



Open Letter

Brussels, 7 March 2014

Dear Members of the European Parliament,

**Vietnam: EU-Vietnam Free Trade agreement must protect human rights and be preceded by a human rights impact assessment**

The European Parliament will vote a resolution on “the state of play in the EU-Vietnam Free Trade agreement”. While not having a legislative aim at this stage, it represents an important opportunity for the EP to formulate the human rights safeguards that will ensure its latter consent. Indeed, should appropriate measures not be adopted, the agreement will serve to perpetuate or aggravate existing human rights violations, putting both the European Union and European investors at a high risk of complicity in these violations.

FIDH has already documented why, beyond being a matter of principle and international obligations, the situation in Vietnam requests specific attention<sup>1</sup>. Yesterday, FIDH and its member organisation, the Vietnam Committee on Human Rights (VCHR), have published a press release that reveals just how important this upcoming vote in EP is and illustrates the insufficiencies of the current draft. The joint publication, calls for the release of the 200 political prisoners in Vietnam, including lawyers, bloggers, land rights activists, Buddhist monks, journalists, writers, singers, labour activists, pro-democracy campaigners, and members of ethnic and religious minorities. By detailing the cases of 17 of those prisoners, FIDH and VCHR demonstrate that some are directed related to trade and investments:

- **Dinh Dang Dinh**, who denounced the impacts of a bauxite mine project : sentenced to six years in prison under Article 88 of the Criminal Code for “propaganda against the Socialist Republic of Vietnam”;
- **Ho Thi Bich Khuong**, a farmer who used the internet to document land confiscation and campaign for land rights : sentenced to two years in prison under Article 258 of the Criminal Code for “abusing democratic freedoms to infringe upon the interests of the State” and sentenced to five years in prison and three years of house arrest under Article 88 of the Criminal Code for “propaganda against the Socialist Republic of Vietnam”;
- **Cu Huy Ha Vu**, who filed a lawsuit against the government granting a mining company rights to mine bauxite: sentenced to “seven years in prison and three years of house arrest under Article 88 of the Criminal Code for “propaganda against the Socialist Republic of Vietnam.”;
- **Ta Phong Tan**, who used blogs to campaign on social justice issues, land confiscation, corruption, and police abuse of power she was sentenced to 10 years in prison under Article 88 of the Criminal Code on charges of “propaganda against the Socialist Republic of Vietnam.”

Far from comprehensive, these cases document how trade and investment, may, and actually have concretely, impeded human rights, and how the Vietnamese authorities, in addition to denying redress to those affected, are actively silencing those who denounce these violations by levelling accusations of

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<sup>1</sup> FIDH, Open letter: The EU-Vietnam Free trade Agreement and the vote in the European Parliament this 13th of February, 12 February 2014, <http://www.fidh.org/en/asia/vietnam/14637-open-letter-the-eu-vietnam-free-trade-agreement-and-the-vote-in-the>; See our previous letters, press releases and other documents : Open Letter : [Vietnam and Free trade Agreement negotiations: NGOs urge the EU to carry out a human rights impact assessment](#), 30 April 2013 ; [The EU's Strategic Framework and Action Plan on Human Rights and Democracy – one year after its adoption](#), 24 June 2013 ; [Trade relations : Reluctant to assess human rights in Vietnam, the EU fails to respect its commitments](#), 3 July 2013 ; [joint submission to the Universal Periodic Review tabled by FIDH and its member organisation the Vietnam Committee on Human rights](#), 17 June 2013

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“propaganda against the state” or infringement upon the national interest. It is apparent and beyond doubt that any clause of the upcoming agreement that deems to protect human rights by only providing way for denouncing violations through a dedicated monitoring mechanism is ineffective; as would be a clause claiming to provide space for human rights reforms by referring to “national interest”. On the contrary, the press release issued today by FIDH and VCHR gives compelling arguments on why the EP must call upon the Commission to conduct a human rights assessment and propose binding, efficient and enforceable human rights provisions to be included in the EU-Vietnam agreement.

