer efficient tools, as the norms it covers receive less protection than the trade obligations. Examples of tripartite civil society monitoring mechanisms (as established in the agreement with South Korea) show few signs of leading to concrete results.

While each of these tools aim to address the overall situation with respect to human rights, they have shown their limits in practice and fall short of being an appropriate mechanism to measure and respond to the potential negative impacts of the FTA.

As a consequence, the following mechanisms and measures need to be set-up and taken:

#### 1. HRIA & roadmap

**Ensure a genuine human rights impact assessment (HRIA)**, in line with the UN Guiding Principles On Human Rights Impact Assessments of Trade and Investment Agreements<sup>5</sup>. This HRIA has been **requested by the EU ombudsman, the European Parliament and the Council of the EU**<sup>6</sup> ;

Based on this HRIA, and before the signature of the agreement, the EU should obtain concrete human rights Roadmap, which would include benchmarked and time-framed commitments from Vietnam to revise its legislation and make progress in human rights fields where the trade and investment policies may have an impact;

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<sup>5</sup> 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

<sup>6</sup> EP resolution of 17 April 2014 on the state of play of the EU-Vietnam Free Trade Agreement; Council conclusions on a rights-based approach to development cooperation, encompassing all human rights, adopted on 19 May 2014 ; EU Ombudsman draft recommendation adopted on March 26 2015 Draft recommendation of the European Ombudsman in the inquiry into complaint 1409/2014/JN against the European Commission <http://www.ombudsman.europa.eu/cases/draftrecommendation.faces/en/59398/html.bookmark>

An efficient follow-up mechanism, with the participation of civil society, should be set up ;

The roadmap should be completed by coordinated mitigation and accompanying measures, implying complementarity of EU policies and the coordination of EU institutions.

## 2. Refer to human rights international standards, and adapt the human rights clauses

Numerous dispositions of the FTA will make reference to notions of 'sustainable development', 'national law', 'public interest', as notions against which the trade and investment policies may be measured. Yet, these notions are too vague and insufficient to encompass human rights obligations. In particular, references to national law are insufficient to ensure due respect of international human rights standards, notably when national laws are in violation of these standards.

In addition, the EU has the obligation to ensure that all international agreements it concludes are in line with its human rights obligations. Referring explicitly to international human rights norms would ensure the reference to internationally agreed norms, that are measurable and controllable by international independent mechanisms. In this context, the FTA should make **explicit reference to human rights international standards and instruments**, in its preamble, as governing the obligations of the parties and stakeholders to the agreement, as well as one of the objectives of the agreement.

**Adopt a new model of HR clauses.** In order to encompass the broad scope of the EU member States human rights obligations, the human rights clause should be re-formulated and detailed, notably as requested by the European Parliament, academics, the UN and civil society stakeholders<sup>7</sup>. Indeed, the Human Rights clause should:

- Reinforce the human rights commitments: **“The parties reaffirm their obligations concerning democratic principles and human rights, as laid down in the Universal Declaration of Human Rights and other relevant international human rights instruments, and the rule of law, and undertake to comply with these obligations in their internal and international policies.**
- Provide necessary flexibility: **“If one of the Parties considers that the other Party has failed to fulfil an obligation under this Agreement or that a provision of the Agreement restricts its own ability to meet its human rights obligations it may take appropriate measures”**
- Oblige the parties, when the treaty is in force, to conduct regular (3-5 years), participative and comprehensive **HRIAs** in line with Olivier De Schutter’s guidelines (2011) **in order to ensure that the implementation of the agreement does not affect the HR obligations of the Parties and to adjust the agreement and its implementation in case of adverse effects.**
- Include a **mandatory and enforceable binding clause for investors to comply** with the principles of CSR as defined at the international level, including the 2010 update of the OECD Guidelines, standards defined by the UN.

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<sup>7</sup> EP resolution : 25 November 2010 in its “resolution on human rights and social and environmental standards in international trade agreements” and others ex: European parliament resolution of 29 April 2015 on the second anniversary of the Rana Plaza building collapse and progress of the Bangladesh sustainability compact; A Model Human Rights Clause for the EU’s International Trade Agreements, Lorand Bartels, February 2014, [http://www.institut-fuer-menschenrechte.de/uploads/tx\\_commerce/Studie\\_A\\_Model\\_Human\\_Rights\\_Clause.pdf](http://www.institut-fuer-menschenrechte.de/uploads/tx_commerce/Studie_A_Model_Human_Rights_Clause.pdf)

3. Set up dedicated monitoring and complaint mechanisms

The agreement should include recourse mechanisms for affected communities to seek redress, whereby its impact may be measured over human rights, and proper compensation be found should violations be committed.

- **A human rights committee and a human rights civil society monitoring mechanism** should be set up. These would be dedicated specifically to addressing human rights concerns having a direct link to trade agreements and composed of independent HR NGOs. They should be allocated a dedicated budget to undertake field visits, interact with civil society, and with human rights experts, and report to the parties of the agreement.
- **A complaint mechanism that can be seized by individuals and communities** whose human rights are affected by trade and investments should be set-up. This kind of mechanism exists in other fora<sup>8</sup> and could be transposed and adapted. It should ensure the access to remedy and compensation, based on need and responsibility.

