

Joint FIDH-VCHR observations on the Opinion of the Commission on the European Ombudsman's draft recommendation ref. 1409/2014/JN

In its draft recommendations dated March 2015 on the EU-Vietnam Foreign Trade Agreement (FTA) and investment negotiations, the Ombudsman found “*that the Commission's refusal to carry out an HR impact assessment constitutes an instance of maladministration*” and concluded, “*The Commission should carry out, without further delay, a human rights impact assessment in the matter*”.

On May 12 the Commission organized a conference on Trade, Sustainable Development and Human Rights in EU-Vietnam Relations.

On 31 July, in its opinion on the European Ombudsman's draft recommendation, the Commission considered that “*there cannot be maladministration on its part*”.

On 4 August, the Commission announced that the EU and Vietnam agreed on the “*substance of the deal*”, adding that “*Provisions on investment protection and dispute settlement are still being negotiated in light of the new EU approach on investment dispute settlement*” and that “*The final legal texts will have to be ironed out by negotiators after the summer break*”.¹

SUMMARY OF THE MAIN ARGUMENTS OF FIDH AND VCHR

To justify its position, and its eagerness to conclude the FTA despite the present case still being pending and despite the draft recommendation of the Ombudsman calling for a Human Rights Impact Assessment (HRIA), the Commission points out that the conference it organized last May and the overall mix of tools it uses to deal with human rights in Vietnam fulfil the overall objectives of an ex-ante HRIA. FIDH and VCHR consider that the Commission position actually deprives HRIA of its essential content. By taking the view that a HRIA is not necessary in the present circumstances, the Commission's position could jeopardize the quality and seriousness of any future impact assessments. FIDH and VCHR call on the Ombudsman to conclude that there has been maladministration and to reject the defensive arguments of the Commission.

The main arguments of FIDH and VCHR are the following:

- As the UN Special Rapporteur on the Right to Food warned “*there is a duty to identify any potential inconsistency between pre-existing human rights treaties and subsequent trade or investment agreements and to refrain from entering into such agreements where such inconsistencies are found to exist*”. “*By preparing human rights impact assessments prior to the conclusion of trade and investment agreements, States are addressing their obligations under the human rights treaties*”²
- This applies from a European legal perspective, respect for human rights being “*a requirement of the lawfulness of European acts*”. The EU founding treaties require respect of the Charter of Fundamental Rights of the EU and of human rights in its external relations and in its internal policies with extraterritorial effects. The EU has to design and implement its policies in order to respect, consolidate and support democracy, the rule of law and human rights in its external relations, and also when dealing with trade.³ In 2010, the Commission recognized impact assessment as “*essential to ensure that the measures it proposes are necessary*” and decided to “*reinforce the assessment of impacts on fundamental rights*”.⁴ In 2011, the EU adopted guidance to take account of Fundamental Rights in Commission Impact Assessments. It was expressly set up to ensure that the EU complies with its obligations. Indeed, the ECJ actually requires that, from a human rights perspective, EU

¹ European Commission, Memo, EU and Vietnam reach agreement on free trade deal, Brussels, 4 August 2015,

² 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

³ Art. 2, 3, 6, 21 TEU and 207 TFEU

⁴ COM(2010) 543 final, Smart Regulation in the European Union, 8 October 2010, p. 6, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0543:FIN:EN:PDF>

institutions prove “that they have carefully considered different policy options and have chosen the most proportionate response to a given problem”.⁵ In June 2012, when the FTA negotiations were effectively launched with Vietnam, the need to carry out a HRIA of the trade and investment agreement was reaffirmed in the EU strategic framework and action plan on human rights and democracy.

- In conclusion and to ensure legality, a comprehensive, in-depth, evidence-based impact assessment on human rights, with wide-ranging consultations engaging all relevant stakeholders inside and outside the EU, was subsequently recognized as not merely optional but imperative.
- The Commission recently confirmed this imperative, when it issued its “Better Regulation Package” which contains renewed and mandatory guidelines on impact assessments.⁶ These guidelines, adopted on 19 May 2015, require human rights to be taken into account at all stages of the regulatory process. They specify, “*The impact assessments should, in particular, examine the **impact of the different options***”. The preferred option chosen as the basis of its proposal is tested again at the end of the process to ensure that it is in line with the Charter of Fundamental Rights and to see, for proposals with an external dimension, if there is scope to “**modify**” **some of the legal provisions so as to reduce the impact on human rights in the partner country**.⁷ The Better Regulation guidelines are complemented by a new tool, detailing the entire process to be followed in trade policies, namely the “*Guidelines on the analysis of human rights impacts in impact assessment for trade-related policy initiatives*” adopted in July 2015⁸. They are clear about the objectives of impact assessments on human rights: To “*bring to the attention of policy-makers the potential impacts of the different options under consideration and thus to support **sound policy-making**. An impact assessment should verify the existence of a problem, identify its underlying causes, assess whether EU action is needed, and **analyse the advantages and disadvantages of available solutions***”.⁹ When negotiating a trade agreement, the impact assessment is an “*opportunity to analyse the potential human rights impacts of a proposed agreement **in greater depth; take into account an extensive consultation of stakeholders (including those in the partner country/ies); and make it possible to elaborate recommendations in order to maximize the benefits of the proposed agreement, and prevent or minimize potential negative impacts***”.¹⁰ It “*should explain how the EU may try to address these recommendations via mechanisms and fora outside the trade agreement (e.g. the political dialogue with the country concerned, development co-operation projects in the country, etc.)*”. It should “*also present recommendations **for measures to be addressed in the trade policy initiative in order to maximise positive impacts, and prevent or minimise potential negative impacts, on human rights [...] the analysis should take account of the existing legal frameworks and domestic policies in the EU and in the partner country/ies; as well as their capacity to mitigate/enhance the impact of the trade policy initiative under consideration***”.¹¹ This clearly echoes de Schutter’s guidelines that state that the Impact Assessment (IA) should be transparent, participative, evidence based, founded on the normative content of human rights as distinct from an impact assessment on sustainability development, and should “**influence the outcome of the negotiations**”, leading to the “**insertion of safeguards in the agreement**” and the “**adoption of mitigation measures**” for example. The need for ex-ante HRIAs has been reiterated several times at UN level, and most recently on 14 July 2015 in the UN independent expert’s Report to the UN Human Rights Council on “*the adverse impact of free trade and investment agreements on a democratic and equitable international order*”¹² and its report “*on the promotion of*

⁵ Commission Staff Working Paper, “Operational Guidance on taking account of Fundamental Rights in Commission Impact Assessments”, SEC(2011)567, 6 May 2011, http://ec.europa.eu/justice/fundamental-rights/files/operational-guidance_en.pdf

⁶ Commission Staff Working Document, “Better Regulation Guidelines”, SWD(2015) 111 final, 19 May 2015, http://ec.europa.eu/smart-regulation/guidelines/docs/swd_br_guidelines_en.pdf

⁷ Ibidem, p. 32

⁸ European Commission, DG Trade, “Guidelines on the analysis of human rights impacts in impact assessment for trade-related policy initiatives”, 2 July 2015 http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153591.pdf

⁹ Ibidem, p. 2

¹⁰ Ibidem, p. 6

¹¹ Ibidem p. 12

¹² Thematic report to the Human Rights Council on the adverse impacts of free trade and investment agreements on a democratic and equitable international order (A/HRC/30/44), http://www.un.org/ga/search/view_doc.asp?symbol=A/HRC/30/44

a democratic and equitable international order on the impact of investor-State-dispute-settlement on a democratic and equitable international order” transmitted to the UN General Assembly on 5 August 2015.¹³

In short and based on ECJ jurisprudence, **whenever the EU decides to launch the process and when the time comes for the EU to conclude a trade and investment agreement, it has to be able to show that it has taken into account all necessary factors and circumstances to frame its policy, that it has carefully considered different policy options and that it has chosen the most proportionate response to ensure it has maximized the positive impacts and prevented or mitigated the negative impacts on human rights. Clearly impact assessments differ from simple data collection** or responses to public opposition. An impact assessment requires an overall and sectorial in-depth analysis that is transparent and participative and that sets the measures negotiated against existing instruments and frameworks as well as the current stress placed on human rights, in order for the policies to be adapted. **A HRIA has essentially to be well founded, transparent, and convincing in its thinking. FIDH and VCHR are of the opinion that the information provided by the Commission is insufficient to meet these conditions for substantive validity.**

Despite the fact that the ex-ante HRIA is clearly considered today as the most appropriate tool for demonstrating that all necessary factors and circumstances have been taken into account in framing its policy, the Commission, in its opinion on the draft recommendation of the Ombudsman, seems to consider that it is sufficiently informed and justified in pursuing what, as is explained in more detail later, FIDH and VCHR term “**its traditional policy**”. FIDH and VCHR consider that the Commission is, in consequence, simply depriving the HRIA of its essential objective:

- The conference organized last May on Trade, Sustainable Development and Human Rights in EU-Vietnam Relations cannot substitute for a comprehensive, in-depth evidence-based impact assessment on human rights, with wide-ranging consultations engaging all relevant stakeholders inside and outside the EU.
- The Commission never talks about the positive or negative impacts the trade agreement may have on human rights or argues about how it has framed its policies to address current challenges to human rights. It never tests its solutions with the specific strains currently placed on human rights in Vietnam or with human rights needs and obligations in the EU.
- Instead, the Commission describes the instruments the EU normally employs to promote human rights abroad. It fails to argue how these instruments are reframed in practice or how they can answer the new challenges and opportunities implied by a new trade agreement. In consequence, the Commission fails to justify upholding what, were actually, pre-existing choices.

The Commission fails to show which elements it has taken into account and how those elements have provided an effective framework or reassessment of the options envisaged, thereby revealing a case of maladministration and leading to the recommendation that a HRIA be carried out without further delay.

Aside from the issue of an ex-ante HRIA, the Commission claims it has chosen adequate instruments, namely the familiar human rights clause, dialogues, démarches, development cooperation, and, in the FTA, a linkage clause, a reference to human rights in the preamble and what seems to be a standard Trade and Sustainable Development (T&SD) Chapter. Ultimately, the Commission’s approach involves concluding the agreement from the outset whatever its impacts, but pursuing promotion of human rights using traditional policies and tools, and then after the impacts occur, carrying out an ex-post HRIA. This proposal is clearly not in line with the reasons why an ex-ante HRIA should be carried out. Furthermore, FIDH and VCHR contest that the solutions proposed constitute a proportionate response that ensures the positive impacts on human rights are enhanced and the negative impacts avoided and mitigated. This is explained in more detail below, but can be summarized in this way:

¹³ Report of the Independent Expert on the promotion of a democratic and equitable international order on the impact of investor-State-dispute-settlement on a democratic and equitable international order (A/70/285), http://www.un.org/en/ga/search/view_doc.asp?symbol=A/70/285

- While each of the proposed instruments aims to address the overall human rights situation, they have shown their limitations in practice and fall short of being an appropriate mechanism to measure and respond to the potentially negative impacts of the FTA.
- In addition, among all the options available, the Commission did not choose the more efficient tools available and did not respond to persistent criticisms regarding the negative impacts that free trade and investment agreements may have on human rights.
- In consequence, the Commission did not opt for the most appropriate response despite the threat that the FTA poses for human rights in the EU and in Vietnam. It remains unclear how the serious human violations occurring in Vietnam and the important human rights challenges it faces will be justified as not requiring the most progressive instruments and clauses available be used to prevent any negative impacts.

As the solutions proposed are obviously not specially adapted to address the new important challenges the future EU-Vietnam FTA will generate for human rights, and as the Commission fails to provide the arguments and information needed to justify its choices, we consider the legislative process is insufficiently informed. FIDH and VCHR renew their call for a HRIA. FIDH and VCHR will point out some of the correctives measures and recommendations that observers who have examined the impacts of FTAs on human rights have proposed. For the Commission to justify its position, it should argue on why it considers they are not adapted to address the challenges created by the EU-Vietnam FTA.

Reviewing the different arguments presented in the Commission's opinion, FIDH and VCHR explain their position in greater detail below.

I. ON THE GENERAL OPINION PRESENTED BY THE COMMISSION ON HOW TO ADDRESS HUMAN RIGHTS CONSIDERATIONS IN TRADE INITIATIVES: FIDH and VCHR consider that, in addition to a requirement for the solutions to be fully followed (something which was not the case), the adequacy of these proposed solutions proposed remains to be assessed and they still need to be adapted to address the new challenges that the FTA generates.

The Commission, in setting out how it usually addresses human rights (HR) in its trade initiatives, and excluding first trade policies, refers to instruments that are supposed to converge to foster HR abroad.

- *“HR considerations in trade policy initiatives should be seen as one component of a wider approach focused on policies and actions to address directly or indirectly HR”* (3.2)
- *“As a consequence, when considering the impact of trade policies on HR issues, the EU's overall relations with the country concerned should be also taken into account”*. (3.3)

Aside from existing dialogues, démarches and supporting measures which are part of these non-EU trade policies, the Commission points out that the following are determinants in its trade policies: the **“use”** of HR clauses, the provisions that **“are normally included in FTAs to specifically ensure that HR are not only addressed, but also fostered and protected”** and the **“systematic use of ex-ante and ex-post assessment”** including on HR:

- *“The lynchpin of the EU trade and human rights policy is the “Common approach on the use of political clauses””* (3.4)
- *“In addition, specific provisions are normally included in FTAs to specifically ensure that HR are not only addressed, but also fostered and protected. This is done through both horizontal provisions of the FTA as well as those included in the Trade and Sustainable Development (hereinafter referred to as ‘T&SD’) Chapter and in other relevant Chapters (on Transparency, for instance). Moreover, specific institutional structures are created under the FTA allowing for a dialogue on any matter of concern not only between authorities, but also with non-state actors.”* (3.5)
- *“Last but not least, since 2010 the Commission is committed to making systematic use of impact assessments and evaluations in trade negotiations at their initial design stage (Commission impact assessments, hereafter referred to as ‘IAs’), during the negotiations (SIAs), and during the implementation*

of the FTAs (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”. (3.7)

- “In conclusion, IAs, SIAs and ex-post evaluations are important policy tools to address HR considerations in legislative initiatives, FTAs included, which are complemented by further measures as described above”. (3.10)

FIDH and VCHR particularly welcome the mention of “*last but not least*” made by the Commission, recognizing that the systematic use of ex-ante impact assessments is a cornerstone, and regret this has not been respected. Dialogues, démarches, development cooperation aid, ex-ante and ex-post assessments, the “*use*” of HR clauses, and the provisions that “*are normally included in FTAs*” may, if applied, and if particular conditions are met to ensure they attain their objective, help the EU to respect its human rights obligations. But it remains to be seen if these tools are being and will be effectively applied and if the conditions required for them to be effective are met. In this case even the provisions that “*are normally included in FTAs*” may remain inadequate.

An ex-ante impact assessment on HR would have helped determine whether all these tools were adequately designed and implemented by considering both the trade measures negotiated and the human rights situation and practices in the State parties concerned. In the absence of a HRIA, FIDH and VCHR will, as the Commission did, nevertheless go through these elements. We argue that they are inadequate in preventing negative impacts and in enhancing positive impacts on human rights by the FTA negotiated, and we strongly reject the Commission’s conclusion that they can be substituted for an ex-ante impact assessment.

II. IN RESPONSE TO THE COMMISSION’S SPECIFIC OPINION ON THE OMBUDSMAN’S ASSESSMENT AND RECOMMENDATION: FIDH and VCHR consider that the Commission’s view that the mix of instruments set out in its general and specific opinions can replace an ex-ante HRIA should be rejected. Contrary to the Commission’s view, this mix of instruments does not have the same overarching purpose as a HRIA, which aims to identify and address the impacts of the FTA on HR. This mix of instruments is clearly insufficient to achieve this.

The Commission firstly sets out the “*existing main relevant provisions initiatives and actions*”, namely traditional instruments belonging to trade and non-trade EU policy.

II.1. Instruments belonging to non-trade policy: FIDH and VCHR consider that as these are not framed to address the impacts of FTAs and have even shown significant limitations in the fields in which they are traditionally applied, they must be adapted to be genuinely able to address the issues at stake. By failing to provide information on how these instruments address these concerns, the Commission fails to show they are a proportionate response that ensures any positive impacts on human rights the FTA may have are maximized and any negative impacts prevented or mitigated.

Setting out what it considers to be the relevant provisions, initiatives and actions addressing HR considerations in the EU-Vietnam FTA negotiations, the Commission firstly refers to the signing of the PCA agreement and its provisions dedicated to establishing respect for HR as an essential element of relations between the EU and Vietnam, the human rights dialogues, the political statements and démarches undertaken, and development cooperation.

FIDH and VCHR agree that these tools could be relevant in the current debate, being part of the mix of instruments that, *along with adequate trade policy*, could play a part in the EU complying with its obligations. However, this can only be the case if the following questions are properly addressed:

- **What are the overall and the specific and sectorial impacts that the FTA might have on human rights?**

- **What are the conditions required for dialogues, démarches and development cooperation aid to effectively avoid, mitigate and remedy the potential negative impacts and enhance the positive impacts of the FTA?**
- **Are these conditions met, given the situation in Vietnam and its relations with the EU?**
- **If not, are the tools adequate for and capable of producing an effect in a timely manner or is there a need to adapt the FTA itself?**¹⁴

The conclusion that must be drawn is that unless these questions are answered and a HRIA carried out to that end, the Commission is failing to properly inform the legislative process.

