



After CETA: the EU-Vietnam agreement

in short

A trade agreement between the EU and Vietnam is likely to create opportunities for Vietnam's development strategy and new openings for European companies. However, the agreement is one of about 20 'new generation' treaties that the EU is negotiating, of which CETA was the first to be ratified by the European Parliament. Thus, the EU-Vietnam agreement corresponds to the characteristics of a "mixed" agreement, in that it is not limited to the exclusive trade competences of the EU but also covers investments, in particular through the Investor-State Arbitration clause, and social and environmental regulations, which are competences of the Member States.

The fundamental problem with this type of agreement is that it guarantees enforceable rights to foreign investors, through the arbitration clause, but does not provide a mechanism for sanctions for non-compliance with social and environmental standards. Moreover no human rights impact assessment has been carried out. That is why a certain number of conditions need to be met before any decision is taken on signature or ratification.

The negotiation of the EU-Vietnam agreement started in June 2012. In 2007 the European Commission had originally received a mandate to negotiate a regional treaty between the EU and all ten countries of the Association of Southeast Asian Nations (ASEAN), but in view of the difficulties encountered, it was then decided (in 2009) to focus on the negotiation of bilateral agreements with the individual ASEAN countries – including Vietnam.

The negotiation of the EU-Vietnam agreement was concluded on 1 February 2016, after fourteen rounds of negotiations organised over three years. This is an unusually short time for concluding such an agreement. This negotiation process took place with a lack of transparency: the mandate was not made public, nor were the documents exchanged during the negotiation. The preparation of the negotiating mandate and the options to be chosen in the negotiating texts were not subject to transparent consultation in parliaments or civil society.

This is a new generation agreement, including some areas relating to trade and others relating to investments, on the model of the CETA (EU-Canada) and TTIP projects (EU-USA). It can therefore be considered as a mixed agreement requiring ratification by the Member States, in addition to approval by the European Parliament. Since February 2016 the agreement has been subject to legal refinement and also translation, which can still take several months, or even years. Based on statements by the European Commission, that is aiming for implementation from 2018, the agreement could be submitted to the EU Member States in 2017 for signature, and then to the European Parliament for approval, with a view to a partial provisional application before approval by the Member State parliaments.

The impact of the agreement on Vietnam's development

Vietnam is emerging as the “workshop of the world”, by integrating the global value supply chains of transnational corporations: the country attracted 11.8 billion dollars of foreign investment in 2015¹, notably from Japan, the United States, China and the British Virgin Islands². Vietnam sees the agreement with the EU as important for attracting European investment and for having better access to the European market, which represents the leading consumer market in the world³.

Vietnam is at the heart of global value chains, specialising in the assembly of industrial components and the export of labour-intensive goods. Access to Western consumer markets is therefore crucial for the Vietnamese economy. The EU-Vietnam agreement guarantees duty-free access to the European market for the key products of Vietnamese exports: clothing, shoes and electronics. Such an advantage is even more highly sought after by the Vietnamese government because Donald Trump's presidency poses a threat to Vietnam's development strategy.

Indeed, the new president of the United States has withdrawn the US from the Trans-Pacific Partnership (TPP), to which Vietnam was a party. Trade between Vietnam and the United States is very exposed to changes in trade policy. Deutsche Bank estimates that the Southeast Asian country would be the second most affected trading partner of the United States in the event of higher US trade tariffs (after Mexico and ahead of Canada). Moreover, the United States is the top destination for Vietnamese exports⁴.

In relation to agriculture, the EU-Vietnam agreement will benefit the agro-exports industry at the expense of family farming. At the conclusion of the negotiations, the European Commissioner for Agriculture, Phil Hogan, welcomed the new export opportunities for the European agri-foods industry. The agreement, he said, will open 99% of Vietnam's agricultural market, while the European market would continue to be protected by import quotas for sensitive products such as rice and sugar. This text therefore risks having a negative impact on the Vietnamese family farming sector, which has been abandoned by a government that prefers to promote the agro-exports industry⁵.

In the context of the liberalisation of services, the EU has obtained the opening up of healthcare and education services to which European service providers will therefore have access⁶. In terms of access to medicines, the EU proudly states that it has banned producers of generic medicines from using test results obtained by others, for a period of 5 years⁷. Yet such restrictions on the sharing of data may hinder the sale of medicines at affordable prices to as many people as possible.

