

## Draft recommendation of the European Ombudsman in the inquiry into complaint 1409/2014/JN against the European Commission

Recommendation

**Case** 1409/2014/MHZ - **Opened on** 03/09/2014 - **Recommendation on** 26/03/2015 -

**Decision on** 26/02/2016 - **Institution concerned** European Commission ( Critical remark ) |

Made in accordance with Article 3(6) of the Statute of the European Ombudsman [1]

*The issue in this case is whether the European Commission should carry out a human rights impact assessment in the context of its negotiations to conclude a free trade agreement with Vietnam. The complainants believe such a specific assessment is necessary. The Commission takes the view that such an assessment is not necessary. The Commission argues that the sustainability impact assessment carried out in 2009, on a proposed EU/ASEAN free trade agreement, is sufficient because it included Vietnam. The Ombudsman's conclusion is that the Commission's failure to carry out a specific human rights impact assessment, in relation to Vietnam, constitutes maladministration and she recommends that the Commission should now carry out such an assessment without further delay.*

### The background to the complaint

1. This case concerns the free trade agreement ('FTA') negotiations between the EU and Vietnam which were launched on 26 June 2012 and the alleged failure of the European Commission to carry out a human rights impact assessment ('HR impact assessment') of the FTA.

2. The complainants (the International Federation for Human Rights and the Vietnam Committee on Human Rights [2] ) contacted the Commission on 30 April 2013, urging it to carry out an HR impact assessment. Relying on public international law, EU primary law and the Strategic Framework and Action Plan on Human Rights and Democracy of 25 June 2012 (the 'Action Plan') [3] , they argued that the EU has an obligation to ensure that its trade agreements do not harm human rights abroad. They contended that the issue was not covered by the initial impact assessment carried out during the free trade negotiations with ASEAN which had been abandoned. They argued that the launching of bilateral negotiations with Vietnam called for a new impact assessment, including an HR impact assessment. They then pointed to a number of



fundamental rights issues in Vietnam which might be further negatively affected by the FTA.

3. On 26 June 2013, the then Commissioner de Gucht replied to the complainants and provided the following explanations.

- The Commission follows an integrated approach towards the assessment of impacts which takes into account economic, social, environmental and human rights impacts in one single document. This has proved to be the most appropriate way for arriving at a balanced assessment.
- The negotiations with Vietnam were taking place under the legal framework established for ASEAN FTA negotiations in 2007. The fact that bilateral negotiations replaced the regional negotiations did not require a new impact assessment.
- The Commission reviewed the 2009 ASEAN Sustainability Impact Assessment ('SIA') and concluded that it was still valid and relevant in a bilateral context. In fact, the regional impact assessment provided country level details and addressed the impact on individual countries. As the objectives and coverage of the bilateral agreement remained the same as for a regional FTA, the longer term impacts would remain by and large the same. This was also confirmed by an impact analysis of the proposed FTA between the EU and Vietnam commissioned in 2011 under the EU-Vietnam Multilateral Trade Assistance Project ('MUTRAP').
- The Commission is committed to implementing the Lisbon Treaty which requires that EU trade policy be guided by the principles and objectives of the EU's external action including human rights. In fact, the EU's trade policy can contribute to the improvement of human rights.
- In 2011, further to the entry into force of the EU Charter of Fundamental Rights (the 'Charter'), the Commission started to introduce in its impact assessments explicit requirements for the analysis of human rights impact. Building on this practice, the Action Plan includes the insertion of human rights in the impact assessments, along with economic, social and environmental impacts. Thus, the Commission would continue to implement this commitment through systematically undertaking a human rights analysis in all impact assessments concluded in conjunction with the preparation of proposals for opening new trade negotiations.
- While trade openness alone does not automatically guarantee full respect of human rights, many precedents show that increased trade and income generate better conditions for development and growth. Sustainable development over a longer period does contribute to improved human rights conditions.
- In all EU trade negotiations, including those with Vietnam, the Commission pursues a clear institutional and legal link to the relevant political framework agreements which contain clauses on human rights, democracy, and the rule of law. This ensures that fundamental rights are essential elements of the EU's bilateral relations also when it comes to trade between both parties. The upgrading of the bilateral relationship through the EU-Vietnam Partnership and Cooperation Agreement ('PCA') signed in June 2012 also includes closer cooperation on human rights. While this agreement was still in the ratification process, the parties agreed to proceed with advanced implementation of priority aspects. Thus, an enhanced human rights dialogue had been established in January 2012. The two sessions that had already been held allowed for a substantial and in-depth exchange of views and information on issues of particular concern to the EU.
- The EU would continue to promote human rights through this enhanced dialogue, public statements, *démarches*, interaction with human rights defenders and projects such as those



funded by the European Instrument for Democracy and Human Rights.