That being said, FIDH and VCHR are more than doubtful about the relevance of these tools to address the challenges of the FTA impacts: PCA, dialogue, démarches and development cooperation aim to address the overall situation with respect to human rights, but they have shown their limitations in practice and fall short of being an appropriate mechanism to measure and respond to the potentially negative impacts of the FTA. By relying on these tools, the Commission is consequently failing to demonstrate that it has maximized the positive impacts and prevented or mitigated the negative impacts on human rights that the FTA may have:

The EU-Vietnam PCA's human rights clause: not the most progressive clause available, failing to answer the shortcomings of human rights clauses in EU policy

In agreements like PCAs, the human rights clauses offer a legal basis for facilitating dialogue, for providing the EU with a legal basis on which to demand that human rights be respected and for proposing incentives and target measures. They offer a legal basis for restrictive measures such as suspending all or part of the agreement in the case of serious violations. Restrictive measures and suspending the agreement are the tools of last resort, but should remain credible options for achieving results when serious and persistent violations occur.¹⁵

In its opinion to the Ombudsman, the Commission insists on the relevance of this clause, because it is “*enabling each Party to take appropriate measures in case of severe and systematic violation of HR, including the partial or full suspension of the FTA, or the partial or full suspension of the PCA, or of both*”. FIDH and VCHR will comment below on the relevance of the HR clause for a FTA, given the legal link that would be established between both agreements (see point II.2). FIDH and VCHR would first like to draw the Ombudsman’s attention to the fact that the discretionary power the EU retains to activate the clause and the assessment of EU practice in this matter must necessarily lead to the conclusion that the human rights clause, in its current form, does not offer any guarantees:

- The ECJ (Mugraby, T-292/09 and C-581/11), examining a similar human rights clause to the one in the PCA with Vietnam, confirmed that the EU retained discretion and was in no way obliged to invoke the essential elements clause in case of HR violations.¹⁶

¹⁴ Conversely, if the answer is yes, are the FTA and other tools sufficiently flexible to adapt the FTA strategy should the circumstances facilitating it change?

¹⁵ Council and Member States, meeting within the Council, *Resolution on human rights, democracy and development*, 28 November 1991; *Report from the Commission to the Council and the European Parliament on the implementation in 1993 of the Resolution of the Council and of the Member States meeting in the Council on human rights, democracy and development adopted on 28 November 1991*, COM (94) 42 final, 23 February 1994; Communication from the Commission to the Council and the European Parliament, *The European Union and the external dimension of human rights policy: from Rome to Maastricht and beyond*, COM (95) 567 final, 22 November 1995; Communication from the Commission to the Council and the European Parliament, *The European Union's role in promoting human rights and democratisation in third countries*, COM (2001) 252 final, 8 May 2001.

¹⁶ Mugraby, T-292/09 §40 “*as regards the alleged failure by the Commission to act with respect to the suspension of the various Community assistance programmes in Lebanon, it must be held that, contrary to the applicant’s assertions, Article 2 of the Association Agreement is not intended to permit or indeed to impose the recourse to and adoption of measures if the parties to that agreement fail to comply with the clause relating to fundamental rights contained in that article. Article 2 of the Association Agreement contains a provision on human rights, which provides that the relations between the parties and all the provisions of the agreement itself are to be based on respect of democratic principles and fundamental human rights.*” And ‘59 “*... it is clear from the wording of the second paragraph of Article 86 of the Association Agreement and, in particular, from the use of the expression ‘[i]f either Party considers that the other Party has failed to fulfil an obligation under this Agreement’, that each party to the agreement is free to decide whether there may be an infringement of the clause relating to the*

- In consequence, the EU rarely makes effective use of the HR clause to suspend an agreement partially or totally and “*Conditionality is normally not activated when human rights violations routinely take place in a country*”¹⁷. The essential elements clause has so far been activated mainly against ACP countries and in exceptional circumstances such as a coup d’état or flawed elections.¹⁸ Observers warned “*The sanctions when applied did not involve the lifting of trade preferences but rather ‘suspension of meetings and technical co-operation programmes’*”¹⁹. They are not activated when EU trade policies negatively impact HR. They are not designed as a tool to remedy the negative impacts of a trade agreement on human rights. Fully documented by specific studies, this was confirmed on 5 August 2015 by the Commission when answering Afzal Khan, Member of the European Parliament, on “*How many EU international agreements containing human rights clauses have been suspended in response to human rights breaches?*”²⁰.

Ultimately, “*many observers have pointed out that [...] the EU’s essential policies clauses are ‘aspirational’ and aimed at fostering dialogue*”²¹. We are obliged to conclude that the EU-Vietnam PCA’s HR clause, despite being able to, actually offers no guarantees of the aforementioned advantage presented by the Commission regarding the possible suspension of an agreement that might impact on human rights.

Moreover, the EU-Vietnam PCA HR clause offers even fewer safeguards for human rights since it is clearly not the most progressive and effective clause to be found in EU practice. The clause does not describe the suspension procedure. Nor does it describe the supporting procedures and mechanisms that foster human rights and at the same time avoid suspension for as long as necessary. It falls far short of the level of protection offered by the Cotonou Agreement that applies to ACP countries for example.

As well as being condemned in studies, the general lack of improvement in the human rights clause negotiated when the model was formulated by the Commission in 1995 is also regularly deplored by the European Parliament. It regularly regrets the lack of enforcement and efficacy of the HR clause. The Parliament attributes its shortcomings both to the reluctance of the Commission to activate the clause and to “*the generic nature of its wording, since this does not spell out detailed procedures for ‘positive’ and ‘negative’ interventions under EU/third country cooperation*”²²; It “*advocates the drafting of a new ‘model clause’ [...]*”²³ to establish a procedure for effective

respect for fundamental human rights laid down in Article 2 by the Republic of Lebanon and, if so, the nature and seriousness of such infringement. It is also clear from the use of the word ‘may’ that, in the event of an infringement of the provisions of the agreement, each party to the agreement is free to adopt the measure it regards as being the most appropriate. It is true that the suspension of the Association Agreement is a measure that the Community, through its competent institutions, may adopt. However, it is not obliged to adopt such a measure, nor does that measure represent the only measure available to deal with an infringement of the obligations in the Association Agreement.”

¹⁷ ‘Essential elements’ clauses in EU trade agreements making trade work in a way that helps human rights?, Nicolas Hachez, KUL, April 2015, p.17

¹⁸ *Ibidem*

¹⁹ *Ibidem*

²⁰ Answer given by Vice-President Mogherini on behalf of the Commission, 5 August 2015, E-008626/2015, <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2015-008626&language=EN>: It said “*In response to extremely grave violations of human rights, such as a coup d’état, the EU has imposed appropriate measures under the human rights clause in the Cotonou Agreement in respect of Niger (1996 — coup d’état), Togo (1998 — flawed electoral process), Niger (1999 — coup d’état), Guinea-Bissau (1999 — coup d’état), Comoros (1999 — coup d’état), Ivory Coast (2000 — coup d’état), Fiji (2000 — coup d’état), Haiti (2000 — flawed electoral process), Ivory Coast (2001 — flawed electoral process), Liberia (2001 — violations of human rights and democratic principles and cases of corruption), Zimbabwe (2001 — violation of human rights, democratic principles and the rule of law), Central African Republic (2003 — coup d’état), Togo (2003 — flawed electoral process), Guinea-Bissau (2003 — coup d’état), the Republic of Guinea (2004 — flawed electoral process), Togo (2004 — flawed electoral process), Mauritania (2005 — coup d’état), Fiji (2007 — coup d’état), Mauritania (2008 — coup d’état), the Republic of Guinea (2009 — coup d’état), Madagascar (2009 — coup d’état), Niger (2009 — violation of democratic principles and the rule of law) and Guinea-Bissau (2011 — violation of human rights and the rule of law). Extremely grave violations of human rights also determined the Council suspension of the Association Agreement with Syria in 2011 (Council Decision 2011/523/EU), and the temporary withdrawal of Sri Lanka from the list of beneficiaries under the unilateral GSP+ trade arrangement (Implementing Regulation 143/2010)”*

²¹ ‘Essential elements’ clauses in EU trade agreements making trade work in a way that helps human rights?, *op.cit.*, p.17

²² European Parliament resolution of 14 February 2006 on the human rights and democracy clause in European Union agreements (2005/2057(INI)) ; European Parliament resolution of 18 April 2012 on the Annual Report on Human Rights in the World and the European Union’s policy on the matter, including implications for the EU’s strategic human rights policy (2011/2185(INI)), considering L and §§54-55;

²³ European Parliament resolution of 14 February 2006 on the human rights and democracy clause in European Union agreements, *op.cit.*, § 7 European Parliament resolution of 13 December 2012 on the annual report on Human Rights and Democracy in the World 2011 and the

implementation of these clauses in the spirit of Articles 8, 9 and 96 of the Cotonou Agreement”²⁴; It recommends “a procedure for consultation between the parties, detailing the political and legal mechanisms to be used in the event of a request for bilateral cooperation to be suspended”, but also a “warning mechanism”²⁵ and “human rights and democracy benchmarks for descriptive and evaluation purposes”²⁶. All this is aimed at enhancing the consistency and effectiveness of the clause.²⁷ Finally, the Parliament stresses that the use of the human rights clause should go hand in hand with the improvement of the dialogue²⁸ and the development of dedicated monitoring mechanisms.²⁹

The necessity to reinforce the usefulness of the HR clauses is not only called for by observers and the European Parliament, the Commission itself agreed it. The EU strategic framework on human rights and democracy adopted in 2012 states that “The EU will step up its effort to make best use of the human rights clause in political framework agreements with third countries” and its action plan adds the commitment of the EU to “develop criteria for application of the human rights clause”³⁰.

FIDH and VCHR consider that, apart for the need for the Commission to properly argue that the comparative improvements in the model clause of 1995 are not adequate or are disproportionate for EU-Vietnam dealings, **the clause needs to be reviewed. At the very least its enforcement mechanisms (dedicated monitoring mechanism, early warning mechanism, consultation procedure and descriptive and assessment procedure) need to be improved through a protocol or, as a last resort, by a declaration annexed to the PCA. There also remains the issue of solving the general lack of use of the human rights clause to address the impacts of EU trade policies, which FIDH and VCHR argue for below in point II.2.**

Dialogues, démarches, statements and development cooperation: These cannot replace a mechanism dedicated to maximizing the positive impacts and preventing or mitigating the negative impacts on human rights that the FTA may have, and they should also be adapted

The core of the EU policy to promote human rights resides in diplomatic contacts and targeted support. However, dialogue, démarches and development cooperation are part of a long-term process to achieve any potential results. These tools also need to be improved to achieve results in their traditional field of application. They moreover need to be adapted if it is hoped that they will effectively deal with the potential impacts of the FTA. Their capacity to effectively create an enabling environment in which trade and investments may take place in a timely manner and with due regard for human rights is in any case challenged. The same is true as regards their capacity to ensure

European Union’s policy on the matter (2012/2145(INI)) <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2F%2FEP%2F%2FTEXT%2bTA%2bP7-TA-2012-0503%2b0%2bDOC%2bXML%2bV0%2F%2FEN&language=EN>

²⁴ European Parliament resolution of 16 December 2010 on the Annual Report on Human Rights in the World 2009 and the European Union’s policy on the matter (2010/2202(INI)), §110 <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2F%2FEP%2F%2FTEXT%2bTA%2bP7-TA-2010-0489%2b0%2bDOC%2bXML%2bV0%2F%2FEN&language=EN>

²⁵ European Parliament resolution of 14 February 2006 on the human rights and democracy clause in European Union agreements, *op.cit.*, §7

²⁶ European Parliament resolution of 18 April 2012 on the Annual Report on Human Rights in the World and the European Union’s policy on the matter, including implications for the EU’s strategic human rights policy, *op.cit.*, The Parliament calls for “clear criteria for when these are to be applied and what type of sanctions should be applied, and including transparent benchmarks for their lifting” European Parliament resolution of 13 December 2012 on the annual report on Human Rights and Democracy in the World 2011 and the European Union’s policy on the matter, *op.cit.*, §78

²⁷ European Parliament resolution of 13 December 2012 on the annual report on Human Rights and Democracy in the World 2011 and the European Union’s policy on the matter, *op.cit.*, §§78, 76; European Parliament resolution of 14 February 2006 on the human rights and democracy clause in European Union agreements, *op.cit.*, §7

²⁸ European Parliament resolution of 11 December 2013 on the Annual Report on Human Rights and Democracy in the World 2012 and the European Union’s policy on the matter (2013/2152(INI)) <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2013-0575&language=EN> European Parliament resolution of 18 April 2012 on the Annual Report on Human Rights in the World and the European Union’s policy on the matter, including implications for the EU’s strategic human rights policy, *op.cit.*, §47

²⁹ European Parliament resolution of 13 December 2012 on the annual report on Human Rights and Democracy in the World 2011 and the European Union’s policy on the matter, *op.cit.*, §77

³⁰ EU Strategic Framework and Action Plan on Human Rights and Democracy, Luxembourg, 25 June 2012, point 33.b), http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/131181.pdf

effective remedies when violations occur. In these circumstances, FIDH and VCHR consider that there is no justification for the FTA not to be reframed in order to provide the safeguards and mechanisms required to avoid, mitigate or remedy its potential negative impacts.

Dialogues still need to be improved, both in general and in EU-Vietnam relations. The most important challenge that faces the EU here is to *make the dialogue a means to achieve measurable, tangible results*. Indeed, while the EU does not control all the factors to achieve results, observers condemn the fact that dialogues “*have become a process rather than a means to achieve measurable, tangible results*”³¹. It is too often said, as the Commission did in its opinion on the draft recommendation of the Ombudsman, that the dialogue “*has been considered as open and frank*”, when the results and the commitments obtained from the other party at the time continue to be ignored.

The European Parliament frequently “*reiterates its concern [...] with the persistently disappointing lack of progress in a number of human rights dialogues*”³² and “*encourages the EU to seek new ways of making the dialogues [...] more meaningful*”³³. It recommends:

- *Better definition of the objectives*³⁴: Priorities are often not defined. It is a matter of concern that the objective of the dialogue may be only to provide the EU with an opportunity to raise human rights issues, with no determination demonstrated to obtain concrete achievements.
- *Better involvement of civil society*³⁵: The most progressive models currently include a civil society forum which presents recommendations prior to official meetings while civil society representatives engage in dialogue. Other models, like the one employed with Vietnam, do not provide these kinds of progressive characteristics.
- *Better coordination and coherence between European institutions* in terms of objectives, values and attitudes³⁶: To obtain concrete achievements, the EU representatives participating in dialogue should have a clearer mandate on the incentives or support they can negotiate to obtain commitments from their counterparts. They should be allowed to discuss topics that also refer to other EU policies, such as trade policies. A clear and enabling mandate on trade matters is essential for the issue at stake and for the relevance of the EU Commission’s opinion on the Ombudsman recommendation, but is still lacking. The absence of internal coordination at the end of dialogue and of any reporting on its results encourage counterproductive attitudes in the bilateral relations that the EU maintains beyond the human rights dialogue. It is up to the EU to raise human rights issues vigorously in all forms of bilateral political dialogue, including at the highest level. The “instrumentalisation” of the human rights dialogue in order to

³¹ European Parliament resolution of 18 April 2012 on the Annual Report on Human Rights in the World and the European Union's policy on the matter, including implications for the EU's strategic human rights policy, *op.cit.*, §46.

³² European Parliament resolution of 13 December 2012 on the annual report on Human Rights and Democracy in the World 2011 and the European Union's policy on the matter, *op.cit.*, §64; European Parliament resolution of 16 December 2010 on the Annual Report on Human Rights in the World 2009 and the European Union's policy on the matter, *op.cit.*, §157; European Parliament resolution of 18 April 2012 on the Annual Report on Human Rights in the World and the European Union's policy on the matter, including implications for the EU's strategic human rights policy, *op.cit.*, §46

³³ European Parliament resolution of 11 December 2013 on the Annual Report on Human Rights and Democracy in the World 2012 and the European Union's policy on the matter, *op.cit.*, §22

³⁴ European Parliament resolution of 16 December 2010 on the Annual Report on Human Rights in the World 2009 and the European Union's policy on the matter, *op.cit.*, §§161,157

³⁵ *Ibidem.*, §157

³⁶ European Parliament resolution of 16 December 2010 on the Annual Report on Human Rights in the World 2009 and the European Union's policy on the matter, *op.cit.*, §159; European Parliament resolution of 18 April 2012 on the Annual Report on Human Rights in the World and the European Union's policy on the matter, including implications for the EU's strategic human rights policy, *op.cit.*, §47

marginalise human rights discussions at other higher levels of political dialogue, such as summits, is regularly condemned.³⁷

- *Better assessment of the results*: The objectives set in advance of dialogue must be evaluated immediately afterwards.³⁸ To that end, dialogue should be accompanied by clear, public, time-framed and country-based benchmarks and indicators.³⁹ Suggestions are required as to how to improve the outcomes of dialogue and how to avoid discussions repeatedly failing.⁴⁰
- *Better transparency and follow-up of the results*⁴¹: The EU should “draw clear political conclusions when the human rights dialogue is not constructive and, in such cases or in cases of persistent human rights violations, put more emphasis on political dialogue, démarches and public diplomacy”⁴² The EP “reiterates that dialogues can be constructive and can have a real impact on the ground only if followed up with concrete steps [...] as well as if corrective measures are put in place”⁴³; “particular consideration must be given to indicators to ensure the effectiveness of democracy and human rights clauses in all EU agreements, whatever their nature”⁴⁴.

