

Decision in case 1409/2014/MHZ on the European Commission's failure to carry out a prior human rights impact assessment of the EU-Vietnam free trade agreement

Decision

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) |

The case concerns whether the European Commission should have carried out a human rights impact assessment in the context of its negotiations to conclude a free trade agreement with Vietnam. The complainants believed that such an assessment was necessary, whereas the Commission's position was that it was not necessary since a sustainability impact assessment had already been carried out in 2009 on a proposed EU/ASEAN free trade agreement, which included Vietnam.

The Ombudsman's conclusion was that the Commission's failure to carry out a specific human rights impact assessment, in relation to Vietnam, constituted maladministration. In March 2015 she recommended that the Commission should carry out such an assessment without further delay.

The Commission refused. It argued that its "non-trade policy instruments" and the human rights clauses in the partnership and cooperation agreement achieved that same purpose.

The Ombudsman did not agree and in doing so underlined the features inherent in the human rights impact assessment tool. As the Agreement has been concluded in the meantime, the Ombudsman closed the case with a critical remark.

The background

1. This case concerns the Free Trade Agreement negotiations between the EU and Vietnam which were launched on 26 June 2012 and the failure of the European Commission to carry out a prior human rights impact assessment of the EU/Vietnam Free Trade Agreement. It is relevant to note that there are serious concerns regarding the protection of the human rights in Vietnam especially in relation to freedom of expression, assembly and association, religious freedom, and as regards detention of human rights activists and violence against women. [1]



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 a human rights impact assessment. This was followed by an exchange with the Commission during 2014.

3. 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] , the complainants 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 [4] , which had been abandoned. They argued that the launching of bilateral negotiations with Vietnam called for a new impact assessment, including a human rights impact assessment. The complainants submitted that the absence of a human rights impact assessment is inconsistent with the Commission's current practice of systematically carrying out a human rights impact assessment in similar cases.

4. The complainants then pointed to a number of fundamental rights issues in Vietnam which might be further negatively affected by the Free Trade Agreement. They submitted that the requirement to carry out a human rights impact assessment applies irrespective of the date on which the negotiations were launched. This is because the purpose of the human rights impact assessment is to ensure that the free trade agreement, when implemented, will not lead to any failure to comply with existing human rights obligations.

5. The Commission refused to carry out a human rights impact assessment of the free trade agreement. It argued that: (i) it follows an integrated approach towards the assessment of impacts which takes into account economic, social, environmental and human rights impacts in one single document; (ii) the negotiations with Vietnam were taking place under the legal framework established for ASEAN free trade agreement negotiations in 2007, reviewed in 2009; (iii) the 2009 Sustainability Impact Assessment concerning ASEAN did include the social impact with special attention paid to working conditions and associated rights, and there is no need for a separate human rights impact assessment concerning Vietnam; (iv) 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; (v) the upgrading of the bilateral relationship through the EU-Vietnam Partnership and Cooperation Agreement signed in June 2012 is legally linked with the FTA and contains clauses on human rights, democracy, the rule of law and security; (vi) human rights issues are further addressed in the context of the human rights dialogue with Vietnam, for which the Partnership and Cooperation Agreement provides a strong framework; (vii) the EU will continue to promote human rights through this enhanced dialogue, public statements, foreign policy *démarches* [5] , interaction with human rights defenders and projects. The Commission submitted that its new practice, to systematically include in its impact assessments a human rights impact assessment, applies to new initiatives only and does not apply retroactively when negotiations have already started.

6. Moreover, the Commission stated that 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.

7. Following its May 2014 meeting, the European Council underlined in its conclusions the "*importance of continuing to carry out human rights impact assessments for trade and investment agreements*" [6] .

8. In August 2014, the complainants lodged a complaint with the European Ombudsman. They alleged that the Commission wrongly refused to carry out a human rights impact assessment as part of the preparations for an EU Free Trade Agreement with Vietnam. They claimed that the Commission should conduct a comprehensive and participatory human rights impact assessment for the Free Trade Agreement.

Allegedly unjustified refusal to carry out a human rights impact assessment of the envisaged Free Trade Agreement with Vietnam and the corresponding claim

The Ombudsman's recommendation

[7]

9. Having examined the arguments and opinions put forward by the parties, the Ombudsman made the finding that the Commission's refusal to carry out a human rights impact assessment for the FTA with Vietnam constitutes maladministration. On 26 March 2015, the Ombudsman made a **recommendation to the Commission that it carry out, without further delay, a human rights impact assessment in the matter.**

10. In her analysis leading to her recommendation, the Ombudsman pointed out 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. This 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 should also aim at furthering the cause of human rights in the partner countries.

