

European Ombudsman's Decision on the failure of European Commission to conduct a prior human rights impact assessment of the EU Vietnam free trade agreement

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Honourable Members,

Thank you for inviting me here to speak to you today.

As you know, last December the European Commission concluded its negotiations on the EU-Vietnam Free Trade Agreement. This Agreement has yet to be approved by the Council and will then need to be ratified by the European Parliament.

Two weeks ago I concluded my inquiry into a complaint concerning this Agreement. My inquiry was prompted by a complaint made to me in August 2014 by two NGOs, the International Federation for Human Rights and the Vietnam Committee on Human Rights. Their complaints did not concern the substance of the proposed Agreement but, rather, the refusal of the Commission to inform its negotiations by conducting a human rights impact assessment in advance of the negotiations with Vietnam.

In undertaking my inquiry into this complaint, I was conscious of the fact that, on 17 April 2014, the European Parliament had adopted a resolution urging the Commission to carry out a human rights impact assessment of the envisaged Free Trade Agreement with Vietnam, pointing out that its consent to the Agreement is mandatory.

In March 2015, on the basis of my inquiry up to that point, I recommended to the Commission that it should immediately conduct a human rights impact assessment. This recommendation reflected my finding that the Commission's failure to conduct such an impact assessment amounted to maladministration. In late July 2015 the Commission rejected my recommendation and proceeded with its negotiations. These negotiations, as I mentioned, were concluded last December.



While trade agreements are designed to be good for the economy, it is not necessarily the case that they always bring benefits in the same way for all the peoples of the countries concerned as we can all acknowledge. Trade agreements may at times have negative consequences for the human rights of the peoples affected by those agreements. Consequently it is important to know whether the EU's Agreement with Vietnam might have negative consequences for the people of Vietnam - a country about which human rights concerns already exist.

I take the fairly simple view that this is a question best asked before , rather than after , any trade agreement is concluded. A prior human rights impact assessment is a critical preventative tool; it is designed to anticipate and avoid any negative consequences of a proposed agreement. The alternative is to identify problems after an agreement has been concluded and then try to fix those problems. This, broadly speaking, was the position put forward by the European Commission in reply to my recommendation. However, I am not at all convinced that this is an acceptable approach.

Article 21 of the Lisbon Treaty stipulates that 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* ".

I was therefore disappointed when, in July 2015, the Commission rejected my recommendation.

The Commission first argued that the Free Trade Agreement negotiations with Vietnam were a follow-up to the ASEAN negotiations, which had been launched before the Commission began the practice, on a systematic basis, of carrying out human rights impact assessments. The Commission argued that its decision to carry out human rights impact assessments, on a systematic basis, did not apply retroactively.

It also argued that the protection of human rights in Vietnam could be ensured using other instruments. It argued that the Free Trade Agreement was institutionally and legally linked with the EU-Vietnam Partnership and Cooperation Agreement, signed in June 2012, and that this contained clauses on human rights, democracy, the rule of law and security. It referred also to some provisions proposed to be included in the Free Trade Agreement itself which would be relevant from a human rights perspective. The Commission argued that this meant that human rights issues had been addressed in the context of the negotiations of the Free Trade Agreement and that this provided a strong framework for the protection and promotion of human rights.

The Commission also referred to the fact that it would continue to promote human rights through non-trade measures: enhanced political dialogue, public statements, foreign policy *démarches* and interaction with civil society and human rights defenders in particular, EU-funded development programmes and projects. Thus, in the Commission's eyes, there was no need for a separate, prior impact assessment. The Commission also said that it intended to carry out



evaluations of the impact of the Free Trade Agreement on human rights after it had become operative.

However, I did not find these arguments convincing and, in my decision closing the case, I criticised the Commission.

I agree with the Commission that EU law, as it stands now, does not provide for an **express obligation** to carry out a prior human rights impact assessment. However, in my view, the Commission's refusal to carry out the human rights impact assessment in the context of the negotiations of the EU-Vietnam Free Trade Agreement goes against the spirit of the provisions in Article 21 of the Lisbon Treaty.

While the Commission may not have been legally obliged to conduct a prior human rights impact assessment, its decision not to do so reflected a failure to act in a manner consistent with the highest values and principles on which the EU is based. This, to me, was maladministration.

In my decision, I drew attention to the fact that, in its Action Plan on Human Rights and Democracy for the years 2012-2014 (**which was adopted one day before the negotiations with Vietnam started**), the Council called on the Commission to incorporate human rights in all impact assessments relating to trade agreements. I note in the meantime that, in its Action Plan for 2015-19, the Council asked the Commission to continue to develop, by 2017, a **robust approach** to the analysis of human rights impacts of trade and investment agreements by way of **prior impact assessments** along with sustainability impact assessments and evaluations following the conclusion of agreements.

I was therefore surprised by the Commission's argument that it was not necessary to conduct a prior impact assessment in the case of negotiations which had started before its policy on carrying out impact assessments had been adopted. I reminded the Commission in my recommendation that respect for human rights cannot be made subject to considerations of convenience or to an overly literal interpretation of its obligations.

I accepted the Commission's view that a prior human rights impact assessment, carried out jointly with environmental and social impact assessments, could be as effective as a separate human rights impact assessment. However, no such assessment was carried out in advance of the Free Trade Agreement with Vietnam or in the context of the multilateral EU-ASEAN agreement as regards that Free Trade Agreement.

I recognise that the Commission has attempted to mitigate its lack of a prior impact assessment by reference to other Agreements and provisions. However, I am not convinced that this is sufficient because the clauses in the instruments referred to do not have the same usefulness, or serve the same purpose, as would a prior human rights impact assessment.

Similarly, carrying out evaluations once the Agreement is in place, developing a range of general policies and instruments to promote human rights compliance, and ensuring the



presence of EU stakeholders in a roundtable in Brussels - all of these may be considered as positive initiatives but do not serve the same purpose as does a **prior** human rights impact assessment.

The purpose of this analytical tool is, as I understand it, to ensure that the free trade agreement, when implemented, will not lead to any failure to comply with existing human rights obligations. It is thus far preferable, while still at the negotiation stage of a trade agreement, that any measures agreed should be informed by a **prior** human rights impact assessment.

I also pointed out that 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. Furthermore, I was aware that the Commission already has a thorough knowledge of how this tool - the human rights impact assessment - operates and of its usefulness.

I regret that the Commission did not, in response to my recommendation, agree to change its stance and decide, even at that stage, to conduct a human rights impact assessment before the negotiations with Vietnam would be concluded. In finalising my inquiry into the complaints received on the matter, I criticised the Commission for having 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.

However, I welcome the fact that the Commission intends to carry out human rights impact assessments in relation to future agreements, along with the environmental and social impact assessments, and that it is committed to carrying out human rights evaluations once the Free Trade Agreement is fully in place. This is a positive development and one which, I am sure, all the interested parties will be watchful to see that it happens.

Thank you for your attention.