

ActionAid Submission

Trade, Sustainable Development and Human Rights in EU-Vietnam Relations

ActionAid values the opportunity to participate in the European Commission consultation on EU-Vietnam relations. We are particularly concerned about the potential impact of the proposed Free Trade and investment Agreement on the number and quality of **jobs** created, and on **land** rights.

Key recommendations

1. We call for the European Commission to ensure that human rights and labour rights in Vietnam are not hampered by the conditions set out in the EU-Vietnam Free Trade and investment Agreement, undertaking a Human Rights Impact Assessment to assess and mitigate the potential impact of the agreement on Vietnam's regulatory and policy space to protect and fulfil human rights obligations.
2. We call on the European Commission to include in the free trade agreements binding mechanisms by which EU investors can be held legally accountable for violations of their human rights and environmental obligations in Vietnam.
3. We encourage the European Commission delegation in Vietnam to work with the government of Vietnam to organise a similar consultation with business and civil society in Vietnam before negotiations are concluded.

Background

1. ActionAid International brings together our work against poverty in over 40 countries, co-ordinated by our International Secretariat, based in Johannesburg, South Africa. Since 2003, ActionAid International has been based in South Africa; we are the only international development organisation which has its headquarters in the global South. ActionAid has been working in Vietnam since 1989. ActionAid Vietnam works closely with rural and urban communities in more than 20 provinces, with civil society partners, with government, and with the domestic private sector.

2. ActionAid UK had the opportunity to participate in a European Commission consultation on sustainable development and human rights in EU-Vietnam relations on 12th May 2015. We welcome the rich discussion of environmental and human rights concerns in Vietnam. However, the discussion focused almost exclusively on the potential for the proposed EU-Vietnam Free Trade and investment Agreement (FTA) to be used as a diplomatic instrument to facilitate EU-Vietnam dialogue on human rights. **The European Commission failed to acknowledge that the core provisions of the EU-Vietnam FTA are likely to have a negative impact on human rights, especially of poor workers and farmers in Vietnam.**

The need to guarantee human rights and labour rights in the EU-Vietnam FTA

3. ActionAid is concerned that there has been insufficient attention given to the potential human rights impact of the core provisions of the proposed EU-Vietnam FTA.

4. In 2009, a Trade Sustainability Impact Assessment was carried out of the impacts of an anticipated EU-ASEAN trade agreement on the Vietnamese economy. Subsequently, EU-ASEAN negotiations were suspended, and the EU and Vietnam launched negotiations of a separate bilateral

agreement in 2012. The findings of the Trade Sustainability Impact Assessment are likely to have been rather optimistic:

- a. whereas the impact assessment was based on the assumption that Vietnam could source from other ASEAN treaty partners and continue to benefit from the tariff preferences provided; rules of origin likely to be included in the bilateral FTA will limit Vietnam's ability to source from regional partners substantially; restrictive rules of origin are likely to have a significant negative impact on the proportion of Vietnam's exports to the EU which will benefit from preferences, which means that the economic scenarios in the impact assessment are unlikely to be valid;
- b. whereas the impact assessment included an assessment of social impacts, this falls far short of the European Commission's obligation to carry out a human rights impact assessment of trade negotiations since 2011.

5. In March 2015, the EU Ombudsman found the European Commission's refusal to carry out a Human Rights Impact Assessment of the EU-Vietnam Free Trade Agreement constituted 'maladministration' and recommended that 'the Commission should carry out, without further delay, a human rights impact assessment in the matter.'ⁱ

6. In April 2015, a UN Independent Expert, Alfred de Zayas, expressed deep concerns about the lack of awareness of the impact trade and investment agreements on human rights. He expressed particular concern about,

the secrecy surrounding negotiations for trade treaties, which have excluded key stakeholder groups from the process, including labour unions, environmental protection groups, food-safety movements and health professionals... It is tantamount to disenfranchising the public and constitutes a violation to accepted human rights law, which stipulates that every citizen shall have the right and the opportunity to take part in the conduct of public affairs.ⁱⁱ

Manufacturing, job creation and human rights

7. Article 6 of the International Convention on Economic and Socio-Cultural Rights requires states to promote the right to work – part of their obligation is to “to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual”. Decent wages and tax revenue from the private sector are prerequisites for the realisation of most of the rights protected under the ICESCR. In General Comment No. 18 on Article 6, the Committee recognises that

The principal obligation of States parties is to ensure the progressive realization of the exercise of the right to work. States parties must therefore adopt, as quickly as possible, measures aiming at achieving full employment.