All these recommendations could apply to the EU-Vietnam dialogue. The dialogue with Vietnam has lasted 10 years and has yet to show it is capable of achieving concrete and tangible results. According to information received, the last HR dialogue did not achieve any specific results or commitments.⁴⁵ The EU discussed legal and constitutional reforms including those for the penal code but did not receive clarification; freedom of expression but with no sign of improvement; and the death penalty and individual cases, including inhuman treatment in prison. Economic, social and cultural rights and trade and investments issues were not addressed despite the express demands of civil society.⁴⁶ Dialogue serves multiple purposes, all of crucial importance in fostering improvements in Vietnam which has a dire human rights record. Some of the reforms needed are trade-related because they deal with issues that are essential for creating a favourable trade environment (e.g. the penal code criminalising freedom of expression and assembly and silencing protest against investment projects, forced eviction and poor working conditions). Other reforms are not or are less obviously trade-related although they are crucial for ensuring the EU pursues its policy of promoting human rights. It could be useful to provide the EU representatives leading the dialogue with a mandate to deal with trade-related issues too, but there is also a need to establish specific dialogue on trade and human issues, ensuring the link with political and human rights dialogue and other tools the EU has at its disposal.

³⁷ European Parliament resolution of 13 December 2012 on the annual report on Human Rights and Democracy in the World 2011 and the European Union’s policy on the matter, *op.cit.*, §61; European Parliament resolution of 18 April 2012 on the Annual Report on Human Rights in the World and the European Union’s policy on the matter, including implications for the EU’s strategic human rights policy, *op.cit.*, §45

³⁸ European Parliament resolution of 16 December 2010 on the Annual Report on Human Rights in the World 2009 and the European Union’s policy on the matter, *op.cit.*, §161

³⁹ European Parliament resolution of 11 December 2013 on the Annual Report on Human Rights and Democracy in the World 2012 and the European Union’s policy on the matter, *op.cit.*, §23; European Parliament resolution of 13 December 2012 on the annual report on Human Rights and Democracy in the World 2011 and the European Union’s policy on the matter, *op.cit.*, §64; European Parliament resolution of 16 December 2010 on the Annual Report on Human Rights in the World 2009 and the European Union’s policy on the matter, *op.cit.*, §158; European Parliament resolution of 16 December 2010 on the Annual Report on Human Rights in the World 2009 and the European Union’s policy on the matter, *op.cit.*, §157.

⁴⁰ European Parliament resolution of 16 December 2010 on the Annual Report on Human Rights in the World 2009 and the European Union’s policy on the matter, *op.cit.*, §158

⁴¹ European Parliament resolution of 13 December 2012 on the annual report on Human Rights and Democracy in the World 2011 and the European Union’s policy on the matter, *op.cit.*, §61; European Parliament resolution of 18 April 2012 on the Annual Report on Human Rights in the World and the European Union’s policy on the matter, including implications for the EU’s strategic human rights policy, *op.cit.*, §45

⁴² European Parliament resolution of 11 December 2013 on the Annual Report on Human Rights and Democracy in the World 2012 and the European Union’s policy on the matter, *op.cit.*, §22

⁴³ European Parliament resolution of 18 April 2012 on the Annual Report on Human Rights in the World and the European Union’s policy on the matter, including implications for the EU’s strategic human rights policy, *op.cit.*, §48

⁴⁴ *Ibidem* §47

⁴⁵ March 2015 civil society organisations debriefing on the 5th EU-Vietnam Human Rights Dialogue, which was held on 19 January 2015. See also EEAS, EU and Vietnam hold Human Rights Dialogue (19/01/2015), http://eeas.europa.eu/delegations/vietnam/press_corner/all_news/news/2015/20150119_en.htm

⁴⁶ FIDH, Vietnam: Sustained EU pressure needed on human rights at upcoming dialogue, 16 January 2015, <https://www.fidh.org/International-Federation-for-Human-Rights/asia/vietnam/16793-vietnam-sustained-eu-pressure-needed-on-human-rights-at-upcoming-dialogue>

As stressed by the EP, there is an **important and urgent need to improve the modalities and substance of these dialogues in consultation with civil society; in view, however, of the “continued EU difficulties to negotiate improved modalities for its human rights dialogues”⁴⁷, they should be negotiated not after but along with the agreement⁴⁸, and, as a last resort, should be addressed in a declaration annexed to the PCA. As regards the impacts of the FTA, as they are not usually raised in human rights dialogues, specific mention should be made of these. In addition, and to avoid dialogue on human rights being completely diluted, dialogue devoted to trade and human rights should be institutionalised in the FTA. These PCA and FTA human rights dialogues must find space for exchanges and mutual support.**

Démarches and statements are not suitable tools for addressing the impacts of the FTA, and feature similar shortcomings to dialogues. According to press statements following summits and high-level meetings and the observations of the European Parliament made above, human rights are, on such occasions, addressed in general terms without any specific follow-up to the main challenges identified during dialogues.

In its opinion on the Ombudsman’s draft recommendation, the Commission states “*HR issues are also often raised in political statements and démarches, important foreign policy tools that can be deployed whenever there is a need. This was, for instance, the case during the latest high-level visit to Vietnam in August 2014 of President Barroso and of the High Representative/Vice-President Ashton*”. However, the “*remarks [made] by EU High Representative Catherine Ashton following her meeting with Deputy Prime Minister, Foreign Minister Pham Binh Minh*” do not mention human rights once⁴⁹ and we cannot find any in Barroso’s statement. Similarly, the declaration made in October 2014 by the Commission’s former President illustrates the place given to human rights during high-level visits with Vietnamese authorities⁵⁰, especially since the joint statement following their meeting focused only on trade investment negotiations without making any mention of human rights.⁵¹ According to the EEAS website, in 2014-2015, apart from a local EU Statement on the sentencing to death of thirty drug smugglers dated January 2014, no statement denouncing violations occurring in Vietnam and calling for reforms were made⁵², and clearly no statement on trade-related human rights violations was made either. Given these circumstances, the Commission’s position that statements and démarches help provide the answer for FTAs is far from convincing.

The Commission further argues for development cooperation by stating “*Almost 20 million € have been committed under EU-funded development programmes and projects to directly support Democracy and HR, Civil Society Organisation and access to justice for vulnerable groups in Vietnam. In addition, governance and the rule of law will be a focal sector of the EU development cooperation effort in the country at least up to 2020. An additional tentative allocation of up to 36 million € has been earmarked to finance initiatives in this sector*”.

In Vietnam, forced evictions and confiscation 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. In the workplace, sweatshop working conditions and low pay have led to a rising number of strikes. Those who denounce violations of economic, social and cultural rights are at risk of harassment, intimidation, arbitrary arrest, and imprisonment. This situation encourages a worsening of human rights abuses by the FTA without providing access to effective remedies for affected populations. Far from being exhaustive, these examples demonstrate that Vietnam needs important reforms to ensure the FTA is rolled out in a favourable environment that will avoid trade-related human rights violations. The rule of law, access to justice and significant changes in Vietnam’s legal and institutional environment and state practices are required.⁵³

⁴⁷ European Parliament resolution of 13 December 2012 on the annual report on Human Rights and Democracy in the World 2011 and the European Union’s policy on the matter, *op.cit.*, §64

⁴⁸ *Ibidem* §64

⁴⁹ Remarks [made] by EU High Representative Catherine Ashton following her meeting with Deputy Prime Minister, Foreign Minister Pham Binh Minh, 12 August 2014, http://eeas.europa.eu/statements/docs/2014/140812_01_en.pdf

⁵⁰ Déclaration du Président Barroso à la suite de sa rencontre avec le Premier ministre du Vietnam, Nguyễn Tấn Dũng, Bruxelles, 13 octobre 2014, http://europa.eu/rapid/press-release_SPEECH-14-685_fr.htm

⁵¹ Joint statement of President José Manuel Barroso and Prime Minister Nguyen Tan Dung of Vietnam following their meeting at the European Commission, Brussels, 13 October 2014, http://europa.eu/rapid/press-release_STATEMENT-14-317_en.htm

⁵² http://eeas.europa.eu/vietnam/news/index_en.htm

⁵³ Among other things, there is an urgent need to:

More information would have been needed to identify the projects and programmes referred to by the Commission and to assess their adequacy to deal with trade-related issues and the chances of success. Existing reports on previous cooperation programmes do not provide us with the information needed to assess how successful the support afforded to governance and rule of law might be.⁵⁴ The Multiannual Indicative Programme for Vietnam 2014-2020 underlines, however, that results cannot be expected to be achieved in the short term and remain far from certain: *“Given the nature of the sector and the country context, risks can be considered relatively high in areas where governance mechanisms modify the way citizens interact with the Government – support to changes in governance are typically gradual and require a long-term perspective”*. *“The objectives of promotion of democracy and participation are to be read in the context of Viet Nam being a one-party State where the oversight capacity of the National Assembly is limited and where the framework for Civil Society engagement is weak”*. *“Changes in corruption practices also require time. Salaries of officials not adapting faster to the economic growth represents a key risk, as well as the criminalisation of corruption to be better defined in the legal framework and enforced.”*⁵⁵ As a long-term strategy, and given the relative inflexibility of procedures of engagement and programming cycles, we cannot share the view that they provide adequate tools to mitigate the negative impacts of the FTA if nothing is said about their ability to avoid such impacts or to provide remedies.

Furthermore, the programme says nothing about how the FTA'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 impact on access to water, food, education and adequate living conditions – see below).⁵⁶ FIDH's efforts failed to see the EU make formal commitments and perfect a strategy for external financial and technical assistance to deal directly with the impacts of the FTA.⁵⁷

In conclusion, and as regards its non-trade policy tools, the Commission clearly relies on its traditional instruments, without explaining and providing guarantees as to how they should be adapted to meet both the new challenges brought about by the FTA and those brought about by their own deficiencies. A HRIA would have given more details and concrete suggestions for addressing specific issues; it would have more effectively documented which issues can and which issues cannot be addressed by the tools proposed, and what was consequently required to improve the FTA. In the meantime, FIDH and VCHR contest the belief that these traditional tools are sufficient to

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- Remove excessive restrictions on the rights to strike, in law and practice; amend legislation that provides for the payment of damages by workers to their employers; bring its legislation on trade union rights into line with international standards on the right to form and join the trade union of one's choice; ratify the ILO Conventions No. 87 on Freedom of Association and Protection of the Right to Organize of 1948 and No. 98 on Right to Organise and Collective Bargaining of 1949.
 - Revise the Criminal Code and abrogate provisions in other legislation that conditions the exercise of human rights on the “interests of the state”. Release all persons detained under these provisions simply for the peaceful exercise of their human rights (protesting forced evictions, poor working conditions or other violations of their rights for example). It should authorise privately-owned press and media outlets, and revise laws on freedom of information both online and offline to bring them into line with international human rights law.
 - Ensure that legislation prevents forced evictions; set up mechanisms to ensure adequate compensation and provide access to efficient redress mechanism if needed, reinforce the national legislation to render private sector accountable for its impact on human rights
 - Legislate against gender-discriminatory practices in the domains of employment, education and health, and give free and unfettered access to international and women's human rights organizations to monitor the situation in Vietnam

⁵⁴ We can find only this report, which does not contain information in that regard: European Commission, EU Delegation in Vietnam, Highlights of recent achievement from EU Development Cooperation in Vietnam EU and Vietnam: cooperation since the 90s, 20 March 2012 http://eeas.europa.eu/delegations/vietnam/documents/eu_vietnam/highlights_of_achievements_en.pdf

⁵⁵ EEAS, Multiannual Indicative Programme for Vietnam 2014-2020, 11 December 2014, https://ec.europa.eu/europeaid/sites/devco/files/mip20142020-programming-vietnam-20140818_en.pdf

⁵⁶ European Commission, Memo, EU and Vietnam reach agreement on free trade deal, Brussels, 4 August 2015, http://trade.ec.europa.eu/doclib/docs/2015/august/tradoc_153674.pdf

⁵⁷ Among others, the European Instrument for Democracy and Human Rights (EIDHR): Global Call for proposal 2015 does deal with the issue, but only deals with GSP: Europaid, The European Instrument for Democracy and Human Rights (EIDHR): Global Call for proposal 2015, 3 August 2015, <https://webgate.ec.europa.eu/europeaid/online-services/index.cfm?do=publi.welcome&nbPubliList=15&orderby=upd&orderbyad=Desc&searchtype=RS&aofr=150264>; The call for proposals for the European Instrument for Democracy and Human Rights (EIDHR) - Country-based support scheme for Vietnam 2014-2015, issued after the present complaint does not deal with the human rights impact of the FTA either and only traces traditional labour issues (advocacy and raising awareness about international labour standards in the context of FTAs) and does not guarantee a commitment to better engage in the matter in the near future. No commitment has been made in the new action plan 2015-2019 adopted to implement the EU Strategic framework on human rights and democracy issued in 2012 Council conclusions on the Action Plan on Human Rights and Democracy 2015 - 2019 as adopted by the Council on 20 July 2015, <http://data.consilium.europa.eu/doc/document/ST-10897-2015-INIT/en/pdf>

address the new challenges that the FTA will create. FTA safeguards are needed. But instead, and as argued below, the Commission seems to have opted for a traditional FTA model, despite vigorous criticism of it.

II.2 The EU-Vietnam free trade and investment agreement: lack of minimum safeguards for human rights

The Commission remains mute on the substantive content of the EU-Vietnam FTA (specific clauses relating to the elimination of custom duties, reduction of TBT, SPS, IPR, access to services and protection of investments for example). It also remains mute on the ISDS mechanism and the solution found to address its serious impacts on human rights. The issue was raised by FIDH at the conference organised by the Commission in May on EU-Vietnam relations, and the Commission's response was, "*the negotiations with Vietnam are based on the current ISDS policy reflected in the FTAs with Singapore and Canada*"⁵⁸, suggesting that even discussions undertaken in the TTIP context are not considered relevant in the Vietnam context.

In its opinion on the Ombudsman's draft recommendation, the European Commission only provides the following information:

"More specifically, through the negotiations of the EU-Vietnam FTA, the EU pursues the inclusion in the FTA itself of a number of provisions relevant from a HR perspective, namely but not exclusively:

- *the principle stated in the preamble reaffirming the commitment of the Parties to key international HR conventions;*
- *the institutional and legal link between the FTA and the 'essential element' and 'non-execution' clauses of the PCA, enabling each Party to take appropriate measures in case of severe and systematic violation of HR, including the partial or full suspension of the FTA, or the partial or full suspension of the PCA, or of both, if Council so decides;*
- *the creation of specific bilateral institutional structures allowing for a dialogue on any matter of concern not only between authorities, but also with non-state actors - through these structures, stakeholders allegedly affected by the FTA can always raise and discuss their concerns;*
- *the T&SD Chapter of the FTA, which – with specific regard to HR - includes: the respect for all core labour standards and fundamental ILO Conventions; obligations to avoid a race to the bottom on domestic labour laws (no social dumping allowed); mechanisms to ensure the involvement of independent stakeholders in the implementation of the Chapter in both the EU and Vietnam; possibility that, for implementation of the Chapter, the Parties can agree specific actions to follow, possibly coupled with aid and appropriate technical assistance to support progress made by Vietnam;*
- *the Chapter of the FTA dedicated to Transparency, including (among many other issues): dedicated provisions guaranteeing the right to comment on any measure of general application, and committing the Parties to endeavour to take such comments into account; the right of review and appeal; and the right to a decision based on evidence and submissions of record".*

As a preliminary remark, FIDH and VCHR strongly deplore that the Commission considers its argument regarding the FTA provisions to be well founded when it provides no indication as to their exact formulation.

It is perfectly well aware of the legal status of the agreement and the considerable impact the actual wording of the aforementioned relevant provisions for HR will have on the quality of protection provided, or conversely on its inability, to deal with worsening human rights and impacts. In addition, by failing to say anything about the other provisions of the agreement, and suggesting they are not "*provisions relevant from a HR perspective*", the Commission demonstrates how superficial its analysis of the human rights impacts of the FTA is. It also demonstrates its failure to inform the current procedure and, more broadly, the democratic debate.