11. The Ombudsman noted that the principles set out in Article 21(1) TEU [8] and Article 21(2) TEU [9] apply also in the area of the common commercial policy [10] . Although the Ombudsman agreed with the Commission that there appears to be no express and specific legally binding requirement to carry out a human rights impact assessment concerning the relevant free trade agreement, she took the view that it would be in conformity with the spirit of the legal provisions mentioned above to carry out a human rights impact assessment. Since the 2009 sustainability impact assessment concerning ASEAN covers only certain aspects of the



impact on social rights, it is not a proper substitute for a human rights impact assessment.

12. The Ombudsman further pointed out that a human rights impact assessment could lead the Commission to conclude that the envisaged free trade agreement 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 might need to consider appropriate measures which would ensure that no such adverse effects would occur.

13 . The Commission had argued that the Free Trade Agreement negotiations had started before the Lisbon Treaty entered into force (and thus prior to Article 21 TEU advancing the human rights cause in third countries), and before the adoption of its 2012 Action Plan. In response to this the Ombudsman pointed out that it would be in conformity with the spirit of Article 21 to carry out a human rights impact assessment. Furthermore, carrying out a human rights impact assessment would also be consistent with the Commission's current practice of carrying out human rights impact assessments and the 2012 Action Plan which requires the Commission to "[i]ncorporate human rights in all Impact Assessments", including as regards "trade agreements that have significant economic, social and environmental impacts" [11] . As regards the Commission's argument that any requirement to carry out a human rights impact assessment should not be applied retroactively and that doing so would have "unjustifiably burdensome and disproportionate" effects, the Ombudsman noted that respect for human rights cannot be made subject to considerations of mere convenience. It would be excessively formalistic to say that, even though it is still possible to carry out a human rights impact assessment of the envisaged free trade agreement and to take the human rights 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 human rights impact assessments and before the Council adopted the 2012 Action Plan.

14. In any event, the Ombudsman noted that the negotiations with Vietnam formally started on 26 June 2012, after the Lisbon Treaty had entered into force and one day after the adoption of the Action Plan requiring the Commission to carry out human rights impact assessments of EU free trade agreements with third countries.

15 . On 31 July 2015 **the Commission** rejected the Ombudsman's recommendation. It reiterated its view that it was only in 2011 that the Commission undertook the commitment to include human rights in its sustainability impact assessments while the sustainability impact assessments of EU-ASEAN free trade agreement negotiations was finalized in 2009. It took the view that a standalone human rights impact assessment for the free trade agreement at issue is against the Commission's established policy and commitment to ensure that economic, social, environmental and - as from 2011 - human rights impacts are all considered side by side in all the assessments and evaluations in line with an integrated approach. This is reflected in the EU Action Plan adopted in 2012 which does not require the Commission to carry out a specific human rights impact assessment for free trade agreements but to "insert human rights in impact assessments, as and when it is carried out". In this respect, **the complainants** pointed out that, by taking the view that a human rights impact assessment is not necessary in these



circumstances, the Commission might jeopardise the quality and seriousness of any human rights impact assessments of forthcoming free trade agreements with other countries.

16 . In its detailed opinion, **the Commission** also took the view that there are measures/instruments in place which play the same role as a human rights impact assessment. They pursue the very purpose of the prior standalone human rights impact assessment enabling the Commission to identify and address any impact of the free trade agreement on human rights in Vietnam.

17 . Those measures/instruments are: (i) human rights clauses included in the free trade agreement with Vietnam considered in conjunction with the human rights clauses included in the EU Partnership and Cooperation Agreement with Vietnam; and (ii) non-trade policy tools (when considering the impact of trade policies on human rights, the overall relations of the EU with the country concerned should be taken into account).

18 . The Commission also stated that, once the Agreement is in place, it will make a subsequent evaluation of the impact of the free trade agreement on the human rights situation in Vietnam ('*ex-post* human rights impact assessment').