4. On 17 April 2014, the European Parliament adopted a resolution urging the Commission to carry out an HR impact assessment of the envisaged FTA with Vietnam, pointing out that its consent to the FTA is mandatory [4] .

5. On 19 May 2014, the Council underlined in its conclusions the "*importance of continuing to carry out human rights impact assessments for trade and investment agreements*" [5] .

6. On 4 July 2014, the complainants contacted the Commission again and argued that the EU has an obligation to ensure that the trade agreements it concludes do not lead to human rights violations either in the EU or in the partner countries. This obligation results from human rights treaties which need to be effectively implemented. Articles 21 of the Treaty on European Union ('TEU') and 207 of the Treaty on the Functioning of the European Union ('TFEU') provide that the EU's external action 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*". Under these provisions, the EU is required to take all measures available to facilitate the respect, protection and fulfilment of human rights in partner countries. The complainants submitted that the requirement to carry out an HR impact assessment applies irrespective of the date on which the negotiations were launched. This is because the purpose of the HR impact assessment is to ensure that the FTA, when implemented, will not lead to any failure to comply with existing human rights obligations. They further stated that the negotiation mandate had expanded to encompass an investment component and an investor-state dispute settlement mechanism. Thus, the mandate was not the same as it had been in 2009 and the impacts of the new component should definitely be assessed.

7. On 23 July 2014, Commissioner de Gucht replied to the complainants as follows.

- Since 2011, in line with the Action Plan, the Commission systematically includes an analysis of potential human rights impacts in at least three instances: impact assessments conducted in conjunction with the preparation of proposals for opening new trade negotiations; all sustainability impact assessments carried out during the trade negotiations; and all subsequent evaluations.
- The Sustainability Impact Assessment concerning ASEAN did include the social impact with special attention paid to working conditions and associated rights. Thus, the Commission would not carry out a specific HR impact assessment for Vietnam.

There are other effective tools allowing the EU to contribute to the enhancement of respect for human rights in Vietnam, such as the PCA. In addition, the EU aims for an institutional and legal link between the FTA and the PCA which contains clauses on human rights, democracy, the rule of law and security. This linkage would ensure that these fundamental rights and principles are essential elements of bilateral relations also when it comes to trade. It would provide for the



right to apply all appropriate measures should there be a breach of these essential element clauses. The Commissioner concluded that he is " *convinced that contractual relationships offer a powerful channel to further engage with a partner country and foster reforms on issues of concern* ".

## The inquiry

8. The Ombudsman opened an inquiry into the complaint and identified the following allegation and claim:

The Commission wrongly refuses to carry out an HR impact assessment as part of the preparations for an EU free trade agreement with Vietnam. The Commission should conduct a comprehensive and participatory HR impact assessment.

9. In the course of the inquiry, the Ombudsman received the opinion of the Commission on the complaint and, subsequently, the comments of the complainants in response to the Commission's opinion. The Ombudsman's draft recommendation takes into account the arguments and opinions put forward by the parties.

## Allegation of a wrongful refusal to carry out an HR impact assessment of the envisaged FTA with Vietnam and the corresponding claim

### Arguments presented to the Ombudsman

10. The complainants argued that the absence of an HR impact assessment breaches the EU's and its Member States' commitments under international law, obligations stemming from the EU Treaties, and the 2012 Action Plan. It is also inconsistent with the Commission's current practice of systematically carrying out an HR impact assessment.

11. The complainants further argued that, although the negotiations with Vietnam had been preceded by ASEAN negotiations, they started on 26 June 2012, that is, after the entry into force of the Treaty of Lisbon, the Charter and the adoption of the Action Plan. The initial impact assessment carried out in the context of negotiations with ASEAN did not sufficiently focus on specific countries. Given that the Commission reviewed the ASEAN impact assessment and its relevance for the bilateral negotiations with Vietnam, it should also assess the human rights impact.

12. In its opinion, the Commission argued that there are no binding legal obligations under international law or EU law requiring a separate HR impact assessment for conducting FTA negotiations. In particular, the Charter, the Treaty of Lisbon and the Action Plan do not require the Commission to carry out an HR impact assessment. However, the EU is committed to



factoring human rights considerations into its trade policy and to taking human rights into account as a key element of its broader external action. Articles 21 TEU and 207 TFEU do not mandate a specific procedural instrument such as an HR impact assessment. Therefore, the EU institutions enjoy a wide margin of discretion in ensuring the general policy objective of consistency between different areas of external action.

**13.** The Commission further stated that its practice corresponds to the Action Plan in that it systematically includes an analysis of potential human rights impact in its impact assessments which are prepared for proposals for opening new trade negotiations.