The details of the obligations for the EU to launch a human rights impact assessment and details of the provisions needed are annexed, but in short, the EP, in addition to ensuring a human rights impact assessment, should propose clauses that:

- Impose the respect of human rights to states parties and companies
- Provide efficient enforcement mechanisms and penalties in case of violations
- Ensure a way for affected people to seize complaints mechanisms
- Guarantee that states parties have the right to regulate, and effectively regulate in order to protect, respect and fulfil human rights
- Prohibit investors to ask for the agreement’s protection when involved in human rights violations. Refuse to provide protection of investors who deny the same level of protection to the people affected by their investments

FIDH deplores that, at this stage and with regard to the previous, the draft submitted to the EP vote in plenary is unsatisfactory in its current state. For the past year, FIDH and its member organisation the Vietnam Committee on Human Rights (VCHR), have called for the EU to respect its obligations by first, assessing the potential impacts that the free trade agreement may have on human rights, and second by introducing the necessary protective and safeguard clauses to ensure that human rights are duly protected, respected and fulfilled by the time the new trade agreement is implemented. In a context where no human rights impact assessment has been done, and where the clauses proposed by the EP to protect human rights remain insufficient, FIDH is extremely concerned over reports that “having accelerated the pace, Vietnam wishes to conclude the negotiations by October 2014”<sup>2</sup>.

It is noteworthy to add that, should the resolution be adopted without the necessary amendments, the EP would effectively be failing to act on its own previous resolutions, notably the one of the 16 April 2013 that:

*“31. Recommends that the Commission negotiate the inclusion of binding and enforceable human rights provisions, in addition to social and environmental provisions, in all future trade agreements in order to increase the effectiveness and credibility of the EU's conditionality policy”;*

*“39. Urges the Commission, when concluding trade and investment agreements, to implement the guidance prepared by the UN rapporteur on the right to food which calls for the use of Human Rights Impact assessments (‘Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements’), so as to ensure that the agreements are consistent with obligations under international human rights instruments”<sup>3</sup>*

FIDH urges the European Parliament to give concrete substance to its previous resolutions and requests.

Sincerely Yours,  
Karim Lahidji  
FIDH president

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<sup>2</sup> INTA newsletter p. 4. <http://www.europarl.europa.eu/document/activities/cont/201402/20140210ATT79148/20140210ATT79148EN.pdf>

<sup>3</sup> European Parliament resolution of 16 April 2013 on trade and investment-driven growth for developing countries, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fTEXT%2bTA%2bP7-TA-2013-0120%2b0%2bDOC%2bXML%2bV0%2f%2fEN&language=EN>

## **ANNEX 1: Details of the needed clauses aiming to protect, respect and fulfill human rights**

### General commitments and protection:

- The promotion, protection, respect, and fulfilment of human rights should be included among the objectives of the agreement;
- Include Human rights clauses that import in the investment agreement the international standards as binding and enforceable commitments, that guarantee respects of human rights, and that allow the parties to invalidate, suspend, derogate or adapt the agreement
- Insert a clause stating that the agreement can not be interpreted as restricting the right of state parties to regulate in order to protect, respect and fulfil human rights. It must be clear that those activities should prevail and do not constitute a violation of the agreement.
- Indicate that the implementation of the agreement should be pursued in compliance with the parties' obligations under international law, including their obligations with respect to human rights, labour rights, and protection of the environment.
- Stipulate that in case of a conflict between the agreement and a host state's international commitments with regard to the protection of human rights, environment, and public health, the latter shall prevail.
- Include a binding clause that commit the parties not to lower human rights, environmental, and labour standards to attract or encourage trade and investment.