4. Renounce to the Investor-state dispute settlement (ISDS) mechanism or ensure it is adapted to include specific concerns with regards to human rights:

States should ensure that they retain adequate policy and regulatory ability to protect human rights under the terms of such agreements, while providing the necessary investor protection, as recommended in Commentary to **Principle 9 of the UN Guiding Principles on Business and Human Rights**. Indeed, “the terms of international investment agreements may constrain States from fully implementing new human rights legislation, or put them at risk of binding international arbitration if they do so”. At this stage, when the agreements refer to the right to regulate, they do not refer to human rights international standards and instruments, and they fail in consequence to offer the adequate HR guaranties and safeguards, as shown in the available ISDS “jurisprudence”. These concerns are echoed in a 2010 appeal from dozens of **academics**, which called for alternatives to the ISDS, that are seen as “hampering the ability of governments to act for their people in response to the concerns of human development and environmental sustainability.”<sup>9</sup> In addition and in the same vein, the **OECD** recognizes that the “inclusion of responsible business conduct language in treaties will not produce desired welfare benefits if ISDS procedures are not properly designed.”<sup>10</sup> Effective recourse mechanisms for populations whose human rights are affected by the arbitration decision should be set up.

Thus, the EC and the Vietnamese negotiators should follow the recommendations of the **High Commissioner for Human Rights**, namely: to balance investors’ rights with investors’ obligations, protect

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<sup>8</sup> ex: the mechanisms put in place in the World bank for development and investment activities <http://ewebapps.worldbank.org/apps/ip/Pages/AboutUs.aspx> : for IBRD & IDA or <http://www.cao-ombudsman.org/about/whoware/index.html> for IFC & MIGA operations

<sup>9</sup> EPRS briefing, Investor-State Dispute Settlement (ISDS) State of play and prospects for reform, 21 January 2014, [http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2014/130710/LDM\\_BRI%282014%29130710\\_REV2\\_EN.pdf](http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2014/130710/LDM_BRI%282014%29130710_REV2_EN.pdf)

<sup>10</sup> OECD, « Investment treaty law, sustainable development and responsible business conduct : a fact finding survey », June 2014 <http://www.oecd.org/daf/inv/mne/2014RBCMinisterial-TreatyRBC.pdf>

affected peoples by setting-up an individual complaint mechanism in relation to human rights violations; include the promotion and protection and fulfilment of human rights among the objectives of investment agreements given States' international responsibilities regarding the promotion and protection of human rights; ensure States' right and duty to regulate; realize effective impact assessments on human rights<sup>11</sup>.

The emergency that exist to solve the gap between trade, investment and human rights is obvious, and has been recalled lastly on **June 2, when several UN experts**, refereeing to the TTIP negotiations but also all other trade and investment under negotiation, called all States to revisit the treaties under negotiation and ensure that they foster and do not hinder human rights, including for the ISDS mechanism. They expressly called for more **transparency, for HRIA (ex ante and ex post) and for robust robust safeguards to be embedded in the agreements to ensure full protection and enjoyment of human rights**<sup>12</sup>.

### **Recommendations to the Vietnamese authorities**

Vietnam has undergone impressive economic transformations since its transition to a free-market economy in 1986 under the policy of *đổi mới* (renovation). Poverty has been substantially reduced, and the general living standards of large sectors of the 90-million population have improved. However, political changes have not kept pace with these economic openings. Vietnam remains a one-Party state, ruled by the Communist Party of Vietnam. The lack of transparency and legal and political accountability of the one-party system remain serious obstacles to progress. There is no independent press or media, no independent trade unions, and no truly independent civil society. The judiciary is not independent either and trials are routinely unfair.

In the absence of mechanisms and safeguards, the adoption of an FTA could adversely affect citizens' enjoyment of their economic, social and political rights.

**1.1. Workers' rights:** In the globalized market, Vietnam keeps its wages low in order to attract foreign investments. The average monthly wage of a Vietnamese worker is \$162, less than half that of China and amongst the lowest in Southeast Asia.<sup>13</sup> The minimum wage is fixed by the government (\$127.2 in the big cities, \$89.5 in rural areas in 2014), but according to a 2013 survey by the Hanoi Institute for Workers and Trade Unions, this covers barely half of a worker's minimum living costs. As a result, strikes are breaking out in many factories – in March 2015, 90,000 workers went on strike at a Taiwanese company in Ho Chi Minh City.