19 . In their subsequent observations, the complainants contended that the measures/instruments referred to by the Commission do not ensure the positive impacts of the free trade agreement on human rights and do not permit the avoidance/mitigation of negative impacts. They cannot be a substitute for prior human rights impact assessments. Only a prior human rights impact assessment would have helped determine whether measures/instruments mentioned under points (i) and (ii) above were adequately designed and implemented by considering both the trade measures negotiated and the human rights situation and practices in Vietnam.

20 . The Commission and the complainants presented the following more detailed arguments:

20.1. The role of human rights clauses included in the free trade agreement and the EU-Vietnam Partnership and Cooperation Agreement

- The Commission took the view that the human rights clauses in both the Free Trade Agreement and the Partnership and Cooperation Agreement may play an important role in preventing human rights abuses. The Partnership and Cooperation Agreement provides that respect for human rights is an essential element of EU-Vietnam relations and that a suspension of the agreement is possible in the event of human rights violations. Through the negotiation of the Free Trade Agreement, the EU strives to ensure the inclusion in the Free Trade Agreement itself of a number of human rights-related provisions such as: (i) the principle in the preamble reaffirming the commitment of the parties to key international human rights conventions; (ii) the institutional and legal link between the Free Trade Agreement and the Partnership and Cooperation Agreement provisions enabling each party to take appropriate measures in the event of severe and systematic violations of human rights including the partial or full suspension of the Free Trade Agreement or the partial or full suspension of the Partnership and Cooperation Agreement, or both if the Council so decides ('human rights clause'); (iii) the



creation of institutional structures permitting dialogue between authorities and non-state actors, through which stakeholders allegedly affected by the Free Trade Agreement can raise and discuss their concerns; (iv) mechanisms ensuring respect for International Labour Organisation (ILO) standards (no social dumping is allowed); (v) the Chapter on transparency providing for the right of review and appeal, among others, and the right to a decision based on evidence. The Free Trade Agreement will set up Domestic Advisory Groups with the task of monitoring the human rights impact of the Free Trade Agreement. It will also provide for regular retrospective human rights impact evaluations, with a view to identifying and addressing any impact on human rights.

- The complainants took the view that an assessment of EU practice in the area of free trade agreements or cooperation agreements generally shows that the clause providing for the suspension of a particular agreement, in response to human rights breaches, is not activated when human rights violations occur routinely in a country. This clause is activated only when there are exceptional circumstances such as a *coup d'état* or flawed elections. Routine human rights violations, they argued, lead only to the suspension of meetings and technical cooperation programmes. The suspension clause, based on human rights abuses, is not used in cases where EU trade policies negatively affect human rights. In any event, suspension the clause may not be effective because the Partnership and Cooperation Agreement does not describe how the suspension procedure will function; neither does it describe the procedures and mechanisms intended to foster and support human rights. Furthermore, the usefulness of these procedures and mechanisms is doubtful in circumstances where they appear to be intended to avoid for as long as possible a decision to activate the suspension clause [12] . Moreover, the sanctions are not designed as a tool to remedy the negative impact of a trade agreement on human rights.

- The complainants pointed out that the Free Trade Agreement link to the Partnership and Cooperation Agreement human rights clause is not useful because the Partnership and Cooperation Agreement (not yet ratified) will be valid for only five years and may not be renewed.

- The complainants pointed out that the Free Trade Agreement refers to labour standards only. It does not describe the enforcement mechanism and the impacts of trade and investment on human rights. In addition to the social and environmental provisions [13] , the Free Trade Agreement should also include a human rights chapter. The Free Trade Agreement should provide for the establishment of a Human Rights Committee which deals with the impact of the Free Trade Agreement on human rights, and helps to find remedies if violations occur. Such a committee should be composed of human rights defenders and independent human rights NGOs. It should have a dedicated budget to enable the members of the Committee to undertake field visits and interact with civil society and human rights experts. In addition, the Free Trade Agreement should set up a complaints mechanism accessible to individuals, and communities whose human rights are affected by trade and investment. The complainants pointed out in this respect that, in 2012, the European Parliament called for the inclusion of a complaints procedure open to social partners and civil society, the establishment of an independent body to settle disputes and the possibility of having recourse to a dispute settlement mechanism which makes provision for fines and the suspension of trade benefits (Annual Report of 2012 on human rights in World). Finally, they considered that the Free Trade Agreement should include a clause binding investors to comply with corporate responsibility



standards as defined by the UN.