**14.** Moreover, the Commission cautioned against the retroactive application of a requirement to carry out an HR impact assessment which, in its view, appeared " *unjustifiably burdensome and disproportionate* ". It noted that the Council authorised the negotiations with ASEAN (including Vietnam) in April 2007, and that, since then, the Commission had already carried out a relevant SIA in 2009. The bilateral negotiations with Vietnam were conducted in the framework of the 2007 authorisation. In the same vein, the Commission submitted that its new practice, developed in 2011 and corresponding to the Action Plan, to systematically include in its impact assessments an HR impact assessment, applies to new initiatives only and does not apply retroactively.

**15.** The Commission further maintained that the 2009 SIA contained sufficient country specific data to allow the Commission to assess the case of Vietnam. The Commission took the view that the findings were still relevant as regards the " *direction and magnitude of economic, social and environmental impacts* ". The trends in the SIA were confirmed by the MUTRAP impact analysis in 2011. The 2009 SIA analysed several issues relating to human rights such as issues linked to the International Labour Organisation's core labour standards and the impact on poverty or gender. The Trade and Sustainable Development chapter of the FTA under negotiation ensures that these issues are addressed in particular areas such as promoting the Decent Work Agenda, labour relations and social dialogue. Human rights issues are further addressed in the context of the human rights dialogue with Vietnam, for which the PCA provides a strong framework. The Commission finally stated that human rights constitute essential elements of the EU-Vietnam relationship and that the Commission aims at reflecting this in the FTA.

**16.** The Commission finally explained that an HR impact assessment is not intended to pass judgment on the actual human rights situation in a country, but to bring to the attention of policy-makers and other stakeholders the potential impacts (positive and/or negative) of different options under consideration and thus to support sound policy-making.

**17.** In their observations, the complainants maintained that the 2009 SIA cannot replace a proper HR impact assessment because it did not contain an HR impact assessment. They added that the reference to poverty reduction cannot replace an assessment based on the normative content of human rights.

**18.** As regards the 2011/2012 EU commitments to carry out an HR impact assessment, they



merely provided more concrete guidelines in respect of obligations which already existed. The Treaties oblige the EU not to take any action that would prevent or make more difficult the realisation of human rights. They oblige the EU to take measures to ensure the respect of human rights, both in its external action and internally. An HR impact assessment aims at defining those measures, including the wording and structure of the FTA, in order to prevent adverse effects on the enjoyment of human rights in the EU and in the partner countries.

**19.** They argued that, in any event, the point in time as of which the obligation to carry out an HRIA is applicable should be the moment when the decision to sign the text of the FTA is taken, not the moment when the negotiation mandate is issued. It is at that point in time that the EU needs to be able to demonstrate that it took into account human rights impacts and defined its policy options in consequence [6] .

**20.** In addition, the complainants argued that the Commission ignored the problem that the 2009 SIA did not cover the investment protection part of the FTA which was added to the negotiations only in 2013. Nor did it cover the inclusion of an investor-State dispute settlement mechanism which is still being considered. Finally, the complainants submitted that " *Vietnam must take important steps in order to comply with international human rights standards and obligations.* "

## **The Ombudsman's assessment leading to a draft recommendation**

**21.** The role of the European Ombudsman is to supervise the EU institutions and bodies in their administrative activities and, in particular, to verify that they act in accordance with the principles of good administration. It is the Ombudsman's longstanding view that good administration means, in the first place, observance of and respect for fundamental rights. In fact, where fundamental rights are not respected, there cannot be good administration. Accordingly, EU institutions and bodies must always consider the compliance of their actions with fundamental rights and the possible impact of their actions on fundamental rights.

**22.** The above applies also with respect to administrative activities in the context of international treaty negotiations. The EU Administration should not only ensure that the envisaged agreements comply with existing human rights obligations and do not lower the existing standards of human rights protection, but it should also aim at furthering the cause of human rights in the partner countries.

**23.** In fact, Article 21(1) TEU provides that " *[t]he Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks 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.* " According to Article 21(2) TEU, "[t] he Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to: [...] (b) consolidate and support democracy, the rule of law,





*human rights and the principles of international law [...]*. These principles apply also in the area of the common commercial policy [7] .

**24.** Although the Ombudsman agrees with the Commission that there appears to be no express and specific legally binding requirement to carry out an HR impact assessment concerning the FTA with Vietnam, she is of the view that it would be in the spirit of the legal provisions mentioned above to carry out an HR impact assessment. The Commission seems to admit that no comprehensive HR impact assessment has been carried out so far. The 2009 SIA, to which the Commission referred, covers only certain aspects of the impact on social rights. In the Ombudsman's view, the 2009 SIA is therefore not a proper substitute for an HR impact assessment.