### Enforcement, cooperation and follow up mechanisms

- Failure to respect human rights and implement international convention on human rights by parties to the treaty or investors should be subject to an appropriate dispute settlement mechanism. Third parties (such as trade unions, affected communities, and human rights NGOs) should be enabled to submit evidence or arguments before the mechanism.
- Encourage cooperation between treaty Parties to provide enhanced environmental, human rights and labour protection and hold expert consultations on such matters.
- A rendez-vous clause should be adopted that prescribes regular ex-post human rights impact assessments (HRIAs) and allow revisions of problematic provisions of the agreement in light of the assessments' findings. UN human rights institutions should be involved, as should independent civil society representatives. The ex-post HRIAs should study the respect of the human rights obligations by the parties and assess the extent to which the investment agreement contributes to achieving expected results in terms of enhancing human rights. They should also investigate the results of the flanking measures, investigate the causes when shortcomings and lead to dedicated procedures to adapt the obligations of the parties if needed.
- The agreement mechanism should set up a mechanism aimed at strengthening the implementation of its human rights provisions. Under this mechanism, international experts, representatives of affected communities, human rights NGOs, should hold regular consultations, channel proposals to improve the HRIAs, and introduce complaints procedures.

### Binding and enforceable protection also regarding the investor and companies activities:

- Include a human rights binding clause that states that investors and companies must comply with international human rights instruments, including the UN Guiding Principles on Business and Human Rights, and the OECD Guidelines for Multinational Enterprises.
- If investors or companies violate human rights it should be possible to use the general dispute settlement mechanism to solve the conflict. If a solution cannot be reached, sanctions in the form of substantial fines should be imposed after the general dispute resolution mechanisms have been exhausted. It should allow amicus curiae.
- "Investor-state" dispute settlement (ISDS) mechanisms have been rightly criticized as a powerful tool which has been abused to challenge measures meant to promote the public interest and thus interfering with legitimate policies and policy-making. It has displayed serious shortcomings (e.g. inconsistent and unintended interpretations of clauses, unanticipated uses of the system by investors, challenges against policy measures taken in the public interest, costly and lengthy procedures,

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limited or no transparency). As ETUC does, FIDH recommend to not set up Investor-State Dispute Settlement and to provide the only State-to-state dispute resolution to guarantee the crucial role of governments in determining and protecting the public interest. If the EU continues to support ISDS, it should allow for full transparency over the proceedings, amicus curiae by any interested or relevant third party, and deny to investors the protections afforded by the treaty when they fail to respect human rights. Arbitration panels should include human rights experts.

## **ANNEX 2 : Obligations to use trade as leverage to foster human rights, to conduct impact assessment and provide for sufficient and efficient clauses and safeguards:**

The EU has an obligation to ensure that the trade agreements it implements are not harmful to human rights abroad. In order to do so, the EU should conduct HRIAs and take all necessary measures (including adapting or renouncing an agreement, or taking flanking measures) to prevent trade and investment agreements from impeding upon the enjoyment of human rights in other countries. Such an obligation is grounded in both international and European law.

**The International Law Perspective.** As all EU Member States have ratified international conventions on human rights (such as the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*), they are required "to identify and resolve any potential inconsistency between pre-existing human rights treaties and subsequent trade or investment agreements".<sup>4</sup>

These pre-existing treaties impose three levels of obligation: to *respect* human rights (to not take any measure that may directly or indirectly lead to a violation of human rights), to *protect* human rights (to take measures to protect the population against human rights violations committed by third parties), and to *fulfil* human rights (to adopt appropriate legislative, administrative, budgetary, judicial, promotional, and other measures towards the full realisation of human rights).<sup>5</sup>

When applied to negotiations concerning international trade and investment agreements, as highlighted by the UN Special Rapporteur on the Right to Food, those obligations mean that States are "precluded from entering into trade or investment agreements that would require them to adopt certain measures (such as lowering tariffs or strengthening intellectual property rights) that would result in an infringement of human rights which they have agreed to uphold".<sup>6</sup> Further, "they must ensure that they will not be precluded from the possibility of controlling private actors whose conduct may lead to violating the human rights of others, for example as a result of an excessively high level of protection of foreign investors established on their territory or because of a broad understanding of the prohibition of imposing performance requirements on such investors".<sup>7</sup> Finally they must "refrain from concluding agreements that would affect their public budgets or balance of payments in a way that would impede the full realisation of human rights, making the fulfilment of human rights impossible or delayed".<sup>8</sup>