That being said, the Commission argues that (along with its non-trade policy tools which have been proven to be deficient) the dedicated HR provisions in the FTA prove it has taken human rights adequately into account. It claims the provisions are sufficient to dispense with a HRIA and to address the negative impacts the trade agreement may

⁵⁸ See European Commission, Summary Paper, Trade, Sustainable Development and Human Rights in EU - Vietnam Relations Roundtable with EU stakeholders Held in Brussels on 12 May 2015, http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153624.pdf; The EU-Singapore Free Trade Agreement authentic text as of May 2015 is available here: <http://trade.ec.europa.eu/doclib/press/index.cfm?id=961>; For Canada, the consolidated CETA text as of 26 September 2014 is available here: http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf

have. FIDH and VCHR contest this position. The information available (mainly the memo on the EU-Vietnam agreement issued by the Commission on 4th August, when it announced that, despite the absence of a HRIA, the trade deal was agreed, the information on other negotiations like the TTIP for which more information is available and the CETA whose negotiations are closed and whose text is available) suggests important impacts will not be addressed. In addition, the aforementioned human rights-related provisions of the FTA, which only foster dialogue, remain unable to address them. We recommend enhancing the human rights safeguards and dedicated mechanisms and fine-tuning the other provisions of the agreement. We maintain that a HRIA remains indispensable for a more in-depth assessment of the strain placed on human rights and for showing how the agreement will alleviate any additional strain.

The preamble

According to the Commission, the EU-Vietnam FTA preamble states a principle “*reaffirming the commitment of the Parties to key international HR conventions*”. According to information provided by the Commission on 4 August when it announced a deal had been achieved with Vietnam, “*In the preamble of the FTA the Parties reaffirm their **commitment to the Charter of the United Nations signed in San Francisco on 26 June 1945 and have regard to the principles articulated in The Universal Declaration of Human Rights adopted by the General Assembly of the United Nations on 10 December 1948***”. We deplore the fact that key international conventions are limited to the UDHR and that the preamble does not at the very least echo the PCA’s HR clause on “*respect for democratic principles and human rights, as laid down in the UDHR and other relevant international human rights instruments to which the Parties are Contracting Parties*”.

In any case, this reference in the preamble will be superseded by other probably more strongly worded clauses, thereby negating the contribution, if any, made by this reference to human rights. The preamble is of limited practical value anyway. It is only a contextual clause that does not amount to substantive provisions. It cannot by itself compel a foreign investor or states⁵⁹ and loses any value if not reinforced by the text of the treaty.

We think that this reference is even counterproductive, when formulated in terms as vague as to “*reaffirm their commitment to key convention*” or worse to “*commit ... to have regard to*[not all the human rights obligations of the parties, but only] *UDHR*”:

- “*having regard*”, instead of protecting and reaffirming the full relevance of human rights international standards, tends to confirm that human rights have little to do with the exceptional rules provided by trade and investment protection. To take the case of investment protection, instead of correcting the serious shortcomings of past practice of investment treaties, it even gives credit to the dire main ISDS outcomes relating to MNF, NT clauses, expropriation and Fair and Equitable Treatment clauses for example (see below).

- “*reaffirm their commitment*” to international convention will not provide much more of a guarantee. At most, it says that if Vietnam encounters problems in fulfilling or enforcing human rights because of the FTA (something that will probably happen – see below), this does not entitle it to disregard them. In other words, Vietnam remains obliged to mitigate the potential negative effects of the FTA. As the reference in the preamble offers no guidance on how human rights modulate the substantive trade and investment obligations contained in the text of the agreement, it will have no effect.

The legal link made to the PCA human rights clause

A clause referring to the PCA HR clause is necessarily limited by the same deficiencies as those of the PCA described above. The clause consequently offers no guarantees regarding the aforementioned advantage presented by the Commission relating to possible suspension of the FTA, even in the case of trade and investment-related human rights violations. Moreover, it offers human rights safeguards that are of even less value given that it is clearly not the most progressive and effective clause to be found in EU practice.

⁵⁹ See the position of Marc Jacob commenting on such clauses: Jacob, Marc (2010): International Investment Agreements and Human Rights. INEF Research Paper Series on Human Rights, Corporate Responsibility and Sustainable Development 03/2010. http://www.humanrights-business.org/files/international_investment_agreements_and_human_rights.pdf

In addition, its legal validity as a means of suspending the FTA will depend on how the link made between the PCA and the FTA is formulated in practice.

- The PCA states: “*The Parties confirm their commitment [...] to the respect for democratic principles and human rights, as laid down in the UN General Assembly Universal Declaration of Human Rights and other relevant international human rights instruments to which the Parties are Contracting Parties, which underpin the internal and international policies of both Parties and which constitute an **essential element of this Agreement***”. And the applying suspension relies on the clause stating that “*If either Party considers that the other Party has failed to fulfil any of its obligations under **this Agreement** it may take appropriate measures*”⁶⁰. This means that for the linking clause to be able to effectively suspend the FTA, the FTA must **be carried out as an “integral part” of the PCA**.
- Past experience has shown the wording can be ambiguous in this regard⁶¹. The most progressive linking clauses are the ones of the Cariforum EPA. The EPA states that **respect for the human rights international conventions is an objective and the basis for the trade agreement**: “*This Agreement is based on the Fundamental Principles as well as the Essential and Fundamental Elements of the Cotonou Agreement, as set out in Articles 2 and 9, respectively, of the Cotonou Agreement [...] The Parties agree that the Cotonou Agreement and this Agreement shall be implemented in a complementary and mutually reinforcing manner*”⁶². It expressly insists on the **integration component** and that human rights clauses are **relevant for all parts of the agreement**: “*The Parties reaffirm that the objective of sustainable development is to be applied and integrated at every level of their economic partnership, in fulfilment of the overarching commitments set out in Articles 1, 2 and 9 of the Cotonou Agreement*”⁶³. It concludes by **referring expressly to the suspension procedure** pointing out that nothing in the trade agreement may prevent the appropriate measures which expressly include suspension: “*Nothing in this Agreement shall be construed so as to prevent the adoption by the EC Party or a Signatory CARIFORUM State of any measures, including trade-related measures under this Agreement, deemed appropriate, as provided for under Articles 11(b), 96 and 97 of the Cotonou Agreement and according to the procedures set by these Articles*”⁶⁴.
- Whatever the formulation of the linking clause, Article 57 of the EU-Vietnam PCA does not expressly refer to suspension creating a discrepancy.⁶⁵
- For the Commission not to choose the most progressive model means it has to duly justify why it is not necessary to enhance the positive impacts and avoid the negative ones, and/or how the EU-Vietnam FTA proposed linking clause offers the same level of protection. For the EU-Vietnam FTA, any ambiguity will be yet more detrimental given that it is accompanied by an investor-state dispute settlement mechanism.

The EU-Vietnam PCA human rights clause to which the FTA would be linked enables a State Party (like the EU) to take appropriate measures only if the other party (e.g. Vietnam) violates its obligations under the agreement. **It does not allow a Party (e.g. Vietnam) to depart from its obligations under the agreement (whatever impact they may have on human rights)**. The human rights clause in consequence does not allow the State Parties to suspend the provisions which oblige State Parties to adopt measures that may infringe human rights (for example, as result of lowering a tariff or strengthening intellectual property rights), that may prevent the State Party from controlling private stakeholders whose conduct may lead the violation of others’ human rights (for example, as a result of an excessively high level of protection for foreign investors operating in their territory), that would prevent the State Party from adopting policies that move towards the full realization of human rights (as result of fiscal and economic

⁶⁰ Framework Agreement on Comprehensive Partnership and Cooperation between the European Union and its Member States, of the one part, and the Socialist Republic of Viet Nam, of the other part, commission proposal COM (2013) 924 articles 1, 57 ; http://eur-lex.europa.eu/resource.html?uri=cellar:e9d99d61-6897-11e3-a7e4-01aa75ed71a1.0011.01/DOC_2&format=PDF

⁶¹ See agreements with Korea or Singapore. Also in Lorand Bartels, The European Parliament’s role in relation to HR in trade and investment agreement, EP policy Department, February 2014, http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/433751/EXPO-JOIN_ET%282014%29433751_EN.pdf

⁶² Economic Partnership Agreement between the CARIFORUM States, on the one hand, and the European Community and its Member States, on the other, JO 289/I/3, 30.10.2008, Article 1 http://trade.ec.europa.eu/doclib/docs/2008/february/tradoc_137971.pdf

⁶³ Economic Partnership Agreement between the CARIFORUM States, on the one hand, and the European Community and its Member States, on the other, JO 289/I/3, 30.10.2008, Art. 3.1 http://trade.ec.europa.eu/doclib/docs/2008/february/tradoc_137971.pdf

⁶⁴ Economic Partnership Agreement between the CARIFORUM States, on the one hand, and the European Community and its Member States, on the other, JO 289/I/3, 30.10.2008, Article 241 Relations with the Cotonou Agreements http://trade.ec.europa.eu/doclib/docs/2008/february/tradoc_137971.pdf

⁶⁵ Only the annexed joint declaration to the PCA (but which does not refer to suspension as other agreements do) refers to Article 60 (3) of the Vienna Convention on the Law of Treaties “on termination or suspension of the operation of a treaty as a consequence of its breach.”

impacts of trade and investment agreements for example).⁶⁶ Given that all these kinds of problems could occur (see below), the human rights clause should be revised:

- In line with what Prof. Lorand Bartels proposes, there is a need to reinforce the human rights commitments: *“The parties reaffirm their obligations concerning democratic principles and human rights, as laid down in the Universal Declaration of Human Rights and other relevant international human rights instruments, and the rule of law, and undertake to comply with these obligations in their internal and international policies”*. There is a need also to ensure flexibility: *“If one of the Parties considers that the other Party has failed to fulfil an obligation under this Agreement or that a provision of the Agreement restricts its own ability to meet its human rights obligations it may take appropriate measures”*.⁶⁷
- However, because of the competing effect of the other provisions in the text of the FTA, it could not fully solve the problems. Indeed the FTA common models, from which the Commission does not appear to depart, provide precise obligations and exceptions capable of negating the value of the clause. The exceptions, for example, are commonly interpreted very restrictively allowing parties to depart from their obligations only if they prove that the measure taken is strictly necessary and that there were no other means to meet the objectives. The clearly worded clauses of the FTA placing an obligation on the parties and offering only limited room for any deviation, will restrict the ability of the parties to argue for suspension because of human rights issues. The existence of an ISDS mechanism enhances the risks, as it has never considered a provision of an agreement as “restricting” the state’s ability to address its human rights obligations (see hereunder). Parties will probably never use the human rights clause, as any investors affected will be eager to contest the need for the measure and to sue any State that claims to be released from its investment protection obligation.
- One solution as described below is for the FTA to reframe the substantive trade and investment clauses of the agreement, provide foreclosure clauses for investors, set up rules of interpretation, reform the ISDS, etc. The Commission in the case of CETA and TTIP has provided improvements, but these fail to prevent or remedy HR impacts as demonstrated below. As well as the other clauses being adapted, the HR clause in FTA should state that: **In the event that one Party presents difficulties in fulfilling its human rights obligations within the context of the FTA, it can take appropriate measures, including the suspension of problematic clauses and obligations contained in the FTA.** Clauses reaffirming that development objectives and human rights prevail, and prevail in the case of inconsistency with the trade agreement, do exist in the EU-Cariforum EPA.⁶⁸

Finally, the FTA linking clause relates to the EU-Vietnam PCA. But the PCA has not yet come into force, and will only be valid for a period of five years. The FTA linking clause will then no longer be effective if the PCA is not ratified and renewed after its validity period.⁶⁹ Preference should be given to human rights clauses in the FTA.

The European Parliament *“reiterates its call on the Commission to draft a new ‘model clause’ referring to the parties’ international obligations, comprising a procedure for consultation and specifying political and legal mechanisms to be used in the event of a request for cooperation to be suspended”*.⁷⁰

⁶⁶ On the conclusion that it would lead to incompatibilities with human rights obligations requiring adapting of the trade and investment agreements see /HRC/19/59/&dd.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, pp. 6-7.

⁶⁷ **Lorand Bartels suggests that “If one of the Parties considers that the other Party has failed to fulfil an obligation under this Agreement or that a provision of the Agreement restricts its own ability to meet its human rights obligations it may take appropriate measures”**. The Lorand Bartels recommendations are not based on ISDS jurisprudence. The ISDS case for the most part considers that investment agreements do not restrict human rights obligations (see below). A Model Human Rights Clause for the EU’s International Trade Agreements, Lorand Bartels, February 2014, http://www.institut-fuer-menschenrechte.de/uploads/tx_commerce/Studie_A_Model_Human_Rights_Clause.pdf

⁶⁸ Economic Partnership Agreement between the CARIFORUM States, on the one hand, and the European Community and its Member States, on the other, JO 289/L/3, 30.10.2008, Article 241 Relations with the Cotonou Agreements http://trade.ec.europa.eu/doclib/docs/2008/february/tradoc_137971.pdf

⁶⁹ Lorand Bartels, The European Parliament’s role in relation to HR in trade and investment agreement, EP policy Department, February 2014, http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/433751/EXPO-JOIN_ET%282014%29433751_EN.pdf

⁷⁰ European Parliament resolution of 18 April 2012 on the Annual Report on Human Rights in the World and the European Union’s policy on the matter, including implications for the EU’s strategic human rights policy (2011/2185(INI))

The specific bilateral institutional structures, T&SD chapter

The Commission argues that the FTA foresees “*the creation of specific bilateral institutional structures allowing for a dialogue on any matter of concern not only between authorities, but also with non-state actors - through these structures, stakeholders allegedly affected by the FTA can always raise and discuss their concerns*”; and the “*T&SD Chapter of the FTA, which – with specific regard to HR - includes: the respect for all core labour standards and fundamental ILO Conventions; obligations to avoid a race to the bottom on domestic labour laws (no social dumping allowed); mechanisms to ensure the involvement of independent stakeholders in the implementation of the Chapter in both the EU and Vietnam; possibility that, for implementation of the Chapter, the Parties can agree specific actions to follow, possibly coupled with aid and appropriate technical assistance to support progress made by Vietnam*”.

The Commission insists on the fact that the T&SD chapter pays specific regard to HR, suggesting that this is not the case for the other “*bilateral institutional structures*” mentioned. In other FTAs this is indeed not the case. In the description of how the T&SD Chapter is supposed to address human rights, it appears that it does not encompass all human rights but focuses on labour standards only. Commenting on this, the European Parliament adopted a resolution that “*reaffirms the principle of the indivisibility of human rights, and condemns attempts to consider any right or ground of discrimination less important than others; calls on the Commission and Council to respect the principle of indivisibility when negotiating human rights clauses with non-EU countries*”.⁷¹ Finally, when explaining how these mechanisms will work, the Commission only points out their capacity to foster dialogue “*possibly coupled*” with target support, whatever the inadequacies of these tools as argued above.