Extensive research demonstrates that it is not possible to create a significant number of decent, well-paid jobs without investing in manufacturing.ⁱⁱⁱ

8. For Vietnam, State Owned Enterprises (SOEs) have played an important role in the development and diversification of its economy. SOEs have been responsible for developing new industries, sometimes in joint ventures with foreign investors. Vietnam's SOEs have seen significant productivity increases since the 1990s, despite concerns of external actors.^{iv} This reflects a pattern of development common in successful Asian economies, where SOEs have played a key role as

entrepreneur of last resort. Governments have also relied on industrial policy tools and investor disciplines to ensure the benefits of investment – especially of FDI – are widely shared.^v

9. Since economic reforms were implemented in the late 1980s, the Vietnamese economy has successfully diversified from textiles and garments into footwear, and now into automobiles, machinery and electronics. Vietnam is distinguished from other Asian economies by the sheer range of its exports. In contrast, its regional neighbours rely more heavily on low value-added industries like garments.^{vi}

10. ActionAid’s research has shown that over-reliance on low-value-added industries like textiles can prevent the government from fulfilling its human rights obligations and can give rise to human rights abuses by investors. In the garment sector, we have identified three key concerns:

- In global value chains, pressure from buyers to deliver cheap, fast and flexibly puts intense downward pressure on labour costs. Competition among suppliers in South Asia has increased with falling US and EU demand, leading to a race to the bottom in working conditions and wages.^{vii}
- Scarcity of alternative employment options for women hinder the ability of those working in the garment sector to negotiate for better conditions. It is easy to get rid of ‘troublemakers’, with millions more waiting for a job or for home-based piece-work.^{viii}
- Under international investment law, foreign investors are able to sue governments for promoting human rights oriented economic development or for protecting workers rights, e.g. for reducing future profits by increasing the minimum wage.

11. While Vietnam has a relatively strong manufacturing base at the moment, many high-value-added industries are still at an early stage and are highly vulnerable to the middle-income trap, facing competition from low-cost labour manufacturing in lower income countries, and higher value added production in OECD countries. Firms are still developing capacity in key areas such as management skills, mastery of technology and cost-effective linkages; even those in higher-value added sectors are still at the lower end of production chains, as sub-contractors or assemblers.^{ix} Liberalisation of sensitive sectors is likely to reverse Vietnam’s successful diversification, increasing the vulnerability of the economy to external shocks.

12. Many years of research has led UNCTAD to conclude, in their 50th anniversary trade and development report, that participation in global production networks risks locking in developing countries into low-value-added activities, preventing them from upgrading or developing new industries, due to pressure on labour costs and power relations in supply chains.^x

13. The core provisions of the EU-Vietnam FTA will prevent Vietnam from using policies that EU Member States have used and are still using to stimulate the development of diversified manufacturing bases and to protect sensitive industries.^{xi} The FTA is also likely to prevent Vietnam from following the example of Asian success stories like South Korea^{xii} and Taiwan^{xiii}.

14. Policies that are likely to be outlawed under the FTA include using SOEs as entrepreneur of last resort, and supporting the domestic private sector using subsidies, tax breaks, reverse engineering of technology, concessional loans, public procurement and import tariffs. Under the FTA Vietnam is likely to be prevented from putting in place policies needed to get the best out of FDI, such as requirements to source from local firms or to transfer technology to local staff and suppliers.