Notably, these obligations are owed by States to their own populations and those on their territory, as well as "to individuals on the territory of the State with which they conclude a trade or an investment agreement, to the extent that the conclusion of the agreement may affect such individuals' ability to enjoy human rights".<sup>9</sup>

The extraterritorial character of these human rights obligations has been repeatedly emphasised by the UN Committee on Economic, Social and Cultural Rights, the UN Human Rights Council, the Office of the UN High Commissioner for Human Rights and several UN Special Rapporteurs. They are detailed in the *Maastricht Principles on Extra-Territorial Obligations of States in the Area of Economic, Social and Cultural Rights*, an expert legal document adopted in September 2011<sup>10</sup>. The obligation to respect, protect and fulfil human rights implies that States should:

<sup>4</sup> Sarah Joseph, *Blame it on the WTO? A human rights critique* (Oxford University Press 2011), p.7.

<sup>5</sup> See for example E/C.12/2000/14, Committee on Economic, Social and Cultural Rights, General Comment N° 14 (2000), The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights), May 2000.

<sup>6</sup> A/HRC/19/59/Add.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 § 2.2

<sup>7</sup> *ibid.*, p. 7 § 2.3.

<sup>8</sup> *ibid.*, p. 7 § 2.4.

<sup>9</sup> *ibid.*, p. 7 § 2.6.

<sup>10</sup> *Maastricht Principles on Extra-Territorial Obligations of States in the Area of Economic, Social and Cultural Rights*, September 2011, available at: <http://www.maastrichtuniversity.nl/web/Institutes/MaastrichtCentreForHumanRights/MaastrichtETOPPrinciples.htm>.

- refrain from “actions that interfere, directly or indirectly, with the enjoyment of [human rights] in other countries”;
- take appropriate and efficient measures to “prevent their own citizens and companies from violating [the human rights] of individuals and communities in other countries”;
- take appropriate measures to ensure that “agreements concerning trade liberalisation” do “not curtail or inhibit a country's capacity to ensure the full realisation of” human rights; and
- take “steps to influence third parties to respect [rights], through legal or political means”.<sup>11</sup>

In addition, under international law, “States cannot release themselves from these obligations simply by delegating powers relevant to their implementation to the EU”.<sup>12</sup> 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 organisations.<sup>13</sup> “Member States remain bound by these obligations and will incur international responsibility to the extent that the EU does not fulfil those duties.”<sup>14</sup> 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”.<sup>15</sup>

**The European law perspective.** Respect for human rights has progressively become “a requirement of the lawfulness of European acts”.<sup>16</sup> First, 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”.<sup>17</sup> 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.<sup>18</sup> In addition, Articles 21 TUE and 207 TFUE (Treaty on the Functioning of the European Union), comprising part of the EU’s founding treaties, respectively 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”.

These provisions, contained in the primary law of the EU have been formulated to be binding (using shall instead of should), and oblige the EU not to take any action that would prevent or make more difficult the realisation of human rights, but rather to take **all measures available to facilitate the respect, protection and fulfilment of human rights** in partner countries. Such measures must be “appropriate” and “sufficient”,<sup>19</sup> and concern the implementation of the EU’s external activities as well as the planning and design of those activities.<sup>20</sup>

Applied to the negotiation and implementation of its trade and investment agreements, this means that the EU must ensure the primacy of human rights, conduct human rights impact assessments for such agreements, and adapt its agreements and policies to prevent or mitigate negative impacts on human