20.2. Roundtable of May 2015

- The Commission attached importance, in the context of the human rights impact assessment, to a roundtable which it organised along with the European External Action Service (EEAS) in Brussels on 12 May 2015. EU Stakeholders on trade, sustainable development and human rights in EU-Vietnam relations took part in the roundtable. The roundtable was organised in the context of the regular civil society dialogue carried out through all the stages of the Free Trade Agreement negotiation process. The event provided a platform for interaction between the Commission and civil society and allowed stakeholders to voice their concerns. The event was recorded and made available on the website of DG Trade. The Commission also published a summary of the Roundtable deliberations.
- Building on contributions and recommendations made during the roundtable discussions, the Commission is in the process of drafting an " *ad hoc EU-in house report* " which will also be published on the website once finalised. It will look " *in greater detail* " at the negotiated Free Trade Agreement provisions in the light of the Partnership and Cooperation Agreement, their implementation and ongoing and planned development assistance programmes providing technical assistance and exchange of best practices and other measures of this kind. The Commission underlined that " *these measures will address human rights and will aim at providing transparent and operational guidance on what the EU should do to increase the likelihood that the Free Trade Agreement will have a positive impact on the human rights situation in Vietnam .* "
- In late January 2016 the Commission published a paper [14] which it describes as "developing the issues discussed in the workshop" in the context of the legal texts of the Free Trade Agreement.
- The complainants considered that the May 2015 roundtable cannot replace a comprehensive, in-depth evidence-based human rights impact assessment with wide-ranging consultations engaging **all** relevant stakeholders within and outside the EU. Moreover, during the roundtable discussions in which the complainants also took part, the Commission did not reveal much about the Investor-State Dispute Settlement (ISDS) mechanism and whether a solution was found to address its serious impacts on human rights. The complainants pointed out that clashes between a State's obligations resulting from investment treaties and that State's human rights obligations resulting from international and domestic law are frequent and have been dealt with in the context of regulatory measures relating to water and sanitation, health and land reform.

20.3. EU-Vietnam Dialogues on human rights, EU High-level visits to Vietnam, the work of the EU Delegation in Hanoi, EU Development aid

- The Commission stated that, although the Partnership and Cooperation Agreement had not then been ratified, on the basis of its provision concerning cooperation on human rights, four human rights Dialogues between the EU and Vietnam authorities have taken place since 2012, and consultations with civil society in Brussels and in Vietnam took place beforehand and afterwards. It also argued that during EU high-level visits to Vietnam, human rights issues were raised. Furthermore, the EU Delegation in Hanoi keeps a close watch on cases of people who have been victims of human rights violations and initiates cooperation on the ground with civil



society, human rights defenders and like-minded countries. Finally, the Commission pointed out that almost EUR 20 million have been committed under EU-funded development programmes and projects to directly support democracy, human rights, civil society organisation and access to justice for vulnerable groups in Vietnam. An additional allocation of up to EUR 36 million has been earmarked to finance EU development cooperation projects to promote governance and the rule of law. Bilateral dialogues and actions on the environment and employment further promote respect for human rights in Vietnam.

- The complainants doubted that that these policy tools address the human rights impacts of the Free Trade Agreement. In their view, the Commission relies on its traditional instruments but does not explain and does not provide guarantees as to how the instruments should be adapted to meet the challenges brought about by the Free Trade Agreement. A human rights impact assessment would have given more details and concrete suggestions for addressing specific issues. The dialogues, *démarches*, statements and development cooperation, referred to by the Commission, cannot maximise the positive impacts and prevent or mitigate the negative impacts on human rights that the Free Trade Agreement may have. They have a limited capacity to create an environment in which trade and investments may take place in a timely manner and with due regard for human rights. They do not ensure effective remedies when violations occur. As regards dialogues in particular, the complainant referred to the European Parliament annual resolutions on human rights in the World [15]. Parliament's views may apply to the EU dialogue with Vietnam on human rights, for instance its view that dialogues became a process rather than a means, or that they do not have sufficient civil society involvement. During the most recent EU-Vietnam Dialogue which took place in January 2015, trade investment issues were not addressed at all, despite the express demands of civil society. The Free Trade Agreement should include provisions on specific dialogues on trade and human rights.

- In the complainants' view, *démarches* and statements are not suitable tools for addressing the impact of the Free Trade Agreement because in the summits and high-level meetings, human rights are addressed in general terms only. The complainants challenged the Commission's statement in the opinion that human rights issues were raised during the visits to Vietnam by the then European Commission President Mr Barroso and the then Vice-President/High Representative Ms Ashton. According to the EEAS website, in 2014-15, no EU statement was made as regards trade-related human rights violations in Vietnam.