The Commission never ensures that there will be a focused and dedicated mechanism to deal with the impacts of trade and investment on human rights. The Commission always avoids speaking about the lack of enforcement and lack of mechanisms devoted to achieving that end. Traditionally, FTAs provide for a Trade Committee and a T&SD Committee to foster dialogue with the partner country, but do not set up a Human Rights Committee dealing with the impact of the FTA on human rights. The European Parliament, however, was already calling in 2010 for a human rights clause to “*be accompanied by an enforcement mechanism so as to ensure its implementation in practice*”, and stressed that “*monitoring and assessment should include formal consultations with civil society regarding the impact of these agreements*”.⁷² In April 2012, before the start of negotiations with Vietnam, it called “*for a comprehensive human rights chapter, in addition to social and environmental chapters, in all future Free Trade Agreements*”.⁷³

The T&SD Chapter is also traditionally accompanied by a Civil Society Monitoring Group, composed of representatives from the private sector, trade unions and NGOs. These mechanisms are not dedicated to human rights and may not be viewed as capable of improving human rights or dealing effectively with the impact on human rights. Such monitoring mechanisms work rather as a negotiation ‘antechamber’ where competing interests are represented rather than as a mechanism able to enforce obligations. In CETA and other models, the T&SD Chapter is drawn up “*without a specific reference to the investment chapter*”, this disassociation creating a new range of difficulties as explained below.⁷⁴ The T&SD Chapter is at any rate criticised for focusing on a limited range of rights, mainly the core ILO conventions, and for being conceived in a way that make labour standards a second-class commitment, expressly excluded from the enforcement mechanisms applying to the other provisions of the FTAs. In April 2012,

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fTEXT%2bTA%2bP7-TA-2012-0126%2b0%2bDOC%2bXML%2bV0%2f%2fEN&language=EN>

⁷¹ European Parliament resolution of 16 December 2010 on the Annual Report on Human Rights in the World 2009 and the European Union's policy on the matter (2010/2202(INI)), <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fTEXT%2bTA%2bP7-TA-2010-0489%2b0%2bDOC%2bXML%2bV0%2f%2fEN&language=EN>

⁷² European Parliament resolution of 16 December 2010 on the Annual Report on Human Rights in the World 2009 and the European Union's policy on the matter (2010/2202(INI)), <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fTEXT%2bTA%2bP7-TA-2010-0489%2b0%2bDOC%2bXML%2bV0%2f%2fEN&language=EN>

⁷³ European Parliament resolution of 18 April 2012 on the Annual Report on Human Rights in the World and the European Union's policy on the matter, including implications for the EU's strategic human rights policy (2011/2185(INI)) <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fTEXT%2bTA%2bP7-TA-2012-0126%2b0%2bDOC%2bXML%2bV0%2f%2fEN&language=EN>

⁷⁴ Markus Krajewski, “Modalities for investment protection and Investor-State Dispute Settlement (ISDS) in TTIP from a trade union perspective”, Friedrich-Alexander-Universität Erlangen-Nürnberg, p. 21

the European Parliament was still calling for the “*inclusion of a **complaints procedure open to the social partners and civil society, the establishment of an independent body to settle pertinent disputes and the possibility of recourse to a **dispute settlement mechanism with provision for fines and the suspension of trade benefits** [...] equivalent to mechanisms for market access provisions***”. It demanded that the objectives of Corporate Social Responsibility (CSR) “*should be binding on European companies operating in countries with institutional weaknesses*”.⁷⁵

The Parliament “*emphasises the importance and indispensability of human rights and democracy clauses and **effective dispute mechanisms in trade agreements** [...] calls for a clear set of human rights benchmarks to be established within the framework of individual trade agreements to ensure that there is a **clear standard and understanding for both parties on what situations and actions may trigger such human rights clauses***”.⁷⁶

As requested by the European Parliament, and supported by academics, the UN and civil society stakeholders dealing with human rights⁷⁷, the FTA should include recourse mechanisms for affected communities to seek redress, whereby its impact on human rights may be measured and proper compensation found should violations finally prove unavoidable:

- **The FTA should set up a specific inter-institutional committee for human rights. It should also provide for a civil society monitoring mechanism that is dedicated to dealing with human rights impacts of the FTA and** composed, not of businesses (with whom dialogue is possible via the T&SD civil society monitoring mechanism), but by human rights defenders and independent HR NGOs. These mechanisms should have a dedicated budget to undertake field visits and to interact with civil society and human rights experts. They would report to the parties of the agreement, the Trade Committee and the T&SD Committee. They should aim to prevent any impacts on human rights and to mitigate and help find remedies if violations occur.
- **The FTA should also set up a complaint mechanism that can be accessed by individuals and communities** whose human rights are affected by trade and investments. This kind of mechanism exists in other fora⁷⁸ and could be transposed and adapted for trade and investment agreements in order to avoid negative impacts and ensure access to remedy and compensation, based on need and responsibility.
- **The FTA should include a mandatory and enforceable binding clause for investors** to comply with the principles of CSR as defined at international level, including the 2010 update of the OECD Guidelines, and with the standards defined by the UN, such as the UN Guiding Principles on Business and Human Rights.

The ex-post HRIA

While insisting on its intention to carry out an ex-post HRIA, the Commission does not specify if this commitment will be enacted by a clause in the FTA. As recommended, the FTA should oblige the parties to conduct regular (3-5 years), participative and comprehensive HRIAs in line with the UN HRC’s guidelines⁷⁹ in order to ensure that the implementation of the agreement does not affect the HR obligations of the Parties and to adjust the agreement and its implementation in case of adverse effects. Prof. Lorand Bartels recommends clauses stating that:

⁷⁵ European Parliament resolution of 18 April 2012 on the Annual Report on Human Rights in the World and the European Union's policy on the matter, including implications for the EU's strategic human rights policy (2011/2185(INI)) <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fTEXT%2bTA%2bP7-TA-2012-0126%2b0%2bDOC%2bXML%2bV0%2f%2fEN&language=EN>

⁷⁶ European Parliament resolution of 16 December 2010 on the Annual Report on Human Rights in the World 2009 and the European Union's policy on the matter (2010/2202(INI)), <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fTEXT%2bTA%2bP7-TA-2010-0489%2b0%2bDOC%2bXML%2bV0%2f%2fEN&language=EN>

⁷⁷ EP resolution: 25 November 2010 in its “resolution on human rights and social and environmental standards in international trade agreements” and others, e.g.: European Parliament resolution of 29 April 2015 on the second anniversary of the Rana Plaza building collapse and progress of the Bangladesh sustainability compact; A Model Human Rights Clause for the EU’s International Trade Agreements, Lorand Bartels, February 2014, http://www.institut-fuer-menschenrechte.de/uploads/tx_commerce/Studie_A_Model_Human_Rights_Clause.pdf

⁷⁸ E.g.: The mechanisms put in place in the World Bank for development and investment activities <http://ewebapps.worldbank.org/apps/ip/Pages/AboutUs.aspx> : for IBRD & IDA or <http://www.cao-ombudsman.org/about/whowere/index.html> for IFC & MIGA operations

⁷⁹ 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.

The Parties undertake to monitor continuously the operation of the Agreement through their respective participative processes and institutions, as well as those set up under this Agreement, in order to ensure that the implementation of the agreement does not affect the obligations of the Parties in [the new model of human rights clause].

A comprehensive review of the Agreement shall be undertaken by the parties not later than five (5) years after the date of signature and at subsequent five-yearly intervals, in order to determine the impact of the Agreement on human rights, including the costs and consequences of implementation.

The review will be undertaken on the basis of a human rights impact assessment conducted by an independent body with appropriate expertise in the subject of human rights impact assessments, on the basis of transparent information and procedures, taking into account all available and relevant evidence from all sources, especially civil society, and will be appropriately resourced.

The human rights impact assessment and a report of the review will be published. The parties, and the Joint Council, as appropriate shall amend its provisions and adjust their application as recommended by the review of the Agreement.

The ex-post Impact Assessment that the Commission proposes instead of an ex-ante HRIA and adapted FTA is furthermore clearly unable to avoid the impacts that the EU-Vietnam FTA could have in the interim. Even after being implemented, its capacity to remedy the negative impacts is doubtful. Indeed, the capacity of an Ex-post HRIA to remedy negative impacts will depend on the willingness of the Parties to renegotiate the problematic clauses as necessary. Traditionally, the FTA does not offer any guarantee of adaptation. Even worst, the possibility for the EU to terminate the Treaty in the event of its inability to reach an agreement on the reforms required will have only limited impact if the FTA contains “a sunset clause”. These clauses, also named “survival clauses”, provide for a party to notify the termination of the treaty without affecting investment protection existing at the time of termination. The treaty continues to provide investment protection, generally for a period of 10 or even 20 years after notification of termination. The CETA (EU-Canada FTA) text confirms that the Commission has not renounced this disproportionate concession overriding sovereignty. The CETA provides a sunset clause applying for a period of 20 years after termination.⁸⁰ Under these conditions, an ex-post HRIA would be ineffectual at correcting the effects of the investment protection provided by the FTA, despite their well-known devastating effects on human rights (see below).

The Chapter on Transparency:

To make up for the lack of information provided by the Commission, we can refer to another FTA Transparency Chapter such as in the CETA. It states: “*Each Party shall ensure that **its laws, regulations, procedures and administrative rulings of general application respecting any matter covered by this Agreement** are promptly published or made available in such a manner as to enable interested persons and the other Party to become acquainted with them. To the extent possible, each Party shall:*

- *publish in advance any such measure that it proposes to adopt; and*
- *provide interested persons and the other Party a reasonable opportunity **to comment on such proposed measures**”.*

Laws, regulations and procedures that may be at that point scrutinized and commented on are those that are “*materially affecting the operation of this Agreement*” and “*a person of the other Party who is directly affected [...] is afforded a reasonable opportunity to present facts and arguments in support of its position*”. The chapter commits parties to ensuring that those interested parties have access to independent and impartial judicial, quasi-judicial or administrative tribunals or procedures, and as stated by the Commission, gives them the right to present their position

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Comprehensive Economic and Trade Agreement (CETA), consolidated text, 26 September 2014, Final provisions, Article X.08

and to benefit from a decision *based on the evidence and submissions of record*, and to “*appeal or further review access*”.⁸¹

Clearly, the text seeks to provide commitments to assist the domestic enforcement of the FTA. The Commission, by considering the Transparency Chapter as relevant for human rights, confirms its tendency to see investment treaties as protecting human rights because they protect the property rights of investors⁸². As commented by some, as far as human rights are concerned, it is at most “*a human rights treaty for a special interest group*”.⁸³ The text on transparency, as it exists for the CETA, does not offer any guidance on ensuring a balance between the rights provided to investors and the protection for the local populations against negative impacts of trade and investment. It seeks to help the domestic enforcement of a FTA that is already deficient in this regard. It is still a matter of considerable speculation whether the rule of law for business may, even in the long term, benefit populations and citizens, whose human rights are affected by business, trade and investments. It is even more speculative since the FTA, which the Transparency Chapter seeks to enforce domestically, threatens human rights and does not provide the requisite safeguards (see below).

In conclusion: The clauses and mechanisms presented by the Commission have been known since 2008-2009⁸⁴ and mainly provide ways for monitoring and dialogue. They are insufficient to address the HR impact of an FTA.

What about the other provisions of the FTA:

The Commission remains silent on the substantive trade and investment clauses of the agreement and the flexibility they create to avoid or redress effectively negative impacts on human rights.

The memo issued by the Commission on August 4, 2015 about reaching an agreement on the EU-Vietnam trade deal reveals that Vietnam has made the following commitments:

- Elimination of nearly all tariffs (over 99%), 65% at entry into force, and the rest over a 10-year period. The EU having negotiated a 7-year period for the elimination of its own duties. According to the words of the Commission “*This is a far-reaching, fully symmetrical tariff elimination that has never before been achieved with a developing country*”
- Reduction of non tariff barriers
- “*High level of protection*” on “*Intellectual Property Rights*”, “*going beyond the standards of WTO TRIPs agreement*” including for pharmaceutical products
- Facilitation of access in the sector of services; The Commission pointing out that “*the result of this chapter goes largely beyond both WTO commitments and any other FTA that Vietnam has concluded, thereby giving EU companies the best possible access to the Vietnamese market*”.

⁸¹ Canada-European Union: Comprehensive Economic and Trade Agreement (CETA), Consolidated text, 26 September 2014, Chapter 31 on transparency, p. 452, 453, http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf or <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/31.aspx?lang=eng>

⁸² SWD (2013) 185 final, Commission Staff Working Document – Impact Assessment Report on the EU-China Investments Relations - Accompanying the document *Recommendation for a Council Decision authorising the opening of negotiations on an investment agreement between the European Union and the People's Republic of China*, Brussels 23 May 2013, available at: http://ec.europa.eu/governance/impact/ia_carried_out/docs/ia_2013/swd_2013_0185_en.pdf, p. 48.

⁸³ See the position of Marc Jacob commenting these kind of clauses : Jacob, Marc (2010): *International Investment Agreements and Human Rights*. INEF Research Paper Series on Human Rights, Corporate Responsibility and Sustainable Development 03/2010. http://www.humanrights-business.org/files/international_investment_agreements_and_human_rights.pdf

⁸⁴ See the clauses in the EU-Cariforum EPA op.cit. See also the Council's 2009 decision to extend the human rights and democracy clause to all agreements and to provide for a linkage between these agreements and free trade agreements by including a ‘passerelle clause’ where necessary; see the T&SD chapter and civil society mechanism in EU-Korea FTA, etc. L. Bartels, the European parliament's role in relation to human rights in trade and investment agreement, Directorate general for external policies of the Union, European Parliament, Study, february 2014, http://www.europarl.europa.eu/RegData/etudes/etudes/JOIN/2014/433751/EXPO-JOIN_ET%282014%29433751_EN.pdf and European Parliament resolution of 13 December 2012 on the review of the EU's human rights strategy, § 47, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2012-0504+0+DOC+XML+V0//EN>

- Opening access to investment in “key sectors”; the Commission stating: “*provisions on investment protection and dispute settlement are still being negotiated in light of the new EU approach on investment dispute settlement*”⁸⁵.

Despite having reached **unprecedented levels**, those commitments **have not been tested** for their effects, neither in light of human rights nor in light of “policy coherence for development”.

The conference organised in May by the Commission offered only one additional piece of information on ISDS: “*Mr Petriccione referred to the broader public debate on ISDS that is currently taking place in Europe, the outcome of which will be translated into specific provisions in the FTA. For the time being, the negotiations with Vietnam are based on the current ISDS policy reflected in the FTAs with Singapore and Canada, which ensure full transparency of the proceedings, greater guarantee to a number of prerogatives of a sovereign government, including the right to regulate*”⁸⁶. As, apart for ISDS, the Commission did not provide information on the model it used, we do not know if it used similar models or previous ones for the formulation of the other clauses of the EU-Vietnam FTA. CETA’s improvements having been qualified as positive, but largely insufficient and mainly cosmetic⁸⁷, we face an important risk that the Commission did not effectively fine-tune the human rights protection provided compared to existing practice. FIDH and VCHR will expose the reasons why FTAs like CETA, even when improved on certain issues when compared to the more traditional models of international agreements, still remain lacking from a human rights perspective. The reference made by Mr Petriccione to CETA and Singapore, instead of TTIP future achievements, is also matter of concerns.

Substantives trade and investment clauses and their impacts on human rights

Facing strong opposition on TTIP, the Commission suspended the negotiation and promised reforms. The CETA agreement however, whose text has been negotiated in the meanwhile, already proposes some innovations. Compared to other investment agreements, it offers a more precise formulation of some of its provisions (such as on expropriation) and offers some innovation regarding ISDS (mainly the possibility to agree later on an appeal mechanism and code of conduct for arbitrators, the possibility for the parties to agree on specific interpretation and transparency rules in ISDS). However, those proposals, despite some positive improvements, only provide a partial answer to human rights challenges. For TTIP, the Commission proposed to improve the model once again. It proposes notably a new clause on the right to regulate, a professionalised ISDS Court (instead of the ad hoc arbitral tribunals), an appeal mechanism, and provides additional elements that may help to preserve the autonomy of the EU legal order. Once again, those innovations are interesting, but do not appear to address the human rights concerns. CETA and TTIP’s innovations show how much there is a need for caution, and not to rush to conclude problematic agreements. This conclusion should also be valid for the EU-Vietnam FTA and requires carrying out a serious human rights impact assessment.

Among the issues at stake:

Substantive clauses excessively protecting the foreign investors, not offering HR safeguards and enforced by ISDS mechanisms in a way that directly affect the ability of States to respect, protect and fulfil their HR obligations.

While the States have an obligation to regulate under human rights law, the investment agreements, in their different formulations on expropriation or fair and equitable treatment (FET) and other clauses, affect the exact contours of the States ability to do so⁸⁸. Investment agreements’ clauses define what is lawful under the Investment Law created by the Agreement. Depending of the wording of its provisions, a same policy, regulation or measure taken by the State, might be considered as necessary and proportionate under human rights international law, but unlawful in regard of international investment law. Any ISDS mechanisms, conceived to enforce investors’ protection clauses of

⁸⁵ European Commission, memo, EU and Vietnam reach agreement on free trade deal, Brussels, 4 August 2015, http://trade.ec.europa.eu/doclib/docs/2015/august/tradoc_153674.pdf

⁸⁶ European Commission, Summary Paper, Trade, Sustainable Development and Human Rights in EU-Vietnam Relations, Roundtable with EU stakeholders Held in Brussels on 12 May 2015, p.3 http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153624.pdf

⁸⁷ Dr Joshua Curtis and Dr John Reynolds, “TTIP, ISDS and the Implications for Irish Public Health Policy”, *opcit.*, p. 98

⁸⁸ Lorenzo Cotula, property in a shrinking planet: fault lines in international human rights and investment law, *International Journal of Law in Context*, June 2015, pp 119-120 http://journals.cambridge.org/abstract_S1744552315000026

the investment agreements, will in consequence have important impacts. ISDSs offer a direct way for foreign investors to challenge the measures taken by the State, even those measures are taken to comply with their obligation to respect, protect and fulfil human rights. Foreign investors can rely on investment agreement's standards to challenge government action that adversely affects business prospects. Clashes between a State's investment treaties and human rights obligations have notably been raised in the context of regulatory measures relating to water and sanitation, health, and land reform.

ISDS cases' analysis reveals that, being lawful under the human rights law (because pursuing legitimate public purpose and being proportionate under HR law), a State measure may be judged unlawful under the investment agreement law, consequently opening a right to compensation for foreign investors. The compensations are not minor or anecdotal, "*Awards are regularly made in the hundreds of millions of US dollars, and awards of billions are becoming more regular*"⁸⁹. In addition, "*average costs of litigating one case are around US\$ 8 million per claim per disputant, and have been as high as US\$ 30 million (or €7.3 and €27.3 million respectively)*"⁹⁰. The case Occidental Petroleum against Ecuador (termination of an oil production site in the Amazon, Ecuador arguing of multiple human rights violations and environmental impacts) resulted in an award of \$1.76 billion to Occidental (\$2.4 billion with interest)⁹¹. Large compensation amounts raise important challenges. Investment agreements are conceived to attract investments and ultimately serve development goals, but "*The more foreign investment it has accepted, the more costly and difficult certain political choices may become with a view to the damages or compensation expected to be awarded by arbitral tribunals. Such financial risks may even reach prohibitive levels*"⁹². UN experts point out that developing countries are even more vulnerable since they lack the resources to defend themselves against major transnational enterprises⁹³. In addition, countries like Vietnam face important risks due to the important regulations, laws and measures they have to take to meet their human rights obligations.