<sup>11</sup> E/C.12/2002/11, Committee on Economic, Social and Cultural Rights, Substantive issues arising in the implementation of the international covenants on economic, social and cultural rights, General Comment N° 15 (2002), The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), 11-29 November 2002, §§31-35; see also E/C.12/GC/19, Committee on Economic, Social and Cultural Rights, General Comment N° 19, The right to social security (art. 9 of the International Covenant on Economic, Social and Cultural Rights), November 2007, §§53-57; E/C.12/2000/4, Committee on Economic, Social and Cultural Rights, General Comment N° 14 (2000), The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights), May 2000, §§38 - 42; E/C.12/1999/10, Committee on Economic, Social and Cultural Rights, General Comment N° 13 (1999), The right to education (article 13 of the International Covenant on Economic, Social and Cultural Rights), December 1999, §56; E/C.12/2011/1, Committee on Economic, Social and Cultural Rights, Statement on the obligations of States parties regarding the corporate sector and economic, social and cultural rights, 12 July 2011; UN Human Rights Committee, *Concluding Observations on the Sixth Periodic Report of Germany*, adopted by the Committee at its 106th session, 15 October to 2 November 2012; A/HRC/19/34, Analytical study on the relationship between human rights and the environment, Report of the UNHCHR, 16 December 2011, § 69- 71.

<sup>12</sup> UN, Office of the High Commissioner for Human Rights, *The European Union and International Human Rights Law*, p. 6, available at: <http://www.europe.ohchr.org/EN/Publications/Pages/Publications.aspx>.

<sup>13</sup> 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.

<sup>14</sup> UN, Human Rights Office of the High Commissioner, *The European Union and International Human Rights Law* (n 15), p. 50.

<sup>15</sup> Tawhida Ahmed and Israel de Jesús Butler, “The European Union and Human Rights: An International Law Perspective” (n 16) 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.

<sup>16</sup> Opinion 2/94, Accession of the European Community to the European Convention on Human Rights and Fundamental Freedoms, ECtHR, [1996] ECR I-1759, Para. 33.

<sup>17</sup> *Nold v Commission* Case C-4/73 [1974] ECR 491, Para. 13.

<sup>18</sup> Articles 2 and 6, Treaty of European Union.

<sup>19</sup> UN Human Rights Committee, *Concluding Observations on the Sixth Periodic Report of Germany*, (n14), § 16: “While welcoming measures taken by the State party to provide remedies against German companies acting abroad allegedly in contravention of relevant human rights standards, the Committee is concerned that such remedies may not be sufficient in all cases (art. 2, para. 2) The State party is encouraged to set out clearly the expectation that all business enterprises domiciled in its territory and/or its jurisdiction respect human rights standards in accordance with the Covenant throughout their operations. It is also encouraged to take appropriate measures to strengthen the remedies provided to protect people who have been victims of activities of such business enterprises operating abroad.”

<sup>20</sup> Article 21, Treaty on European Union.



rights. The response has to be adequate, and can encompass the refusal to conclude an agreement or include a problematic clause, to amend or denounce an agreement, to insert safeguards, to provide compensation, to adopt mitigation measures, etc.<sup>21</sup>

Since the June 2012 adoption of the EU Strategic Framework and Action Plan on Human Rights and Democracy, these obligations have been translated into concrete commitments. Under the Framework the EU “will integrate the promotion of human rights [...] in all areas of its external action without exception”, and will ensure the “effective use of and interplay of EU external policy instruments” thus ensuring “the best articulation between dialogue, targeted support, incentives and restrictive measures”.<sup>22</sup> This means that in negotiating trade and investment agreements, the EU must conceive its negotiations in a strategic manner in such a way as to avoid human rights violations. It should also ensure that negotiations are used as an incentive to obtain the necessary safeguards - including in terms of domestic law and practice. In addition, and to that end, the Action Plan specifies that the EU has committed to “insert human rights in Impact assessments” conducted for trade agreements and to “develop methodology to aid in the consideration of human rights situations in third countries in connection with the launch or conclusion of trade and/or investment agreements”.<sup>23</sup>

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<sup>21</sup> A/HRC/19/59/Add.5, *Guiding Principles on Human Rights Impact Assessments of Trade And Investment Agreements*, (n 9), p. 8, § 3.

<sup>22</sup> Council of the European Union, 11855/12, EU Strategic Framework and Action Plan on Human Rights and Democracy, 25 June 2012. See the Framework and the action plan, para. 33.

<sup>23</sup> See the AA points 1 and 11.