15. The enforcement mechanism is extremely strong – if an EU investor is of the opinion that Vietnam has violated the terms of the FTA, the investor will be able to bring a claim against Vietnam

under international arbitration. Even if the investor is wrong, Vietnam will be faced with extremely high legal costs. Without access to these policy tools, there is a strong risk that diversification will be reversed, reducing the number and quality of jobs available outside the footwear industry.

Findings of the EU-ASEAN Trade Sustainability Impact assessment, Vietnam annex

16. ActionAid's concerns are reinforced by the findings of the Vietnam annex of the EU-ASEAN Trade Sustainability Impact assessment. This is likely to be an optimistic scenario given that it is based on an assumption that Vietnam will be able to source inputs from across ASEAN, whereas this is unlikely to be the case under bilateral FTA.

17. The impact assessment suggests that 'Vietnam stands to gain most in the footwear and leather sectors' with 'substantial' increases in employment, but 'prices are projected to decline as well, implying that output and exports – in the long run – will be concentrated in mass produced lower value added products'. ActionAid is concerned that this shift will expose Vietnamese workers to the same commercial pressures as garment workers face, putting downward pressure on wages and working conditions. Indeed, this has already been observed with the equitisation of SOEs.^{xiv}

18. In contrast, the FTA is projected to undermine higher-value-added sectors, 'the motor vehicles and parts sectors and insurance sectors all see a decline in output. The sectors in which Vietnam was a late arrival: electronic and machinery equipment will also see a downward trend as these sectors have not yet been able to build up the strength to withstand competition.'

19. We welcome the Commission's recognition that it will be important to provide for 'asymmetry in tariff liberalisation in those sectors that will need time to adjust'. It will be important to phase in liberalisation slowly to avoid undermining the emergence of these high-value added sectors. As the impact assessment found:

Since the opening up of Vietnam's economy will lead to major structural changes and initial unemployment, the recommendation to phase in tariff reductions gradually is relevant. The gradual adjustment will allow the necessary policy and legislative reform to be passed, as well as for improvements in competitiveness.

The need for binding mechanisms to hold EU companies accountable for abuses

20. ActionAid is concerned that the proposed FTA is likely to grant EU investors the right to bypass national courts and sue the Vietnamese government for legitimate actions taken to promote a strong and diversified manufacturing base or to protect working people's human rights and the environment.

21. While investment arbitration was initially deemed necessary to protect investors in risky contexts, this rationale has increasingly been called into question. Foreign investors are already protected by a range of other mechanisms, including political risk insurance and state-to-state dispute resolution.^{xv} Investor-state dispute settlement provisions in the Vietnam-EU FTA will offer foreign investors an additional layer of protection in respect of government action and policy that could affect their operations and profitability. These are exclusive rights, unparalleled in international public law, and not available to any other actor. They also impose no enforceable responsibilities on investors regarding their conduct in host countries, whether in terms of the

economic contribution of their activities, or in terms of their human rights and environmental obligations.

22. The huge increase in the number of cases taken by companies has prompted calls from civil society and governments, for urgent review: at the end of 1994, only three investment treaty related disputes had been submitted; by the end of 2014, that number had grown to 608.^{xvi} Privatisations undertaken as a condition of IMF and World Bank loans have set the scene for many investor-state arbitrations.^{xvii} This is of particular concern as Vietnam continues its programme of reform and equitisation of SOEs. Up to this point, Vietnam has had relatively little known exposure to investment disputes – winning the four disputes that have been reported. Nonetheless, even these cases involve significant legal costs.

23. UNCTAD find in particular that BITs have failed to deliver investment in critical sectors for sustainable development, such as water and sanitation, and are poorly designed to do so.^{xviii} The water sector has become particularly notorious, with a number of high profile cases of governments being sued for capping rapidly escalating water user fees in response to economic crisis and to protect their citizens' right to water.^{xix}

24. In contrast, mechanisms in place to ensure corporate accountability for human rights abuses are extremely weak.^{xx} Investment agreements tend to explicitly prohibit measures to ensure investors make a reasonable contribution to sustainable and equitable development, through linkages to local firms, technology transfer and creating decent jobs.