Investment agreements, creating new and more stringent conditions for a State measure to be lawful, and weighting seriously on public finances, have created a worrisome "chilling effect". Indeed, it appears that governments are now factoring liability risks into decision-making and States hold back from enacting legislation due to concerns about arbitration claims⁹⁴:

- One of the most prominent cases illustrating this "chilling effect" is that of Vattenfall on the construction of a new power plant at Moorburg near Hamburg. To avoid damages said to be of some 1.4 billion Euros, Germany has issued, as part of the amicable settlement, "a modified water use permit".⁹⁵
- Australia referred expressly to this "chilling effect" in its defence on the claim initiated by Philip Morris against its decision on plain packaging. It says "*many countries are now awaiting the results of the litigation in order to decide on their own legislative proposals on plain packaging.*" Australia adds that the case has "*produced and is producing a deep and profound regulatory chill across the globe*"⁹⁶. Indeed, New Zealand's government decided "*not to take any action before the resolution of on-going investment claims by Philip Morris against Uruguay and Australia*"⁹⁷. And "*Uruguay itself reportedly considered watering down its tobacco control regulations as an initial response to the claims*"⁹⁸.

⁸⁹ Dr Joshua Curtis and Dr John Reynolds, "TTIP, ISDS and the Implications for Irish Public Health Policy", *op.cit.*, p 44

⁹⁰ Dr Joshua Curtis and Dr John Reynolds, "TTIP, ISDS and the Implications for Irish Public Health Policy", *op.cit.*, p 44

⁹¹ UN Independent expert Alfred-Maurice de Zayas, Report, 14 July 2015, A/HRC/30/44, *op.cit.*

⁹² Dr Ingolf Pernice, *op.cit.*, p. 134 .

⁹³ UN Independent expert Alfred-Maurice de Zayas, Report, 14 July 2015, A/HRC/30/44, *op.cit.*§ 28

⁹⁴ Lorenzo Cotula, property in a shrinking planet: fault lines in international human rights and investment law, *International Journal of Law in Context*, June 2015, p 129.

⁹⁵ Dr Ingolf Pernice, *op.cit.*, p. 139.

⁹⁶ Dr Joshua Curtis and Dr John Reynolds, "TTIP, ISDS and the Implications for Irish Public Health Policy", *op.cit.*, p 67

⁹⁷ Dr Joshua Curtis and Dr John Reynolds, "TTIP, ISDS and the Implications for Irish Public Health Policy", *op.cit.*, p 83.

⁹⁸ *Ibidem.*

- In the same vein, a Commission established by the Canadian government to enquire into the extension of non-profit public health insurance, to cover extra treatments such as prescription medicine and dental care, warned that “*this may not be feasible due to damage claims under investment treaties*”⁹⁹. And the threat of investment claims reportedly “*factored into the eventual decision of the Czech government not to re-establish a number of hospitals as non-profit organisations*”¹⁰⁰.

This “chilling effect” known in developed countries could be far more important in developing countries and in countries, such as Vietnam, already reluctant to protect human rights. In *Sawhoyamaya v. Paraguay*, an indigenous community claimed restitution of their ancestral lands. It is reported “*The Paraguayan government resisted restitution, arguing that the claim ‘collides with a property title which has been registered’, lastly with a German investor protected under the Germany–Paraguay BIT*”¹⁰¹

Finally “*investor-State dispute settlement has mutated from a corporate shield against allegedly unfair behaviour by States into a tactical weapon to delay, weaken and kill regulation. Specialized law firms actually encourage their multinational clients to scare Governments into submission: ‘It’s a lobbying tool in the sense that you can go in and say, ‘Ok, if you do this, we will be suing you for compensation.’ It does change behaviour in certain cases*”¹⁰².

“*Investment treaties act to effectively ‘lock in’ market oriented policies favourable to foreign investors and their profit margins mak[ing] the reversal of these policies prohibitively expensive*”¹⁰³. As observed by the UN independent expert, Alfred-Maurice de Zayas “*It is not just a question of reforming the investor–State dispute settlement system for the future, but imperative to review and revise existing bilateral investment treaties and free trade agreements, which were never intended to become prisons for States*”¹⁰⁴.

In the absence of adequate safeguards to ensure the right balance between collective and individual interest, as does the HR law, serious impacts will be deplored. Past experience actually proves that “*Trade agreements and their associated dispute resolution systems are currently failing to accommodate or facilitate human rights, or are otherwise actively opposed to their protection and fulfilment*”¹⁰⁵.

ISDS cases’ review indeed confirms that insufficient clauses, such as vague formulation on rights to regulate, affirmation of environmental and development objectives, affirmation of the relevance of international law and the reference to customary interpretation rules contained in Vienna Convention on the Law of Treaties, and T&SD chapter, remain insufficient¹⁰⁶. Instead “*Experience shows that arbitrators interpret international investment agreements without human rights or environmental constraints*”¹⁰⁷. And finally “*No investment tribunal has yet engaged with international human rights law, let alone sought to apply it*”¹⁰⁸. The following examples illustrate the tendency of arbitral tribunals to reject human rights law and to adopt narrower interpretation of what should be considered as lawful State measure exempting in consequence the State’s liability to serve prohibitive compensation:

⁹⁹ Dr Joshua Curtis and Dr John Reynolds, “TTIP, ISDS and the Implications for Irish Public Health Policy”, *op.cit.*, p 67

¹⁰⁰ Dr Joshua Curtis and Dr John Reynolds, “TTIP, ISDS and the Implications for Irish Public Health Policy”, *op.cit.*, p 67

¹⁰¹ Lorenzo Cotula, property in a shrinking planet: fault lines in international human rights and investment law, *International Journal of Law in Context*, June 2015, pp 127 http://journals.cambridge.org/abstract_S1744552315000026

¹⁰² Report of the Independent Expert on the promotion of a democratic and equitable international order on the impact of investor-State-dispute-settlement on a democratic and equitable international order (A/70/285), §46 http://www.un.org/en/ga/search/view_doc.asp?symbol=A/70/285

¹⁰³ Dr Joshua Curtis and Dr John Reynolds, “TTIP, ISDS and the Implications for Irish Public Health Policy”, *op.cit.*, p 72

¹⁰⁴ UN Independent expert Alfred-Maurice de Zayas, Report, 14 July 2015, A/HRC/30/44, *op.cit.* §30

¹⁰⁵ Dr Joshua Curtis and Dr John Reynolds, “TTIP, ISDS and the Implications for Irish Public Health Policy”, “TTIP, ISDS and the Implications for Irish Public Health Policy”, A Report for the Irish Cancer Society, Full Report, July 2015, p.48 <http://www.cancer.ie/content/eu-us-trade-deal-likely-affect-irelands-ability-pass-public-health-laws#sthash.AkkR1oIW.dpbs>; citing Ernst Ulrich Petersmann, ‘The WTO Constitution and Human Rights’ 3 *Journal of International Economic Law* (2000); Robert Howse, ‘Human Rights in the WTO: Whose Rights, What Humanity? Comment on Petersmann’ 13 *European Journal of International Law* (2002) and rank Garcia, ‘The Global Market and Human Rights: Trading Away the Human Rights Principle’ 25 *Brooklyn Journal of International Law* (1999)

¹⁰⁶ OECD, « Investment treaty law, sustainable development and responsible business conduct : a fact finding survey », June 2014 <http://www.oecd.org/daf/inv/mne/2014RBCMinisterial-TreatyRBC.pdf>

¹⁰⁷ UN Independent expert Alfred-Maurice de Zayas, Report, 14 July 2015, A/HRC/30/44, *op.cit.* p10.

¹⁰⁸ Dr Joshua Curtis and Dr John Reynolds, “TTIP, ISDS and the Implications for Irish Public Health Policy”, *op.cit.*, p. 98

- *Eureka v. Slovak Republic*, the tribunal reject the applicability of the EU Charter on Fundamental Rights: “BIT protects “assets” and “investments” rather than the arguably narrower concepts of “possessions” and “property” protected by the EU Charter on Fundamental Rights, give rise to the possibility of wider protection under the BIT than is enjoyed under EU law.”¹⁰⁹
- *Rompetrol Group N.V. v. Romania*, the arbitral tribunal stated “The ECHR has its own system and functioning institutional structure for complaints of breach against States Parties. [...] **The governing law for the issues which do fall to the Tribunal to decide is the BIT**”.¹¹⁰
- *Siemens V. Argentina*, the tribunal “observes that Article I of the First Protocol to **the European Convention on Human Rights permits a margin of appreciation not found in customary international law or the Treaty**”¹¹¹.
- *Bernhard von Pezold and Others v. Republic of Zimbabwe*: human rights law is judged “**unrelated to the matters before the Arbitral Tribunals**”. The case being related to a reform aiming to redistribute lands to discriminated populations, and affecting property rights of foreign investors, the tribunal added “The Petitioners provided no evidence or support for their assertion that international investment law and international human rights law are interdependent such that any decision of these Arbitral Tribunals which did not consider the content of international human rights norms would be legally incomplete”¹¹².
- In *Suez*, the Tribunal explained that Argentina was “**subject to both international obligations, i.e. human rights and treaty obligation, and must respect both of them equally**”. It added that “Argentina’s human rights obligations and its investment treaty obligations are not inconsistent, contradictory, or mutually exclusive. Thus, as discussed above, **Argentina could have respected both types of obligations**”¹¹³.
- In *SAUR* the tribunal did not reject the right of Argentina to regulate to fulfil its human obligations, but stated “**these powers are compatible with the rights of investors to receive protection under the [investment agreement]. The human right to water and the right of the investor to benefit from the protection offered by [the investment agreement] operate on different levels. If the government decides to expropriate [...], the investor shall have the right to compensation in the terms that the Treaty grants it**”¹¹⁴.
- In *EDF*: “The Tribunal does not call into question the potential significance or relevance of human rights in connection with international investment law. However, [...] **no showing has been made that Argentina was not able to comply with the relevant treaty provisions [...]. In short, no evidence persuades the Tribunal that Respondent’s failure to renegotiate tariffs in a timely fashion, [...], was necessary to guarantee human rights**”¹¹⁵.
- In *Chevron*, a case were the oil company, being sued before Ecuadorian Courts for the environment and human rights impacts in Lago Agrio region, used the ISDS to escape condemnation. The tribunal considered “**If there were an inconsistency between the Respondent’s obligations under the BIT and the Lago Agrio plaintiffs’ rights as determined by the Courts in Ecuador, it would be for the Respondent to decide how to resolve that inconsistency [...]. The question for this Tribunal is in essence whether the Respondent has or has not violated rights of the Claimants under the BIT because of the way in which the Respondent has,**

¹⁰⁹ Eureka B.V. v. Slovak Republic UNCITRAL, PCA Case No. 2008 -13, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010 (para. 261) <http://www.italaw.com/sites/default/files/case-documents/ita0309.pdf>

¹¹⁰ The Rompetrol Group N.V. v. Romania, ICSID Case No. ARB/06/3, Award, 6 May 2013, §§ 154, 168-170, 172, 206-261 <http://italaw.com/sites/default/files/case-documents/italaw1408.pdf>

¹¹¹ *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007 (para. 354) ; see also *Quasar de Valores SICAV S.A., Orgor de Velores SICAV S.A., GBI 9000 SICAV S.A., ALOS 34 S.L. v The Russian Federation*, SCC CC Case No. 24/2007, Award, 20 July 2012 <http://italaw.com/sites/default/files/case-documents/ita1075.pdf> /

¹¹² *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, procedural order n°2, 26 June 2012, §§ 57 TO 60 <http://www.italaw.com/sites/default/files/case-documents/ita1044.pdf>

¹¹³ *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentina*, ICSID ARB/03/19, Decision on Liability, 30 July 2010, ICSID Case No. ARB/03/19 <http://www.italaw.com/sites/default/files/case-documents/ita0826.pdf>

¹¹⁴ *SAUR International SA v. Republic of Argentina*, ICSID Case No. ARB/04/4, § 331 decision on jurisdiction and liability, 2012 <http://www.italaw.com/sites/default/files/case-documents/ita1015.pdf>

¹¹⁵ *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award, 11 June 2012 (paras. 194) *France Argentine BIT & Belgique Argentine BIT* <http://italaw.com/sites/default/files/case-documents/ita1069.pdf>

through its organs, acted [...]. The question is one of the rights and obligations existing between the Claimants and the Respondent; and the Lago Agrio plaintiffs, who are not parties [...] to the BIT, do not have rights that are directly engaged by that question. If it should transpire that the Respondent has [...] taken a step which had the legal effect of depriving the Lago Agrio plaintiffs of rights under Ecuadorian Law that they might otherwise have enjoyed, that would be a matter between them and the Respondent, and not a matter for this Tribunal.”¹¹⁶

Arbitral tribunals obviously remain reluctant to consider human rights law, and when recognized as relevant, the “**respect both**” (investment agreement and human rights obligations) theory, made human rights law unable to inflect the investment agreements obligations. The protection provided to foreign investors by investment treaties consequently participate in impeding the capacity of States to protect human rights by controlling the activity of businesses, and to fulfil human rights by taking relevant policies and measures if they affect foreign investors. The solutions proposed by the Commission before the CETA and TTIP reforms remain insufficient (see for example its position in EU-China investment agreement context “*In DG Trade's opinion there was no inherent conflict between both sets of rights. States had the possibility to advance Human Rights obligations as defence against investor claims. Arbitration tribunals had then to examine whether Human Rights obligations were a valid defence for the state measures in question [...] In this context, DG Trade had proposed to include a reference to the Vienna Convention in an article on rules of interpretation*”)¹¹⁷. This solution, being inefficient to address the human rights challenges described, should not be applied to the EU-Vietnam FTA.

EU-Vietnam FTA UE models and modifications proposed in CETA and TTIP proposals

ISDS Tribunals considered that the investment treaty is creating a particular regime. Adopting a ‘*respect both approach*’ arbitral tribunals have shown abilities to completely annihilate the expected effect of several safeguard clauses. ISDS cases showed that clauses, referring to Vienna Convention, to international law or to international obligations of the parties, have been insufficient to secure an interpretation conform to human rights law. Simple reference to human rights, or right to regulate does not suffice to provide protection. Because of the ‘respect both’ theory, the “margin of appreciation” or the benefit of the special “proportionality test” existing in human rights law were simply denied to States¹¹⁸.

The general exception clauses, allowing States to take measures to protect public morality, public order or health for example, do not help either, tribunals having also interpreted those clauses narrowly. They rejected the State’s defence stating, for example, that they were “not convinced” that the state “*was not able to comply with the relevant treaty provisions*”, that the measure “*was necessary to guarantee human rights*”, that “*choice made was the only one available*” or that the choices made “*were the only means by which [the State] could have protected its public interests*”.

In those conditions, even a reference to the prevalence of human rights obligations or the recognition of a right for States to depart from the obligations of the investment agreement when they consider these obligations restrict their ability to meet their human rights obligations (clause that we do not find in the Commission proposals, even in the

¹¹⁶ *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 2009-23., Third Interim Award on Jurisdiction and Admissibility, 27 février 2012, <http://www.italaw.com/sites/default/files/case-documents/ita0175.pdf>, Part III, pt. 4.66 & 4.70

¹¹⁷ SWD (2013) 185 final, Commission Staff Working Document – Impact Assessment Report on the EU-China Investments Relations - Accompanying the document *Recommendation for a Council Decision authorising the opening of negotiations on an investment agreement between the European Union and the People's Republic of China*, Brussels 23 May 2013, available at: http://ec.europa.eu/governance/impact/ia_carried_out/docs/ia_2013/swd_2013_0185_en.pdf, pp. 78-80

¹¹⁸ Lorenzo Cotula, property in a shrinking planet: fault lines in international human rights and investment law, *International Journal of Law in Context*, June 2015, pp 125

most recent ones), might be insufficient. As the above case law demonstrates, Tribunals may consider that the capacity to meet human rights obligations is not restricted at all and that, because human rights obligations and investment obligations “**operate on different levels**”, States should “**respect both**” or demonstrate they had “no other means” to meet their human rights obligations. In consequence, human rights safeguard clauses cannot be conceived in isolation from the other substantives clause of the agreement, their application to the entire agreement should be clear as to their ability to inflect all State FTA’s obligations. Any ambiguity in the substantive trade and investment clause of the agreement in that regard should be left out.

The EU must ensure the introduction of efficient human rights safeguards in its investment agreements. That supposes to adequately conceive its human rights clauses, to provide efficient flexibility and exceptions, to adapt the formulation of the obligations (such as on expropriation, FET and other clauses), and to completely revise the dispute settlement mechanisms. The entire economy of the investment agreement should be revised to ensure the EU respects its obligations, and the States do not enter in treaties that actually impede human rights' realisation.