However strategic it may be from the perspective of the Vietnamese government, the agreement does therefore include measures of which the impact is likely to be negative in several sectors, such as family farming and healthcare. It also suffers from a lack of balance, since it includes an arbitration clause which makes the rights of investors binding, whereas social and environmental standards are optional because there is no mechanism for sanction. Finally, it should be noted that at this point Vietnam does not participate in the international initiatives to combat tax evasion – the BEPS (Base Erosion Profit Shifting) plan and the automatic exchange of tax information of the OECD.

The Investor-State Arbitration clause

In a communiqué in February 2016, the European Commission welcomed the inclusion in the EU-Vietnam agreement of the so-called ICS (Investor Court System) arbitration clause based on the CETA model⁸. This ICS mechanism is supposed to replace the former ISDS (Investor-to-State Dispute Settlement) mechanism, now repudiated but which exists in hundreds of bilateral agreements on investment. It is defined in Section 3 of Chapter VIII (Trade in services, investment and e-commerce) of the EU-Vietnam agreement⁹.

The main advances put forward by the Commission relate to the independence of judges and the possibility of appeal. However, several key problems from ISDS are still present in the ICS. On the one hand, there is no obligation to exhaust national legal avenues, or to demonstrate their possible lack of reliability¹⁰, before having recourse to the ICS. It includes a “No U-Turn” clause, which prevents a company from being able to use both the ICS and the national legal avenues, instead of being required to initially exhaust the national legal channels. The incorporation of such a parallel system threatens the effective and consistent application of European law.

On the other hand, the ICS continues to define vaguely the principle of “fair and equitable treatment” to which investors are entitled – the court having to decide whether their “legitimate expectations” at the time of the ratification of the treaty have been frustrated or not. The mechanism also prohibits “indirect expropriation” – a formula which in the past has allowed a number of arbitrators to consider as such public regulations in environmental, social or health matters. The “right to regulate” of States is therefore limited by the threat of a potential litigation from a foreign investor which considers itself to be the victim of an indirect expropriation. Several emblematic cases have demonstrated the use of the ISDS arbitration clause by investors against public health and/or environmental protection measures remain possible under the ICS¹¹.

Furthermore, the scope of the ICS clause in the EU-Vietnam agreement is broader than that of the CETA agreement. The mechanism of the EU-Vietnam agreement incorporates provisions that were common in the older generation of arbitration clauses (ISDS), such as the “umbrella clause”, which grants a foreign investor the right to activate the arbitration clause in relation to rights arising not only from the treaty but also from any contract into which he may have entered with the signatory State of the treaty.

The chapter on sustainable development

The EU-Vietnam agreement includes a chapter on sustainable development. It contains references to ILO (International Labour Organisation) conventions and to international agreements on the environment. Unfortunately, as is the case with CETA, this chapter is explicitly excluded from the mechanism for sanctions and resolution of disputes between States which ensures compliance with the treaty's trade chapters¹². The EU-Vietnam treaty is thus an unbalanced agreement, in the sense that it guarantees binding rights for transnational firms via the ICS arbitration mechanism, whereas the social and environmental standards are non-binding, due to the absence of a mechanism for sanction if these standards are not complied with.

Moreover, the chapter on sustainable development in the EU-Vietnam agreement is less ambitious than in CETA. The non-binding provisions of CETA, which have the merit of committing the partners in relation to taking account of contributions by civil society for the implementation of this chapter¹³, are replaced by an encouragement to members of civil society designated by their respective governments to express their views without any obligation for these to be taken into account¹⁴. The establishment of a “panel of experts” to assist in the resolution of conflicts related to this chapter is also weaker than is the case with CETA (longer and extendable time frame for its setup, shorter time frame for the investigative work, possibility of revising the parameters at a later point, unilateral and non-collaborative decision as to the actions to be taken to correct any breaches found, etc.¹⁵). Lastly, the provisions that leave the door open to negotiation and the possible subsequent inclusion of a sanction mechanism for breaches of workers’ rights¹⁶ is not present in the EU-Vietnam agreement.