**25.** An HR impact assessment could lead the Commission to conclude that the envisaged FTA complies with existing human rights obligations and standards and will have no adverse effects on human rights, especially in Vietnam. Or, depending on the results of its analysis, the Commission could consider appropriate measures which would ensure that no such adverse effects would occur. Carrying out an HR impact assessment would also be consistent with the Commission's current practice of carrying out HR impact assessments and the 2012 Action Plan which requires the Commission to " *[i]ncorporate human rights in all Impact Assessment* ", including as regards " *trade agreements that have significant economic, social and environmental impacts* " [8] .

**26.** As regards the Commission's argument that any requirement to carry out an HR impact assessment should not be applied retroactively and that doing so would have " *unjustifiably burdensome and disproportionate* " effects, the Ombudsman notes that the respect for human rights cannot be made subject to considerations of mere convenience. As the complainants correctly pointed out, what is decisive is not at which point in time the EU decided systematically to carry out HR impact assessments and whether that was before or after the FTA negotiations with Vietnam started, but rather to ensure that the FTA with Vietnam, which is still being negotiated [9] , will have no negative impact on human rights. Taking into account what is at stake, it would be excessively formalistic to say that, even though it is still possible to carry out an HR impact assessment of the envisaged FTA and to take the HR impact assessment results into account, this should not be done because the negotiations are a follow-up to the ASEAN negotiations which were launched before the Commission started systematically carrying out HR impact assessments and before the Council adopted the 2012 Action Plan.

**27.** In any event, the Ombudsman notes that the negotiations with Vietnam formally started on 26 June 2012, which is one day after the adoption of the Action Plan requiring the Commission to carry out HR impact assessments of EU free trade agreements with third countries. The Ombudsman is therefore not convinced that insisting on an HR impact assessment in relation to the FTA with Vietnam would amount to a retroactive application of the approach set out in the Action Plan.

**28.** Moreover, although the negotiations with Vietnam are linked to the ASEAN negotiations, they are formally distinct. The Commission did not challenge the complainant's argument that



the negotiation mandate was subsequently extended to cover an investment component and a dispute settlement mechanism. In addition, the Commission admitted that it had reviewed the ASEAN impact assessment. It could have therefore also carried out an HR impact assessment. For all these reasons, the Ombudsman is of the view that the Commission's argument based on retroactivity is not tenable.

**29.** In addition, the Ombudsman notes that the European Parliament, the only EU body directly elected by European citizens, called on the Commission to carry out an HR impact assessment of the envisaged FTA with Vietnam.

**30.** In light of the above, the Ombudsman finds that the Commission's refusal to carry out an HR impact assessment constitutes an instance of maladministration. She therefore makes a corresponding draft recommendation below, in accordance with Article 3(6) of the Statute of the European Ombudsman.

## The draft recommendation

On the basis of the inquiry into this complaint, the Ombudsman makes the following draft recommendation to the European Commission:

**Taking into account the above findings, the Commission should carry out, without further delay, a human rights impact assessment in the matter.**

The Commission and the complainant will be informed of this draft recommendation. In accordance with Article 3(6) of the Statute of the European Ombudsman, the Commission shall send a detailed opinion by 30 June 2015. The detailed opinion could consist of the acceptance of the draft recommendation and a description of how it has been implemented.

Strasbourg, 26/03/2015

Emily O'Reilly

European Ombudsman

[1] Decision of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties (94/262/ECSC, EC, Euratom), OJ 1994 L 113, p. 15.

[2] The Vietnam Committee on Human Rights is a member organisation of the International Federation for Human Rights.





[3] Council Document 11855/12, 25 June 2012. The Action Plan sets out that the Commission should " *[i]ncorporate human rights in all Impact Assessment* " including as regards " *trade agreements that have significant economic, social and environmental impacts* " (point I/1).

[4] European Parliament resolution of 17 April 2014 on the state of play of the EU-Vietnam Free Trade Agreement (2013/2989(RSP)). See in particular paragraphs 1 and 25. Paragraph 25 reads as follows:

*" Urges the Commission to carry out as soon as possible a Human Rights Impact Assessment, as requested by Parliament in its resolution of 25 November 2010 on human rights and social and environmental standards in international trade agreements, with a view to ensuring 'comprehensible trade indicators based on human rights and on environmental and social standards', and in line with the Report of the UN Special Rapporteur on the right to food "*.

[5] See the Council conclusions on a rights-based approach to development cooperation, encompassing all human rights of 19 May 2014, point 8.

[6] Case C-310/04, Spain v Council, [2006] ECR I-7318, paragraphs 133-135.

[7] Article 207(1) TFEU provides: "[...] *The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.* " Article 21(3) TFEU provides : " *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 covered by this Title and Part Five [TFEU ...]*". Part Five TFEU covers, among other things, the common commercial policy.

[8] Point I/1.

[9] <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1242> [Link]