Under unprecedented pressure in the TTIP debate, the European Commission opened consultations. Based on the CETA text, the Commission concluded in its results: “[i]n general, many respondents recognise the EU’s efforts to improve the investment protection system, but consider for various reasons that the approach is insufficient”¹¹⁹. The Commission decided in consequence to reconsider the issue and proposed new reforms on 16 September 2015, but according to the press release, only for TTIP. **FIDH and VCHR consider that the EU-Vietnam FTA should follow the last model of ISDS designed for the TTIP -which provides for a professionalised court and an appeals procedure-, that an in-depth HRIA should be carried out to prove that the new model is adequate and sufficient to address human challenges, and that mitigating measures be adopted to fine tune the model accordingly.**

Among the persistent problems, and far from being exhaustive, **on expropriation for example:**

The proposal is the same for TTIP¹²⁰ and for CETA¹²¹. The text prohibits expropriation without compensation, even in the case that it occurs for a public purpose, under due process of law and in a non-discriminatory manner¹²². Considered in isolation, this text does not, consequently, solve potential conflicts with human rights law which gives States a large margin of appreciation on what is “for public purpose” and proportionate, and which recognises, in some cases, the possibility of not compensating or offering only limited compensation¹²³. In TTIP and CETA proposals, a way for the State to escape compensation is to argue that the measures taken do not amount to expropriation. For indirect expropriation at least, using first “a standard and broad definition” that does not really help¹²⁴, CETA and TTIP proposals offer a list of factors to take into consideration¹²⁵. Moreover, the text adds that,

¹¹⁹ European Commission, Report on the online consultation on investment protection and investor-to-state dispute settlement in the Transatlantic Trade and Investment Partnership agreement, Memo/14/560, 13 January 2015, p. 3

¹²⁰ art 5 & annexe 1, 16 september 2015

¹²¹ X.11 and interpretation in annex

¹²² Neither Party may nationalize or expropriate a covered investment either directly, or indirectly through measures having an effect equivalent to nationalization or expropriation (hereinafter referred to as “expropriation”), except: (a) for a public purpose; (b) under due process of law; (c) in a non-discriminatory manner; and (d) against payment of prompt, adequate and effective compensation.

¹²³ ECHR, Dennis GRAINGER and others against the United Kingdom, Application no. 34940/10, Decision 10 July 2012, § 36 [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-112312#{%22itemid%22:\[%22001-112312%22\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-112312#{%22itemid%22:[%22001-112312%22]})

¹²⁴ Markus Krajewski, “Modalities for investment protection and Investor-State Dispute Settlement (ISDS) in TTIP from a trade union perspective”, Friedrich-Alexander-Universität Erlangen-Nürnberg, p. 13, <http://library.fes.de/pdf-files/bueros/bruessel/11044.pdf>

TTIP annexe on expropriation and CETA annex on expropriation define: “1. Expropriation may be either direct or indirect: (a) direct expropriation occurs when an investment is nationalised or otherwise directly expropriated through formal transfer of title or outright seizure. (b) indirect expropriation occurs where a measure or series of measures of a Party has an effect equivalent to direct expropriation, in that it substantially deprives the investor of the fundamental attributes of property in its investment, including the right to use, enjoy and dispose of its investment, without formal transfer of title or outright seizure”

¹²⁵ TTIP annexe on expropriation and CETA annex on expropriation : “2. The determination of whether a measure or series of measures of a Party, in a specific fact situation, constitutes an indirect expropriation requires a case-by-case, fact-based inquiry that considers, among other factors: (a) the economic impact of the measure or series of measures, although the sole fact that a measure or series of measures of a

normally, if not judged too severe in light of their purpose and under certain conditions, measures that are “*designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment*” do not constitute direct expropriation¹²⁶. Seen as a positive step¹²⁷, observers nevertheless note that the capacity of these elements of definition to prevent the abusive interpretation we have known in the past, remains limited. The lack of express mention of human rights could invite tribunals to consider that the measures that do not appear to be directly linked to welfare objectives, such as health, safety and the environment, cannot benefit from the presumption of legality provided by the text on indirect expropriation. In addition, the clause uses a number of “*unclear and broad aspects*” that might invite the tribunal to evaluate whether the object and intent were legitimate and to review domestic laws based on its own assessment of the measure’s necessity and relation to the goal that the measure pursues¹²⁸. The text is insufficient to prevent the tribunals to reject the State’s ‘margin of appreciation’ and the ‘proportionality test’ recognized by human rights law and adds some problematic factors to take into consideration such as the “legitimate expectations of the investor”¹²⁹. Dr Joshua Curtis and Dr John Reynolds argue: “*While this text is a step in the right direction it does not secure the right to regulate [...] the text instead solidifies the role of tribunals in second guessing [...] regarding a balance between public goals and costs incurred by foreign investors. Tribunals will again engage in inherently subjective proportionality analysis, requiring evaluations of whether or not the measures at issue are substantially and sufficiently related to the given public purpose, whether or not they are justified according to their own cost-benefit analysis, and whether alternatives that are more desirable from the investor’s standpoint should have been adopted instead*”¹³⁰. The risk persists to see tribunals decide that investment agreements set more stringent standards than human rights law.

Indeed, based on past cases, observers consider it insufficient to create a presumption in favour of some state regulations; express mention that some measures are not indirect expropriation “*regardless of their adverse impact on investments*” should be preferred¹³¹. The list of factors to be taken into account to qualify indirect expropriation is moreover considered as positive but only at the condition that the list avoids vague reference to “legitimate/reasonable expectations” of investors, and “character” of the measure, and introduce a hierarchy of criteria that may be otherwise irreconcilable (like the economic effect and character of the measure)¹³².

When substantive clauses do not offer sufficient protection, the **general exceptions** can help the State to escape its liability. The EU CETA model, however, excludes expropriation and FET from the scope of the general exceptions¹³³. So measures amounting to an indirect expropriation or a measure violating the fair and equitable

Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred; (b) the duration of the measure or series of measures by a Party; (c) the extent to which the measure or series of measures interferes with distinct, reasonable investment-backed expectations; and (d) the character of the measure or series of measures, notably their object, context and intent”.

¹²⁶ TTIP annexe on expropriation and CETA annex on expropriation : 3. For greater certainty, **except** in the rare circumstance where the impact of the measure or series of measures is **so severe in light of its purpose** that it appears manifestly excessive, non-discriminatory measures of a Party that are **designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment**, do not constitute indirect expropriations.

¹²⁷ Markus Krajewski underlines that whilst the rejects of the so-called “sole effects” doctrine (which would only assess the effects of a measure to determine whether it amounts to indirect expropriation) even difficult questions remain.

¹²⁸ Markus Krajewski, “Modalities for investment protection and Investor-State Dispute Settlement (ISDS) in TTIP from a trade union perspective”, Friedrich-Alexander-Universität Erlangen-Nürnberg, p. 13, <http://library.fes.de/pdf-files/bueros/bruessel/11044.pdf>

¹²⁹ Markus Krajewski, “Modalities for investment protection and Investor-State Dispute Settlement (ISDS) in TTIP from a trade union perspective”, Friedrich-Alexander-Universität Erlangen-Nürnberg, p. 13, <http://library.fes.de/pdf-files/bueros/bruessel/11044.pdf>

¹³⁰ Dr Joshua Curtis and Dr John Reynolds, “TTIP, ISDS and the Implications for Irish Public Health Policy”, *opcit.*, p. 94 they add: “The standard of review here, of ‘appearing manifestly excessive’, and the qualification involved in a reference to ‘rare circumstances’, admittedly sets a relatively high threshold. However, the track record of tribunals in skirting around restrictive wording does not instil too much confidence in the ultimate effectiveness of these conditions. For starters, only the appearance of manifest excess is required, which may preclude an in depth analysis of whether a measure was in fact excessive”

¹³¹ IISD, Bonnes pratiques, L’expropriation indirecte, Suzy H. Nikiéma, mars 2012, http://www.iisd.org/pdf/2012/best_practice_indirect_expropriation_fr.pdf

¹³² IISD, Bonnes pratiques, L’expropriation indirecte, Suzy H. Nikiéma, mars 2012, http://www.iisd.org/pdf/2012/best_practice_indirect_expropriation_fr.pdf

¹³³ They apply to National Treatment and Market Access for Goods, Rules of Origin, Origin Procedures, Customs and Trade Facilitation, Wines and Spirits, Sanitary and Phytosanitary Measures and for Investment on Establishment of Investments and Non-discriminatory Treatment. ;

treatment standard could not be justified on the basis of the exception clauses¹³⁴. Even in their field of application, the model remains criticized. Based on the WTO's general exceptions model, and already "*interpreted very narrowly*" in this trade context, the small window through which authorities must fit their public policies is yet more limited in the context of investments. In the ISDS context, "*the vast majority of tribunals hearing this defence rejected it on a narrow interpretation of the term 'necessary', finding in its proportionality analysis that other measures less damaging to investors could have been taken by the State and that it remained liable under the investment regime*"¹³⁵. Under the CETA general exceptions regime, maintaining the 'necessity test', arbitral tribunals will be charged "*with a highly subjective task of weighing and balancing the interests of investors against their perception of the validity, legitimacy and importance of the public measures taken*"¹³⁶. It continues in consequence to give credit to ISDS cases rejecting the 'margin of appreciation' and 'proportionality test' making measures lawful under human rights law.

In addition, in the EU's approach, the general exceptions clauses only cover a limited set of policy goals. They include public order and public security measures, health and safety measures and environmental measures¹³⁷. Human rights, social and labour policy measures are not covered.¹³⁸ In other words, if human rights laws were to have a discriminatory effect on foreign investors, they might not be justifiable under the general exemption clauses.¹³⁹

This model being unable to preserve the ability of States to meet their human rights obligations Prof. L. Bartels proposed the following clause: *Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between the Parties where like conditions prevail, or a disguised restriction on trade in goods [services or establishment], **nothing in this Agreement shall be construed to prevent the adoption or enforcement** by the parties of measures undertaken for the purpose of respecting, protecting or fulfilling human rights and respecting democratic principles and the rule of law in their internal and international policies"*¹⁴⁰. A clause that should, in addition, go hand in hand with the reform of ISDS and interpretation rules.

Finally, to preserve the right to regulate in conformity with human rights law standards, additional precautions should be taken. They must ensure that the global economy of the investment regime cannot be seen as deploying in parallel to public interest but effectively ensure the right and fair balance between private interests and public interest. To that end, along with a deeper and more efficient protection of human rights in the clauses, like those related to expropriation and general exceptions, specific provisions on the right to regulate and a reform of the dispute settlement may help.

CETA however, contains only a mention in the preamble that the "*provisions of this Agreement preserve the right to regulate [...] to achieve legitimate policy objectives*" (once again without mentioning human rights), while the text

see CETA consolidated text, 26 September 2014, Ch. 32 Exceptions, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/toc-tdm.aspx?lang=eng>

¹³⁴ Markus Krajewski, "Modalities for investment protection and Investor-State Dispute Settlement (ISDS) in TTIP from a trade union perspective", Friedrich-Alexander-Universität Erlangen-Nürnberg, p.22; Applicable for example to National treatment general exceptions would allow states to defend discriminatory measures taken for specific legitimate policy goals provided that the measures are necessary and that their application is not discriminatory and does not constitute a disguised restriction on trade

¹³⁵ Dr Joshua Curtis and Dr John Reynolds, "TTIP, ISDS and the Implications for Irish Public Health Policy", *opcit.*, p. 91

¹³⁶ Dr Joshua Curtis and Dr John Reynolds, "TTIP, ISDS and the Implications for Irish Public Health Policy", *opcit.*, p. 90

¹³⁷ Markus Krajewski, "Modalities for investment protection and Investor-State Dispute Settlement (ISDS) in TTIP from a trade union perspective", Friedrich-Alexander-Universität Erlangen-Nürnberg, pp 11-12, <http://library.fes.de/pdf-files/bueros/bruessel/11044.pdf>

¹³⁸ CETA adding even : "The public security and public order exceptions may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society" CETA, art 32 Exceptions, Article X.02: General Exceptions

¹³⁹ Markus Krajewski, "Modalities for investment protection and Investor-State Dispute Settlement (ISDS) in TTIP from a trade union perspective", Friedrich-Alexander-Universität Erlangen-Nürnberg, pp 11-12, <http://library.fes.de/pdf-files/bueros/bruessel/11044.pdf>

¹⁴⁰ A Model Human Rights Clause for the EU's International Trade Agreements, Lorand Bartels, February 2014, p. 37 http://www.institut-fuer-menschenrechte.de/uploads/tx_commerce/Studie_A_Model_Human_Rights_Clause.pdf

only refers to the right to regulate in the T&SD chapter. The imprecision of the clauses cannot prevent tribunals to consider, as they have done, that the right to regulate is simply not at stake because human rights law and investment laws ‘operate on different levels’, so the State has to ‘respect both’. As said by Dr. Pernice, that kind of clause does not give assurance to the host state that “*their legitimate and democratically decided policies are not impaired by the decision of an arbitration tribunal under ISDS*”¹⁴¹. Worst, CETA Article x-36(3), which gives direction to tribunals when calculating damages incurred by investors, states that “*any repeal or modification*” of the measure or measures complained, is to take into account when calculating ultimate damages. “*This could act as an incentive for States, either before or in the course of litigation, to in fact change or withdraw the measure in the hope of ultimately paying less to the injured investor. This text is highly undesirable as it “institutionalizes the pressure for a state to change its decisions in favour of foreign investors”*.”¹⁴²

The September 16, 2015 TTIP proposal is more advanced but remains unclear. The clause on the right to regulate effectively prevents tribunals from considering that investors may have legitimate/reasonable expectations that the State will not change the legal and regulatory framework¹⁴³. This would be a clear improvement compared to past practice. But beyond this, the provisions problematically only apply to a specific section of the agreement (including expropriation and FET) but not to the entirety of the agreement¹⁴⁴ and the global efficiency of the clause to address the human rights concerns presented above remains doubtful. Indeed, the clause is formulated in vague terms and enters directly in contradiction with the other clauses, whose terms are clearer and stronger, and will consequently prevail. The clause on the right to regulate states: “*The provisions of this section [ex: on expropriation] shall not affect the right of the Parties to regulate within their territories through measures necessary to achieve legitimate policy objectives, such as the protection of public health, safety, environment or public morals, social or consumer protection or promotion and protection of cultural diversity*”. The use of the term “affect” is ambiguous, and ISDS's past practice has shown that even a narrow interpretation of the investment agreement is considered as not affecting the right to regulate. The term “affect” offers even less protection as, immediately after, in the same clause on the right to regulate and regarding State aids, we see what is said when the parties effectively wish to protect the right to regulate. For subsidies, the text indeed says “*nothing in this Section shall be construed as preventing a Party from discontinuing the granting of a subsidy and/or requesting its reimbursement, or as requiring that Party to compensate the investor therefor, where such action has been ordered by one of its competent authorities listed in Annex III*”. Finally, the real contour of the right to regulate remains dependent on the formulation of the other clauses, and the clauses do not mention human rights. Even in their field of application, they do not necessarily inflict the substantive clauses of the investment agreement and reintroduce instead a ‘necessity’ test.

Minimal in the CETA, it is the reform of ISDS proposed for the TTIP that presents the more important improvements. Beyond the lack of safeguards in the text of the agreements, one of the more prominent problems of

¹⁴¹ Dr Ingolf Pernice, *op.cit.*, p. 142- 143

¹⁴² Dr Joshua Curtis and Dr John Reynolds, “TTIP, ISDS and the Implications for Irish Public Health Policy”, *op.cit.*, p. 97

¹⁴³ Transatlantic Trade and Investment Partnership TRADE IN SERVICES, INVESTMENT AND E-COMMERCE

CHAPTER II - INVESTMENT, Commission draft text TTIP - investment, 16 september 2015,

http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf, Art. 2.2 « **For greater certainty, the provisions of this section shall not be interpreted as a commitment from a Party that it will not change the legal and regulatory framework, including in a manner that may negatively affect the operation of covered investments or the investor’s expectations of profits**”. The clause provide some guarantees on State aid 2.3 “For greater certainty and subject to paragraph 4, a Party’s decision not to issue, renew or maintain a subsidy (a) in the absence of any specific commitment under law or contract to issue, renew, or maintain that subsidy; or (b) in accordance with any terms or conditions attached to the issuance, renewal or maintenance of the subsidy, shall not constitute a breach of the provisions of this Section”. 2.4 “For greater certainty, nothing in this Section shall be construed as preventing a Party from discontinuing the granting of a subsidy and/or requesting its reimbursement, or as requiring that Party to compensate the investor therefor, where such action has been ordered by one of its competent authorities listed in Annex III”. On this issue see Dr. Pernice Study on international investment protection agreements and EU Law, Directorate General for external policies of the EU, INTA, Investor-State Dispute Settlement (ISDS) provisions in the EU’s international investment agreements, Vol 2-Studies, September 2014, p. 132 -167, http://www.europarl.europa.eu/RegData/etudes/STUD/2014/534979/EXPO_STU%282014%29534979%28ANN01%29_EN.pdf

¹⁴⁴ For example « National treatment mandates that foreign investors must be treated the same as nationals of the host State. This provision can cause problems with certain forms of positive discrimination legislation aimed at redressing societal imbalances, attending to human rights, protecting domestic industry, and correcting the legacies of previously unjust regimes ». Dr Joshua Curtis and Dr John Reynolds, “TTIP, ISDS and the Implications for Irish Public Health Policy”, *op.cit.*, p 57

ISDS decisions was the inconsistency of the arbitral jurisprudence, the lack of independence, impartiality, and professionalism of the arbitrators and their abusive interpretation of the investment agreements made in contravention of the international law and disregarding the authoritative interpretation made by the other courts and tribunals¹⁴⁵. As stated by UN independent expert de Zayas “*Among the major threats to a democratic and equitable international order is the operation of arbitral tribunals that act as if they were above the international human rights regime*”¹⁴⁶ “*A history of abuse by arbitrators and interpretative practices well beyond articles 31 and 32 of the Vienna Convention on the Law of Treaties vitiates the system. Repeated findings by United Nations bodies notwithstanding, including the 2003 report of the Subcommission and the reports of several special procedures mandate holders, have remained without effect, since the arbitrators have continued their practice of extensive interpretations and disregard of the human rights impacts*”¹⁴⁷. In the same vein, Dr Pernice warned the EU about tensions existing between ISDS and the autonomy of the EU legal order¹⁴⁸, and the ECJ opinion 2/13 on the accession to ECHR confirms this threat has to be taken seriously. Dr Pernice considers that at minimum, the insurance of the exhaustion of local remedies should be provided giving “*the ECJ an opportunity to decide upon the validity and interpretation of any EU law provision at stake before an arbitration tribunal may base its award on its own understanding*”. But adds that “*Neither this solution nor a “prior involvement procedure”, though, would exclude that a tribunal bases its decisions on substantive EU law or on the conditions for the liability of the EU or Member States on an interpretation that could be in tension with the interpretation of the ECJ and, thus, with the autonomy of EU law*”.