Land rights

25. ActionAid Vietnam has extensive experience on working on land reform, and of supporting landless and land-lost poor people to pursue off-farm and non-farm livelihoods as alternatives to land-based livelihoods. Much of Vietnam's success in achieving both growth and poverty reduction is attributed to de-collectivisation and highly equitable land redistribution between 1987 and 2000; nearly 11 million land titles were issued by 2000.^{xxi} This laid the foundations for pro-poor growth during the first part of Vietnam's reform period.^{xxii}

26. These reforms also meant that Vietnam has one of the highest labour/land ratios in the region; to maintain future growth and cope with a growing population, sources of growth outside agriculture had to be sought. Vietnam has since pursued successful industrial policies, creating millions of jobs by diversifying from textiles and garments into footwear and now into electronics, machinery and automobiles.

27. Inevitably, these policies, as well as urbanisation more broadly, have led to conflict between land rights and economic growth, as agricultural land has been expropriated for real estate and industrial projects. Between 2001 and 2010, nearly one million hectares of land have been expropriated, or almost 10 per cent of all land use for agriculture nationwide. The total area covered by industrial zones is likely to increase from approximately 27,000 hectares in 2005 to 80,000 hectares by 2020.

28. While ActionAid welcomes industrialisation, it should not come at the cost of access to land for the poorest, especially those who will struggle to find an alternative livelihood, even if retraining is offered. The dissolution of SOEs is likely to free up two million hectares of land in coming years. ActionAid is calling on the Vietnamese government to redistribute a substantial proportion of the land vacated by SOEs back to local people, especially ethnic minorities^{xxiii}.

29. ActionAid is concerned that the already significant pressure on land in Vietnam will be exacerbated by an influx of foreign investors and a sudden shift away from production of food for domestic consumption towards export-oriented agriculture. The global pressure on natural resources, and on land in particular, is on the rise, as witnessed by the countless number of cases of land grabs and land concentration in all regions of the world.^{xxiv} Many of the cases of land grabs documented by ActionAid and our allies have involved foreign investors. It is often extremely difficult to hold them accountable for their actions.

30. Most trade and investment treaties say little or nothing about obligations on foreign investors in relation to respecting human rights or social and environmental standards.^{xxv} Research suggests that investment contracts enshrine foreign investors' right to access large swathes of land in law, without regard to whether that land (or associated water resources) is already being used – these rights are then enforceable under international arbitration.^{xxvi}

31. The 2009 EU-ASEAN Trade Sustainability Impact Assessment notes that 'given the high share of agricultural employment in Vietnam – the impact of the FTA may be quite significant. Lower prices and lower output will translate into lower real income for Vietnamese producers. By far the largest negative impact for output and employment are predicted to occur in the grain and cereals sector.' Given that Vietnamese rice is already the most competitive in the world, the impact of the FTA on farmers' livelihoods is likely to be devastating. Economic distress is likely to make farmers even more vulnerable to land grabbing, or force them to accept inadequate levels of compensation.

32. Research suggests that farmers whose land has been expropriated receive inadequate compensation and struggle to find alternative livelihoods. Industrial parks built on former agricultural land can often only hire 3-5% of the farmers, as most of the farmers are 'unqualified' to work in industry.^{xxvii}

Recommendations

33. We call for the European Commission to ensure that human rights and labour rights in Vietnam are not hampered by the conditions set out in the EU-Vietnam Free Trade and investment Agreement, undertaking a Human Rights Impact Assessment to assess and mitigate the potential impact of the agreement on Vietnam's regulatory and policy space to protect and fulfil human rights obligations.

33.1. Tariff liberalisation should be asymmetrical and phased in slowly to allow emerging high-value added manufacturing in Vietnam to become competitive.

34. We call on the European Commission to include in the free trade agreements binding mechanisms by which EU investors can be held legally accountable for violations of their human rights and environmental obligations in Vietnam.

34.1. The EU-Vietnam FTA should not include Investor-State Dispute Settlement. The EU should ensure that any other protections afforded to investors do not undermine government efforts to protect human rights and to develop a diversified manufacturing base.