- The complainants also referred to the Commission's arguments concerning EU-funded development programmes and projects devoted to supporting democracy, human rights and related issues. They stated that more information is needed to assess their adequacy to deal with and prevent trade-related human rights abuses. Publicly accessible reports on the EU development projects and programmes do not provide the information needed in order to assess how successful they were in supporting governance and the rule of law. In fact, the Multiannual Indicative Programme for Vietnam 2014-2020 [16] states that improvements in governance mechanisms and changes in corruption practices cannot be expected in the short term. The Programme says nothing about how the Free Trade Agreement's potential impacts will be mitigated (such as the loss of state revenues brought about by the lifting of tariff barriers, the impact on the most vulnerable sectors and communities, the potential impacts on access to water, food, education and adequate living conditions). The reality in Vietnam is that forced evictions and confiscations of land by the State for development purposes, exacerbated by endemic official corruption and abuse of power have left hundreds of thousands of farmers



homeless. There are bad working conditions generally and salaries are low. Those who denounce violations of economic, social and cultural rights are at risk of harassment, intimidation, arbitrary arrest and imprisonment. Under such circumstances, the Free Trade Agreement may aggravate human rights abuses without providing access to effective remedies for affected populations.

20.4. Retrospective (ex-post) human rights impact assessment

- The Commission provided assurances that a human rights impact assessment will be included in the first retrospective evaluation of the actual impact of the Free Trade Agreement on human rights in Vietnam.
- The complainants consider that such a human rights impact assessment cannot avoid the impact that the Free Trade Agreement could have in the interim because remedying that impact will depend on the willingness of the Parties to renegotiate the problematic clauses. In any event, the Free Trade Agreement includes what are known as 'sunset clauses' stipulating that protection for investments is granted for a period of about 10 or even 20 years after termination of the Free Trade Agreement. It follows that if such a termination were to happen because of human rights violations, the retrospective human rights impact assessment could not correct the negative effects on human rights of the investment protection provided by the Free Trade Agreement.

The Ombudsman's assessment after the recommendation

21 . On 2 December 2015, while the Ombudsman's inquiry was still underway, the EU-Vietnam Free Trade Agreement was concluded. It has yet to be presented by the Commission for approval to the Council of Ministers and, subsequently, tabled for ratification by the European Parliament. At the outset of this assessment, the Ombudsman points out that her inquiry in the present case concerns only the alleged failure by the Commission to carry out a prior (*ex ante*) human rights impact assessment of the EU Free Trade Agreement with Vietnam. The Ombudsman will thus not take a position on the complainants' remarks, submitted in their observations, on the Commission's detailed opinion on how the Free Trade Agreement and the Multiannual Indicative Programme for Vietnam 2014-2020 should have been concluded.

22 . The Ombudsman regrets that the Commission maintained its refusal to carry out a human rights impact assessment for the Free Trade Agreement while it was still being negotiated. The Ombudsman points out that in its resolution of 17 April 2014 [17] , the European Parliament specifically asked the Commission to carry out a human rights impact assessment before concluding the relevant agreement.

23 . While the Ombudsman agrees with the Commission that a prior human rights impact assessment carried out jointly with environmental and social impact assessments could be equally effective as a separate one, she points out that such an assessment was not carried out in advance of the Free Trade Agreement with Vietnam in the multilateral context of the agreement EU-ASEAN or otherwise.



24 . In the Ombudsman's view, the Commission should do its utmost to assure EU citizens that it has thoroughly analysed the measures negotiated in the Free Trade Agreement in order to prevent or mitigate its negative impact on human rights in Vietnam. Indeed, the Commission is well aware of the specific human rights situation in Vietnam and in this context of the importance of assessing the impact of the Free Trade Agreement on human rights. The most certain way of doing so efficiently is to carry out a human rights impact assessment **in the preparation phase** of the Free Trade Agreement and **not after** the Free Trade Agreement enters into force, which the Commission says it will do. By their nature, negotiations aim at accommodating parties' objectives until a final agreement is reached. For the human rights impact assessment to have a significant effect, it should be carried out **before the agreement is** concluded if the trade which the agreement brings about is intended to have a positive impact on the human rights situation in a given country.