The reform proposed for ISDS foresees the creation of a professionalised tribunal, with an “*expertise in international law*” and a permanent appeal tribunal, and it provides rules on conflict of interest and guidelines for interpretation. Interpretation shall be made “*in accordance with customary rules of interpretation of public international law, as codified in the Vienna Convention on the Law of Treaties*” and, “*Where the Tribunal is required to ascertain the meaning of a provision of the domestic law of one of the Parties as a matter of fact, it shall follow the prevailing interpretation of that provision made by the courts or authorities of that Party*” even “*the meaning given to the relevant domestic law made by the Tribunal shall not be binding upon the courts or the authorities of either Party. The Tribunal shall not have jurisdiction to determine the legality of a measure, alleged to constitute a breach of this Agreement, under the domestic law of the disputing Party*”. Those rules do not seem sufficient to prevent an interpretation that could be in opposition with the authoritative interpretation of the EU law and human rights law. They do not solve the problem of measures judged lawful under human rights law but unlawful in regard of the investment agreement, they are not able to avoid the ‘chilling effect’ described above. To solve the serious concerns that may arise as regards matters of interpretation, the text provides in consequence the possibilities for the parties to agree on an interpretation that shall be binding for the Tribunal and the Appeal Tribunal. How this proposal will respect the respective powers of the Commission, the European parliament, the Council and the member states remains to be seen. In addition, Dr. Curtis and Dr. Reynolds warn that “*while such a mechanism has been a part for NAFTA for 20 years it has been used to issue an interpretive statement on a substantive standard in the treaty only once. Furthermore, this statement was of questionable effectiveness, which is the reason why the US and Canada have gone to lengths to change the wording of their treaties in an attempt to gain more effective control. Outside of*

¹⁴⁵ Lorenzo Cotula, property in a shrinking planet: fault lines in international human rights and investment law, *International Journal of Law in Context*, June 2015, pp 119-120 http://journals.cambridge.org/abstract_S1744552315000026; Alain pellet, The Case Law of the ICJ in Investment Arbitration, *Oxford Journals, Law & Social Sciences, ICSID Review*, Volume 28, Issue 2, Pp. 223-240 ;

¹⁴⁶ UN Independent expert Alfred-Maurice de Zayas, Report, 14 July 2015, A/HRC/30/44, *op.cit.* p9.

¹⁴⁷ Report of the Independent Expert on the promotion of a democratic and equitable international order on the impact of investor-State-dispute-settlement on a democratic and equitable international order (A/70/285), §54 http://www.un.org/en/ga/search/view_doc.asp?symbol=A/70/285

¹⁴⁸ Dr Ingolf Pernice, Study on international investment protection agreements and EU Law, Directorate General for external policies of the EU, INTA, Investor-State Dispute Settlement (ISDS) provisions in the EU's international investment agreements, Vol 2-Studies, September 2014, p. 132 -167, http://www.europarl.europa.eu/RegData/etudes/STUD/2014/534979/EXPO_STU%282014%29534979%28ANN01%29_EN.pdf

NAFTA the mechanism has never been used at all in relation to investment agreements, despite the fact that it exists as a matter of international treaty law”¹⁴⁹.

As matter of concern, the proposal does not offer the exhaustion of local remedies and the solution provided to avoid competing claims remains insufficient. In that regard, the proposal foresees a “fork in the road” clause having shown its limits. The clause requires that the Tribunal dismiss a claim by a claimant who has submitted a claim to a domestic court or tribunal concerning the same treatment. But it only precludes simultaneous claims of the same type, and the *Chevron v. Ecuador* case provides a record on how restrictive the interpretation of this clause may be in that regard¹⁵⁰.

We should conclude, as did Dr Joshua Curtis and Dr John Reynolds, that “*The Commission itself is aware that there are many problems with ISDS and proposes a number of further adjustments to the procedural aspects of an investment chapter in TTIP. However, the Commission would seem to deliberately avoid some very simple and effective solutions to these problems, such as instituting a requirement to exhaust domestic remedies [...], in favour of more cosmetic but ultimately ineffective adjustments*”.¹⁵¹ Among the different recommendations that have not been integrated in the different Commission proposals, and in addition to the specific improvements that FIDH and VCHR recommended above, we find:

- A clause that legally establishes the State’s right to regulate in the public interest, with application to EU-FTA in its entirety¹⁵²;
- A provision requiring the agreement to be interpreted and implemented in full consistency with the obligations of States and the responsibilities of corporations and investors under international human rights law¹⁵³. A clear provision stipulating that in case of conflict between the human rights obligations of a State and those under other treaties, human rights conventions prevail.¹⁵⁴
- A provision that recognises the obligations of States and the responsibilities of corporations and investors under the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises, requiring the provisions of the agreement to be read in consistency with these international instruments, in addition to further international instruments detailing the specific obligations of States under international human rights law, as well as any future treaties or instruments relating to human rights and business enterprises¹⁵⁵.
- A provision barring foreign investors from the protections of the investment chapter where there is sufficient evidence of direct or indirect violation of national laws and international human rights obligations and responsibilities, both their own and those of the State in which they operate.¹⁵⁶ Indeed the investment agreements problematically contain any enforceable provisions on investors’ obligations¹⁵⁷. The EU’s approach excludes investments, which are not made in accordance with the applicable law at the time the

¹⁴⁹ Dr Joshua Curtis and Dr John Reynolds, “TTIP, ISDS and the Implications for Irish Public Health Policy”, *op.cit.*, p. 97

¹⁵⁰ « Tribunals in earlier investment cases have applied a ‘triple identity’ test, requiring that in the dispute before the domestic courts and the dispute before the arbitration tribunal there should be identity of the parties, of the object, and of the cause of action. In the present case, there is no identity of parties, of object or of cause of action between the Lago Agrio litigation » *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 2009-23, Third Interim Award on Jurisdiction and Admissibility, 27 février 2012, <http://www.italaw.com/sites/default/files/case-documents/ita0175.pdf>, Part III, pt. 4.75

¹⁵¹ Dr Joshua Curtis and Dr John Reynolds, “TTIP, ISDS and the Implications for Irish Public Health Policy”, *op.cit.*, p. 98

¹⁵² Dr Joshua Curtis and Dr John Reynolds, “TTIP, ISDS and the Implications for Irish Public Health Policy”, *op.cit.*, p. 19

¹⁵³ Dr Joshua Curtis and Dr John Reynolds, “TTIP, ISDS and the Implications for Irish Public Health Policy”, *op.cit.*, p. 19

¹⁵⁴ UN Independent expert Alfred-Maurice de Zayas, Report, 14 July 2015, A/HRC/30/44, *op.cit.* p5.

¹⁵⁵ Dr Joshua Curtis and Dr John Reynolds, “TTIP, ISDS and the Implications for Irish Public Health Policy”, *op.cit.*, p. 150

¹⁵⁶ Dr Joshua Curtis and Dr John Reynolds, “TTIP, ISDS and the Implications for Irish Public Health Policy”, *op.cit.*, p. 152

¹⁵⁷ Markus Krajewski, “Modalities for investment protection and Investor-State Dispute Settlement (ISDS) in TTIP from a trade union perspective”, Friedrich-Alexander-Universität Erlangen-Nürnberg, p. 21

investment was made (known as the “clean hands doctrine”)¹⁵⁸. The agreement should instead clearly foresee that the investor may not contravene the human rights international standards and local law which is conform to human rights international law, nor be complicit in its violation, for the full duration of the investment. In addition, it should lay down basic duties such as ensuring respect for anti-corruption and international human rights standards, and again avoiding complicity in human rights abuse by others, including the host State. Additionally, it should be made explicit that the tribunal is not simply allowed to refuse protection under such circumstances according to its discretion but is in fact obliged to do so¹⁵⁹.

- A provision allowing local communities and affected individuals whose rights or interest are affected to enjoy equal standing and access to the adjudicative process¹⁶⁰
- A provision barring foreign investors from the protections of the chapter where a contribution to the economic development of the host State cannot be sufficiently demonstrated.¹⁶¹
- A provision allowing for States to initiate counter-claims in cases where foreign investors are suspected of having failed to meet their own obligations and responsibilities under national and international human rights law.¹⁶²
- A general exception clause that does not adopt a test of necessity but employs a lower standard of causal connection for the exception of government measures, also expressly excepting measures taken to fulfil States’ human rights obligations under international and domestic law¹⁶³, and including reference to States’ human rights obligations as specified grounds.¹⁶⁴
- The substantive provisions of the investment chapter should be restricted to national treatment and most-favoured nation treatment, excluding provisions on minimum standards of treatment and indirect expropriation, as does the “2015 China-Australia FTA. At the least, the clause on indirect expropriation should set out clearly that non-discriminatory measures taken in the public interest never amount to compensable expropriation.¹⁶⁵
- A provision setting out clearly that the treatment to be accorded to foreign investors under the agreement cannot exceed the level of treatment afforded to domestic investors.¹⁶⁶
- A provision requiring the prior exhaustion of domestic remedies¹⁶⁷: There is no convincing argument to not require the exhaustion of local remedies as a general principle. *“Even in investment agreements with less developed legal systems, this principle should be included as it could provide an incentive for reforms and improvements of domestic judicial systems”*¹⁶⁸.

¹⁵⁸ Markus Krajewski, “Modalities for investment protection and Investor-State Dispute Settlement (ISDS) in TTIP from a trade union perspective”, Friedrich-Alexander-Universität Erlangen-Nürnberg, p. 9, <http://library.fes.de/pdf-files/bueros/bruessel/11044.pdf>

¹⁵⁹ Dr Joshua Curtis and Dr John Reynolds, “TTIP, ISDS and the Implications for Irish Public Health Policy”, *opcit.*, p. 88

¹⁶⁰ Dr Joshua Curtis and Dr John Reynolds, “TTIP, ISDS and the Implications for Irish Public Health Policy”, *opcit.*, p. 98

¹⁶¹ Dr Joshua Curtis and Dr John Reynolds, “TTIP, ISDS and the Implications for Irish Public Health Policy”, *opcit.*, p. 152

¹⁶² Dr Joshua Curtis and Dr John Reynolds, “TTIP, ISDS and the Implications for Irish Public Health Policy”, *opcit.*, p. 152

¹⁶³ Dr Joshua Curtis and Dr John Reynolds, “TTIP, ISDS and the Implications for Irish Public Health Policy”, *opcit.*, p. 20

¹⁶⁴ Dr Joshua Curtis and Dr John Reynolds, “TTIP, ISDS and the Implications for Irish Public Health Policy”, *opcit.*, p. 151

¹⁶⁵ Dr Joshua Curtis and Dr John Reynolds, “TTIP, ISDS and the Implications for Irish Public Health Policy”, *opcit.*, p. 151

¹⁶⁶ Dr Joshua Curtis and Dr John Reynolds, “TTIP, ISDS and the Implications for Irish Public Health Policy”, *opcit.*, p. 151

¹⁶⁷ Dr Joshua Curtis and Dr John Reynolds, “TTIP, ISDS and the Implications for Irish Public Health Policy”, *opcit.*, p. 19

¹⁶⁸ Markus Krajewski, “Modalities for investment protection and Investor-State Dispute Settlement (ISDS) in TTIP from a trade union perspective”, Friedrich-Alexander-Universität Erlangen-Nürnberg, p. 19

- A State-to-State dispute settlement mechanism instead of Investor-State dispute settlement mechanism¹⁶⁹ : Under this procedure, the home State would have discretion over whether to bring a claim, and States would decide on the court that should hear the case, for example, the International Court of Justice or ad hoc tribunals with appeal chambers¹⁷⁰. The UN also proposes “The creation of an international investment court “where the judges would be bound not only to take into account, but to give priority to the Charter and the core United Nations human rights treaties; a court that would have competence to examine suits brought by investors against States and by States against investors and that would allow mutual counter-claims”. A standing international investment court, to replace the system of multiple ad hoc arbitral tribunals with a single institutional structure.¹⁷¹ In case of claims implying human rights issues, a provision that sets up a dialogue mechanism between the investment courts and the UN and regional human rights treaty bodies should be provided so that recommendations may be made and advice given on the scope and application of human rights norms, to better inform and to bind the investment court.

The UN has continuously called for an improvement of trade and investments and UN experts have regularly relayed this message¹⁷². Considering the lack of answers provided this summer 2015, Alfred-Maurice de Zayas, the UN the Independent Expert on the promotion of a democratic and equitable international order, stated that “*a sensible compromise that allows foreign direct investment while ensuring the protection of human rights is possible, as recognized by the Guiding Principles on Business and Human Rights*”¹⁷³.

In conclusion, whenever the EU decides to launch the negotiation process, the EU has to be able to show that it has taken into account all necessary factors and circumstances to frame its policy, that it has carefully considered different policy options and that it has chosen the most proportionate response to ensure it has maximized the positive impacts and prevented or mitigated the negative impacts on human rights. FIDH and VCHR are of the opinion that the information provided by the Commission is insufficient to meet these conditions for substantive validity. Despite the EU-Vietnam agreement having reached (according to the own words of the Commission) unprecedented levels of commitments, the Commission fails to show how they have been tested for their effects on human rights. The Commission never talks about the positive or negative impacts the trade agreement may have on human rights or argues about how it has framed its policies to address current challenges to human rights. It never tests its solutions with the specific strains currently placed on human rights in Vietnam or with human rights needs and obligations in the EU. Instead the Commission describes the instruments the EU normally employs to promote human rights abroad. It fails to argue how these instruments are reframed in practice or how they can answer the new challenges and opportunities implied by a new trade agreement. In consequence, the Commission fails to justify upholding what, were actually, pre-existing choices. It fails to show that it has carefully considered different policy options and has chosen the most proportionate response to ensure it has maximized the positive impacts and prevents and mitigates the negative impacts on human rights. The refusal of the Commission to conduct ex-ante HRIA to assess and improve its agreement where needed, amount, from FIDH and VCHR view, to maladministration.

¹⁶⁹ Dr Joshua Curtis and Dr John Reynolds, “TTIP, ISDS and the Implications for Irish Public Health Policy”, *op.cit.*, p. 19

¹⁷⁰ Report of the Independent Expert on the promotion of a democratic and equitable international order on the impact of investor-State-dispute-settlement on a democratic and equitable international order (A/70/285), §55

http://www.un.org/en/ga/search/view_doc.asp?symbol=A/70/285

¹⁷¹ Report of the Independent Expert on the promotion of a democratic and equitable international order on the impact of investor-State-dispute-settlement on a democratic and equitable international order (A/70/285), §55

http://www.un.org/en/ga/search/view_doc.asp?symbol=A/70/285

¹⁷² see notably HCHR report Human rights, trade and investment (E/CN.4/Sub.2/2003/9), 2 July 2003, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G03/148/47/PDF/G0314847.pdf?OpenElement>; /HRC/19/59/&dd.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 ; Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover, UN Doc A/69/299, 11 August 2014, paras 48 to 59.

¹⁷³ UN Independent expert Alfred-Maurice de Zayas, Report, 14 July 2015, A/HRC/30/44, *op.cit.* p5.

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International Federation for Human Rights (FIDH),

17 Passage de la Main d'Or, 75011 Paris, France;

15 rue de la Linière, 1060 Brussels, Belgium

Tel.: +32 479.19.59

Fax: +32 2 6094433

E-mail: gdusepulchre@fidh.org

Vietnam Committee on Human Rights (VCHR)

48 rue Parmentier, 94450 Limeil Brevannes, France

Tel.: + 33 1 45 98 30 85

Email: vietnam.committee@gmail.com