34.2. The EU-Vietnam FTA should include a legally binding mechanism that requires EU investors to respect the UN Guiding Principles on Business and Human Rights and the UN Voluntary Guidelines on the Tenure of Land, monitors compliance and offers effective redress for affected communities.

34.3. The EU-Vietnam FTA should incorporate a binding mechanism where EU investors in Vietnam are required to integrate and respect legitimate land tenure rights, notably by ensuring that any affected communities give their free, prior and informed consent to land acquisitions.

35. We encourage the European Commission delegation in Vietnam to work with the government of Vietnam to organise a consultation with Vietnamese business and civil society in Vietnam before negotiations are concluded.

ⁱ <http://www.ombudsman.europa.eu/cases/draftrecommendation.faces/en/59398/html.bookmark#hl5>

ⁱⁱ <http://www.ip-watch.org/2015/04/23/un-expert-says-secret-trade-negotiations-a-threat-to-human-rights/>

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<http://www.ifc.org/wps/wcm/connect/4fa107804602c0ccad5ebd9916182e35/Industrialization,+Employment+and+Poverty.pdf?MOD=AJPERES>

^{iv} http://www.wider.unu.edu/publications/working-papers/research-papers/2009/en_GB/rp2009-30/

^v Amsden, 2001, The Rise of “The Rest”: Challenges to the West From Late-Industrializing Economies

^{vi} Thoburn, 2009, Vietnam as a Role Model for Development, UNU Wider Research Paper No. 2009/30

^{vii} See further: https://www.actionaid.org.uk/sites/default/files/doc_lib/actionaid_who_pays_report.pdf

^{viii} See further: https://www.actionaid.org.uk/sites/default/files/doc_lib/clothing_media_brief.pdf

^{ix} <http://www.tni.org/sites/www.tni.org/archives/reports/altreg/euseanfta-vietnam.pdf>

^x <http://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=981>

^{xi} <http://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=981>

^{xii} Chang, 2002, Kicking Away the Ladder, Anthem Press

^{xiii} Wade, 2004, Governing the Market, PUP

^{xiv} <http://www.theguardian.com/news/2015/apr/22/vietnam-40-years-on-how-communist-victory-gave-way-to-capitalist-corruption>

^{xv} Poulsen, Lauge N. Skovgaard (2010) “The Importance of BITs for Foreign Direct Investment and Political Risk Insurance: Revisiting the Evidence” in Sauvant, Karl (ed.) *Yearbook on International Investment Law and Policy* Oxford University Press

^{xvi} http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf

^{xvii} Poulsen, Lauge N. Skovgaard (2011) *Sacrificing Sovereignty by Chance: Investment Treaties, Developing Countries and Bounded Rationality* PhD thesis, London School of Economics

^{xviii} <http://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=981>

^{xix} <http://www.foodandwaterwatch.org/reports/corporate-investor-rule/>

^{xx} http://www.lse.ac.uk/businessAndConsultancy/LSEEnterprise/pdf/reality_of_rights.pdf

^{xxi} Klump, R., & Bonschab, T. (2004). Operationalising Pro-Poor Growth: A Case Study on Vietnam. OPPG Work Programme . AFD, BMZ, DFID and the World Bank.

^{xxii} See further http://www.actionaid.org/sites/files/actionaid/inequality_why_it_matters_and_what_can_be_done.pdf

^{xxiii} http://digitalcollections.sit.edu/cgi/viewcontent.cgi?article=2753&context=isp_collection

^{xxiv} http://www.actionaid.org/sites/files/actionaid/the_great_land_heist_4.pdf

^{xxv} IIED (2014) *Foreign investment, law and sustainable development, A handbook on agriculture and extractive industries*, International Institute for Environment and Development (IIED): London

^{xxvi} See <http://pubs.iied.org/12568IIED.html> and <http://pubs.iied.org/pdfs/17260IIED.pdf>

^{xxvii} Nguyen, Suu Van. "Agricultural land conversion and its effects on farmers in contemporary Vietnam." *European Journal of Anthropology*. (2009): 106-113.