Meanwhile, as pointed out by Vietnamese civil society organisations, Vietnam is a long way from meeting the minimum social and environmental standards. In terms of respect for fundamental rights at work, Vietnam does not recognise the right to freedom of association and the law provides that trade unions are placed under the authority of the Vietnamese Communist Party. The ITUC (International Trade Union Confederation), which has no affiliate members in Vietnam, denounces the fact that the right to collective bargaining and the right to strike are severely restricted¹⁷.

No human rights impact assessment

In its Resolution of 17 April 2014 the European Parliament called for a human rights impact assessment of the EU-Vietnam treaty to be carried out before its conclusion. This is indeed a legal requirement of the European Commission. Faced with the refusal of the latter, the International Federation for Human Rights (FIDH) called on the European Ombudsman in 2014, who in 2015 recommended that the Commission should carry out this impact assessment “without further delay”.

The FIDH issued recommendations for the formulation of a clause for the protection of human rights, which should include mechanisms for redress and accountability in relation to the communities affected¹⁸. The FIDH welcomed the decision of the Ombudsman, who called the Commission’s refusal to conduct the impact assessment “maladministration”, and pointed out that in Vietnam there is no independent media, no free trade unions and that independent civil society organisations are severely curtailed¹⁹.

recommendations

Despite the opportunities that it offers, the fundamental problem with the EU-Vietnam agreement is that it guarantees enforceable rights to foreign investors, through the arbitration clause, but does not provide a mechanism for sanction for non-compliance with social and environmental standards. Moreover no human rights impact assessment has been carried out. This is why the following conditions should be met before signature and *a fortiori* before ratification:

- Make the chapter on sustainable development binding by making it subject to a mechanism for sanctions and for resolving disputes between States, such as the one included in the agreement to ensure compliance with the treaty's trade chapters.
- Guarantee a hierarchy of norms giving primacy to human rights and to social and environmental standards over the rights of investors, through appropriate provisions in the agreement and/or in a binding international treaty such as the one currently being negotiated in the United Nations Intergovernmental Working Group, which ensures access to justice for victims of human rights violations²⁰.
- Make ratification of the agreement conditional on the ratification of the ILO core conventions by the Vietnamese government, and also on Vietnam's participation in the BEPS plan and the automatic exchange of tax information.
- Incorporate into the agreement a clause for the protection of human rights providing mechanisms for redress and accountability for the communities affected.
- Require the prior use of national and European legal avenues before having recourse to the arbitration clause and limit the scope of application of this clause to direct discrimination and expropriation – excluding – indirect expropriations.
- Remove the restrictions in matters of intellectual property rights which reduce access to generic medicines and to healthcare.

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7/ *Ibidem*.

8/ European Commission, *CETA: EU and Canada agree on new approach on investment in trade agreement*, February 2016, http://europa.eu/rapid/press-release_IP-16-399_en.htm

9/ EU-Vietnam, *Trade in services, investment and e-commerce*, http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154210.pdf, p. 25

10/ In fact, a clause for the exhaustion of local remedies is used in many areas of international law and is usually accompanied on most occasions by formulations of type "I show that all local remedies have been exhausted or the claimant has demonstrated that attempting to do so would be futile", example drawn from the US law on diplomatic protection, see Matthew C. Porterfield, *Exhaustion of local remedies in investor-state dispute settlement: an idea whose time has come?*, The Yale Journal of International Law Online 2015 <https://www.law.georgetown.edu/academics/academic-programs/clinical-programs/our-clinics/HIP/upload/Porterfield-Exhaustion-of-local-remedies-2015.pdf>, p. 3

11/ *Le système juridictionnel des investissements mis à l'épreuve. La nouvelle proposition européenne perpétuera les attaques contre la santé et l'environnement*, CCPA, CEO, Friends of the Earth Europe, TNI, 2016.

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12/ *Except as otherwise provided in this Chapter, the Chapter XXX (Dispute Settlement) and its Annex III (Mediation) shall not apply to this Chapter*,

EU-Vietnam FTA, *Trade and Sustainable Development*, p. 11

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13/ Refer in particular to CETA, Articles 23.8.4 and 5, p. 188,

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14/ Refer in particular to EU-Vietnam FTA, Article XX.15.4, p. 10.

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20/ For which the next round of negotiations is scheduled for October 2017.

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