However, the right to strike is severely restricted, and the government-controlled Vietnam General Confederation of Labour (VGCL), the only legal trade union, rarely supports workers' demands. Most strikes are considered illegal, and workers who participate in strikes risk sanctions or fines. Whereas in China, where the Communist Party is pushing the official All-China Federation of Trade Unions to represent the workers, the Vietnamese government is making no such efforts to press the VGCL in this way. Vietnamese

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11" HCHR report Human rights, trade and investment (E/CN.4/Sub.2/2003/9), 2 July 2003, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G03/148/47/PDF/G0314847.pdf?OpenElement>

12 UN experts voice concern over adverse impact of free trade and investment agreements on human rights », 2 june 2015 press release <http://www.ohchr.org/FR/NewsEvents/Pages/DisplayNews.aspx?NewsID=16031&LangID=E#sthash.1oEjaU16.dpuf>

13" 2014 Japan External Trade Organization Survey of Business Conditions of Japanese Companies in Europe, March 2015, [http://www.jetro.go.jp/ext\\_images/en/reports/survey/pdf/2015\\_03\\_biz1.pdf](http://www.jetro.go.jp/ext_images/en/reports/survey/pdf/2015_03_biz1.pdf).

workers who are exposed to bad working conditions, low pay and a lack of adequate health or retirement benefits have no legal means to redress their grievances.

This situation would be exacerbated by the adoption of the FTA, where the pressure of investors and potential competitiveness could lead to decreased wage rates on the one side and increased social unrest on the other.

While ratification of international conventions on labour rights and economic and political rights is important, they have not proven to be an end in themselves. Vietnam acceded to the ICCPR and the ICESCR in 1982 – yet has still not brought domestic legislation into line with these treaties. Legal reforms must be urgently undertaken to enable the implementation of international human rights instruments as well as their ratification.

In this context, FIDH and VCHR urge the Commission to require of Vietnam concrete labour reforms before concluding the FTA, notably by following the recommendations of the Committee on Economic, Cultural and Social Rights (December 2014) to:

*Remove excessive restrictions on the rights to strike, in law and practice; amend legislation that provides for the payment of damages by workers to their employers; bring its legislation on trade union rights into line with international standards on the right to form and join the trade union of one's choice; ratify the ILO Conventions No. 87 on Freedom of Association and Protection of the Right to Organize of 1948 and No. 98 on Right to Organise and Collective Bargaining of 1949.*<sup>14</sup>

**1.2. Freedom of Expression and Legal reforms:** Freedom of opinion, expression, association and peaceful assembly are all severely restricted by domestic legislation in Vietnam. Citizens protesting forced evictions, poor working conditions or other violations of their rights, may be arrested and prosecuted under vaguely-worded articles in the Criminal Code, e.g. Article 79 on “activities aimed at overthrowing the people’s administration” (which carries the death penalty); Article 88 on “conducting propaganda against the Socialist Republic of Vietnam” or Article 258 on “abusing democratic freedoms to infringe upon the interests of the State”. In 2014, at least 10 people were convicted under article 258. Other repressive laws include Decree 38/2005 and Circular 9/2005 which prohibit demonstrations of more than five people without permission, Decree 72 on the Internet which restricts freedom of expression online.

Before concluding the FTA, Vietnam should make significant reforms to ensure that the enabling environment in which investors will operate guarantees freedom of opinion and expression, ensures transparency through guaranteeing the right to freedom of information, without fear of undue prosecution.

- *Vietnam should urgently revise the Criminal Code and abrogate provisions in other legislation that conditions the exercise of human rights on the “interests of the state”. Release all persons detained under these provisions simply for the peaceful exercise of their human rights. It should authorise privately-owned press and media outlets, and revise laws on freedom of information both online and offline to bring them into line with international human rights law.*

**1.3. Forced evictions and land grabbing:** Land ownership is a serious problem in Vietnam, one that has led to grave human rights abuses. People do not own their land, but are issued with Land-use Rights Certificates

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14" Concluding Observations of the CESCR, E/C.12/VNM/CO/2-4, December 2014

(LURCs). The state can recover the land at any time. Under the 2013 amended Land Law, local Communist Party authorities (People's Committees) are in charge of fixing the rates of compensation and carrying out forced evictions. Given the high level of corruption and almost total impunity of local officials, incidents of state land-grabbing are widespread. In March 2014, four UN experts denounced the forced eviction of Catholic parishioners in Con Dau, near Danang, as a “*clear case of land grabbing for the profit of local entrepreneurs at the expense of local communities*”. With growing investment and probable re-localization of companies to Vietnam with the FTA, forced evictions will increase, and farmers (over 70% of the population), will be exposed to grave violations of their human rights.

- ***Vietnam should ensure that legislation prevents forced evictions; set up mechanisms to ensure adequate compensation and provide access to efficient redress mechanism if needed, reinforce the national legislation to render private sector accountable for its impact on human rights.***

**1.4. Women's Rights:** Economic liberalization has negatively impacted the status of Vietnamese women, exposing them to increased violence, sweat-shop working conditions, lack of access to health care and education, trafficking and other forms of discrimination. Women are paid 85% less than men, work longer hours and receive less bonuses. In many factories, women are contractually bound not to get pregnant for three years, or hired on six-month contracts that preclude them from obtaining maternity benefits. Violations of women's land rights are widespread. Since only 10.9% of LURCs in rural areas bear the names of both husband and wives, widows may be expropriated without any compensation when their husband dies, and are denied access to bank loans and credit.

- ***Vietnam should legislate against gender-discriminatory practices in the domains of employment, education and health, and give free and unfettered access to international and women's human rights organizations to monitor the situation in Vietnam***