25 . The Ombudsman also notes with regret that, in its detailed opinion, the Commission reiterated its earlier arguments that the commitment it had entered into, to carry out a human rights impact assessment, did not apply to the agreement at issue because this commitment postdates the date on which the EU started its negotiations with Vietnam. The Ombudsman had already made it clear in her recommendation (as explained in point 13 above) that she does not accept this argument. The Commission further argued that, in any event, there was no need for a prior human rights impact assessment in the present case, in light of its own and the EEAS's various actions and initiatives. The Ombudsman cannot accept this new argument either. As rightly argued by the complainants, the human rights impact assessment is not a collection of data or a response to public opposition, but rather an analytical tool for demonstrating that all necessary factors and circumstances have been taken into account in framing a policy. The human rights impact assessment tool identifies the sources of risks and the human rights impacts on the affected stakeholders at each stage of the implementation of the agreement concerned. Its role is preventive in the first place because when negative impacts are identified, either the negotiated provisions need to be modified or mitigating measures have to be decided upon before the agreement is entered into. This analytical tool cannot be replaced by trade or non-trade policy measures, meetings with stakeholders, internal summaries or reports of such meetings. The Commission has a vast knowledge of what this tool should look like. Its own Guidelines on the analysis of human rights impacts in impact assessment for trade-related policy initiatives, adopted in July 2015, provide clear guidance [18] .

26 . In its opinion, the Commission sought to mitigate the failure to conduct a prior human rights assessment of the Free Trade Agreement by reference to the fact that the Partnership and Cooperation Agreement already contained some human rights clauses and that the Free Trade Agreement makes "an institutional and legally binding linkage to the Partnership and Cooperation agreement." [19] The Ombudsman however does not accept that these clauses in the Partnership and Cooperation Agreement have the same usefulness, or serve the same purpose, as would a prior human rights impact assessment. In fact, these clauses are ambiguous as regards the human rights implications of EU trade with Vietnam (for instance, the 'suspension clause' in the Partnership and Cooperation Agreement [20] , in the event of human rights violations, does not explicitly mention the possibility of suspending mutual trade commitments [21]).



27 . As matters stand, it would indeed appear, as argued by the complainants, that the Commission's approach involves concluding the Free Trade Agreement whatever its impact may be, promoting human rights by using traditional policies and tools, and then, where human rights have been negatively affected, carrying out a retrospective human rights impact assessment. Clearly, prior human rights impact assessments are aimed at anticipating and eliminating or avoiding such negative effects on human rights. The Commission failed to convince the Ombudsman of the correctness of its approach in this case. 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. In the view of the Ombudsman, it is far preferable, when negotiating such an Agreement, that any measures intended to prevent or mitigate human rights abuses should be informed by a prior human rights impact assessment.

28 . In light of the above considerations, the Ombudsman concludes that the Commission has failed to provide valid reasons in support of its position that there was no need to carry out a prior human rights impact assessment on the EU Free Trade Agreement with Vietnam. This constituted maladministration. Since (i) the negotiations have in the meantime come to an end [22] , and, therefore, it is not now possible to remedy this omission, and (ii) the Commission clearly considers that human rights impact assessments will be conducted in the future cases as regards free trade agreements [23] , the Ombudsman decides not to make a special report to Parliament [24] but will close her inquiry with a critical remark.

The Ombudsman's conclusion

On the basis of the inquiry into this complaint, the Ombudsman closes it with the following critical remark:

The Commission failed to provide valid reasons for its refusal to carry out a prior human rights impact assessment for the EU Free Trade Agreement with Vietnam when negotiations on that agreement were still ongoing. This constitutes maladministration.

Strasbourg, 26/02/2016

Emily O'Reilly

European Ombudsman

[1] See points 19, 23, 24, 25, 26 and 28 of the European Parliament non-legislative resolution of 17 December 2015 concerning the Framework Agreement on Comprehensive Partnership and Cooperation between the EU and its Member States, of the one part, and the Socialist



Republic of Vietnam, on the other part (

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2015-0468+0+DOC+XML+V0//EN>

[Link]), and the European Parliament's Resolution on the situation in Laos and Vietnam, dated November 2009 (P7_TA(2009)0104) referred to therein.

[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, available at:

<http://data.consilium.europa.eu/doc/document/ST-11855-2012-INIT/en/pdf> [Link]

The Action Plan stipulates that the Commission should "[i]ncorporate human rights in all Impact Assessments" including as regards "trade agreements that have significant economic, social and environmental impacts" (point I/1).

[4] The Association of Southeast Asian Nations.

[5] *Démarches* (fr) are diplomatic steps or initiatives, especially formal appeals and protests. See http://eeas.europa.eu/delegations/vietnam/about_us/delegation_role/index_en.htm

[6] See the Council conclusions on a rights-based approach to development cooperation, encompassing all human rights of 19 May 2014, point 8, available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/foraff/142682.pdf [Link]

[7] For further information on the background to the complaint, the parties' arguments, the Ombudsman's inquiry and her analysis leading to the recommendation, please refer to the full text of the Ombudsman's recommendation available at:

<http://www.ombudsman.europa.eu/cases/draftrecommendation.faces/en/59398/html.bookmark> [Link]

[8] "The 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."

[9] "The 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 [...]"

[10] Article 207(1) TFEU provides that: "[...] The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action." Article 21(3) TEU provides as follows: "[t]he 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.

[11] Point I/1 of the 2012 Action Plan.

[12] In the complainants' view the level of the human rights protection offered by the Cotonou Agreement is higher
(https://ec.europa.eu/europeaid/where/acp/overview/cotonou-agreement/index_en.htm_en)

[13] Chapter 'Trade and sustainable development'.

[14] Commission Staff Working Document "Human Rights and Sustainable Development in the EU-Vietnam Relations with specific regard to the EU-Vietnam Free Trade Agreement "
SWD(2016)21 final http://trade.ec.europa.eu/doclib/docs/2016/january/tradoc_154189.pdf

[15] For instance in 2015:

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2F%2FEP%2F%2FTEXT%2BTA%2BP8-TA-2015-0076>

[16] https://ec.europa.eu/europeaid/multi-annual-indicative-programme-vietnam-2014-2020_en

[17] 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 ".

[18] Available at: http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153591.pdf [Link]

The human rights impact assessment should (i) verify the existence of a problem, (ii) identify its underlying causes, (iii) assess whether EU action is needed, and (iv) analyse the advantages and disadvantages of available solutions. The human rights impact assessment should allow for recommendations to be made in order to maximise the benefits of the proposed agreement and prevent and minimise its potential negative impact. The analysis should take into account the existing legal frameworks and domestic policies in the EU and partner country as well as their capacity to mitigate/enhance the impact of the trade policy initiative under consideration.

[19] The Commission pointed out the same in its staff working document, referred to in footnote 13.

[20] Article 57 (2) of the Partnership and Cooperation Agreement provides that if a party fails to



fulfil its obligations under the Agreement the other party is empowered to take " *appropriate measures* ." Article 57(4)4 provides that " *In the selection of these measures priority must be given to those which least disturb the functioning of this Agreement* ." The Commission explained in its working paper referred to in the footnote 13 that, Article 57 enables another party to take 'appropriate measures' against the offending party, including as the last resort the suspension of "the agreement or parts thereof."

[21] The complainants pointed out in this respect that the Cotonou Agreement includes a very elaborate consultative procedure which requires a mandatory political dialogue in non-urgent cases as a preliminary step and the suspension of the agreement as a last measure – Articles 96 and 97.

[22] http://wtocenter.vn/sites/wtocenter.vn/files/STATEMENT-15-6217_EN_0.pdf

[23] In point 3.7 of the detailed opinion, the Commission stated: "(...) *since 2010 the Commission is committed to making systemic use of impact assessments and evaluations in trade negotiations at their initial design stage* (..), *during the negotiations, and during the implementation of the Free Trade Agreements (ex post evaluations)*. *In line with the integrated approach, economic, social and environmental impacts* - as well as **impacts on HR** (since 2011) - are all considered side by side in all the above assessments and evaluations." (emphasis added).

[24] If the detailed opinion of the institution, body or agency is not satisfactory, the Ombudsman may consider making a special report to the European Parliament. In his annual report for 1998, the first European Ombudsman pointed out that the possibility for him to present a special report to the European Parliament was of inestimable value to the Ombudsman's work, and therefore special reports should not be presented too frequently, but only in relation to important matters where the Parliament was able to take action in order to assist the Ombudsman (Annual Report for 1998, pages 27-28, approved by the European Parliament). This approach is sustained by the current Ombudsman, Emily O'Reilly.